

# From McLibel to e-Libel: Recent issues and recurrent problems in defamation law

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## Introduction

2014 was the year for concerns about proportionality, self-represented litigants, high legal costs, how to make the defence of partial justification work and the impact of social media. Although the matter complained of was a pamphlet rather than a blog<sup>1</sup>, very similar issues arose in the longest-running trial of any kind in English legal history, *McDonalds Corporation v Steel and Morris* [1997] EWHC 366 (“McLibel”<sup>2</sup>).

This is a background paper for discussion of some of the recurring issues over the past twelve months, and is correspondingly written in an informal fashion. In particular, I want to consider is why, thirty years after the McLibel case began its long journey through the courts, these problems are not only still features of defamation law in Australia, but are exacerbated by the added complexity of online publication. The principal topics I have covered are:

- **Social media and Internet cases:** Although the evidence in some jurisdictions is equivocal<sup>3</sup>, the number of social media/Internet cases appears to be increasing<sup>4</sup>.

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<sup>1</sup> The matter complained of, a pamphlet entitled “What’s wrong with McDonalds?”, was published in 1986. The trial, which commenced on 28 June 1994, became the longest defamation trial on 11 December 1995 and, on 1 November 1996, the longest ever trial in English legal history. The 762-page judgment (delivered on 19 June 1997) was appealed all the way to the European Court of Human Rights, resulting in reduction of the damages from £60,000 to £40,000 and, in the ECHR ruling of 15 February 2005, a ruling that Articles 6 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms had been breached, coupled with an award of compensation to the defendants (see “McLibel: longest case in English history”, BBC, 15 February 2005).

<sup>2</sup> The documentary may be viewed at <https://www.youtube.com/watch?v=sBpbaVJo9gE>.

<sup>3</sup> Newspaper reports are generally pessimistic: see, for example, Adam Turner, “Social media defamation the tip of the iceberg”, *Sun-Herald*, 6 March 2014; Aleisha Orr, “What WA’s first Facebook defamation case means for you”, *WA Today*, 6 January 2015, <http://www.watoday.com.au/wa-news/what-was-first-facebook-defamation-case-means-to-you-and-me-20150105-12ib74.html>. However, James Nunez, in “Social Media, Internet Threads and Defamation Law in Victoria”, *Gazette of Law and Journalism*, 13 February 2015, reports that “only a small proportion” of the 39 defamation cases heard in the Supreme Court of Victoria related to comments posted on social media and Internet threats.

<sup>4</sup> There are conflicting reports concerning the interpretation of defamation statistics in the United Kingdom. Early reports suggested a rise in social media claims in 2011: Christopher Williams, “Facebook and Twitter drive rise in defamation claims”, *the Telegraph*, 26 August 2011, <http://www.telegraph.co.uk/technology/twitter/8725859/Facebook-and-Twitter-drive-rise-in-online-libel-claims.html>. Roy Greenslade (“23% increase in defamation actions as social media claims rise”, *the Guardian*, 20 October 2014) refers to observations by legal publishers Thompson Reuters, based on judgments coming to their attention, that while defamation claims in other areas are falling, social media claims are rising, and that the increase in claims (from 70 to 86) was the result. His conclusions have been challenged by *Inform* (“2013 defamation claims down 24%—no privacy injunctions—jan-june-2014/”, <https://inform.wordpress.com/2014/10/24/judicial-statistics-2013-defamation-claims-down-24-no-privacy-injunctions-jan-june-2014/>, 24 October 2014). Other UK reports suggest an even steeper rise; see Ian Burrell, “Libel cases prompted by social media rise 300% in one year”, *The Independent*, 20 October 2014. Some American commentators claim that social media defamation claims have mushroomed “across the globe”: (<http://www.hoganlovells.com/files/Publication/7df6afd8-2bfa-4f26-91ab->



homeless shelter (*Bodenstein v Hope Street Urban Compassion* [2014] NSWDC 126) to an estimated \$780,000 to run a trial in Western Australia (*Moran v Schwartz Publishing Pty Ltd (No 2)* [2015] WASC 35).

Perhaps as a result, 2014 saw “judicial activism” - new remedies such as proportionality<sup>8</sup>, and reinventions of older ones, such as orders for security for costs against a plaintiff without the means to pay the costs of trial if unsuccessful<sup>9</sup>.

2014 has also, finally, seen proposals for legislative reform, ranging from the overdue (such as the long-awaited proposal to amend s 26) to the over-reactive (the Tasmanian government’s now-abandoned plan to permit all corporations to sue – perhaps this change of heart occurred after someone showed the Tasmanian government a copy of the McLibel judgments?).

The most important issue to arise in 2014 is the increasing inability of the uniform legislation to cope with electronic publication. What is the reason for the continued reluctance of the legislature to look at these issues, and why were they not foreseen in the 2010 review? It is helpful to start with a return to the submissions made to the 2010 legislative review (provided for by s 49), to see what consideration was being given to the impact of electronic publication to defamation law at that time.

### **Back to the future**

The uniform legislation was agreed between State and Territory Attorneys-General in the shadow of a Commonwealth threat to enact national legislation operating only within the scope of Commonwealth constitutional power, based on the corporations, telecommunications and interstate trade powers<sup>10</sup>. Subsequent academic and professional commentary regretted the haste with which the legislation was finally agreed to, and called for further consideration of the legislation<sup>11</sup>. Fortunately, the legislators also provided a 5-year review period for the Act (s 49 *Defamation Act 2005* (NSW)), and a review of the legislation was conducted in 2010.

However, the submissions made to the 2010 review<sup>12</sup> barely mention Internet publication, let alone social media. For example, the NSW Bar Association’s submissions<sup>13</sup> referred to the

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<sup>8</sup> *Bleyer v Google Inc* [2014] NSWSC 897.

<sup>9</sup> *Moran v Schwartz Publishing Pty Ltd (No 2)* [2015] WASC 35.

<sup>10</sup> *Commonwealth Constitution*, s 51. In 2004, the Commonwealth Government did not foresee that electronic publication would come to dominate communication methods.

<sup>11</sup> In “Six Years of Australian Defamation Law”, (2011) 35 UNSWLJ 31, Professor Andrew Kenyon cites (at footnote 6) Richard Ackland, “Defamation Law Has Its Reputation on the Line”, *Sydney Morning Herald* (Sydney), 15 April 2005, 11; Michael Gillooly, “The Making of the Modern Law of Defamation: Book Review” (2006) 14 *Torts Law Journal* 311; Kim Gould, “The More Things Change, the More They Stay the Same ... or Do They?” (2007) 12 *Media & Arts Law Review* 29; David Rolph, “A Critique of the National, Uniform Defamation Laws” (2008) 16 *Torts Law Journal* 207.

<sup>12</sup> See generally “Submissions to the NSW Department of Attorney General and Justice, Review of Defamation Act 2005 (NSW), 25 January 2012”,

<[http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpclrd\\_consultation/lpclrd\\_stat\\_reviews.html](http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpclrd_consultation/lpclrd_stat_reviews.html)>. Professor Kenyon (*loc. Cit.*) notes, at footnote 37, that “consultation appears to have been almost entirely NSW focused” and that some of the submissions were put in well after the deadline, such as the submission from the Law Council of Australia, “apparently due to lack of earlier communication from the NSW Department of Attorney General and Justice”, which may have been an indication of a degree of lack of interest in genuine review. For individual

Internet only once in its main text (at 1.3), in relation to concerns about the entitlement of corporations to sue, in that they were seen as more vulnerable. Similarly, in the Communication Alliance's submissions<sup>14</sup>, the sole reference to social media occurs in the introduction section, which notes the rise of use of this means of communication. The submissions made by the Supreme and District Courts (which mirror each other) essentially only complain about jury trials. Many of the issues raised in the 2010 review, as well as more recently, were the perennial favourites, such as the right to bring claims by deceased persons and prescribed corporations<sup>15</sup>, rather than issues of modern technology.

That is not to say that the submissions were superficial or self-interested; there were careful and persuasive submissions on important issues such as the challenge of inconsistency<sup>16</sup>, and there was universal concern about the implications of *Besser v Kermode* (2011) 282 ALR 314 and attempts to deny defendants a right to jury trial (*Channel Seven Sydney Pty Ltd v Fierravanti-Wells* (2011) 283 ALR 178).

Most importantly, there were several submissions as well as commentary, from experienced practitioners as well as academics, which did foresee change. These included comments from Dr Matt Collins<sup>17</sup>, whose authoritative text, "Defamation and the Internet", first appeared in 2001; he not only referred to Internet publication issues, but helpfully provided a redraft of s 26. In the Ninemsn submissions<sup>18</sup>, Jennifer Duxbury warned that the Defamation Act 2005 "does not provide the optimal framework for achieving the right balance between [the legislation's] objectives for Australian digital media businesses such as ours... We believe that the Review needs to reconsider the issue of the extent to which internet intermediaries should bear liability for the publication of defamatory material produced by third party content providers". The need for a "safe harbour" provision was squarely raised in this submission. Additionally, Associate Professor David Rolph<sup>19</sup> raised "the development of internet technologies" as requiring a more detailed review of defamation law.

