DEFAMATION:

RECENT CHANGES AND EMERGING ISSUES

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8 MARCH 2008

Uniform defamation laws

1. The *Defamation Act*, 2005 commenced operation on 1 January 2006 as part of a long-awaited goal to achieve uniform defamation laws in Australian States and Territories. Uniform defamation laws had been urged as long ago as 1979 by the Australian Law Reform Commission. There were a few attempts to achieve a uniform law over the following decades. The project effectively died until it was suddenly revived at the instigation of the former Commonwealth Attorney-General, Mr Ruddock, who threatened to enact a Commonwealth Act if the State and Territory Attorneys-General did not rapidly enact uniform laws. Contentious issues such as whether truth alone should be a defence were quickly compromised by politicians behind closed doors. There was limited time for consultation with experts in the field about the drafting of the new laws and, as a result, there are some drafting blemishes. The uniform defamation laws are not the product of a report by a law reform commission, and so we cannot look to a report to provide guidance to resolve any ambiguities.

2. The legislation was accompanied by Explanatory Notes. But they say very little about how the Act should be interpreted. The model legislation was drafted by officers of the New South Wales government. A comparison between the Act and the *Defamation Act*, 1974 (NSW) shows that the legislation was heavily-influenced by the New South Wales Act. In some instances the Explanatory Notes state in terms that its provisions are based upon provisions of the *Defamation Act*, 1974. For example, the new statutory defence of qualified privilege in s.30 is said to be based on s.22 of the *Defamation Act*, 1974 (NSW). In other instances, the provisions of the new Act can be seen to be drawn largely from the 1974 New South Wales Act. As a result, judicial interpretations of the *Defamation Act*, 1974 (NSW) are likely to prove influential in the interpretation of the 2005 uniform legislation.

Application of the 2005 Act

3. The Act commenced on 1 January 2006. Subject to s.49(2) it applies to the publication of defamatory matter after 1 January 2006. Leaving aside the complexities of s.49(2), the basic position is that the 2005 Act applies to the publication of matter after 1 January 2006 and the previous law of defamation continues to apply to causes of action in the same way as it would have applied to

those causes of action had the Act not been enacted, namely to any cause of action that accrued before 1 January 2006.

The revival of the common law

4. In Queensland for over a century the law of defamation was codified in the form of the *Defamation Act*, 1889 that was drafted by Sir Samuel Griffith. The Act is no longer a Code. Although it is a comprehensive statute, the general law applies except to the extent that the Act provides otherwise. As a consequence, defamatory matter is defined by the common law, not by the Act. Common law defences, such as the common law defence of qualified privilege can apply. Section 6 revives the common law as if the 1889 Act had never been enacted.[1] Section 24 provides that a defence under Division 2 is additional to any other defence or exclusion of liability available to the defendant apart from the Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability.

Key changes

5. Some of the significant changes made by the 2005 Act are as follows:

- There is a new limitation period: civil actions for defamation must be commenced within one year, subject to an extension of up to three years.
- The cause of action in defamation consists of the publication of "defamatory matter" about a person even if more than one defamatory imputation about the person is carried by the matter.
- There are choices of law rules for publication within Australia, but the defamation laws of each Australian State and Territory now being uniform, the same substantive law generally applies to a publication that is made in multiple Australian jurisdictions.
- There is a new procedure for resolution of civil procedures without litigation by an "offer to make amends". Successful resort to this procedure by a defendant provides a defence if, amongst other things, the offer that was made and declined was reasonable in all of the circumstances.
- An apology can be made without fear that it will be relied upon by the plaintiff on the issue of liability as an express or implied admission of fault or liability.
- Many corporations are excluded from suing in defamation.

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1 *Defamation Act*, 2005, s.6(3).

- Substantive defences have been modified and modernised.
- Truth alone is a defence.
- There is a new defence of contextual truth.
- The statutory defence of qualified privilege now requires a defendant to prove that its conduct in publishing the defamatory matter was "reasonable in the circumstances". This substantially narrows the scope of statutory qualified privilege compared to some of the provisions under s.16 of the 1889 Act which did not require the defendant to prove that is conduct was reasonable in the circumstances.
- There is a cap on damages for non-economic loss of $250,000.
- Exemplary damages are abolished.
- Juries no longer determine damages.
- There are new provisions dealing with criminal defamation.

