CAMLA Defamation Judges Panel Discussion

Defamation cases are rarely out of the public eye, over publications ranging from nasty Facebook posts to serious investigative journalism pieces. Now more than ever, Courts are grappling with the meaning of defamatory publication on social media and online platforms, and are faced with the new and unenviable task of applying the recently updated defamation legislation.

On the evening of 7 December, CAMLA members were treated to an enlightening and invaluable panel discussion with judges from the three main Courts hearing defamation cases in Australia: **Justice Michael Lee** from the Federal Court of Australia, **Justice John Sackar** from the Supreme Court of NSW and **Judge Judith Gibson** from the District Court of NSW. Moderated by David Sibtain, a barrister at Level 22 Chambers, and **Marina Olsen,** a partner at Banki Haddock Fiora, we have reproduced below a transcript* of the evening.

**Please note that this is not an official transcript and, while every effort has been made to reproduce the words spoken accurately, it is provided for educational purposes only and should not be relied upon in any formal way.*

M Olsen: Let's jump right in at the deep end and start with the question of serious harm and the new test that applies under section 10A with the new amendments. Judge Gibson, can I please start with you? You handed down a comprehensive decision recently, in which you were required to apply the UK test, the UK serious harm test, that was in *Raider v Haines*. Do you think that when the time comes to consider the test under Australia's section 10A in your Court, it will be applied in any significantly different way to the UK test? And procedurally speaking, how and when do you see the issue being ventilated?

Gibson DCJ: Can I expand that by saying, although I don't want to talk about serious harm, because I've handed down a judgment on the topic recently, I wanted to talk about how it is that I see judges in Australia are going to approach these areas of the law. And what particularly concerned me was actually a passing remark by one of the judges on appeal in the case of *Mrad*, where one of the judges commented that there was no place in Australian defamation law for English concepts such as fatal variance, this being an English doctrine in relation to the law of slander.

I think that one of the things we have to be very cautious of here is that there is something of a history of reluctance by the judiciary around Australia, particularly at appellate level, to embrace English inventions, such as *Jameel*, there's *Thornton v Daily Telegraph*, there's *Reynolds*. Need I go on? I mean, basically, if I was sitting in crime, I would say there is a long prior history of recalcitrant behavior. I think that the first thing we need to bear in mind when we're looking at this issue, is I think that judges might have to think about not only the law reform process but also, perhaps revisiting some of their own ideas on judicial method and what Professor David Rolph likes to call judicial receptivity. So I'm hoping that one of the changes that this new legislation will bring about is the renewed interest in new ideas as opposed to referring to the absence of a suitable vehicle.

The second thing I would like to see is I would like to see judges, and I'm sure they will be, embracing technology more, understanding technology more, receiving more assistance from the bar in this regard, and avoiding what the Supreme Court in the United States has been accused of, which is a terrible word. It's technofogeyism. So we don't want any of that here. Another area of the law that I would like to see judges looking at, perhaps a little differently, is avoiding loophole thinking. 'Aha! I found a loophole. Look, this section doesn't work'. In particular, I'm hoping that the methods of statutory analysis will be approached with a degree of flexibility. I'm still worried about the decision in the *Mohareb* case which, again, I can't discuss, where it was decided that a statement of claim amounted to a concern notice. That does trouble me because I thought the whole purpose of a concerns notice was to avoid a statement of claim. So having noted those points, and also having noted that I'm hoping the judges will be aware of the costs issues, because if I can come back to serious harm, the single biggest reason for the introduction of the serious harm test in the United Kingdom was the blowout in costs. Because the blowout there was amazing. I have spoken many times about the study in 2008, at Oxford University, which found that it cost 140 times more in 2008 to run a defamation case in England than it did in civil law jurisdictions on the Continent. It gave a lot of people a good big fright. Now, that's probably the longest speech I'll make all night. So I'm now going to hand over to my colleagues, what do you think about the new way that we approach this legislation?

Lee J: I think I'll address the two issues, I can do that at a relatively high level of generality, that have been raised in that question. The first is, procedurally speaking, how and when will the issue of serious harm be ventilated in the Federal Court. As those of you who have practised in the Federal Court in relation to defamation matters over the last few years would well understand, there is a reluctance to engage in what the Court perceives as unnecessary interlocutory disputation. Now, minds differ about that. But there is certainly a clear admonition in the Practice Note to ensure that interlocutory disputation is minimised. When it comes, though, to the question of serious harm, it does become an interesting question as to how that issue is to be ventilated. One of the sections of the *Federal Court of Australia Act* which I think is under-utilised and not really thought about is section 31A. In section 31A, you have a section which has created a

Marina Olsen

new element in the cause of action. Section 31A of the *Federal Court of Australia Act* was supposed to get away from the *General Steel* test and lower the bar for applications for summary dismissal and summary judgment. Perhaps picking up on what Judge Gibson said, there may have been a bit of traditional reluctance to giving full effect to that provision over the years and there are two lines of authority which perhaps have some degree of tension in them about how low the threshold is in section 31A. But if one gives effect to one of those lines of cases, which does seem to me at least arguably more in the spirit of the reform that was supposed to be reflected in section 31A, it may provide a mechanism by which serious harm could be considered by a judge. Now, that then gives rise to the very interesting question about what happens when consideration of the serious harm threshold changes. For example, are there issues going to be ventilated at trial which may bear upon the question? Now all that will have to be worked out.