The problem was, firstly, that only limited submissions were made by organisations outside New South Wales and, secondly, there seems to have been a lack of interest in the respective governmental organisations even in soliciting submissions, let alone considering appropriate

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reports, see "Australia's Right to Know: Submission to NSW Department of Attorney General and Justice, Review of the Defamation Act 2005 (NSW)", (2011) 6 <[http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld\\_consultation/lpcld\\_stat\\_reviews.html](http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_consultation/lpcld_stat_reviews.html)>; Law Council of Australia, Submission to NSW Department of Attorney General and Justice, Review of the *Defamation Act 2005 (NSW)*, 1 August 2011, 10 [5.5] <[http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld\\_consultation/lpcld\\_stat\\_reviews.html](http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_consultation/lpcld_stat_reviews.html)>. The Free TV submission, at

[http://www.lpcld.justice.nsw.gov.au/agdbasev7wr/lpcld/documents/pdf/defamation\\_act\\_submission\\_free\\_tv.pdf#xml=http://search.justice.nsw.gov.au/isysquery/5392f1fe-7af9-4fd1-a34a-658b56179058/1/hilite/](http://www.lpcld.justice.nsw.gov.au/agdbasev7wr/lpcld/documents/pdf/defamation_act_submission_free_tv.pdf#xml=http://search.justice.nsw.gov.au/isysquery/5392f1fe-7af9-4fd1-a34a-658b56179058/1/hilite/), which, similarly to many other submissions, makes no reference to social media or Internet issues.

<sup>13</sup> NSW Bar Association Submission to the Attorney General's Review of the Defamation Act 2005 (NSW).

<sup>14</sup> Communications Alliance Submissions to the Attorney General's Review of the Defamation Act (5 May 2011)

<sup>15</sup> NSW Bar Association Submission to the Attorney General's Review of the Defamation Act 2005 (NSW)

<sup>16</sup> Gould, K.C., "The Proper Focus of Defamation Defences and the Challenge of Inconsistency", (2010) 33(3) *Australian Bar Review*, pp. 258-275.

<sup>17</sup> Matt Collins, "Five Years on: A Report Card on Australia's National Scheme Defamation Laws" (2011) 16 *Media & Arts Law Review* 317.

<sup>18</sup> Duxbury J., Ninemsn Submission to the NSW Attorney General on the Defamation Act 2005

<sup>19</sup> See also David Rolph's extensive discussion of these issues in "Publication, Innocent Dissemination and the Internet after *Dow Jones & Co Inc v Gutnick*" (2010) 33 *University of New South Wales Law Journal* 562, 571-3.

amendments to the legislation. This may have been because, as some of the contributors to “Social Media and the Law” note<sup>20</sup> (and Professor Andrew Kenyon, in his comprehensive 2011 review<sup>21</sup>, infers), Australians were slower than their overseas counterparts to bring proceedings raising issues concerning Internet, social media or electronic publication<sup>22</sup> and these bureaucrats did not appreciate the problem. Certainly there was no action taken in relation to any of the proposals for reform (including, notably, the redrafting of s 26).

This lack of understanding of technological change, and its implications for law reform, is not a problem restricted to defamation law. Defamation legislation is only one area of the law where legislators’ ignorance of computer functioning and social media has resulted in inappropriate or inadequate legislation, as Sir Tim Berners-Lee recently pointed out.<sup>23</sup> Nor are Australian legislators the only ones who fail to understand modern technology. David Cameron, the Prime Minister of the United Kingdom, has explained his call for the reintroduction of the so-called “snooper’s charter” because he has seen it used in the television programmes he enjoys<sup>24</sup>, a proposal that suggests that the “CSI effect”<sup>25</sup> is not limited to jurors.

There are plenty of other examples of technological Ludditism in Australia<sup>26</sup> – such as the former NSW Attorney-General’s announcement on 21 December 2012 that he would ban laptops and smartphones from courts to stop tweeting and social media<sup>27</sup>. It is certainly not a problem limited to Australia; the Information Technology & Innovation Foundation recently handed out a raft of Luddite Awards to US legislators<sup>28</sup>,

### **The parties: the litigant in person and the online publisher**

Australia is not the only country to note a rise in litigants in person over the past few years. In her annual review of media law in New Zealand ((2013) 15 MALR 242, Ursula Cheer said: “It has been a year of the defamation litigant in person”. The Canadian courts have handed down a series of decisions concerning the problems of litigants in person in defamation

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<sup>20</sup> “Social Media and the Law”, Patrick George (ed.) Sydney, LexisNexis, 2014.

<sup>21</sup> “Six Years of Australian Uniform Defamation Law: Damages, Opinion and Defence Meanings”: <file:///D:/Documents%20and%20Settings/jgibso1/My%20Documents/Downloads/SSRN-id2341439.pdf> .

<sup>22</sup> In fact, the first Internet publication ever to go to trial occurred in Australia. However, Ipp J’s judgment in *Rindos v Hardwick* (Supreme Court of Western Australia, 31 March 1994) was considered to be of such relative unimportance that it was not published in the law reports. In one of life’s ironies, it is only available on the Court’s electronic website, as well as on Wikipedia, at <http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/c04d382e733a94a148256fc4002b2e2b/12ce060858b5eb9e4825641300205ca6?OpenDocument&Highlight=2,rindos>.

<sup>23</sup> Sir Tim Berners-Lee, speaking at the “Every Second Counts” forum in the Rolex Awards for Young Laureates (2014) as reported in the *Guardian*: <http://www.theguardian.com/technology/media-network-blog/2014/nov/17/sir-tim-berners-lee-we-need-more-mps-who-know-how-to-code>

<sup>24</sup> David Cameron: TV crime dramas show need for “snooper’s charter”, *The Telegraph*, 30 January 2014.

<sup>25</sup> “The ‘CSI Effect’”, *The Economist*, 22 April 2010, <http://www.economist.com/node/15949089?zid=292&ah=165a5788fdb0726c01b1374d8e1ea285> .

<sup>26</sup> Some of them are suggested by Jim Chalmers in *the Drum*, 9 March 2015, “Where’s the plan to confront technological change?” There actually was no person named Ludd; “General Ludd” was perhaps history’s first avatar. The legislation which distressed his “Luddite” followers, the *Frame Work Act of 1812* (28 Geo 3 c.55), can be seen at this link: <http://www.slaw.ca/wp-content/uploads/2011/03/28-Geo-3-c.55.pdf> . Here is a more legible copy of the text: <http://www.slaw.ca/wp-content/uploads/2011/03/28-Geo-3-c.55-modernized.pdf> .

<sup>27</sup> See NSW Parliamentary debates, Legislative Assembly, 21 December 2012.

<sup>28</sup> <http://blog.caranddriver.com/gov-snyders-anti-tesla-law-wins-michigan-the-luddite-award/> 15 January 2015; see also Paul Venezia, “Why politicians should never make laws about technology” *Infoworld*, 3 January 2012.

proceedings, resulting in the series of principles set out in *Slipetz v Trudeau* [2013] MBQB 111 by Martin J for dealing with a litigant in person in defamation proceedings.

The number of trials at which a party is a litigant in person and/or the proceedings are undefended continues to grow. Statistics up to September 2013, in *Australian Defamation Law and Practice* (LexisNexis) at [60,590], have previously noted that in actions brought under the uniform legislation, 25% of all plaintiffs and 20% of all defendants are unrepresented at trial, and approximately 10% of all trials are undefended. Thanks to the undefended social media publications which went to trial in 2014, this pattern has continued.

2014 commenced and ended with social media defamation actions heard as assessments only, either ex parte or against litigants in person: *Mickle v Farley* (2013) 18 DCLR (NSW) 51; *North Coast Children's Home Inc. trading as Child & Adolescent Specialist Programs & Accommodation (CASPA) v Martin* [2014] NSWDC 125; *Wilson v Ferguson* [2015] WASC 15. Such judgments are often not put online, so there may well be more. Only *Wilson v Ferguson* (where the defendant was a litigant in person and made limited submissions) involved consideration of any defences; any defences filed were struck out (e.g. *Mickle v Farley*, *supra*).

Filing a defence in *Polias v Ryall* [2014] NSWSC 1692 seems to have made things worse for the defendants, as the findings from [33] onwards would seem to confirm. Nevertheless, some of those sued for social media publications may have had a defence, or the claim brought against them may not have been as meritorious as it appeared: see for example *Elliott v Tompkins (No 3)* [2014] NSWDC 68. The complexity of defamation, and the cost, may be the reason behind so many summary judgment applications, sometimes brought very early in the litigation, and at very short notice (*Facer v Wolfe* (2013) 17 DCLR (NSW) 391; *Coren v Master Builders Association of New South Wales Pty Ltd* [2014] NSWCA 244 (2 days notice of summary dismissal for non-timetable failure to answer correspondence); *Elliott v Tompkins (No. 3)* [2014] NSWDC 68; *Time for Monkeys Enterprises Pty Ltd v Southern Cross Austereo Pty Ltd* [2015] NSWDC 13).

One reason so many litigants are unrepresented (particularly in the case of defendants) is that the costs of this litigation are high and there is generally no insurance. The parties told the court that costs of \$100,000 for a 3-day trial were incurred by one defendant (the other did not take part) in proceedings brought by a self-represented homeless person against a homeless shelter (*Bodenstein v Hope Street Urban Compassion* [2014] NSWDC 126). The agreed cost of the Barrow v Bolt trial, where Mr Barrow unsuccessfully sued Andrew Bolt for defamation<sup>29</sup>, was \$500,000 (see most recently *Moran v Schwartz Publishing Pty Ltd (No 2)* [2015] WASC 35 where the estimate was \$780,000).

However, another reason why litigants may be unrepresented is the “Wikipedia solution” of looking everything up on the Internet which is an increasing factor in medical diagnoses, architecture and other professional advice where members of the public had previously lacked both the knowledge and the confidence to challenge those with the relevant qualifications and expertise. It is now recognised that these theories of self-teaching and non-institutional education are driving court users, and that this new “drive through” or “DIY” mentality, whether as self-diagnosis of medical problems or as alternatives to university

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<sup>29</sup> “Bolt defamation litigant loses case, will declare bankruptcy”, *Crikey*, 3 December 2014, <http://www.crikey.com.au/2014/12/03/bolt-defamation-litigant-loses-case-will-declare-bankruptcy/>. [Note: See correction on pages 23 – 24.]

courses, has resulted not only in an increase in self-representation but to “self-help centres”<sup>30</sup> in many courts in the United States to cope with the increased demand for assistance.