THE CAUSE OF ACTION

New limitation period

6. The 2005 Act amended the *Limitations of Actions Act*. Under s.10AA an action on a cause of action for defamation must not be brought after the end of one year from the date of publication. But s.32A enables an application for an order extending the limitation period. A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within one year from the date of publication, extend the limitation period to a period of up to three years from the date of the publication.

7. In other words, the former limitation period of six years has been replaced by a limitation period of one year which may be extended if the court is satisfied that it was not reasonable in the circumstances for the plaintiff to commence the action within the one year period.

The cause of action for defamation (s.8)

8. The decision in *Robinson v Laws*[2] emphasised the importance of the imputation in the definition of "defamatory matter" under the 1889 Act. The Court of Appeal's interpretation of the 1889 Act had the practical effect of making the law in

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[2] [2003] 1 QdR 81 at 93 para [49].

Queensland similar to the law in New South Wales which made each imputation a separate cause of action.

9. The uniform defamation law provides that a person has a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than one defamatory imputation about the person is carried by the matter.[3]

10. But the practical consequences of this change should not be exaggerated. Defamatory imputations remain as part of defamation practice, and except in the clearest of cases, a plaintiff is required to plead or at least particularise the "imputation" or "meaning" which is alleged to have been conveyed by the publication.[4] The fact that the Act provides for a single cause of action for multiple defamatory imputations in the same matter does not mean that there will not be contests about the precision with which imputations are pleaded[5] or the capacity of publications to convey those imputations.[6]

11. Pleaders still need to take care in pleading defamatory imputations since the plaintiff is bound by those imputations.[7]

Limitations on the right of corporations to sue (s.9)

12. A corporation has no cause of action for defamation under the new Act unless it was "an excluded corporation" at the time of publication.[8] A corporation is an excluded corporation if:

    (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators; or

    (b) it employs fewer than ten persons and is not related to another corporation,

    and the corporation is not a public body.

13. The Act picks up the definition of whether a corporation is "related to" another corporation from s.50 of the *Corporations Act*. Where a body corporate is:

    (a) a holding company of another body corporate; or

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3 Section 8.

4 From a technical point of view "imputation" is the preferred technical term to "meaning" since extrinsic matters may give rise to implications which go beyond the "meaning" of the words in their ordinary sense.

5 *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135; *Magub v Hincliffe* [2004] QSC 4.

6 For recent examples of this see *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186; *Channel Seven Adelaide Pty Ltd v DJS* [2006] SASC 10.

7 *Chakravarti v Advertiser Newspaper Ltd* (1998) 193 CLR 519; *Robinson v Laws* (supra) at para [47].

8 *Defamation Act*, 2005, s.9(1).

(b) a subsidiary of another body corporate; or

(c) a subsidiary of a holding company of another body corporate;

the first-mentioned body and the other body are related to each other.

14. These changes to the right of a corporation to sue for defamation are significant. They also seem completely unprincipled. Why should a corporation with nine employees be able to sue, yet one with ten or a hundred employees not be able to sue? The business of a corporation with ten or more employees can be destroyed by a reckless or malicious defamation and it seems contrary to principle to leave that corporation without a remedy in defamation. This is especially odious in the case of the reckless or malicious conduct of media organisations that are not subject to s.52 of the *Trade Practices Act*, 1974 because they are "prescribed information providers".[9]

15. The question of when a corporation of "employs" fewer than ten persons was an issue in *Redeemer Baptist School Ltd v Glossop*[10] in which the Court ruled that the term "employs" means no more than to use the services of a person and applies even where there is no contract of employment. A corporation employed an individual even if the understanding was not legally enforceable and whether or not it paid for the services of the person. The only relevant issue is whether or not, as a matter of fact, the number of persons who services the corporation used in the business at the time of publication was fewer than ten.

16. The severe restriction upon the right of a corporation to sue for defamation has proven the most significant change to occur since the uniform defamation laws were enacted. Directors of companies and their solicitors who were unaware of these changes and who have sought my advice after a corporation has been horribly defamed often take on the appearance of "stunned mullets" when I break the news that the corporation has no cause of action in defamation.

17. The effect of abolition of the right of a corporation with ten or more employees to sue for defamation prompts resort to other remedies by the corporation or its directors, managers and employees.

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9 *Trade Practices Act*, 1974, s.65A.

10 [2006] NSWSC 1201, followed in …….. v …….