And the last question, is there a role for a proportionality challenge now that the series harm test has been introduced? Without expressing a definitive view, it's very difficult to see how, given an element of the cause of action is now serious harm to the reputation of the plaintiff, it's difficult to see why that proportionality challenge fits comfortably into the legislative reform.

M Olsen: Justice Sackar, did you have any comments on the serious harm test or the other comments from Judge Gibson or Justice Lee?

Sackar J: There are a number of points that should be made. The first one is that the English provision in section 1 of their *Defamation Act 2013*, and ours in NSW, is differently worded. I won't dwell on that for the moment, but there are differences in the terminology. The provision in NSW is also much more prescriptive about a number of things. For example, it's a judge-alone issue, and subsection 3 of section 10A makes that clear.

There are other provisions in the NSW section 10A which, unlike the English provision, do purport to deal with procedural issues. The bottom line is this: if you're acting for a media proprietor, and you have an issue about the seriousness of the libel, my view is that we will see an upswing in section 10A applications, in the alternative, proportionality arguments running as the second or an alternative argument. They do have a tendency to run hand in glove, at least in theory, and it does seem to me that, as happened in the UK, I do think they will be preliminary points because in NSW particularly where, let's say, a trial is going to be a jury trial, serious harm is going to be a judge-alone question. It lends itself much more to a preliminary debate. In England, where it's already being looked at, and Judge Gibson has comprehensively dealt with the English authorities, in the development up to *Lachaux*. The preliminary argument there before Justice Warby in Queen's Bench took two days. And it took two days because, ultimately, whether or not there is a serious harm issue is a question of fact.

It also, as far as the UK Supreme Court is concerned, the UK legislation, and this is yet to be determined if I may say so, apart from Judge Gibson's valuable contribution - the question is whether the Australian legislative provision will be seen to have affected the common law, as the UK Supreme Court says it has by, as it were tweaking, or rather putting into a different context, the question of presumption of damage. So to sum all that up, it's a bit like section 7A. I think it will be a bright, shiny object. I think there is very little doubt that media proprietors in the appropriate case in NSW will seek to have the matter determined at an early stage. It's a factual dispute so I can see the matter taking a couple of days perhaps, potentially – it depends on the case. So I do think it will become a preliminary point. And I think it'll be, arguably, in the appropriate case, the new replacement section 7A as a preliminary issue. Because the

amount of time that it would save, having a fullblown trial if there is no serious harm, subject as I've said to the fact that both pieces of legislation are differently worded, and they are yet to be looked at in that context.

D Sibtain: Thank you Justice Sackar, now in the interests of keeping this in a sequential fashion, I'm going to jump around, and I'm going to move over to case management. Because I think certainly what Justice Sackar was saying, and what Justice Lee was saying at the very least in relation to how interlocutory disputes that are capable of disposing of the whole proceedings might be entertained. Can I move to the topic of case management more generally? Case management has been something that has been institutional in the District Court and institutional in the Supreme Court. But in the Federal Court, as Justice Lee indicated, there has been a reluctance to deal with interlocutory matters in advance. Now, that reluctance has been the rule, but there have been frequent departures from it. For example, in the recent decision of Justice White in *Gould v Jordan* this year where there were a number of issues that were determined separately and in advance, albeit where there were matters that could be determined on a documentary basis. But there have been other cases where there are interlocutory determinations of matters, whether by separate question or interlocutory determination. My question then, I might start with Justice Lee because the Federal Court is the Court that probably operates in a way less likely to manage them on an interlocutory basis. Is there room for it? Is it a good idea?

Lee J: Well, the answer to that question is yes, but it depends. I think what you have to understand when it comes to this question of matters in the Federal Court is the different history of that Court, compared to the more established procedures in the Supreme Court and the District Court. And, in particular, the fact that the Federal Court has always been a case, subject

Judge Judith Gibson

to something we might touch on later, where all issues are going to be determined by a judge. And, in particular, at the early stages of the development of the defamation work in the Federal Court there were judges, with the possible exception of Justice Rares, who had come out of a tradition where trials were also conducted by judges alone. And so it was thought by those judges that there is some efficiency, particularly in a docket system, for the judge determining all issues as quickly as they can at a trial. And, like all discretions in the Federal Court, it's supposed to be exercised conformably with part 5B of the *Federal Court of Australia Act*, and that is the efficient disposition of the case.

My bias is to try to get on trials as quickly as possible, but if there are sound reasons in an individual case, then the parties should raise it at the first case management hearing. The first case management hearing will generally occur immediately after the filing of the defence. One will understand what I'll describe as the architecture of the case, the likely defences which are going to be run. If there is a perceived real utility, for example, in determining issues of meaning early on, because that's going to vastly decrease the scope of any trial, then that should be fairly evident early on. And I don't think you'll find, particularly as we go forward, I don't think you'll find judges who will be so obsessed about the idea of avoiding interlocutory disputation that they will not adopt proportionate and sensible approaches to dealing with issues discretely if the bespoke circumstances of the case commend it.