Whatever the reason, unrepresented litigants give rise to special problems in court management of proceedings. Issues arising in litigant in person trials during 2014 included:

- Costs problems: *Sims v Jooste* [2014] WASC 373 (S) at [11] (special costs order made due to the increased difficulty of running a case against a litigant in person); *Bodenstein v Hope Street Urban Compassion* [2014] NSWDC 126 (costs of successful defence to claim by penniless litigant in person exceeded \$100,000); *Barrow v Bolt & Anor (Ruling No 3)* [2014] VSC 16 (costs against the litigant in person, agreed after judgment at \$500,000, were unrecoverable).
- Repeated hopeless pleadings: *Trkulja v Dobrijevic (No 2)* [2014] VSC 594; *Ghosh v TCN Channel Nine Pty Ltd*; *Ghosh v Ninemsn Pty Ltd (No 4)* [2014] NSWDC 151. In *Lighthouse Forward Planning Pty Ltd v Queensland Newspapers Pty Ltd* [2014] QSC 217 the defendant was represented by an unqualified “McKenzie friend” who appears to have been of less assistance than most unrepresented litigants.
- Gross delay: *Ghosh v NBN Ltd* [2014] QCA 53.
- Bias applications: *Attorney General (WA) v MTI* [2014] WASC 303.
- Hardship to unrepresented third parties: *Daniels v State of New South Wales* [2014] NSWSC 1256 at [15]; *Spillane v Curr* [2011] NSWDC 150 (Catholic school under subpoena).
- Court case management generally: *PW v MS (No 3)* [2014] WASC 202; *North Coast Children's Home Inc. trading as Child & Adolescent Specialist Programs & Accommodation (CASPA) v Martin* [2014] NSWDC 125) and in particular where both parties are unrepresented: *Findley v Morand* [2014] QSC 297.
- Intemperate publications requiring injunctive relief: *Stokes v Ragless* [2014] SASC 56; *Munsie v Dowling (No 4)* [2015] NSWSC 37.
- Failure to attend court: *Zwambila v Wafawarova* [2014] ACTSC 73.
- Repeated applications for summary judgment: *Ghosh v TCN Channel Nine Pty Ltd (No. 2)*; *Ghosh v Ninemsn Pty Ltd (No. 5)* [2014] NSWDC 215; *Ghosh v Miller (No 2)* (2013) 17 DCLR (NSW) 237.
- Trial difficulties: *Barrow v Bolt (Ruling No 3)* [2014] VSC 16 (one of a series of rulings in a trial where the plaintiff was a litigant in person).

In *Dean v Vrettos* [2014] NSWSC 186 both plaintiff and defendant, who were self-represented, brought applications to strike each other’s pleadings out. The proceedings were transferred to the District Court, but this is just a transfer of the problem, and the limitation of the new Practice Note 6 to the Sydney registry means that there are no guidelines beyond “usual practice” in country or suburban registries.

Some courts in other jurisdictions have dealt with this problem by having special lists for litigants in person, or by referring them all for legal advice. However, for the determined litigant in person, free legal advice may not be the answer, as the extensive Maxwell-Smith litigation over the last decade shows. There are no easy solutions to this problem, but recent

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<sup>30</sup> Meyer, “Social Media and the Courts”, (2014) *International Journal for Court Administration* at pp. 4 – 5. Meyer also comments that DIY-style litigants “will likely expect the judiciary to offer social media to them as part of their interactions with the courts”.

applications for summary dismissal on *Bleyer v Google Inc* [2014] NSWSC 897 grounds, or for security for costs, suggest that there may be alternatives to a full-blown, and expensive, hearing.

Looking at some recent decisions in NSW (*Munsie v Dowling (No 4)* [2015] NSWSC 37) and Western Australia (*Gallagher v Destiny Publications Pty Ltd* [2015] WASC 40), issues of this kind will continue to be a feature of Australian defamation law in the foreseeable future.

Practice notes and court rules need to be updated to take into account the ongoing problem of litigants in person who lack the insurance as well as the skills to deal with defamation law issues. The Uniform Civil Procedure Rules and Practice Notes in New South Wales do not have any special rules to assist the litigant in person, his opponent or the court, either in defamation or generally.

Additionally, many of these actions involve electronic publication and social media; this is one of the many gaps in the UCPR and Practice Notes, as well as failure to provide particulars for electronic publication, any of the common law defences and provision of written submissions. Rules in New South Wales vary from the strictures of the Supreme Court Practice Note to the provision, in the District Court Practice Note No. 6, that the rules only apply to cases started in the Sydney registry. The failure of the UCPR and Practice Notes to refer to electronic publication brings me to the next problem litigant in defamation proceedings: the third party provider of the conduits for electronic publication.

### **The online publisher**

The liability of Internet search engines, social media platforms and online discussion forums is not settled. As Ryan Turner notes in his perceptive review of inconsistencies in the judgments in this area<sup>31</sup>, contradictory approaches to Internet defamation, not only in Australia, but also in New Zealand, Hong Kong and the United Kingdom, create uncertainty requiring legislative direction.

The difficulties Australian courts face when dealing with these issues has been noted in blogs such as *Inform*'s<sup>32</sup> discussion of the differing approach to online liability taken by McCallum J in *Bleyer v Google Inc* [2014] NSWSC 897 to that taken by the Hong Kong Court of Appeal in *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKCFA 47; see also (2013) 18 *Media and Arts Law Review* 382.

This is a vast topic, to which I cannot do justice in this overview of recent developments. I agree with Ryan Turner that this is a problem which can be rectified only through legislation. This would hopefully also include a reconsideration of the refusal to consider the single publication rule. It can only be hoped that the forces propelling the States and Territories to consider amending the section 26 defence will consider other amendments in relation to the many changes to the law arising from electronic publication issues as well. Lord Bingham pointed these problems out, in the introduction to the first edition of Dr Collin's tome "Defamation Law and the Internet" in 2001. It is now 2015 and these issues have not yet begun to be addressed by the legislature.

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<sup>31</sup> Ryan J Turner, "Internet defamation law and publication by omission: a multi-jurisdictional analysis" (2014) 34 *UNSW Law J* 34.

<sup>32</sup> See the 22 August 2014 post: <https://inform.wordpress.com/2014/08/22/case-law-australia-bleyer-v-google-inc-search-results-libel-action-stayed-as-disproportionate-hugh-tomlinson-qc/> .



This brings me to the problem defence of 2014 – partial justification.

### **The partial justification defence**

How often are publications entirely false? There is frequently some truth in what was said, and the purpose of sections 25 and 26 of the uniform legislation (justification and partial justification) and nuance imputations (*Polly Peck* or *Hore-Lacy* imputations: *David Syme & Co Ltd v Hore-Lacy* [2000] 1 VR 667) is to arrive at an appropriate balance between a defence of truth to the whole publication (s 25) and some form of partial justification.

Many defamation actions are precarious balancings of the portion of the matter complained of that is true with the portion that is not. Like the curate's egg, partial justification defences seem incapable of being able to reconcile these differing good and bad parts of the publication. This has been partly due to very bad drafting of s 26, which led to artificial attempts to restrict plaintiffs undermining the defence by adopting the defendant's imputations (*Waterhouse v The Age Co Ltd* [2012] NSWSC 9).

The following cases illustrate the problems:

- ***Hore-Lacy* pleas:** Differing views have been taken of the availability of the *Hore-Lacy* nuance imputation in *Bateman v Fairfax Media Publications Pty Ltd (No 2)* [2014] NSWSC 1380 and *Setka v Abbott* [2014] VSCA 287. Additionally, differing views are taken as to the complexities of such pleadings: compare *Kingsfield Holdings Pty Ltd v Sullivan Commercial Pty Ltd* [2014] WASC 408 with *Bateman v Fairfax Media Publications Pty Ltd (No 2)*, *supra*.
- **Particulars:** Particularising both ss 25 and 26 justification defences seems to be harder to particularise. The entire s 25 defence of justification was struck out in *MacDonald v Australian Broadcasting Corporation* [2014] NSWSC 1472 on the basis that particulars of assisting others to make millions of dollars could not justify an imputation that the plaintiff personally made millions of dollars out of corrupt conduct; a s 25 defence failed for the same reason in *Walsh v Bennetts* [2014] WASC 453.
- **Section 26:** The first problem is the form of the imputation. Imputations pleaded in a s 26 contextual justification defence were struck out in *Walsh v Bennetts* [2014] WASC 453 (contextual imputations not more serious), *Corby v Network Ten Pty Ltd* [2014] NSWSC 1431 (not “in addition to”); *King v Fairfax Media Publications Pty Ltd (No 2)* [2014] NSWSC 1244 (all impermissibly imprecise); *Jones v TCN Channel Nine Pty Ltd* [2014] NSWSC 1453 (broad contextual imputation as against specific meanings in the same area not permitted, an argument which also succeeded in *Corby*); *Maher v Nationwide News Pty Ltd (No 4)* [2014] WASC 461 (on a variety of grounds, but with leave to replead). Imputations pleaded in a s 26 contextual justification defence survived a strike out application in *Macdonald v Australian Broadcasting Corporation* [2014] NSWSC 1472.
- **Pleading back s 26 contextual imputations:** In *Hall v TCN Channel Nine Pty Ltd* [2014] NSWSC 1604 the plaintiff was permitted to adopt the defendant's contextual imputations, as McCallum J refused to follow *Waterhouse v The Age Company Ltd*

[2012] NSWSC 9. This has led to a series of similar applications. This is discussed in more detail below.

