

First Test of Defamation Public Interest Defence: Where to from Here for the Media?

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Introduction

The first decision applying the new public interest defence to defamation, introduced under s 29A of the *Defamation Act 2005* (NSW) in July 2021, has now been handed down in the Federal Court.

The decision in *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 ultimately found that the Australian Broadcasting Corporation (ABC) and its journalists failed to make out the defence. In coming to his decision, Justice Lee provided a detailed analysis of the new defence, including consideration of the common law and statutory history of defamation law which led to its introduction.

His Honour observed that the facts of this case did not “present a good vehicle for demonstrating that the defence has real work to do in making appropriate allowances for editorial judgment and recalibrating the balance between two important rights which often exhibit tension: the right to freedom of expression on matters of public interest and the right to reputation”.

Background

The proceeding related to reports published by the ABC which alleged that members of the November Platoon in the 2nd Commando Regiment of the Australian Defence Force were involved in serious misconduct and war crimes in Afghanistan.

Mr Russell commenced proceedings for defamation over the two articles and associated television and radio broadcasts. In a preliminary judgment, Justice Lee found that the defamatory imputations particularised were not conveyed by the radio broadcast.

At the trial, the only remaining defence was the public interest defence.

Key findings about the defence

His Honour held that:

1. The public interest defence applies to the matter complained of, not the imputation, such that the publisher is required to establish the reasonable belief that the publication of the article, report or program which conveyed the defamatory imputations was in the public interest, not that the publication of the defamatory imputations was in the public interest. Justice Lee said it was “tolerably clear” that Parliament intended the section to provide a complete defence.
2. “Public interest” refers to “matters relating to the public life of the community and those who take part in it” and “the governance of public bodies, institutions and companies which give rise to a public interest in disclosure”, but “excludes matters which are personal and private, such that there is no public interest in their disclosure”. Justice Lee observed that establishing public interest is not intended as a particularly burdensome requirement.

3. In relation to the requirement that the publisher prove they believed the publication of the matter complained of was in the public interest, his Honour held that this requirement must be proved by reference to the respondent’s actual or attributed state of mind and not merely what a reasonable person in the respondent’s position could have believed. To establish this, evidence must be called from those substantively responsible for the publication, which may not necessarily be the editor or executive producer.
4. In relation to the assessment of the reasonableness of the publisher’s belief that the publication of the matter complained of was in the public interest, his Honour emphasised that the list in s 29A(3) is non-exhaustive and warned against any attempt to establish a comprehensive list, considering that it would be unhelpful for the purposes of the statute, which requires having regard to “all the circumstances”.
5. His Honour said “it is clear on the face of s 29A and the explanatory materials that the defence is intended to continue and extend the previous law in this area”, and the focus has shifted in the new defence from what a reasonable person would have done to an objective assessment of the publisher’s reasoning as it happened. His Honour rejected a submission that reasonableness dictates factual accuracy, saying: “Public interest journalism does not pretend to be a form of fact-finding that is functionally equivalent to the judicial process; and it is certainly not the case that its public utility depends upon such an equivalence”.
6. Even if the publisher reasonably believed that the publication was in the public interest at the time of its initial publication, the defence of public interest may be lost if circumstances change such that the publisher no longer holds the belief or the belief is no longer reasonable. If the public interest defence operated, but later ceases to apply, the element of serious harm will also need to be reconsidered at that later date.

Decision

Public interest defence

Ultimately, Justice Lee found that while the Respondents believed that the publication of the matters complained of was in the public interest, this belief was not objectively reasonable and, accordingly, they could not make out the s 29A defence.

His Honour considered that the journalists did not sufficiently investigate and corroborate the allegations and failed to distinguish between suspicions, allegations and proven facts. His Honour was critical of the Respondents for not disclosing in the matters complained of the caveat that their source had given about his recollection being fuzzy.

Justice Lee also found that the ABC’s urgency in publishing had been “commercial and vindictory”, and given the seriousness of the imputations, further care should have been taken as to the detail of what was published.

Damages

Since the Respondents' only defence was unsuccessful, Justice Lee awarded Mr Russell \$390,000 in general damages.

His Honour found that Mr Russell's poor conduct on the witness stand (particularly in relation to his evidence regarding a false invoice provided to the Respondents) was not so exceptional as to justify a finding that he only be entitled to nominal damages. His Honour declined to take the adverse credit findings into account in mitigation of damage, but did consider them in finding that aggravated damages should not be awarded.

Further, while Justice Lee did not find Mr Russell's evidence as to hurt to feelings persuasive, and that his actions were consistent with someone who had "not suffered significant hurt but rather embraced the public controversy", his Honour ultimately concluded that he could not disregard the evidence from seventeen witnesses that Mr Russell had in fact suffered real hurt to feelings and should therefore be compensated by an award of damages, which took into account the significant extent of publication and the seriousness of the imputations.

Takeaways

While this first consideration of the s 29A public interest defence was ultimately unsuccessful for the Respondents, Justice Lee's judgment provides some helpful guidance about the application of the defence that can be taken into account by media publishers prior to publication. In particular:

- In order to later prove the publisher's belief at the time of publication that it is in the public interest to publish, it will be useful to have contemporaneous records which document the state of mind of the journalists and editors.
- In relation to the assessment of the reasonableness of the publisher's belief that the publication of the matter complained of was in the public interest, his Honour emphasised that the list in s 29A(3) is non-exhaustive and warned against any attempt to establish a comprehensive list, considering that it would be unhelpful for the purposes of the statute, which requires having regard to "all the circumstances".
- Publishers should be mindful of changing circumstances in relation to ongoing (i.e. online) publications, which may affect their belief or the reasonableness of their belief that a matter is in the public interest.

Event Report: The 2023 CAMLA Oration

Isabella Barrett (Lawyer, Corrs Chambers Westgarth)

On Thursday 16 November, CAMLA hosted our second annual oration evening at the Ashurst Ballroom with keynote speaker Nick McKenzie, 14-time Walkley award winner, 4-time Australian Journalist of the Year, and investigative journalist for *The Age* and *Sydney Morning Herald*.

Nick has been at the forefront of our nation's most ground-breaking investigations, and most recently uncovered alleged war crimes by former SAS soldier Ben-Roberts Smith, which resulted in "the defamation trial of the century". It was a privilege to hear from Nick and there was ample opportunity for the lawyers and journalists in the room to ask him their burning questions. Plus, there was the

chance to get Nick's new book about the investigation into Ben-Roberts Smith, 'Crossing the Line', personally signed.

A key takeaway from the event was the power of both investigative journalism and the law in the pursuit of the truth.

The CAMLA Oration Evening was established in 2022 as an annual event to hear from a distinguished

guest on a timely topic in media law. This year's event was a fantastic follow-on from CAMLA's inaugural Oration Evening last year, which consisted of a keynote address from her Excellency, the Honourable Margaret Beazley AC KC, entitled "Freedom of Speech: To What End?"

CAMLA would like to extend our gratitude to Nick McKenzie for his invaluable insights, which has set a high bar for next year's oration. Thank you to Eli Fisher and Ashleigh Fehrenbach for organising this event. We look forward to seeing what next year has in store.