D Sibtain: So Justice Sackar, in response to that, you sit as the list judge in the defamation list in the Supreme Court, which has a long history of case management to bring matters by one judge efficiently up to trial. Why has that worked as a system or not worked?

Sackar J: Well, I think it does work. But the complication in NSW in libel is the presence potentially of the jury. And that's why I think that the serious harm defence or serious harm point, and given the fact that it's a judgealone determination anyway lends itself to, whatever else one might think about it, a determination. Now of course it can be determined on the first day or two of a trial, but you wouldn't want the parties, if there's a serious point to be made there, pardon the pun, it's best to be determined sooner rather than later

Judge Michael Lee

because the jury trial will take longer, will cost more, and it creates greater uncertainty for everyone concerned. Now, it won't be every case… that fits into that mould, but I do think that there is a very great prospect, that is these points being raised, as they have in the UK, being raised as preliminary issues. And I think that factor will be case managed accordingly.

D Sibtain: Perhaps broadening the topic to general case management or, should I say, the determination of separate questions early. In a judge alone trial where there has not been an election for a jury, do you see any utility in separate determinations on meaning?

Sackar J: Well, the problem with separate determinations in the context. If it's judgealone, yes, of course. The judgealone is a paradise in the sense that one isn't burdened by putting juries in and out of a room as Judge Gibson is obviously incredibly familiar with. But if there is a jury involved or likely to be involved, one problem you have about determining in advance are factual questions, which may be their domain. And in NSW, that is more complicated. In a Federal Court system where there is no jury, then by consent and otherwise, the factual issues relevant to the particular issue can be and are susceptible of determination in a confined way. I presume that's what Justice White did in *Gould v Jordan*. Obviously, it was a consent regime, the parties clearly participated in it. It's a novel one from my point of view. But equally, I can see that if the factual issues are not controversial, or are within a narrow ambit. It's very difficult reading that judgment to see how much factual material was in fact involved, although I think the hearing took two days, on the 30th of November and 1st of December. There must have been some factual material, but the impression one gets is that there must not have been much factual controversy. So on that basis, yes, it's clearly an efficient way of dealing with it.

D Sibtain: So Judge Gibson in cases where there isn't an election made for a jury and the parties are happy to do that, do you see any attraction in having a separate determination of meaning in advance of the rest of the issues in the trial?

Gibson DCJ: Well, while I was reading a lot of English cases recently, I also read some articles which suggested that increasingly, these applications are being brought at trial rather than as an interlocutory application beforehand. That seems to be an increasing trend. I don't know if that will be the case here. Can I say this about jury trials? I'm not sure that they do take longer and cost more. They're certainly much more reliable. This is the time when I start saying to people 'bring out your perverse jury case, come on, where is it?' And there's only been one under the new legislation, that's that *Kencian v Watney* case up in Queensland, and the jury went back the second time and found for the defendant all over again. So who do you think was right, the jury or the Court of Appeal? But having got that off my chest. Look, I agree with everything that my colleagues have said. I think that these are very good points, I think this is going to be important. In terms of case management, the problem with the docket system is that it can be expensive, it's the same judge all the time. Whereas if you've got a case management list, where – and also I have the advantage, if I'm running the list, if I do seem to express a view or an opinion, or look as if I

favour one over the other, I won't be the trial judge, you see. So that's the attraction. I see those as being relevant issues in relation to case management. But each system, of course, has a lot to offer to practitioners wanting to consult the system which has got the best result.

Lee J: Can I just pick up on something that Justice Sackar just said which I think is important, and that is what occurred before Justice White was something which evolved out of a highly cooperative and sensible approach taken by practitioners. And if experienced practitioners come along to a judge and say 'an early determination of this issue is going to assist not only in the curial resolution, but perhaps in the noncurial resolution of the case', then a judge will take that terribly seriously. And so, one of the things we try to do before the case management hearings is ensure that practitioners speak together and think of ways to, you know, properly calibrate the procedures, depending upon the issues thrown up by the pleadings.

M Olsen: Can I just ask one followup question that I think arises from both of those comments. Judge Gibson, you talked about how sometimes separate questions are determined during the trial, and I was going to ask a question about the *Elaine Stead* case, Justice Lee. In that case, with the consent of the parties, you determined meaning at the close of the applicant's case. Do you think if there is a separate question put to the judge on meaning, do you have any views on when that is best to be determined? Whether earlier, after, is there a benefit to hearing the applicant's case?

Lee J: Well, it seemed to me a sensible idea in that case because I thought meaning was as plain as a pikestaff. And I always thought that, and it was going to make writing a judgment a lot easier. More importantly, it was going to reduce the hearing time because a whole series of defences to imputations that I just thought weren't going to be carried didn't need to be run. But, look, it just depends upon the case. I raised it in another case that I'm hearing at the end of January. I said to both parties, 'if you wish me to determine [meaning]', I think it was sort of last week. I was quite happy to do that in the context of a case management hearing if both parties agreed. They didn't. And therefore I said, 'well, I'll just leave it for trial'. So I've got no *a priori* views about when it should occur. It just depends upon the circumstances of the case.

