



## Profile: Richard Leder OAM

Head of Commercial Litigation at Wotton + Kearney

CAMLA Young Lawyers representative and lawyer at Gilbert + Tobin, **Alana Callus**, recently caught up with **Richard Leder OAM**, Head of Commercial Litigation at Wotton + Kearney, to discuss what he has learned about justice and risk as a life-long litigator and his thoughts on defamation law reform.

**ALANA CALLUS:** On behalf of the CLB readers, thank you for taking the time to speak with me today Richard. Could you tell us a little bit about your career path so far and how it has led you to your current role?

**RICHARD LEDER OAM:** I've been a media lawyer and commercial litigator for my whole career, which is getting on to forty years. Anyone who litigates knows that there's so much variety and so many opportunities to do different things. Obviously, the media law side is really interesting and varied and has the real advantage of being fast paced, which is always good fun, interesting, and keeps you informed. It means you're constantly dealing with issues that are current and in the news. I've done a whole range of different commercial litigation and then in more recent years, a number of royal commissions and inquiries. And then apart from that, I sit on various not-for-profit boards. Currently, I am Chair of the Royal Children's Hospital Foundation in Melbourne and on other boards, including the Melbourne Press Club and The Conversation Media Group.

**CALLUS:** You have recently moved across from Corrs Chambers Westgarth to Wotton + Kearney with your team to be the new head of commercial litigation. How have you found the move?

**LEDER:** I'm absolutely loving it. The firm is a relatively young firm and a bit smaller than what I'm used to, but very focused, forward thinking and flexible in letting people do things in a way that makes sense to them. In the four months I've been here, my team has grown to 15 people, which is

really gratifying. There is a very strong culture of being loyal to your clients and to your people and that comes through in how W+K works day to day.

**CALLUS:** People always say about you're either a transactional lawyer or a litigator. What initially drew you to litigation?

**LEDER:** I didn't think that I'd be a lawyer at all, but after I finished uni my first graduate rotation was in media law within the litigation group, and I ended up staying there. Back in those days, there was a lot more defamation litigation than there is now. At the time the media took the attitude that if somebody wanted to take them on, they were happy to run the fight. So there was no hesitation about defending defamation litigation. There were fewer concerns about costs and a greater risk appetite than there is now. Not necessarily better for the development of defamation law, but probably better for lawyers who wanted to run lots of defamation litigation.

**CALLUS:** As someone who studied media law, I'm very grateful for all those interesting cases! How did you branch out from media law to general commercial litigation?

**LEDER:** I think the variety of general commercial litigation is interesting and attractive, but the mix of media law and litigation with other types of law and litigation enables you to give better advice, understand that a media client's interests are, in part, what they can publish but also that they are a business in the broader business world and operate in that context.

One of the things I like about being a litigator is the variety. One day you might be litigating a defamation case or a contempt charge, and the next day you might be representing someone in a royal commission, dealing with a contract dispute or litigating the interpretation of legislation. All of that variety is really helpful. In terms of pre-publication advice, it's all about assessing risk and understanding risk and I think that a broad perspective and lots of variety provides an important advantage when it comes to assessing risk. If you see a particular pre-publication issue within the broader context of what is going on in the media and news cycle that day, and more broadly in the world and the courts, you put yourself in a position to make better decisions.

**CALLUS:** Your current practice spans several areas of law and sees you instructing clients on their litigation strategy both in and out of the courtroom. How has this variety of experiences assisted you throughout your career?

**LEDER:** Generally speaking, most litigation settles. Defamation litigation is no different from other commercial litigation in that sense. I spend most of my time negotiating and mediating rather than sitting in court. You refine and improve your trial preparation skills by negotiating cases and seeing what settles and what doesn't. Litigation is very much about working out your risk appetite. If it is unlimited, you could run everything to trial. But most rational people have limits on their appetite for risk and would prefer to get on with running their business rather than raking over history in court. And I think in media that's particularly true.

For a defamation plaintiff, the claim and the damage to reputation is still very real and very current. But often for the media, the story moved on long ago. So the need to defend the story may have been important at the time but less so a year or two down the track. That is sometimes a relevant settlement factor. Other times, the principle will be really important in the development of case law or, for example, the protection of freedom of expression. Therefore there is a need to keep running the case and to try to win it.

