

Catch Up at the Bar: Recent Developments in Defamation Law

Ashleigh Fehrenbach, Senior Associate at Minter Ellison, interviews Tim Senior, a specialist media barrister at Banco Chambers, about recent developments in defamation law.

Tim Senior joined Banki Haddock Fiora after practising for five years in London at David Price Solicitors & Advocates, a leading boutique media law firm. Whilst at BHF, Tim was a specialist in media and defamation and has been involved in some key media litigation including:

- *Trad v Harbour Radio Pty Limited*,
- *Qureshi v John Fairfax Publications Pty Limited*,
- *McMahon v John Fairfax Publications Pty Limited*.

This year, Tim was recognised as a Legal 500 Asia Pacific next generation lawyer in media and entertainment law. He has joined the bar, where his focus remains on defamation and media related matters.

FEHRENBACH: Tim, thank you so much for your time. You've recently gone to the bar, congratulations! What has been the biggest challenge you've faced so far in this new role?

SENIOR: Thank you! While I'm continuing to practise defamation and media law, the biggest challenge so far has probably been working across the new and varied areas of law that come my way every day. But that variety of work and the opportunity to develop your practice are great things about coming to the bar.

FEHRENBACH: You have been a defamation lawyer for approximately ten years. Prior to that, you studied archaeology before law. Can you tell us a little bit about your career so far, and how your earlier degree might (or might not) have played a role in what you do today?

SENIOR: I've always been interested in media law, particularly the way defamation law seeks to strike a balance between freedom of speech and the right to protect reputation. At the time I was practising in the UK, London was the libel capital of the world and privacy law was

taking off following decisions like *Campbell*, *Douglas* and *Mosley*. While archaeology and law might sound worlds apart, there are parallels in the skills you learn. The weeks spent carefully examining different coloured soil for evidence of human activity prepared me well for the patience and attention to detail you need as a lawyer wading through folders of documents! Towards the end of my degree, I started focusing on a career in law and my dissertation was on the protection of archaeology in the UK town planning framework. I went on to complete a postgraduate diploma in law and my training contract with David Price Solicitors & Advocates. David Price QC is renowned as one of the UK's top media and defamation specialists, and it was a great time to be practising in London and be involved in some of the leading privacy cases (including *McKennitt v Ash*). I went on to qualify as a solicitor-advocate. I came to Sydney about eight years ago and qualified in New South Wales. I think statistically Sydney has now taken the title of libel capital of the world – nothing to do with my arrival! – so career wise, I guess I followed the libel!

FEHRENBACH: Given that you made the move to Australia after practising in London for five years, can you comment on some of the cultural differences that you see playing a role in Australian media companies, compared to those in the UK? For example, some say that the press in the UK are more invasive compared to in Australia. What has been your experience in that regard?

SENIOR: I haven't lived in the UK for a number of years now, but the print media industry used to be huge and have a lot of influence. There were a lot of titles dedicated to celebrity stories that were pretty sensational and often fairly invasive. My sense is that things have changed. There



Tim Senior

are fewer of these titles, and the ones that still exist don't have the same freedom. The Leveson inquiry and phone hacking scandal, which saw a number of journalists jailed, combined with the way in which privacy law has evolved in the UK and a general decline in print media across the world have all had an impact. In Australia, magazine and newspaper journalism has traditionally been more conservative and less celebrity focused than in the UK.

FEHRENBACH: It's certainly been an exciting time for defamation law over the last couple of months. There has been much talk of the proposed 'cyber aged reboot' for defamation law in New South Wales. One of the proposals made by the NSW government is for large corporations to be able to sue for defamation. What are your thoughts on this proposal? Are there other specific reforms you would like to see made to the Defamation Act?