Judge John Sackar

M Olsen: And I think that leads to another question, which is about, you know, what benefit you gain from submissions on meaning and how, as a matter of practice, and this is for all the judges, how you determine meaning. Is it a matter of first impressions?

Gibson DCJ: I have to be the ordinary reasonable reader, viewer, whatever. And I always start with, of course, Justice Hunt's classic explanation of how to do this in the *Marsden* decision. I read it regularly because it really is the last word in how to deal with these issues. I try and think of myself as being, not quite sitting on the Clapham omnibus, but sitting there, being somebody who's read this in a bit of a hurry, perhaps gone back and seen it again, or if it's on the radio, I'm conscious that it's transient. So that's what I always do. I try and pretend I'm the ordinary reasonable reader, or whatever.

M Olsen: Justice Sackar, do you have any comments on that, anything to add?

Dauid Sibtain

Sackar J: Not really but you must bear in mind that the section 7A regime operated for a very long time in NSW. That was a preliminary determination by the jury of the meaning. And it was done of course because of the history of long trials, particularly *Parker v 2UE*, having taken weeks at the end of which the jury came to a view that the imputations simply didn't arise. And the Court of Appeal was incensed that so much time had been taken, circling a number of issues, which ultimately proved to be irrelevant. It's clear that in some cases, if there is no factual issue concerning identity, if there is no factual issue concerning publication, as there is in a slander case, or often is in a slander case, determination of meaning, in the absence of a true innuendo, where you are simply talking about natural and ordinary meaning cries out for determination. The meaning is not going to get better or worse, depends upon whether qualified privilege, comment or justification is on the landscape. It is divorced from those issues, because the first step the plaintiff has to take is to prove: (a) that the meanings arise and (b) that they were defamatory. And that's why 7A operated fairly successfully. And if it's a judge alone determination of meaning, then you've got the reasoning process of the judge, which can be scrutinised by an appellate court. Of course, if you've got a jury determination under 7A, the appellate jurisdiction in those years was devoted to whether the judge misdirected the jury on that issue, and/or whether in advance, it could be regarded as perversity. But in terms of determination of the natural and ordinary meaning, it is clearly cost effective in the absence of any other issues such as identification and publication, and even then it can be confined factually and very often should be.

D Sibtain: I think it's over to you, Justice Lee.

Lee J: Well, I don't think I don't think there's anything I can usefully add to those two very learned descriptions of how one should approach it. Save to say this, which picks up specifically on something you've said, that is the use of submissions. The extensive written submissions that I have seen on meaning deconstructing the publication, as I described it in a judgment, like one was deconstructing a haiku, are really of very limited use. As both judges have said, it is something which ought not be over-complicated.

D Sibtain: So we don't assist you very much?

Lee J: No, not really [laughs].

D Sibtain: Fair enough, just wanted to get that off my chest. We've got to move on to another topic of juries, which has been raised, which is a topic that applies to all Courts, probably with more of a leaning in the District Court because there are more District Court jury trials perhaps than in other places. But I might start with Judge Gibson on the question. Are there fewer jury trials in the District Court? Are you hearing more trials on your own?

Gibson DCJ: No, no, there are far fewer, we've had really about four or five over the last, we were lucky to get one a year. But can I say this about juries? That we trust them with enormously complex, and often quite distressing cases in crime. If it weren't for the jury system, our criminal law system would collapse. We'd have to triple the number of judges we had, just so that we could run them the way some civil law countries do. So, every time you say 'I don't like juries', I sound like Wendy and Peter Pan, I'm not saying a fairy dies. But, really, you make a criminal somewhere very happy. So, juries do have a place, they have an

important place. And I think being on a jury also has a very important educative factor for members of the community. I never tire of seeing them come into the witness box looking terrified. And by the end of the jury trial, they've worked something out. They've been judges, it means something. I think there is an important part of freedom of speech that is protected by having juries. And I'm not referring to the fact that politicians notoriously do badly in front of them, I'm referring to the fact that there's a lot of history there. So, I'm hoping that there will still be some role for the jury in appropriate cases. And I mean, obviously, you know, the Eddie Obeid-type case, that sort of thing, the big case involving freedom of speech, yes. Not, however, the little backyarder where two neighbors have fallen out over who should pay for the fence.

D Sibtain: Why do you think there's been an election for more judge-alone trials in your Court?

Gibson DCJ: There are two kinds of lawyers, there are trial lawyers, and there are what Americans call discovery lawyers. We don't have so many trial lawyers now. But I can tell you that the lawyers in the District Court, or the barristers who consider that they are good with juries, are increasingly asking for juries. I've really noticed this over the last year, I'm having an increasing number of requests, and I'm having them from plaintiffs too, most unusually, they want to go before a jury.

D Sibtain: Well to mix it up, I'll ask Justice Lee next, because a jury is a dispensation from the usual practice of the Federal Court. What's your view on juries and their utility?