**CALLUS:** Let's focus on defamation law, which is an area of law that you have specialised in for many years. Defamation law seeks to balance the right to reputation and freedom of expression. Do you think the new reforms are sufficient to improve this balancing act? Or are there further reforms you would like to see introduced?

**LEDER:** I think a lot depends on whether these reforms work. The public interest defence is the great unknown. In the litigation between Lachlan Murdoch and Crikey, we were going to see whether the public interest defence was effective. If the defence works as the media hopes it works, then it's a really important step forward. The way to understand the significance of this defence is to think of the Watergate scandal. That sort of story would be very difficult to get up in Australia because the only defence that could have been relied on was truth. And that was almost impossible to prove when your informant "Deep Throat" was never going to get into a witness box. And this was one of the most significant pieces of public interest journalism ever published. To think that if that sort of corruption existed in Australia it couldn't be reported on by the media safely is really alarming and really chilling. If the public interest defence works, then that's precisely the sort of case that could be reported now.

One of the things that is really difficult in defamation law reform is to get the balance right between protecting the reputations of public figures and protecting the reputation of very private people. For a very private

person who has been defamed by a publisher, the main reason why they might be reluctant to sue is that suing is just going to bring more publicity to something that they would prefer was forgotten. Whereas for public figures, part of being in the public means you are legitimately exposed to more criticism. But I think it shouldn't be unlimited. Very public figures still have the right to defend their reputation.

When we see politicians sue, for instance, it is rarely because of criticism of decisions that they made as a politician. They'll sue because they've been accused of infidelity or corruption or dishonesty, something that goes to the heart of their character. So different plaintiffs will have very different motivations as to why they sue. I think in trying to get the balance right between protecting reputation and free speech, it isn't a one size fits all answer. Where there are important issues such as government or political matters, we recognise that the balance is more in favour of allowing the publication to occur. The public interest defence will hopefully reflect that balance. In contrast, where a private person has been defamed in a context that doesn't really matter except to the people involved, then it's much harder to see any public interest in the story.

That also speaks to the other important reform which is the serious harm test. This recognises that we have increasingly seen that the defamation claims that get to the point of being issued, let alone get to the point of going to trial, have increasingly not been claims against the mainstream media. They are often individuals suing another individual for something that was said on social media in a very limited publication. Another thing that is seen as important is protecting the court system and making sure that the courts are not overloaded with cases that don't need to be tried.

So I think those two reforms together are sound and well directed, but it remains to be seen how they work in practice – whether they achieve what was intended or whether it's just another hurdle plaintiffs have to overcome.

**CALLUS:** As a longstanding advisor to media clients (ranging from big names like Rebel Wilson to The Big Issue), what do you see as some of the legal challenges facing the current media landscape?

**LEDER:** From a media lawyer's perspective and particularly a prepublication advisor, it's about understanding and identifying risk and then working out whether the risk is worth taking or not. Whether the allegations can be defended, and if not, whether the risk is worth taking anyway.

In Rebel Wilson's case, the publications were indefensible unless they were true, and the jury found they were quite plainly not true. I suspect that for some media outlets like those involved in defaming Rebel Wilson, the risk analysis that they often engage in is that they can say essentially whatever they like because people won't sue. And I think the Rebel Wilson case is a good example of the fact that if you strike people where it really hurts them, they will sue. For Rebel, her honesty and integrity was really important to her and she clearly demonstrated she's prepared to take that all the way. And the verdict absolutely vindicated her.

There's no doubt that acting for a high-profile person adds to the profile of the litigation and it speaks to the fact that all litigation, not just media litigation, plays out in two courts: It plays out in the court of law and the court of public opinion. One of the wonderfully interesting perspectives that you get from being involved in media litigation is that you get to see how things play out in both courts. You get insight into how the media perceive things, how they report things, and that allows you to form views about not only how the case will play out in court, but how the case will play out in the media. Because you can be winning in both, or winning one but losing the other. All companies that are engaged in litigation will be worried about that – how will it impact shareholders, the board, staff, the company and so on. Obviously, if you are a defamation plaintiff, you'll be worried about winning the case, but also in some cases the reporting of the case and the constant repetition of

the allegedly defamatory publication means that even if the plaintiff wins at the end, they've lost along the way.