18. A corporation barred from suing for defamation might consider alternative causes of action, such as injurious falsehood or a contravention of the *Trade Practices Act*, 1974 (Cth). But these alternative causes of action comes with their complexities. Injurious falsehood requires the plaintiff to show that:

    (a) the defendant published to third parties statements that are false;

    (b) they refer to the plaintiff or its property or its business;

    (c) they were published maliciously;

    (d) special damage has followed as a direct and natural result of their publication.[11]

    It is not always easy to prove malice. Carelessness, stupidity or prejudice cannot be equated with malice.

19. Consideration might be given to whether the elements of a contravention of s.52 of the *Trade Practices Act* are established if the relevant publication is likely to mislead or deceive. But in the case of a prescribed information provider, which includes the media and any other person who "carries on a business of providing information",[12] s.65A of the *Trade Practices Act* provides a rather broad "media safe harbour defence". How deep or wide that harbour is may be determined in a pending appeal to the Full Federal Court in *Bond v Barry*.

20. A statement that is defamatory of a corporation may also convey a defamatory meaning against its officers. They may be identified by name or otherwise, and a publication about the business in which they work or the company that they direct may convey an imputation against them personally. Accordingly, the severe restrictions on corporations suing for defamation may prompt resort to actions by others. Naturally, those persons cannot recover for loss and damage which is suffered by the company itself. But that is a different matter.

Choice of law

21. Section 11 contains detailed provisions about choice of law for defamation proceedings. These relate to publications that occur within a particular Australian

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11 See generally *Gatley on Libel and Slander*, 10th Edition, Chapter 20; *Australian Defamation Law and Practice* para [7001]; *Clerk and Lindsell on Torts*, Chapter 23 especially para 23-09; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 692-4, 711-712 and 733.

12 For instance, a freelance reporter: *Carlovers Carwash Ltd v Sahathevan* [2000] NSWSC 947; *Bond v Barry* [2007] FCA 1484.

State or Territory or in more than one "Australian jurisdictional area". In the case of a multiple publication in more than one Australian State or Territory, the substantive law applicable is the area with which the harm occasioned by the publication as a whole has its closest connection. There are rules in determining the area with which the harm occasioned by a publication of matter has its closest connection.[13] But, for practical purposes, these rules generally do not matter because the law of defamation in each Australian jurisdiction is now the same. Provided the law of defamation remains uniform, their only practical operation will be where the law of a particular jurisdiction contains some additional defence or limitation of liability in a separate statute. An example would be a statute that protects a public official from civil liability for actions taken in good faith and without negligence.

22. Claims for defamation for publications outside Australia will be dealt with under common law rules for choice of law.

23. The new choice of law rules for defamatory publications within Australia apply to the substantive law to be applied, not procedural rules.[14]

Offer to make amends (ss.13-18)

24. Sections 13 to 18 make detailed provisions for offers to make amends. These provisions are an alternative to offers to settle under the UCPR. A publisher may make an offer to make amends to an aggrieved person. The offer cannot be made if 28 days have elapsed since the publisher has been given "a concerns notice" by the aggrieved person that the matter in question is or may be defamatory, or if a defence in an action for defamation brought by the aggrieved person has been served.[15]

25. A publisher can seek further particulars if the concerns notice does not adequately particularise the imputations of concern.[16]

26. The Act makes detailed provision concerning the content of an offer to make amends, which must be in writing. The offer must be identifiable as an offer to make amends under Part 3 Division 1.[17] The offer may be limited to a particular defamatory

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13 Section 11(3).
14 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.
15 *Defamation Act*, 2005, s.14.
16 Section 14(3).
17 Section 15(1)(b).

imputation. The offer is taken to be made without prejudice, unless the offer provides otherwise. The offer must include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited.[18] The offer must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer.[19] It may include an offer to publish an apology or an offer to pay compensation. An offer to pay compensation may comprise one or more of the following:

(a) an offer to pay a stated amount;

(b) an offer to pay an amount to be agreed between the publisher and the aggrieved person;

(c) an offer to pay an amount determined by an arbitrator appointed or agreed on by the publisher and the aggrieved person;

(d) an offer to pay an amount determined by a court.[20]

27. If an offer to make amends is accepted and if the publisher carries out the terms of the offer, then the aggrieved person cannot assert or continue to enforce an action for defamation against the publisher against the matter in question even if the offer was limited to any particular defamatory imputations.[21]

28. If an offer to make amends is made but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if:

(a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory; and

(b) at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer; and

(c) in all the circumstances the offer was reasonable.[22]