Lee J: Well, as you know, the combined effect of sections 39 and 40 of the *Federal Court of Australia Act* is the usual mode of trial in the Federal Court is by judge alone, and a jury will only be ordered if a judge thinks the interests of justice render it expedient to do so. It's fair to say that no judge, [laughs], that very rarely has a judge considered it expedient to order a jury. There are a few isolated examples. Now, having said that, thinking about it, the increase in pure defamation matters in the Federal Court is relatively recent. There, I think, is a prevailing view amongst the profession that the result of the Full Court's decision in *Wing* is the Federal Court will never order a jury. That's not what *Wing* says, if you read it. There are cases where, depending upon what I think you could properly describe as exceptional circumstances or unusual circumstances, it would be appropriate to order that there be a trial by jury. The quintessential example, of course, would be something which involves evolving community standards, and one can only see what's been happening in the community over the last few years concerning a certain aspect of human interactions which may involve circumstances where it would be appropriate to order a jury. So if there was an appropriate case, I wouldn't suggest that people not make an application notwithstanding the historical fetters. Such an application will be successful.

The other two quick points I'd make concerning the Federal Court and juries are this: being a national Court, and this is touching upon something I mentioned earlier, there is a different tradition towards jury trials in various states. South Australians, West Australians, Queenslanders, New South Welshmen and Victorians all have very different experiences about civil juries. And, of course, we pick up the state systems under section 79 of the *Judiciary Act* if a jury was awarded. I noticed recently, for example, if there was a civil jury in a Federal Court defamation case in Tasmania it would involve seven jurors. So it's that national… a lot of the reluctance in defamation cases comes out of that very varying history of juries in respect of defamation cases throughout Australia.

D Sibtain: Justice Sackar, in a previous life you were a jury advocate and appeared before many juries in defamation trials. Now, sitting on the other side of the fence, do they remain as good and essential as they always were?

Sackar J: I don't think they do. Juries give rise to philosophical differences amongst practitioners. Some of the philosophical differences are based on purely romantic notions. Patrick Devlin once described the jury as 'the lamp that chose that freedom lives.' And that's all very interesting, but the problem is this: judges are obliged to give reasons. They're obliged to state clearly, concisely and comprehensively why someone wins and why someone loses. The jury doesn't have to do anything of the sort. Now, there's a slight qualification, which Judge Gibson would be incredibly familiar with, and that is, many defamation juries are given a series of questions, almost like a multiple-choice HSC paper. That, in and of itself, can be regarded as fairly superficial. Over the period of time that I've been thinking about the law of libel and practising in it both as a counsel and as a judge, I've come to the view that I do think these days juries do not really make any contribution to any issue in a libel case. The old idea that a jury was more reflective of community standards, more in tune with the language is just, it's simply not tenable these days because of modern judicial method. And so, consequently, for my part, I know Judge Gibson disagrees with me, I do regard juries as more difficult, and as I've said they don't give reasons, which is antithetical to a democratic system in my view.

And, secondly, the litigation over the years has become labour intensive, it always perhaps was, but it's hugely expensive. To worry about the discharge of the jury, and let's face it, it has happened. And when it does happen, it has dramatic consequences on the litigants involved, both their stress levels, and of course their pockets. I just think that, as a risk factor alone, in a highly technical area like libel, should be removed from being a risk factor at

all. So, my view, I've come the full circle. I would have had an entirely romantic notion of juries when I practised years ago, but my views have changed dramatically in that field.

M Olsen: Thank you Justice Sackar, that was an interesting insight. Dauid's asking me to jump around just a little, which is making me freak out, but now we're jumping to damages. I was going to ask, and maybe I'll ask you first Judge Gibson, how do you assess damages from a practical perspective? We know that the recent amendments to section 35 require that aggravated damages are awarded separately from general compensatory damages. When you're approaching the question practically, how do you do that? And will the new changes, where the aggravated damages are required to be awarded separately, have any impact on that practice?

Gibson DCJ: Well, if you read the judgments that I've handed down where I've talked about damages, you may have picked up a hint of my concern that so many judgments just consist of setting out in often less than a paragraph, sometimes little more than a sentence, 'doing the best I can, I'll give the plaintiff X dollars, inclusive of aggravated damages.' I find this to be antithetical to the kind of careful analysis that used to be the case in personal injury cases about 30 years ago and which has really gone by the board generally. I think that there's a lot to be said for giving careful and cogent reasons for the very reasons that John Sackar has referred to, the need for somebody to see why it is that that sum of money was awarded. Because that's often the most important part of the judgment, as some of the English judges have commented, they say 'well people want to know, yes, but what did he get?' you see. So, that's why it's important to set out… so I go through and I emphasise the evidence of hurt to feelings, any specific feature that's unusual or different. One case I had, the plaintiff had to explain to his children because something had been said at school, that sort of thing. So that's the personal touch. If there's evidence of that sort, I think it's important to put that in. In terms of aggravation, I've never been a fan of having separate sums for general and aggravated lumped in together so you don't know the difference. It just creates problems on appeal. So, I'll probably continue my naughty habit of setting out, 'well this is the general damages, but I would add X for aggravated damages' and waiting for the Court of Appeal to shake its head and say no. Well, but the thing is that at least they know, and I've never had a judgment set aside because I did that, even though they keep saying that people don't do it.

M Olsen: Justice Lee, I know that in some judgments you've awarded a lump sum, is that…?