**CALLUS:** You also continue to be an advocate for the community. You were awarded a medal in the Order of Australia in 2019 to recognise your involvement with several not-for-profit boards and pro bono work. Why is this important to you?

**LEDER:** First of all, as lawyers we are in a privileged position within the community where we have skills and experience that can be used to help people and to contribute to good decision-making. One of the things that you can contribute by sitting on a board is the experience that you have as a lawyer. The way that lawyers think about issues, problems, challenges and solutions will be different from the way that other people think and approach the same problems. A good board is a board that has a variety of people from different disciplines with different levels of experience who can collectively come to a really well-tested decision.

The second reason for me is that I am motivated to give back to the community and that reflects the values that have been instilled in me by my parents, my family and some of the mentors that I've been fortunate enough to be guided by through my life. The opportunity to give back is incredibly rewarding.

The third reason is the variety. It's great to be a lawyer and advise clients, but it's also a lot of fun to go around to the other side of the boardroom table and essentially become a client.

**CALLUS:** Continuing that idea of public service, you have been involved in several royal commissions and inquiries with significant public interest aspects including historical sexual abuse, mental health, aged care quality and the Lawyer X case. What did you learn about justice and advocacy from these experiences?

**LEDER:** The first thing I would say is that there are two sides to almost every story. The fact that somebody might have a deserving claim doesn't mean that there isn't also a legitimate defence and the fact that someone might have suffered damage doesn't

mean that they are entitled to a blank cheque. Justice involves trying to find the right outcome, and that is a balance.

One of the great failings of civil litigation is that ordinarily the only remedy is money. Sometimes that's not what people want or need. Most often what individuals who are in court as plaintiffs want is for the clock to be turned back and for whatever it is they're suing about to have not happened or to have happened differently and clearly that's not something that can be delivered. So money is an imperfect substitute.

But one of the things that we learn from inquiries and Royal Commissions is that they can delve into issues in a more systemic way. For example, in the mental health space, when mental health issues get to court, they're very often because someone with mental health issues has fallen foul of the criminal law and the court is therefore having to deal with that person, their conduct and how as a society we should respond to that. This is a very long way from trying to understand what causes the issues in the first place and how as a society we want to deal with the issues through prevention and treatment. The Mental Health Royal Commission is a really good example of an inquiry that was trying to understand the systemic issues and find systemic solutions in a way that individual court cases can't and that individual treatment plans for a patient from their healthcare providers also couldn't.

A second aspect is using the justice system to create a process that allows us to have a broader examination of an issue or a problem or a range of solutions. Sometimes a royal commission will be the right approach. Other times it might be better to have some other kind of investigation or inquiry, like a law reform commission study. Trying to develop case law on an individual basis is very piecemeal and relies on the important issues actually making it to court and not settling. But if you have a law reform initiative as we've had in defamation, that hopefully allows the law to develop not based on the randomness of whatever cases actually get to trial but rather with a more comprehensive approach.

**CALLUS:** Looking back on your career, is there one case that has had the greatest impact on you?

**LEDER:** There have been a number but if I had to pick one, I'd say acting for Rebel Wilson would have to be my highlight because of the outcome and because she is a wonderful person and was such an intelligent and measured client. It was a real privilege to work with her and see her up close. When you are involved in litigation, you see people at a vulnerable time and being able to support them during a time of vulnerability is a real privilege.

**CALLUS:** What advice would you give to young lawyers looking to build a career in media law and commercial litigation?

**LEDER:** Keep your eyes open and be aware of what's happening in the world. There's nothing worse than going to a meeting with a client who's been on the front page of the paper, or when there has been a development or crisis in their industry or some great discovery or invention, and you don't know about it. Knowing your client and knowing what's happening in the world is really important. And remember that your career progression is unlikely to be linear. I didn't start off expecting to be a media lawyer, I was given the opportunity as a graduate lawyer, which luckily introduced me to an area of law that is very interesting and rewarding and I have now ended up where I am!

**CALLUS:** On behalf of CAMLA, thanks so much for your time and brilliant insights!



Alana Callus