SENIOR: The current law prevents companies from suing for defamation unless they are excluded (i.e. a small or non-profit company). The thinking was that allowing large and well-resourced companies to sue for defamation might

deter the publication of material that was in the public interest but critical of a company. It also flowed from the notion that reputation is primarily a personal right. The recent review received a range of responses. Some suggested that the relevant section of the Defamation Act should be narrowed to stop all corporations from suing. Others said that the prohibition should be done away with completely, allowing any company to sue. I can see both sides of the argument. I certainly understand that corporate reputations are important and need protecting. In other jurisdictions there are no restrictions on companies suing for defamation. However, I can also understand concerns about the potential chilling-effect on freedom of expression and public scrutiny if all companies were able to sue. As I said before, the law of defamation is always seeking to strike a balance between the two competing rights of freedom of expression and the right to protect reputation. Overall, I think the current law in relation to corporations strikes a fairly good balance between those competing rights. Of course defamation is not the only cause of action, and corporations can still sue on other grounds such as injurious falsehood.

As to the other areas the NSW Government has recommended for review, I'm interested in the idea of introducing a single publication rule, perhaps something along the lines of section 8 of the Defamation Act 2013 (UK). That would prevent plaintiffs suing after the one year limitation period on the basis that the relevant publication is still available for download in an archived form on a publisher's website. I also think it's worth considering the introduction of a "serious harm" threshold to deter trivial claims. I think everyone is agreed that the defence of contextual truth also needs to be amended to properly reflect section 16 of the old Defamation Act 1974 (NSW) on which it was meant to be modelled.

FEHRENBACH: Shortly after the "reboot" was announced, the High Court delivered its judgment in *Trkulja v Google LLC [2018] HCA 25*, striking down a Victorian Supreme Court case. This decision paved the way for Milorad Trkulja to pursue

a defamation claim against Google over search results and search term auto-completions. The Court found that search term auto-completions are capable of being defamatory, and that search engines should not be immune from defamation claims. Do you think this case will have significant implications for media organisations in Australia?

SENIOR: The High Court decision followed Google's application to summarily dismiss the proceedings. It focused on the second ground of the application, namely whether the matters complained of were capable of being defamatory of the plaintiff (it found they were). The Trkulja decisions more generally have considered a number of interesting questions concerning the interplay between traditional principles of defamation law and the modern digital world. As the case moves forward, my understanding is that one of the issues likely to arise is the availability and operation of the innocent dissemination defence in a digital context. That is something that will be of particular interest not only to ISPs, but to media organisations more generally. The innocent dissemination defence, and whether it requires amendment to better reflect the operation of ISPs, internet content hosts and search engines as publishers is also something that the NSW Government has recommended for review.

FEHRENBACH: The next case that rocked the defamation space was the Victorian Court of Appeal allowing media giant Bauer to appeal the judgment that had awarded Rebel Wilson \$4.5 million in damages. Did this decision come as a surprise to you?

SENIOR: The Court of Appeal's decision to set aside the big award of around \$3.9 million for economic loss turned on its review of the relevant evidence adduced by the plaintiff at trial. I'm not sure there were too many surprises about the way in which the Court interpreted section 35 of the Defamation Act 2005 (Vic) which deals with the cap on damages for non-economic loss. It rejected Bauer's challenge to the way in which the trial judge had construed the operation of

section 35, and accepted that where a court is satisfied that an award of aggravated damages is appropriate, it is entitled to make an order for damages for non-economic loss that exceeds the statutory cap in respect of both pure compensatory damages and aggravated compensatory damages.

FEHRENBACH: For our readers who are interested in moving into, or launching their careers, in the defamation and media law space, what are two pieces of advice you would give to them?

SENIOR: For a more direct route into a career in media law I would recommend skipping a degree in archaeology. In all seriousness, an interest in news, current affairs and the media is obviously important. It's a fairly small and competitive area of practice so perseverance is essential, and I'd recommend getting as much experience working with a specialist law firm or perhaps working in-house with a media company. There is usually a defamation trial happening somewhere, and I would definitely recommend going along to watch. I think defamation and media law are more important than ever in a world of fake news and where freedom of expression is increasingly under threat. It's an intellectually challenging area of the law and all about people, which makes it particularly interesting. I would definitely encourage any of your readers who are interested to get involved.



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