Lee J: Well, I always have because they're compensatory damages. But there's much to be said for what Judge Gibson just said and, in these reforms if one picks up on what Justice Sackar said, and that is transparency. There is an ability to fudge the issue when one's rewarding a lump sum for compensatory damages, being pure compensatory damages and aggravated damages. The one thing about this reform will be to introduce some degree of transparency in the reasoning process by which you have, or perhaps reasoning process is putting it too highly, about how one has come to the figure that one has come to.

M Olsen: There was one aspect of section 35, I think [there] has not been much commentary on it. And that is that, now the cap can come off for all aggravatory circumstances. So previously, the position was that it had to be aggravation based on the circumstances of publication. That's not the case now. Do you think that that will have any significant impact on the award of aggravated damages, but also the cap coming off, given that they're quite a different nature in a way?

Lee J: Well, I suppose anything which allows you to have regard to a broader range of circumstances is going to be of significance. How that plays out in the case law, who knows.

M Olsen: And Justice Sackar, did you have any comments on the award of aggravated damages separately to general compensatory damages, and your general practice about assessing damages?

Sackar J: No, no, I think that in every award of damages the award is very largely impressionistic, and it is always a balance between, as section 34 states itself, the appropriate and rational relationship between the harm sustained, and the particular person and his or her reputation. It's always a balancing act, and it's a balancing act, an impressionistic one, about which reasonable minds differ. Hence, the Court of Appeal will often differ on the issue. But I think at the end of the day, it's an idiosyncratic approach, although there are obvious pointers that one has to take into account. So the answer is no, I think it will just simply, it's a cliche, but it will turn on the facts of the particular case. And in a case where there is a resounding need for aggravated damages for whatever reason, then it'll be appropriate and rational.

D Sibtain: Thank you Justice Sackar. Now, can I move on to something that precedes damages, namely, a defence, the responsible journalism defence. Statutory qualified privilege, many tears have been shed over that by media defendants trying to convince judges that their conduct was reasonable. How do you think, and I might start this time with you Justice Sackar, how do you think the responsible journalism defence is going to provide for the media a defence, and do you think there's going to be a greater chance of success for media defendants?

Sackar J: Well, I think it's going to turn on the individual journalists, as it always has historically. It's going to turn on what he or she has done. And the fact that there are certain factors in the Act which obviously, as the Court is in New South Wales

bound to take into account, it's going to be very, very factually specific. And so, again, it's going to be a juxtaposition - what is the nature of the imputation, or imputations, how much investigation has taken place? How many opportunities, or not as the case may be, has the plaintiff been given to respond? And so there'll be a checklist, and I think most judges will... Historically, I think many judges have been reluctant to apply with a certain liberal attitude, qualified privilege, particularly common law qualified privilege, and even section 22 in the old days, in a mass media environment. The legislation now will require a judge, appropriately, to go through a checklist and to consider these matters. But it's going to turn upon the old, old story of how your journalist scrubs up in the witness box. And if and when the person is called, how plausible is the proposition placed by the journalist on the table as to the extent to which he or she has gone through the various checklists. And I think the Act itself is going to require re-education in some media outlets as to precisely what is required if they want to have a responsible journalism defence held up.

D Sibtain: Appellate decisions frequently say that, in the context of the statutory qualified privilege defence, a counsel of perfection isn't required. But invariably, or more often than not, those defences don't succeed. Applying that absence of counsel of perfection, Justice Lee, how do you see the responsible journalism defence, perhaps, allowing even less perfection?

Lee J: Well, it's not going to be as significant as it would have been if the 2013 UK model had been adopted as some people were advocating, particularly given the way Courts in Australia have approached the issue of public interest quite narrowly. It may be that the joy that some people were hoping to receive from the responsible journalism defence may not be reflected by the reality. It's a little unclear when it comes to the way in which it's been enacted, how far it really has departed, given it's very much a hybrid from what was originally intended by those advocating for it. So, again, it'll just have to play out in the cases, but… if I had a degree of intuition and prognostication here, I don't think you're going to find it as radical a change as one would have originally thought may have been the case.

D Sibtain: Judge Gibson?

Gibson DCJ: Oh, I agree with what you both said, and I really don't have anything to add.

M Olsen: I might ask about what remains for section 30. So, assuming the media won't be relying on that section, how do you see it being used? It's been pared back so that the public interest and responsible journalism elements have come out. Might it be used in cases where a common law qualified privilege defence is also available, or maybe it will sit on a spectrum between a reply to attack defence being available in a very small audience, and then a large audience with the mass media? Is there somewhere where it might sit in the middle of that? Justice Sackar, maybe you have some views on where section 30 can assist in future?

Sackar J: Well, I can only say this. The tort of defamation has had more statutory tweaking, innovations and fiddling than almost any other cause of action in the history of the law. And, to have a common law dynamic where the factors can be developed case by case, as opposed to a statutory formula, will inevitably cause a problem because it raises for the judge and for the parties concerned, particularly those who are running or wanting to consider these defences. I think it is perplexing, frankly, and I'm not quite sure that the delineation between the two is going to be all that clear. It'll just have to be worked out on a case-by-case basis. That sounds like I'm dodging the issue, and I sure am, because I don't think there is a clear answer to it. And the more statutory innovations you have, especially in this area, certainly the more complications you create notwithstanding the best will in the world. And I think Lord Sumption said something about this in the judgment of *Lachaux* that in the UK they had the similar experience, the more tweaking is done by the legislature, particularly when it is not entirely clear, explicitly, that the common law is being displaced, to what extent it's being displaced, to what extent it's being placed in a different context. The legislators sometimes leave things a little bit up in the air, and I think this is one example.