29. There is no compulsion upon a potential plaintiff to issue a "concerns notice" before action. But if a concerns notice is received by a defendant which has a substantial

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18 Section 15(1)(d).
19 Section 15(1)(f).
20 Section 15(2).
21 Section 17.
22 Section 18.

exposure to a claim, an astute defendant will make use of the offer to make amends procedure. If the offer is not accepted and it was in all the circumstances reasonable, then there is a defence. It is hard to generalise about what will make an offer reasonable in all of the circumstances. Typically, a Court will require some kind of apology and an offer to pay a reasonable amount by way of compensation, in addition to the mandatory elements of such an offer, namely an offer to publish a reasonable correction and an offer to pay the reasonable expenses of the aggrieved person.

30. If the defence is relied upon then the quantum of any compensation offered will become known to the Court and, in an appropriate case, it may be prudent for a defendant to make a formal offer to settle under the UCPR in an amount greater than the sum offered in order to provide additional cost protection.

Apologies (s.20)

31. Section 20 provides that an apology does not constitute an express or implied admission of fault or liability by the person in connection with the matter and is not relevant to the determination of fault or liability. Section 20(2) provides that evidence of an apology made by or on behalf of a person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

32. This is a welcome change to ensure that publishers are encouraged to apologise without the risk of the apology being used against them. But the publisher is able to rely upon an apology in mitigation of damages.[23]

DEFENCES

Justification (s.25) – truth alone is a defence

33. Under the Griffith Code and also under the 1974 New South Wales Act truth alone was not a defence. Apart from proving the truth of the defamatory imputations that were carried by the matter, the defendant was required to prove (in Queensland) that it was "for the public benefit that the publication complained off should be made"[24] or (in New South Wales) that the imputation related "to a matter of public interest".[25] These public benefit/public interest elements operated to protect disclosure of

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[23] Section 38.
[24] *Defamation Act*, 1889, s.15.
[25] *Defamation Act*, 1974 (NSW) s.15.

sensitive private facts of no legitimate interest to the public. The extent to which they operated to protect certain public figures from disclosure of sensitive private facts was illustrated in *Chappell v TCN Channel Nine Pty Ltd*.[26] The New South Wales Court of Appeal recently reinstated a defence of justification under the 1974 Act on the basis that the plaintiff's behaviour at a social function arguably was a matter of public interest.[27] In that case, the plaintiff succeeded in establishing that a gossip column article conveyed imputations that "she had behaved in a nauseating manner with a married man at a social function" and that "she had performed an obscene dance at a social function".

34. These arguments about privacy and matters of public interest have now passed. Truth alone is a defence. Ancient events in a person's otherwise blameless life can be published provided they are true. True gossip about individuals, which is of no legitimate interest to its recipients, is now protected. Many of us opposed the abolition of the limited privacy protection that the old law conferred, and its abolition provides further impetus towards the development of a tort of privacy in this country.

Contextual truth (s.26)

35. Section 26 provides:

> "It is a defence to the publication of defamatory matter if the defendant proves that:
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> (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (*contextual imputations*) that are substantially true; and
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> (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations."

This defence was intended to introduce the kind of defence of contextual justification that was contained in s.16 of the *Defamation Act*, 1974 (NSW). But there are some unintended consequences that arise from drafting changes between it and the NSW provision. In essence, the defence applies where the matter complained of is shown to have conveyed one or more defamatory imputations upon which the plaintiff succeeds but which are moderate in comparison with an alternative, contextual imputation that

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[26] (1988) 14 NSWLR 153.

the defendant nominates, and which the defendant is able to prove is true. The defendant has to prove that the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputation.

36. Much judicial ink has been spilled in New South Wales on the meaning and operation of the defence of contextual justification under the 1974 New South Wales Act. Any contextual imputation must differ in substance from the plaintiff's imputations.[28] If the imputation differs in substance, was capable of being conveyed by the matter complained off and is true, then the Court has to decide whether the plaintiff's imputations further harmed the reputation of the plaintiff because of the substantial truth of the contextual imputations. In a case in which the contextual imputations absolutely overwhelm the plaintiff's imputations, the answer will be clear. But the defence is not only available in a case in which there is this overwhelming effect. The Court is involved in a process of weighing imputation against imputation and assessing the facts, matters and circumstances that are said to establish the truth of the contextual imputation.[29]

37. The purpose of a contextual truth defence is to provide a defence where the publication conveys various imputations, substantially different from one another, so that a defendant should be able to plead that the truth of a more serious imputation (or imputations) means that a less serious imputation (or imputations) did not further harm the plaintiff's reputation. The defence is intended to bring about a just result and to prevent an undeserving plaintiff from succeeding by reason of the truth of what was in fact published.[30] A simple example is where a newspaper article alleges that the plaintiff stole a bicycle and is a murderer. If the plaintiff chooses to sue only over the bicycle thief imputation, then under the defence of contextual truth the defendant is able to plead the murder imputation, prove that it is true, and demonstrate that the truth of the murder imputation meant that the bicycle thief imputation caused no further harm to the plaintiff's reputation.