- **Section 26 problems at the trial:** In *Phillips v Robab Pty Ltd* [2014] NSWSC 1520, Rothman J noted the conflict between the approaches taken in *McMahon v John Fairfax Publications Pty Ltd (No 6)* [2012] NSWSC 224 and *Mizikovsky v Queensland Television Pty Ltd* [2013] as to whether the contextual imputation is measured against those of the plaintiff's imputations which are found to be untrue; his Honour followed McCallum J's approach in *McMahon*.
- **Damages and partial justification:** The approach to damages where a defence of justification to one or more of the plaintiff's imputations has succeeded is discussed in *Fisher v Channel Seven Sydney Pty Ltd (No 4)* [2014] NSWSC 1616

### “Judicial activism” and the s 26 defence

Although the NSW Court of Appeal considered that the intention of the legislature must have been to enact only the limited partial justification defence previously available in Tasmania, rather than the s 16 *Defamation Act* 1974 (NSW) complete defence, a review of submissions made prior to the legislation, the statements made in Parliament during the passage of the Bill (*Creighton v Nationwide News Pty Ltd (No. 2)* [2010] NSWDC 192) and coverage of the *Kermode* decision in texts on tort law all suggest that the result in *Kermode* was an unwelcome surprise. However, the legislation was clearly open to such an interpretation, and if that was not the intention, it should have been corrected swiftly, to reflect the true intention, not only of the legislature, but also of the recommendations and submissions of the many parties who addressed these issues in the course of the legislation being drafted.

It is now common knowledge that Simpson J's referral of this issue for legislative reform was indeed received by the NSW Attorney-General's Department (who acknowledged receipt and said they would look into it) and that, despite receiving drafts for amendment from Dr Matt Collins and others in the 2010 review, nothing was ever done about it until the recent proposed draft, the text of which I have yet to receive a copy.

Following the decision in *Kermode*, the s 26 defence was reduced to a defence for imputations the plaintiff dared not plead. Since any plaintiff with sense would plead the defendant's imputation back to avoid a s 26 judgment, this meant that s 26 became largely ineffective. This led to a series of applications by defendants to stop plaintiffs pleading their contextual imputations back as well as to increasingly intricate contextual imputations.

The court's endeavours to deal with this legislative gap – which it is now clear was never intended by anyone, including the legislators - led to two pieces of judicial activism. The first was Nicholas J's decision in 2012 to refuse leave to plaintiffs to do so on the basis that they had to get the imputations right first time: *Waterhouse v The Age Co Ltd* [2011] NSWSC 9 (Nicholas J does not refer to it, but he was clearly following *Ahmed v Nationwide News Pty Ltd* (2010) 11 DCLR (NSW) 396, handed down in 2011 and reported in the District Court reports, which was itself inconsistent with earlier decisions: *Phelps v Nationwide News Pty Ltd* [2001] NSWSC 130 at [10]; *Creighton v Nationwide News Pty Ltd (No 2)* (2010) 11 DCLR (NSW) 271). The second was McCallum J's refusal to follow Nicholas J in *Hall v TCN Channel Nine Pty Ltd* [2014] NSWSC 1604.

There can be no doubt that the Court of Appeal in *Kermode* never intended this kind of muddle of conflicting authorities to occur. Simpson J herself had noted, at first instance:

“[41] Senior counsel who appeared for the defendants advanced a pragmatic argument against this construction. It was that, in any case where a defence of contextual truth is pleaded by a defendant, a plaintiff may defeat that defence by simply adopting the contextual imputations as imputations of which he or she complains. In doing so, a plaintiff would lose nothing, because, by pleading the imputations as contextual imputations, the defendant has signalled an intention to prove their truth. By adopting (or, put more pejoratively, “appropriating”) the contextual imputations pleaded by the defendant, the plaintiff could deprive the defendant of a defence under s 26. That has, in fact, occurred on at least one occasion: *Corby v Channel Seven Sydney Pty Ltd* (NSWSC, 20086/2007). Senior counsel’s proposition is correct, but it cannot be allowed to dictate the proper approach to statutory construction.”

These sentiments were referred to with approval by the NSW Court of Appeal in *Holt v TCN Channel Nine Pty Ltd* (2014) 86 NSWLR 96 at [23]. Macfarlan JA, with whom Gleeson JA and Sackville AJA agreed, relied on the plaintiff’s failure to plead those imputations back as relevant to the issue of damages:

“[23] The submission should be rejected as those contextual imputations were not ones upon which Mr Holt sued. It was open to Mr Holt to “adopt” the respondents’ pleaded contextual imputations by himself pleading them against the respondents (*Fairfax Media Publications Pty Ltd v Kermode* [2011] NSWCA 174; 81 NSWLR 157 at [88]–[89]) but he did not do so. It would be a subversion of the litigious process for him to be awarded damages in respect of conduct of the defendants of which he did not complain. Defendants are entitled to fair notice of the case made against them and to the opportunity to deal with it. This did not occur in relation to the conduct that Mr Holt seeks to rely upon for the first time on appeal. There is no reason to doubt the respondents’ assertion on appeal that if the point had been taken by Mr Holt at first instance, the evidence there may have been different, in particular as a result of cross-examination of Mr Holt as to why he sought damages for imputations that he had not identified at the outset of the proceedings, or before, as carried by the publication (compare *Coulton v Holcombe* [1986] HCA 333; 162 CLR 1 at 7–8).”

During the first three months of 2015 decisions of the District Court (*Mallegowda v Sood* (No 3) [2015] NSWDC 14; *Petty v Zhao* (No 2) [2015] NSWDC 18; *Balzola v Federal Capital Press of Australia Pty Ltd* (ACN 008 394 063) [2015] NSWDC 23) have followed McCallum J’s decision, although McCallum J herself has warned that leave to plead back is not automatically granted: *Chel v Fairfax Media Publications Pty Ltd* [2015] NSWSC 171 (where the plaintiff really wanted to strike the imputations out rather than plead them back).

The complexities of trials since that time where these defences have been pleaded<sup>33</sup> are, in my view, an indictment of legislative inaction following *Kermode*. However, that is only one reason. The other is the continued insistence on a procedure where first the plaintiff formulates imputations, then the defendant puts forward contextual or Hore-Lacy imputations (except, currently, in New South Wales), and then there are further interlocutory battles as the trial progresses, which now can proceed all the way to the hearing: *Nationwide News Pty Ltd v Hibbert* [2015] NSWCA 13.

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<sup>33</sup> See in particular *Ell v Milne* (No 3) [2012] NSWSC 9 at [12]–[14] per McCallum J (affirmed on appeal *Milne v Ell* [2014] NSWCA 407; *Kelly v Harbour Radio Pty Ltd* [2013] NSWSC 9 at [8]–[27]; *King v Fairfax Media Publications Pty Ltd* (No 2) [2014] NSWSC 1244; *Mizikovsky v Queensland Television Ltd* [2014] 1 Qd R 197; at [1] per Holmes JA, [16]–[19], [21]–[26] per Fraser JA, [57] per Fryberg J; *Tauaifaga v TCN Channel Nine Pty Ltd* [2013] NSWSC 8 at [7]–[8].

There is no uniformity in procedure in the various States and Territories of Australia. Some courts have defamation lists and practice notes; others have practice notes only for the city court; most have no specialist list or practice note and no special procedure rules. Uniform practice rules might encourage more efficient disposal of interlocutory applications. Consideration could be given, if there is uniformity, to the English system of determining meaning, where everyone (including the judge) sorts out all the imputations at the same time. This will only work, however, if s 26 is rectified, which brings me to this long-awaited statutory reform.

### **Proposed redrafting of s 26**

There is finally a proposal for s 26 to be amended to overcome the impact of the decision in *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852 and *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157. The redraft has not been widely circulated and its adequacy is unknown.

Whatever the explanation for the four-year delay in amending s 26, it is only one of a series of legislative amendments that are well overdue. I have referred elsewhere in this discussion paper to the need to clarify the s 33 defence and the position of ISPs. The continuing practice of joining journalists as defendants because of perceived deficiencies in the defence of honest opinion could also benefit from legislative clarification.

Finally, while judicial activism resulted in the development of principles of proportionality (the *Jameel* principle: *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 (“*Jameel*”)), this is an issue which, in my view, can only be resolved by legislative intervention to introduce some form of “serious harm” threshold. This brings me to the other major development in defences in 2014, namely the use of provisions in the *Civil Procedure Act* 2005 (NSW), especially sections 60 and 67 and UCPR r 12.7, to strike out proceedings summarily.

### **Proportionality and summary dismissal**

Publishers unwilling to settle have two choices: defend the action or bring it to an early conclusion by summary dismissal or stay. During 2014 (and early 2015), publishers were successful in striking out or staying proceedings in circumstances where in past times such applications have failed. These were:

- Summary dismissal of limited publications on the principles explained by McCallum J in *Bleyer v Google Inc* [2014] NSWSC 897.
- Summary dismissal for failure to get on with the case in an effective way: *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288; *Coren v Master Builders Association of New South Wales Pty Ltd* [2014] NSWCA 244; *Ghosh v NineMSN Pty Ltd* [2014] NSWCA 180.
- Security for costs: *Moran v Schwartz Publishing Pty Ltd (No. 2)* [2015] WASC 35.