M Olsen: Justice Lee, do you have any views on any lasting role for section 30?

Lee J: Justice Sackar said at one stage during his remarks that it might be thought that he was dodging the question, but I am going to dodge the question because I have to look at this specifically in about three months and given Chatham House rules don't apply I think I should dodge the question.

M Olsen: Understood, thank you.

Gibson DCJ: Me too.

M Olsen: Understood, thank you [laughs].

D Sibtain: Well there we are.

Gibson DCJ: Now let's cut to the chase. Let's get to the *Social Media Anti-Trolling Bill 2021*. Because I think that's something that we're all interested in and concerned about. So having taken over...

D Sibtain: Keep going.

Gibson DCJ: Well, I'm looking forward very much to hearing what my colleagues have to say about that. Would you like to tell us what you think?

Lee J: Well, I printed off the exposure draft yesterday but I really haven't had the opportunity of looking at it in any detail. I will make one comment about it. This will mean that any defamatory material which is posted on any social media will be

a matter within federal jurisdiction, because… it'll be a matter arising under an Act of Parliament. Look, I think there's a lot of water under the bridge that will occur before that becomes enacted. How closely any final legislative reform will have to the exposure draft is something which we'll see in due course. Social media defamation is a big issue in our Court, we have seen a rash of applications under… the preliminary discovery rules… One of the reforms, as you'll recall, when this was announced was the notion of getting orders to require revelation of information concerning people who have posted a comment. Of course, preliminary discovery which has been available in the Federal Court for a long time, it's also available under the UCPR. It's already been a mechanism by which well-heeled people have taken advantage in order to obtain access to information or to allow them to bring a proceeding.

One of the problems we have in our Court is there have been, unlike the Supreme Court and the District Court where practitioners have often made a choice depending upon what they regard as their likely damages award as to whether they commence proceeding in one or another Court. There has been a bit of a rush over the course of the last six or eight months where cases have been commenced in the Federal Court which really ought not be there. One of the difficulties we have, of course, is that we have nowhere to transfer them other than what was the Federal Circuit Court, now the Family and Federal Circuit Court. One of the things that I think will happen over the course of the next couple of years is there will be a couple of specialist… particularly I think this has been a real problem in Melbourne… a couple of specialist practitioners who may well take over a defamation list in those Courts.

But this is a real challenge for, I imagine, all Courts, these sort of social media cases and they do present some real challenges.

M Olsen: Judge Gibson, one of the quirks of the proposed legislation is that it refers to 'trolls' in the title, but I don't think you'll find a reference to trolls in the body of it.

Gibson DCJ: Not a one. 44 mentions of 'defamation', not a one. But the other problem is whoever drafted this forgot something. They forgot that abuse is not defamatory. I had a case on this recently, I had one of those YouTube jolly singing cases where somebody was (pardon the language) an "ass licker", someone else was "the Terminator", you know. And of course, this is the trouble, vulgar abuse is not defamatory. This is *Mundey v Askin*. So the first problem is that if this is aimed at stopping people who send anonymous insults to the mother of that dear little girl who was missing for so long, it's not going to work.

I had the good fortune on the way down here to run into Professor David Rolph on the street. And I think what I can say safely is that basically all of the concerns that he has raised, which have been the subject of quite extensive media report, and also the concerns of Michael Douglas, who's written an excellent piece in *The Conversation*, I have to say, I endorse. I think it's going to be a disaster, and the Federal Court is going to have a tsunami of litigants in person, you're going to have people on social media saying, 'Well, look, why should we bother vetting? Why should we bother even looking, because basically we don't need to worry anymore because ISPs are liable, full stop.' So you see the ISPs are going to, they're just going to retreat into laziness. And that's the difficulty that we've got, you're going to have a loss of pre-checking. And of course, then you've got all of the inconsistencies where you have different rules for liability on the Internet resulting from copyright, misleading and deceptive conduct, contempt, you've got a whole different concept of who's liable in those areas of the law. So, I just go back to something that I always quote on this, every time I'm asked to speak at a seminar I refer them to the without peer, excellent report of Kylie Pappalardo and Nicolas Suzor who say, in their best scientific language, online intermediary liability law in Australia is a mess, remains a mess. And it's just become an even bigger mess thanks to this particular proposed piece of legislation.

It also shows a complete lack of understanding of how the Internet functions. I mean, what's Peter Dutton going to do? Is he going to ask every single one of the thousands of people who called him an apologist for rape, is he going to sue them all? Has anybody mentioned Barbra Streisand to him? I mean, it's a recipe for disaster. And, also, if they're not doing this in Canada, New Zealand, the UK and the other common law jurisdictions, chances are it's not the simple answer it looks like being.