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27 *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364.

28 *Jackson v John Fairfax & Sons Ltd* (1981) 1 NSWLR 36 at 40; *Jones v John Fairfax Publications Pty Ltd* [2005] NSWSC 1133; *Woodham v John Fairfax Publications Pty Ltd* [2005] NSWSC 1204; *Zunter v John Fairfax Publications Pty Ltd* [2005] NSWSC 759.

29 *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541.

30 *Blake v John Fairfax Publications Pty Ltd* [2001] NSWSC 885 at [12].

38. The 1974 New South Wales Act also allowed a defence of contextual truth to operate where the plaintiff sued over both the bicycle imputation and the murder imputation. Under the 2005 Act this may not be possible. By definition the "contextual imputations" are imputations other than the imputations of which the plaintiff complains. This drafting difference may have unintended consequences.

Demise of the Polly Peck defence

39. The defence or defences recognised in the 1986 English Court of Appeal decision of *Polly Peck Holdings (PLC) v Trelford*[31] have been the subject of review by Australian Courts. The Queensland Court of Appeal in *Robinson v Laws*[32] ruled that a *Polly Peck* plea was not available under the 1889 Act. The *Polly Peck* plea has been rejected in a series of decisions of the New South Wales Court of Appeal and subjected to substantial restrictions in other States. If it survives as part of the common law it has a limited application and is not available in respect of a meaning that is substantially different from the meanings alleged by the plaintiff.[33] The overruling or confining of the *Polly Peck* defence may not have any significant practical consequence, given the availability of a defence of contextual truth under s.26.

Partial justification

40. In a case in which the plaintiff relies upon several defamatory meanings, the defendant may seek to justify any one of them. This is known as a defence of partial justification.[34] In fact, this is not a defence at all. Instead, the defendant's ability to prove the truth of one or more of the plaintiff's imputations operates to reduce damages. The limits on this "defence" are significant. In *Mann v Mackay Television Ltd*[35] the Queensland Full Court ruled:

> "Where there is, in effect, a single broad defamation of a person made on the occasion of a single publication, the unity of the attack must be justified as a whole and cannot be supported by saying the publication was partly true. The particular statutory defence was not meant to

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31 (1986) 1 QB 1000.

32 [2003] 1 QdR 81.

33 *David Syme & Co Ltd v Hore-Lacy* (2001) VR 667; *Nationwide News Pty Ltd v Moodie* (2003) 28 WAR 314; *Advertiser-News Weekend Publishing Co Ltd v Manock* (2005) 91 SASR 206.

34 *Howden v Truth in Sportsmen Ltd (No 2)* (1938) SR(NSW) 287; *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1 at 23-24; *Whelan v John Fairfax Publications Pty Ltd* (2002) 56 NSWLR 89.

35 [1992] 2 QdR 136 at 139.

> offer protection to irresponsibility or to cover carelessness in launching slurs when people's reputations are at stake. It is not open to a defendant to publish something which in form does not lend itself to being justified and yet attempt to justify it in part by relying on something which neither language nor in substance was what was published."

In that case, the plea of justification failed because it was found on analysis to be directed to the whole of the publication, not to certain meanings only, and also because the supporting facts did not establish those meanings in any event. The quoted passage was cited by *Gatley on Libel and Slander*:[36]

> "Where there is, in effect, a single broad defamation made by a single publication, the attack must be justified as a whole and it cannot be justified by saying that the publication was partly true. However, where the claimant complains about a number of defamatory allegations contained in a publication, the defendant may justify some only, provided the charge or charges which he justifies can be divided from the rest, and convey a distinct and separate imputation on the claimant. If the defendant takes this course, he must make the separation so that the court may see quite clearly which charges he justifies and which he does not. If he leaves it doubtful, his defence may be struck out as embarrassing. Before pleading justification of any individual charge, the pleader is under a duty to satisfy himself that evidence is available to justify the plea."