Summary dismissal of proceedings in circumstances where the plaintiff has not been guilty of delay, but where principles of proportionality apply, is a step that courts are reluctant to take other than in the most extreme cases. In relation to defamation proceedings, even in England where summary dismissal is more widely used, the relevant principles are applied with caution. I would summarise these as follows:

- Summary procedure for striking out pleadings is to be used only in plain and obvious cases. The burden of proof lies on the moving party, and it is a significant burden. All the averments in the statement of claim must be assumed to be true: *Ewing v Times Newspapers Ltd* [2011] NIQB 63 at [32], citing *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 at 406C.
- Courts are particularly cautious in any developing field of the law (such as the proportionality argument), or where the court is asked to determine such points on assumed or scanty facts pleaded in the statement of claim. While evidence by affidavit may be admissible (*Ewing* at [35]; *Cumberland v Clark* (1995 - 6) 39 NSWLR 514 at 528), the facts must be construed in the plaintiff's favour.
- In practical terms, applications raising *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 ("*Jameel*") issues should not be painstaking examinations of the extent of readership or the factual evidence, but an overall (though equally careful) analysis of the parties' submissions as to whether the proceedings can hurdle the very high bar of being considered "simply not worth the court time and costs which they entail" (*Ewing* at [37]). This principle is sometimes alternatively stated as being whether "the game is worth the candle", a gamester's saying: *Jameel* at [57], citing *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296 at 319.
- Repeated attempts to strike out defences, based on technicalities, may not be well regarded by the court: see *Rayney v State of Western Australia (No. 5)* [2014] WASC 147 and *Rayney v Pan Macmillan Australia Pty Ltd* [2014] WASC 129.

**Proportionality: *Bleyer v Google Inc* [2014] NSWSC 897 and *Smith v Lucht* [2014] QDC 302**

Generally considered as the most important defamation judgment in 2014, *Bleyer v Google Inc* firmly grasps the nettle of determining how the court should approach a claim for publication where the number of persons who have read the matter complained of are at best a handful of persons, and where any judgment, if obtained, is unenforceable.

Mr Bleyer sued Google for seven publications, two of which were snippets produced on Google searches; the others were snippets with material accessible by hyperlink. The imputations set out the serious criminal matters referred to in the searches. Particulars of publication were for two persons in the State of Victoria and one in New South Wales, in circumstances where lack of pre-notification publication (other than to one person) was a factor in McCallum J being satisfied that the defence of innocent dissemination might succeed (c.f. *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] 5 HKC 253), one of three relevant factors for holding that the costs involved would be disproportionate to the remedy. The proceedings were accordingly stayed pursuant to ss 60 and 67 *Civil Procedure Act* 2005 (NSW) and r 12.7 *Uniform Civil Procedure Rules* 2005 (NSW).

However, McGill SC DCJ has recently declined to follow McCallum J's reasoning (*Smith v Lucht* [2014] QDC 302). McGill SC DCJ did not find McCallum J's analysis of the relevant legal principles in *Bleyer* "particularly persuasive" (at [24]). His Honour went on to say:

“It is, I think, not an encouraging sign that the analysis begins, in paragraph 51, with a rhetorical question. The significance of statutory provisions in England and in New South Wales should not, I think, be overlooked.”

McGill SC DCJ considered that he should instead follow the NSW Court of Appeal in *Bristow v Adams* [2012] NSWCA 166 where his Honour noted that the Court of Appeal had declined to apply the principles set out in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 (“*Jameel*”) for “various reasons”, including the applicability of s 33, the absence of equivalent provisions to the European Convention on Human Rights and the different language of the applicable statutory provisions. Additionally, his Honour noted the “fairly rigorous test” (at [8]) in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 and the absence of an equivalent to s 60 *Civil Procedure Act 2005* (NSW) in the *District Court of Queensland Act 1967* (QLD) (the application having been made under s 69(2)(c)).

The matter is before the Court of Appeal, in that an appeal from my judgment in *Ghosh v TCN Channel Nine Pty Ltd* [2014] NSWDC 151 is the subject of an application for leave to appeal on 16 March 2015.

The alternate application brought by the defendant in *Ghosh* was for the proceedings to be summarily dismissed on the principles enunciated by McCallum J (as endorsed by the Court of Appeal) in *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288. This is another increasingly popular basis for summary dismissal (see below).

In *Freeburn v The Cake Decorators Association of NSW Inc (No 2)* [2014] NSWDC 173 proceedings were dismissed by reason of proportionality, but the facts in that case were exceptional. Again, as in *Bleyer*, no appeal was lodged.

Issues of serious harm are likely, in my view, to receive very short shrift from appellate courts<sup>34</sup>. Section 33 has failed repeatedly, even in circumstances where the matter complained of was published in the course of a long series of allegations about a party, which were not the subject of defamation claims (*Cush v Dillon; Boland v Dillon* [2009] NSWDC 21; *Dillon v Cush; Dillon v Boland* [2010] NSWCA 165; the Court of Appeal decision did not deal with the unlikelihood of harm grounds of appeal at all, presumably on the basis that they were hopeless).

The court’s predilection for striking out defences by defendants in person in social media publications means that the question of the availability of this defence for social media publications, spoken of in such a hopeful fashion by Kim Gould in ‘The statutory triviality

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<sup>34</sup> However, I note that the Court of Appeal has applied somewhat similar principles in declining to extend time for a claim it considered small and of dubious merit: *Cranbrook v Stanley* [2002] NSWCA 290 at [79] – [83]. The plaintiff was sexually assaulted at night in bed by an unknown person; school staff allowed him to believe it was another student, who was consequently expelled. In fact that student was himself the victim of a teacher, who was subsequently gaol. The plaintiff sued the school for injury arising from his distress when, much later, he discovered the truth, as well as for not providing counselling or investigating his complaint. Heydon JA considered the plaintiff’s claim “speculative” and the damage suffered from, for example, lack of counselling, to be “highly questionable” and that the court’s discretion to extend time should accordingly not be exercised. Views about sex abuse in school have changed in the past decade, and it is uncertain whether a court would arrive at the same decision today.

defence and the challenge of discouraging trivial defamation claims on Facebook<sup>35</sup>, has yet to be tested. It was, however, successful at trial in *Barrow v Bolt* [2014] VSC 599 (see below).

### **Summary dismissal for failure to comply**

Courts appear to be exhibiting a greater willingness to strike out pleadings due to failure to comply with timetables and to attend court: *Coren v Master Builders Association of New South Wales Pty Ltd* [2014] NSWCA 244; *Ghosh v NineMSN Pty Ltd* [2014] NSWCA 180; *Zwambila v Wafawarova* [2014] ACTSC 73; *Elliott v Tomkins (No. 3)* [2014] NSWDC 68.

For a helpful summary of the relevant principles, see *Rayney v The State of Western Australia (No 5)* [2014] WASC 147 and *Rayney v Pan McMillan Australia Pty Ltd* [2014] WASC 129 (but cf *Coren v Master Builders Association of New South Wales Pty Ltd* [2014] NSWCA 244, where a failure to attend court to explain failure to provide answers to particulars was sufficient to strike out the whole claim).

Defendants in Western Australia found another alternative, namely an application for security for costs: *Moran v Schwartz Publishing Pty Ltd (No 2)* [2015] WASC 35.

### **Security for costs: *Moran v Schwartz Publishing Pty Ltd (No 2)* [2015] WASC 35**

Mr Moran commenced defamation proceedings against a book publisher and author in relation to the book ‘Have you seen Simone?’, which dealt with the murder of the plaintiff’s girlfriend. In the course of an application for an injunction, which was refused Martin J considered the book was capable of conveying imputations of guilt, rather than mere suspicion: *Moran v Schwartz Publishing Pty Ltd* [2014] WASC 334. The defendants were in fact pleading context truth of the book conveyed imputations that he was reasonably suspected of having murdered his former girlfriend, as well as fair report of the coronial inquest which was the source of much of the information, honest opinion and qualified privilege. However, if a jury considered that imputations of guilt (as opposed to suspicion) were conveyed, the defendants would have some real difficulties with their defences.

The defendants applied for security for costs for a sum in excess of \$780,000, the estimated costs for a five-week trial. The defendants conceded that the plaintiff, although a foreign national, was now ordinarily resident in Western Australia (at [39]). The defendants argued that there was nevertheless good and proper reason why security for costs should be ordered. The plaintiff, while “conveniently impecunious” (at [41]) had support from family and friends and had hired “an expensive and specialist team of defamation lawyers from Bennett & Co, who were not said or suggested to be acting pro bono” (at [42]). This meant that the plaintiff was “only nominally or conveniently impecunious”, in an exceptional sense (at [43]). Furthermore, the plaintiff had been “less than completely forthright” (at [44]) about where this money was coming from. Finally, the “likely very high legal expenses of proceeding with this defamation trial of some weeks’ duration” would pose a great financial hardship (at [45]).

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<sup>35</sup> Gould, K.C. 2014, ‘The statutory triviality defence and the challenge of discouraging trivial defamation claims on Facebook’, *Media and Arts Law Review*, vol. 19, no. 2, pp. 113-151.

Martin J noted (at [49]) that the application did not meet any of the nominated grounds for ordering security as set out in O 25 r 2 *Rules of the Supreme Court* 1971 (WA) (although these were non-exhaustive). The plaintiff was not a corporation. The fact that the plaintiff was impecunious should help, rather than hinder, his opposition to the making of an order. However, a close examination (at [53]) of all the underlying circumstances revealed “some further relevant factors” (at [53]) which enlivened the exercise of discretion. These included the likelihood of an unsatisfied taxed costs award of roughly \$500,000 (at [57]).

What was special about this case was that the plaintiff, although apparently impecunious, had financial support to run his case, but nothing at all had been said about the amenability of the same beneficial supporters to provide security for the defendants’ costs were the defendants to win the trial, in circumstances where that silence was “rather deafening”. His Honour concluded that the plaintiff “has not adequately condescended to explain why it is that the financial largesse he undoubtedly enjoys to pursue and pay for his own legal costs of advancing the action does not extend to his opponents’ taxed costs, should he lose the trial” (at [84]). His Honour accordingly made an order for security for costs in the sum of \$500,000, on the basis of security of the level of the full costs (\$780,000) would amount to the complete indemnification of the defendants (at [87]).