M Olsen: Justice Sackar, you were commenting earlier on defamation being an area where there's been a lot of legislative intervention with common law principles that have developed. One of the aspects of the new legislation is deeming provisions about publication. One aspect of that is deeming social media page operators *not* publishers, which is overriding I suppose the recent *Voller* decision. And then another aspect is deeming social media platforms publishers, although most people would say that doesn't really change the current position. Do you think there is any danger in prescriptive legislation regulating who is a publisher and who is not?

Sackar J: Well, I think there is because I think it'll be progressive, it'll be a work in progress for obvious reasons. So social media, which dominates our lives, is one of the most potent innovations in the media in the history of the planet. And it's still early days in terms of how Courts best grapple with the potency of social media and social media platforms. So, the answer to the question, I think, has to be seriously qualified. I think it has to be regarded as a work in progress. Because I

think we are yet to discover the full depths of how social media can operate and deeming provisions are very interesting but they tend to be a little restrictive. And so the difficulty with that is it may not fit the justice of every single case. And I think it'll just have to be reviewed. There'll be examples no doubt in the future which will require the legislators to have another look at it, but certainly I think it's a work in progress.

D Sibtain: We've probably got time for one more question and I'm going to ask an esoteric and wishy washy one. Is defamation law tying up Court resources? Is it an important matter that needs determination by the Courts, every single little backyarder, every single media publication? How important is it?

Gibson DCJ: In my spare time, I sit on a committee which looks at costs law, under the LPUL. My interest in legal costs comes from my very great concern about the enormous impact that I see on a day to day basis of defamation actions on ordinary members of the community who have to sell their home, who come to my Court in tears. To me, the cost is terrible. I think if we have a justice system where it costs half a million dollars to run an interlocutory application, we have a justice system that is not working. I have very strong views on this, and I remain deeply concerned. I am particularly concerned with how changes have been made to the costs assessment system which mean that, if you like, the lid's been taken off. Practitioners tell me with great concern that actions are becoming increasingly expensive. There are silks who are charging unimaginable figures per day in terms of what they're doing. I'm very troubled by it. Are we really the sort of country where we want to be the libel centre of the world? Is it attractive that we hear more defamation cases in this country than the UK and the US combined? Is this what we want to be? Why are we so sensitive about our reputations? David Levine told me he thought when social media was invented, that that would be the end of defamation because everybody would be able to just express their point of view. How wrong he was.

D Sibtain: Justice Sackar, how important is defamation?

Sackar J: It depends if you're defamed or not. And if you get defamed it's terribly important. But one of the things which, in my view, is much to the credit of the Federal Court is the promptness with which these matters are dealt. There is very little point, if vindication is to play as important a role as the award of damages or anything else, it's very important that the person defamed is able to be vindicated sooner rather than later. And I mean, very much sooner rather than later. So, the efficiency of the Court, I think makes it relevant. And as I said, it depends if you're defamed or not. Reputations can be trashed, and with serious consequences and serious financial consequences. That's plain and obvious from the case law over the many years. And I think one of the great advantages of the docket system, if I may say so, is the ability of the judge to grapple with the case, move it along quickly, give parties a hearing date, determine case management issues without the concern of the spectre of a possible jury trial at the end of a long road. And, to that extent, I think of course it's an important tort, you're not going to get rid of it because every taxi driver in Sydney will have a view about that as they have done for many, many years about defamation law reform. So, I don't think it's going to go away in a hurry. It needs to be put into context, but I think promptness in determination is fundamental.

D Sibtain: Justice Lee?

Lee J: I've got to comment on both of the principal remarks that have been made by Judge Gibson and Justice Sackar. It does concern me that in such an important individual cause of action, the ability to commence a proceeding in order to obtain vindication is out of reach to most even relatively wealthy individuals. And any justice system which has allowed itself to become so complex and so expensive will alienate itself from the people it's supposed to serve if that is required to continue. And that's linked to the point that Justice Sackar made. One of the things that I would like to see, and one thing that I'm trying to do in defamation cases, is fix the hearing date at the first case management hearing and fashion procedures to move back from that date. That's not going to be the approach that some docket judges make but the more time that you allow to pass between the case commencing and the case being determined at first instance, or alternatively going to a mediation where it hopefully can be resolved, the more time that elapses, experience shows the more costs will be expended, and the more unnecessary costs will be expended. So, the desire is, consistently with the dictates of justice, to try to ensure that practitioners approach these cases in a proportionate and efficient way in order to minimise costs as much as possible and get the cases on.

And that's why I commend anyone who's commencing proceedings in the Federal Court to read carefully the Practice Note, both the General Practice Note and the Defamation Practice Note, which encourages people to think about how this case can be best run and resolved in accordance with the overarching purpose. This is not mere rhetoric. Sometimes I feel, and perhaps defamation law is a quintessential example of this, that getting practitioners to think in a new way about how litigation is run is a bit like turning a battleship around. But we've got to do it because these problems will just continue to mean the legal system is alienated, as I said before, from people it's supposed to serve.

D Sibtain: I think that probably brings us to our time. I'd like to thank our learned panel of judges. It was wonderful to hear all of your insights as frankly as you're able to do pending reserved judgments or cases to be heard.