For courts which have a residual discretion, as opposed to courts of record which can only make orders based upon the relevant legislation, applications of this sort where a plaintiff is impecunious may well become more common after this success.

Would s 33 be an appropriate basis for summary dismissal? McGill SC DCJ in *Smith v Lucht*, *supra*, considered that proportionality would not be necessary because of the s 33 defence. Although his Honour did not suggest the defence was summarily available, it is helpful to look at one of the very few cases where this defence has succeeded.

### **Unlikelihood of harm: *Barrow v Bolt* [2014] VSC 599**

It is curious that nearly all the cases where judges extol the efficacy of the s 33 defence seem to be those where a s 33 defence is not actually before the court at the time of these praising words. This was the case in *Bristow v Adams* (where the alleged success of s 33 was one of the bases for refusing to consider the *Jameel* principle) and in *State Bank of New South Wales Ltd v Currabubula Holdings Pty Ltd* (2001) 51 NSWLR 399, where Giles JA was absolutely certain that such a defence would apply for intra-corporate publications (the Court of Appeal in *Enders v Erbas and Associates Pty Ltd* [2014] NSWCA 70 did not, however, agree). However, the defence has had a surprising success in *Barrow v Bolt* [2014] VSC 599, where the plaintiff commenced proceedings for defamation for an intra-office email that Mr Andrew Bolt, a journalist, sent to the managing editor in relation to a complaint made by the plaintiff to the Australian Press Council. While the defendant succeeded on all defences (see the findings at [54] et seq.), the reasons for the s 33 defence are rewarding of study.

Noting the elements in the defence and the differences between ss 33 and its predecessor, s 13 (at [63]-[65]), Forrest J set out and followed the controversial departure by Kaye J in *Szanto v Melville* [2011] VSC 574 at [159] and [162] from previous authority, even though Kaye J’s views were obiter. Forrest J then went on to note the circumstances which the defendant’s argument satisfied the statutory defence (a course much criticised by the NSW Court of Appeal in *Jones v Sutton* (2004) 61 NSWLR 614, but invariably followed in cases ever since), as follows:



“[71] ... In particular, I refer to the following circumstances. The impugned email went only to two persons. I consider that the tenor of the email makes it clear that the author was expressing his personal opinion, rather than saying that the plaintiff had been declared to be a vexatious litigant. Although the email did not contain the factual foundation for the opinion, its recipients, Mr Armsden and Mr Herman were aware of at least some of it, and I consider it likely they would have seen the opinion for what (in my view) it was. It is also clear that the defendants were responding to one of many complaints made by Mr Barrow to the APC. There is no evidence of any “grapevine effect” or the likelihood of same at the time of publication. The only ‘leakage’ of the impugned email was caused by the plaintiff himself who published it on his website.”

His Honour went on to note (at [72]) that the defamatory imputations were relatively mild and their audience minute, and that accordingly the defendant had proved that the circumstances of the publication were such that the plaintiff was unlikely to suffer any harm. By “harm”, damage to reputation was connoted, as opposed to hurt to feelings.

This success may answer Kim Gould’s gloomy prognosis for s 33 in ‘The statutory triviality defence and the challenge of discouraging trivial defamation claims on Facebook’ (see the section “Should the s 33 defence be retired?”).

Also in 2014, an attempt to argue the s 33 defence misconceived the fundamental proposition that hurt to feelings was presumed and that the defence had no effect failed: *Enders v Erbas and Associates Pty Ltd* [2014] NSWCA 70. However, so did the defence, despite the publication being made in almost identical circumstances to *Barrow v Bolt*.

I do not share the view that s 33 is the answer for social media/Internet publication. The principal problem, if s 33 is applied to social media or other publications capable of being published on the World Wide Web, is the potential for a global audience. How courts deal with that, in terms of the enormous amount of material on the World Wide Web, will be a matter for future judicial interpretation and, hopefully, legislative reform in the shape of some kind of test for serious harm. For the present, while the success of the s 33 defence in *Barrow v Bolt* appears to be an indication that the defence is healthier than had previously been prognosticated, it remains a defence of very limited ambit, particularly since the ambiguity as to what any harm at all means remains a bone of contention.

## **Damages**

2014 was a year for record awards of damages including:

- *Cripps v Vakras* [2014] VSC 279 (damages totalling \$450,000)
- *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674 (\$350,000)
- *Polias v Ryall* [2014] NSWSC 1692 (\$340,000)
- *North Coast Children's Home Inc. trading as Child & Adolescent Specialist Programs & Accommodation (CASPA) v Martin* [2014] NSWDC 125 (\$250,000)
- *Tassone v Kirkham* [2014] SADC 134 (\$176,408.81, see also *Kirkham v Tassone* [2015] SASC 6)
- *Fisher v Channel Seven Sydney Pty Ltd (No 4)* [2014] NSWSC 1616 (\$125,000)

The subject matter varied; for example, the publications in *Polias v Ryall* were Facebook exchanges and dinner party statements made concerning the honesty of a poker player, while

*Pedavoli v Fairfax Media Publications Pty Ltd* raised imputations of the utmost seriousness concerning a teacher allegedly having sexual relations with underage students.

In September 2013 I provided a list of 58 judgments for damages for publications brought under the uniform defamation legislation. These ranged from \$350,000 in *Petrov v Do* [2012] NSWSC 1382 to \$2,500 for a “backyarder” slander (*Beaven v Fink* [2009] NSWDC 218; *Fink v Beaven* [2010] NSWCA 92). I have updated that list to March 2015 to include the 79 judgments that have been made available to me:

**\$200,000 plus (a total of 12 judgments)**

*Cripps v Vakras* [2014] VSC 352 \$450,000 (Mr Vakras to pay Mr Cripps \$350,000 (inclusive of \$100,000 for aggravated damages) and \$15,000 to Mr Redleg; Ms Raymond to pay Mr Cripps \$70,000 (inclusive of \$20,000 for aggravated damages) and \$15,000 to Mr Redleg); *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674 (\$350,000); *Petrov v Do* [2012] NSWSC 1382 (\$350,000) (against two defendants); *Polias v Ryall* [2014] NSWSC 1692 (\$340,000); *Ahmed v Nationwide News Pty Ltd* (District Court of NSW, 7 December 2012) \$325,000 (against two defendants); *McMahon v John Fairfax Publications Pty Ltd (No 7)* [2013] NSWSC 933 (\$300,000); *Ahmed v Harbour Radio Pty Ltd* [2013] NSWSC 1928 (\$280,000); *North Coast Children’s Home Inc. trading as Child & Adolescent Specialist Programs & Accommodation (CASPA) v Martin* [2014] NSWDC 125 (\$250,000 to three defendants (\$50,000 + \$100,000 + \$100,000)); *Haertsch v Channel Nine Pty Ltd* [2010] NSWSC 182 (\$255,000); *Trkulja v Yahoo! Inc LLC* [2012] VSC 88 (\$225,000); *Smith v Dahlenburg* [2008] VSC 557 (\$210,000); *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 (\$200,000); *Greig v WIN Television NSW Pty Ltd* [2009] NSWSC 632 (\$200,000).

**\$150,000-\$199,999 – 2 judgments**

*Tassone v Kirkham* [2014] SADC 134 (\$176,408.81, see also *Kirkham v Tassone* [2015] SASC 6); *Manefield v Association of Quality Child Care Centres of NSW Inc* [2010] NSWSC 1420; (\$150,000); *Nowak v Putland* [2011] QDC 259 (\$150,000).

**\$100,000-149,999 – 8 judgments**

*Davis v Nationwide News Pty Ltd* [2008] NSWSC 693 (\$140,000); *Kunoth-Monks v Healy and Anor* [2013] NTSC 74 (\$125,000); *Fisher v Channel Seven Sydney Pty Ltd (No 4)* [2014] NSWSC 1616 (\$125,000); *Gunston v Davies Brothers Pty Ltd* [2012] TASSC 15 (\$124,500); *Attrill v Christie* [2007] NSWSC 1386 (\$110,000); *Higgins v Sinclair* [2011] NSWSC 163 (\$100,000 to each of two plaintiffs); *Royal Society for the Prevention of Cruelty to Animals (NSW) v Davies* [2011] NSWSC 1445 (\$100,000); *Forrest v Chlanda* [2012] NTSC 14 (\$100,000).

**\$50,000-\$99,999 – 25 judgments**

*Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350 (\$90,000); *Smith v Mather* (Queensland District Court, Clare SC DCJ, 31 October 2013) (\$85,000); *Graham v Powell (No 4)* [2014] NSWSC 1319 (\$80,000); *Belbin v Lower Murray Urban & Rural Water Corp* [2012] VSC 535 (\$70,000 – first and second plaintiffs; \$85,000 – fourth plaintiff); *Cornes v Ten Group Pty Ltd* [2011] SASC 104 (\$85,000); *Akras v Mora* (Victorian

County Court, Murphy J, 23 August 2012) (\$85,000); *Korean Times Pty Ltd v Pak* [2011] NSWCA 365 (judgment reduced on appeal from \$100,000 to \$80,000); *Shandil v Sharma* [2010] NSWDC 273 (\$80,000); *Ryan v Premachandran* [2009] NSWSC 1186 (\$80,000); *Hocken v Morris* [2011] QDC 115 (\$75,000); *Cantwell v Sinclair* [2011] NSWSC 1244 (\$75,000); *Woolcott v Seeger* [2010] WASC 19 (\$70,000); *Linsley v Domaille (aka James)* [2009] VCC 554 (\$70,000); *Naudin-Dovey v Naudin & Ors* [2013] QDC 119 (\$65,000); *Rastogi v Nolan* [2010] NSWSC 735 (\$65,000); *Mundine v Brown (No 6)* [2010] NSWSC 1285 (\$60,000); *Stevens v Boyle* [2012] SASC 232 (\$51,500); *Phillips v Robab Pty Limited* [2014] NSWSC 1520 (\$50,000); *Gluyas v John Best Junior* [2013] VSC 3 (\$50,000); *Gluyas v Canby* [2015] VSC 11 (\$50,000: note: Mr Gluyas was also the plaintiff in [2013] VSC 3); *PK v BV (No 2)* [2008] NSWDC 297 and 292 (\$50,000 to each plaintiff); *Moumoutzakis v Carpino* [2008] NSWDC 168 (\$50,000); *Prendergast v Roberts* [2012] QSC 144 (\$50,000); *Clarke v Coles Supermarkets Australia Pty Limited* [2012] NSWDC 107 (\$50,000); *Dossis v Andreadis (No. 4)* [2012] SADC 114.

### **\$20,000-\$49,999 – 18 judgments**

*Osuamadi v Okoroafor* [2011] NSWDC 1 (\$49,000); *Wilson v Ferguson* [2015] WASC 15 (\$48,404 including economic loss of \$13,404); *Stevens v Mayberry* [2012] SASC 220 (\$46,575); *Restifa v Pallotta* [2009] NSWSC 958 (judgment of \$40,000 for each plaintiff); *Conlon v Advertiser -- News Weekend Publishing Co Pty Ltd* (2008) 256 LSJS 457; [2008] SADC 91 (\$40,000); *Larach v Urriola* [2009] NSWDC 97 (judgment for plaintiff and his company for sums totalling \$40,000); *Cerutti v Crestside Pty Ltd* [2014] QCA 33 (damages for first plaintiff increased from \$7,000 to \$20,000 and for second plaintiff from \$5,000 to \$10,000, totalling \$30,000); *Bushara v Nobananas Pty Ltd* [2013] NSWSC 225 (\$37,500); *RJ v JC* [2008] NSWDC 217 (\$30,000); *Winn v Goodwin* [2008] VCC 1507 (\$30,000); *Leech v Green & Gold Energy Pty Ltd* [2011] NSWSC 999 (\$30,000); *Martin v Bruce* (2007) 6 DCLR (NSW) 157; [2007] NSWDC 264 (\$25,000); *Perkins v Floradale Productions Pty Ltd & Ors* (District Court of NSW, Walmsley SC DCJ, 28 May 2013) (\$25,000); *Gluyas v Tenana* [2008] VCC 1161 (\$20,000); *Tropeano v Lauro* (2010) 272 LSJS 125; [2010] SADC 113 (\$20,000); *Bui v Phung* (Queensland District Court, 14 October 2011) (\$20,000); *Prince v Malouf* [2014] NSWCA 12 (\$20,000 (reduced from \$138,500 (*Malouf v Prince* (District Court of New South Wales, McLoughlin DCJ, 14 December 2011)) to \$20,000 on appeal).

### **\$0-\$19,999 – 13 judgments**

*Hallam v Ross* [2012] QSC 274 (\$18,750); *Ell v Milne (No 8)* [2014] NSWSC 175 (\$15,000); *Jeffrey v Giles* [2013] VSC 268 (\$12,000 – first plaintiff; \$8,000 second plaintiff); *Dabrowski v Greeuw* [2014] WADC 175 (\$12,500); *Bristow v Adams* [2011] NSWDC 11; [2012] NSWCA 166 (\$10,000); *Amanatidis v Darnos* [2011] VSC 163 (\$10,000 for one plaintiff and \$5,000 for the other); *Ahmadi v Fairfax Media Publications Pty Ltd* [2010] NSWSC 702 (\$7,500); *Ritson v Burns* [2014] NSWSC 272 (\$7,500); *Luke v Richardson* [2014] WADC 27 (\$6,500); *Allen v Lloyd-Jones (No. 6)* [2014] NSWDC 40 (\$6,000 (reduced from \$65,000 (*Allen v Lloyd-Jones*, District Court of New South Wales, 9 May 2011) following a partial retrial); *Holt v TCN Channel 9 Pty Ltd* [2012] NSWSC 968 (\$4,900 (appeal dismissed [2014] NSWCA 90); *Trkulja v Trajkovska* [2010] VCC 10 (\$3,000); *Beaven v Fink* [2009] NSWDC 218 (\$2,500).

## Is the cap working?

The introduction of the cap on damages and the requirement that judges and not juries determine damages were designed to put an end to large damages award. However, as John-Paul Cashen points out in his article “Defamation Cap Rising Well Above Inflation” (*Gazette of Law and Journalism*, 10 December 2014), and as the table set out above shows, damages are getting higher, rather than lower, and awards of a nominal sum are rare indeed.

Is it a cap or a ceiling? Opinions differ. In *Attrill v Christie* [2007] NSWSC 1386 at [44], Bell J considered the cap was the “outer limit” on damages (see also *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350 at [235]). One of the damages developments in 2014 was Kyrou J’s rejection of Bell J’s reasoning in *Cripps v Vakras* [2014] VSC 279 at [599] – [608], on the basis that it followed the pre-uniform legislative interpretation of s 46A *Defamation Act* 1974 (NSW).

Are other awards a guide? This was not the case under the repealed legislation; see the comments of Young J in *John Fairfax Publications Pty Ltd v O’Shane (No 2)* [2005] NSWCA 291 where his Honour doubted whether consideration of comparable verdicts should be permissible under s 46A *Defamation Act* 1974 (NSW). That is not the approach taken by the Queensland Court of Appeal in relation to the uniform legislation: *Cerutti v Crestside Pty Ltd* [2014] QCA 33. As is set out in more detail below, other courts have taken a different view.

## The method of calculation of damages

It is now clear from the emerging patterns of assessment of damages that there are significant differences in the manner of approach of assessment of damages being taken by judges. These differences have not been the subject of comment by the New South Wales Court of Appeal; in *Clarke v Coles Supermarkets Australia Pty Ltd* [2013] NSWCA 272 the Court of Appeal dismissed the damages appeal in one sentence, on the basis that no issue of principle was raised (at [103]). The nature and extent of these differences can best be examined by careful comparison of two publications where a jury found certain of the imputations conveyed were true but the plaintiff succeeded overall: *Cerutti v Crestside Pty Ltd* [2014] QCA 33 and *Fisher v Channel Seven Sydney Pty Ltd (No 4)* [2014] NSWSC 1616.

### *Cerutti v Crestside Pty Ltd* [2014] QCA 33

The defendant sent a letter of complaint about the services of an accountant to the CPA Australia (the governing body for certified public accountants), the Pioneer Permanent Building Society and the Australian Institute of Company Directors. The imputations were that the plaintiffs (an accountant and his company) had:

- (a) misled Mr Turnour in relation to the circumstances under which Mr Scagliotti’s employment ceased;
- (b) had issued invoices intending to deceive Mr Turnour;
- (c) had issued an invoice intended to disguise an “excessive” fee for Yasmin;
- (d) had engaged in “dishonest” practices when issuing accounts;
- (e) engaged in “unfair practices” when issuing accounts; and
- (f) were unethical.

At trial the publications were found to have been made with malice which precluded reliance upon a defence of qualified privilege. The defence of justification succeeded in relation to the two least serious imputations, namely imputations (a) and (e). The trial judge considered the case was an appropriate one for an award of aggravated damages, but awarded only \$7,000 in total to the plaintiff and \$5,000 to the company. The trial judge also declined to award any interest on the damages. On appeal, the damages award was set aside as inadequate, and interest was awarded.

In setting aside the award of damages, Applegarth J commenced with an overview of the general principles for an award of damages for reputation loss (at [25]-[45]). His Honour then considered the question of the role comparable awards played when determining damages (at [46]-[49]), noting that while comparisons with awards of general damages in personal injury cases are different (*Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [70]-[79]; *Crompton v Nugawela* (1996) 41 NSWLR 176 at 192 and 198-199) a trial judge would benefit from “the careful selection and citation by counsel of broadly comparable cases” (at [49]).

The question before the court was whether the award of damages was “manifestly inadequate or manifestly excessive”. Having noted the limited circumstances in which an appellate court would intervene (at [50]-[57]), Applegarth J then applied the information available to him as to “broadly comparable cases” (at [45]), noting that examination of the awards of damages under the new Act, as set out in *Australian Defamation Law & Practice* at [60,500]-[60,600] and the schedule of awards provided to the trial judge, “did not disclose any case in which a professional person had been awarded such small damages for imputations of dishonesty”. The letter had been published to a small number of recipients, but even publication to a limited number of persons may justify an award of substantial damages; one of the cases cited by Applegarth J, *Trantum v McDowell* [2007] NSWCA 138, involved a publication where the few persons to whom the matter complained of (a petition) was circulated signed their names, thereby themselves republishing the libel. Having carried out this exercise, Applegarth J then sought an “appropriate starting point” for an award of general damages, prior to discounting that amount by reason of the two imputations which were found to be true. He estimated an appropriate range as being between \$15,000 and \$30,000.

The next issue was whether the trial judge had erred in discounting those damages by 50% to take into account the two imputations which the jury had found to be true. Applegarth J had no difficulty in holding that this was the case; not only were these imputations far less serious to those which were proved not to be true, but they had been made with malice and the respondents had persisted in alleging dishonesty through to the end of the trial (at [67]). It was by reason of this deductive process that Applegarth J held (at [74]) that the general damages awarded to Mr Cerutti was not only too low, but had been too highly discounted (at [74]). Similarly findings were made in relation to the partnership (at [87]-[88]).

Applegarth J’s analysis of aggravated damages (at [37] – [42]) explained – for the first time – that an award of aggravated damages in excess of the cap is permitted if the circumstances of publication are such as to warrant an award (this is the only reference in the judgment to the cap). His Honour also sets out a useful analysis of mitigation of damages. The result is a useful summary of the legislation and principles, a consideration of comparable awards to ascertain a range, adjustments for the aggravating and mitigating factors and an award which reflects all those issues. However, a different approach was taken by Rothman J in *Fisher v Channel Seven Sydney Pty Ltd (No 4)* [2014] NSWSC 1616.

***Fisher v Channel Seven Sydney Pty Ltd (No 4) [2014] NSWSC 1616***

The plaintiff brought proceedings for a segment on *Today Tonight* accusing him of misconduct as a driver of a bus carrying school children. The plaintiff pleaded seven imputations. Two of these imputations were found to be true by the jury:

- (1) The plaintiff drove his bus which was carrying school children in a dangerous manner;
- (2) The plaintiff drove a bus containing 40 school children without wearing a seat belt.

One of the seven imputations found not to have been conveyed was as follows:

- (1) The plaintiff unjustifiably fights and bullies school children on his bus.

Four of the seven imputations which were found not to be true were as follows:

- (1) The plaintiff wrongly used his mobile phone while driving his bus containing 40 school children on a notorious stretch of outback road;
- (2) The plaintiff is a menace to the safety of others;
- (3) The plaintiff unjustifiably banned school children from travelling on his bus thereby depriving them of the opportunity to attend school;
- (4) The plaintiff stranded children who were passengers on his bus.

The defendants relied upon defences of substantial truth (s 25) and s 26, as well as other defences which failed. The jury found that two of the six defamatory imputations were substantially true. One of the seven pleaded imputations was held not to have been conveyed. The remaining four imputations were, relevantly for the purposes of this analysis, held not to be justified on the basis of true, honest opinion or fair comment. The defendants also failed to prove the truth of the contextual imputation that the “plaintiff’s conduct as a bus driver is so poor that he is not a fit and proper person to be allowed to drive a bus carrying school children”. As was the case in *Cerutti*, the jury here found that, while the imputations of lesser seriousness were true, the defences of justification and contextual justification failed in relation to the remainder of the imputations.

After noting the evidence on damages, Rothman J noted the general principles relevant to damages for injury to reputation at [66]-[69]. At [70]-[83] Rothman J rejected a submission that the defamatory publication was the cause of the plaintiff’s marriage breakdown and loss of his bus operating licence and declined to take into account other publications of similar defamatory material.

At [84]-[91] Rothman J considered the impact of the jury’s findings as to those imputations found to be true or untrue. Having noted that damage is presumed, his Honour went on to note at [94] “the extent of publication is another factor in assessing the plaintiff’s harm and injury to reputation” and that this could include the grapevine effect (at [94]-[98]). His Honour declined to make any adjustment for mitigation of damages or for aggravated damages. The sum to be awarded - \$125,000 – was then stated, without explanation, to be the result of dealing with “the nett imputations” (at [107]), which was the basis upon which no further discount for mitigation was included.

The differences in approach by Rothman J to the approach taken by Applegarth J are considerable. In particular, in Rothman J's judgment:

- There was no discussion as to a range of appropriate damages, instead there is a statement that the damages will not be “at or near the cap” but will be “sufficient” to compensate the plaintiff “without the need for aggravated damages”. Does that suggest his Honour prefers *Cripps v Vakras*?
- Rothman J considers there is no “need” for aggravated damages.
- There is no reference to other comparable awards or to a range of damages.
- It is unclear how any discount or reduction of the amount in the range by reason of two of the six surviving imputations being found to be true is arrived at. It appears that by taking a “nett” (at [107]) view, no discount for mitigation is necessary.

As to quantum, it is not easy to reconcile to reconcile this \$125,000 award with the nominal \$5,000 award that was upheld on appeal in *Holt v TCN Channel Nine Pty Ltd* [2014] NSWCA 90 for a plaintiff who had similar mixed jury findings as to the imputations.

Which is the right approach? The approach taken by Rothman J is the most common in defamation proceedings, particularly in New South Wales. However, comparison with the method of approach to other claims in tort, notably personal injury, show a greater degree of rigour is required in claims for non-economic loss than is the case for defamation. The purpose of the legislation in requiring judges assessing damages (as opposed to juries) was to ensure that jury verdicts were not Delphic utterances of an unexplained sum. There is much to be said for a judgment referring not only to the relevant statutory provisions and current cap, but to other assessments, and for providing reasons in some detail as to how the sum is calculated, including a careful explanation of the circumstances in which aggravated compensatory damages are (or are not) considered appropriate. Otherwise, judges may as well give the question of damages back to the jury.

### **Defamation legal costs**

The continued high legal costs of defamation actions are not the result of inadequacies of defamation law; it has long been a feature of defamation actions under common law system in other jurisdictions<sup>36</sup>. The problem these high costs cause is that, unlike claims for personal injury, very few persons sued have defamation insurance. This means that the search for the person with the deep pockets (to use the term given by Richard A Posner in “Economic Analysis of Law”, 1998, at p. 205) may at times distort the conduct of the case.

The \$780,000 estimate in *Moran v Schwartz Publishing Pty Ltd (No 2)* [2015] WASC 35 (at [87]) and the \$500,000 bill for the unsuccessful plaintiff who sued Andrew Bolt fall well short of McDonalds' £10M trial bill in the McLibel case, but are beyond the reach of the average uninsured person. **[Correction: In an earlier version of this article, I said that David Barrow was bankrupt. Mr Barrow has been quoted publicly as stating that he would have to declare bankruptcy as a result of costs orders made against him in his**

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<sup>36</sup> See the Centre for Socio-Legal Studies 2008 report, “A Comparative Study of Costs in Defamation Proceedings Across Europe”, (<http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf>), which found that the costs of running a defamation action in the United Kingdom were 140 time higher than costs in European countries. Costs of defamation proceedings in all common law jurisdictions in Europe were significantly higher than civil law countries.

**unsuccessful proceedings against Andrew Bolt and the Herald & Weekly Times Pty Ltd. I accept that Mr Barrow has not in fact been made bankrupt.]** This would not be such a problem if defamation actions were brought against media outlets and other business entities with the resources to respond, but the advent of social media and “e-libel”, has made anyone and everyone a potential publishers to a global audience, which has exacerbated the problem.

Section 40 was enacted to ensure that prompt settlement occurred, at the risk of indemnity costs, and that the financially disadvantaged party had some protection. The Andrew Bolt case is a good example of the limits of this statutory provision. While courts continue to permit the bringing of, for example, slanders to one person, or where cases are weak or poorly pleaded, s 40 will be of little assistance.

Defamation lawyers used to enjoy telling the story of the plaintiff’s solicitor who told his opponent: “My client will stop at nothing to win this case and has sold his house to ensure he has the funds to do so.” The reply: “Really? And how is he going to fund the second week of the trial?”, although probably apocryphal, is revealing.

This brings me back to the issue of proportionality and s 60 *Civil Procedure Act 2005* (NSW). The disproportion between the sums of damages to be awarded and the legal costs incurred should enable s 60 to be relied upon to prevent trivial claims for publications of a minor nature to a handful of people. If, as seems likely, the appellate courts reject the use of s 60 or UCPR r 12.7 to dismiss such actions, consideration should be given to a redraft, along the lines of s 1 *Defamation Act 2013* (UK)<sup>37</sup>, being added to the legislative drawing board.

## Conclusions

At a time when the profound changes caused by electronic publication require urgent legislative attention, it is regrettable that the most widely publicised legislative amendment has been one which would have led to more “McLibel” litigation, namely removing the s 9 “prescribed corporation”<sup>38</sup> test. The only other legislative reform in the pipeline is an amendment to s 26 that should have happened four years ago. This does not say much for defamation law reform in Australia.

However, the abortive Tasmanian defamation law reform proposal to permit all corporations to sue may turn out to be a good thing. If governments are prepared to return to the drawing board to make amendments to the uniform legislation to help large corporations, there is plenty of work for them to do to effect more constructive change – appropriate legislative protection of ISPs and other online providers, a “serious harm” test, interim costs provisions such as costs capping or security for costs, and of course the revised s 26 defence. It would be ideal if s 49 were amended to provide that the litigation be reconsidered every five years, and not just as a one-off proposal, but I cannot imagine governments having the foresight to consider this.

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<sup>37</sup> <http://www.legislation.gov.uk/ukpga/2013/26/crossheading/requirement-of-serious-harm/enacted> .

<sup>38</sup>For a selection of articles on the “backlash” to this proposal, see <http://www.abc.net.au/news/2015-02-05/why-tasmania-backed-down-on-defamation-law-changes/6072170>; <http://tasmaniantimes.com/index.php/article/ta-ann-targets-defamation-law-...-and-huon-valley-environment-centre>; <http://www.themercury.com.au/news/scales-of-justice/tasmanias-company-defamation-laws-plan-dumped/story-fnj8cre7-1227208402588>; <http://www.timebase.com.au/news/2015/AT043-article.html>. Given the repeated “backlash” references and public outcry on freedom of speech referred to in all these stories, it seems surprising that defamation law reform has remained so resolutely outside the agenda of governments of all political hues.



Defamation law, in the “e-libel” future, will become more complex, not less, and legislation needs to respond to the profound changes created by this new technology. If the States and Territories are not prepared to act sufficiently quickly, the Commonwealth may be in a stronger position; the telecommunications power is of far greater significance in 2015 than it was in 2005. Perhaps Mr P Ruddock MP (who reportedly has some time on his hands at the moment) could consider a renewal of his threats to have the current legislation “ripped up”<sup>39</sup> in the event of further inaction<sup>40</sup>.

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<sup>39</sup>Queensland Government, “Uniform Defamation Laws”, <http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2005/200514.pdf>, p. 17.

<sup>40</sup> This discussion paper covers issues up to 23 March 2015. Thanks to my associate Vincent Mok for his assistance.