Absolute privilege (s.27)

41. The 2005 Act provides a range of absolute privilege defences in respect of publications in the course of proceedings of various parliamentary, judicial and other bodies. The privilege extends to the publication of matter that would be subject to the privilege under a corresponding law of another Australian jurisdiction. The Act preserves other circumstances in which publication is absolutely privileged at common law, and there is authority to the effect that certain government and ministerial communications are protected.[37]

Defence of publication of public documents (s.28)

42. There is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in:

    (a) a public document or a fair copy of a public document; or

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[36] 10th Edition, para 27.8.

[37] *Australian Defamation Law and Practice*, para [12,055]-[12,080]; *Gatley on Libel and Slander*, 10th Edition, paras 13.25-13.26.

(b) a fair summary of, or a fair extract from, a public document.

43. The term "public document" has a very broad definition and includes:

(a) any document issued by the government, or by an officer, employee or agency of the government, for the information of the public; and

(b) any record or other document open to inspection by the public that is kept by an Australian jurisdiction, by a statutory authority of an Australian jurisdiction or by an Australian court.

The defence will be defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.

Defence of fair report of proceedings of public concern (s.29)

44. Section 29 contains an extensive list of "proceedings of public concern" that extend beyond the kinds of proceedings that were the subject of fair report defences under the 1889 Act. They include the proceedings of a broad range of proceedings of parliaments, courts, commissions, inquiries, sporting trade and other associations, public meetings of shareholders of public companies and numerous other proceedings. A defence applies if the defamatory matter was contained in "a fair report" of such a proceeding. To be a fair report, the report must be a substantially accurate summary. The fairness of a report is to be determined objectively by comparing the report with the events which it purports to describe. It must convey to the recipient an impression of the proceedings which are not substantially different form the impression that a recipient would have received had he or she been present during the proceedings.[38] If the defendant succeeds in establishing that the matter was a fair report, the defence will be defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or for the advancement of education.[39]

Defence of qualified privilege for provision of certain information (s.30)

45. The enactment of this defence represents one of the most significant changes to the substantive law of Queensland effected by the Uniform Defamation Act. The Griffith Code provided extensive protection to media and other defendants to communicate

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38 *Waterhouse v Broadcasting Station TGB Pty Ltd* (1985) 1 NSWLR 58 at 62-63.

39 *Defamation Act*, 2005, s.29(3).

defamatory matter in the course of reporting or discussing matters of public interest. The extent of that protection was confirmed in a series of cases.[40] A defendant was not required to prove that its conduct in making the publication was reasonable under the circumstances. Numerous defendants succeeded in circumstances in which their conduct was unreasonable in the extreme. The burden was placed upon the plaintiff to prove that the publication was made with an absence of "good faith'. Careless, prejudiced, pig-headed, obtuse and generally unreasonable communications had the protection of the statutory defence of qualified privilege provided the elements of one of the sub-sections in s.16 were established, and s.16(1)(h) in particular provided extensive protection to discuss matters of public interest. That protection has been removed by a new form of statutory qualified privilege defence which provides far less protection. It requires the defendant to prove, amongst other things, that its conduct in publishing the matter was reasonable "in the circumstances".

46. Section 30 is based upon s.22 of the *Defamation Act*, 1974 (NSW). A series of judicial interpretations effectively limited the practical use of that section to media defendants.[41] Courts subjected pre-publication conduct to close scrutiny. Very rarely were defendants able to establish that their conduct was reasonable. In the cold light of day it is always possible to identify additional research, additional inquiries or other things that could have been undertaken to improve the story. The omission of information by journalists acting under constraints of space and time was rarely regarded as reasonable. The strictness of the reasonableness test was established in *Morgan v John Fairfax & Sons Limited*[42] in which Hunt AJA, with whom Samuels JA agreed, suggested the following propositions in relation to the reasonableness requirement, noting that the propositions did not purport to be exhaustive:

> "1. The conduct must have been reasonable in the circumstances to publish each imputation found to have been in fact conveyed by the matter complained. The more serious the imputation conveyed, the greater the obligation upon the defendant to ensure that its conduct in relation to it was reasonable.

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40 *Sinclair v Bjelke-Petersen* (1984) 1 QdR 484; *Calwell v Ipec Australia Ltd* (1975) 135 CLR 321; *Pervan v The North Queensland Newspaper Company* (1991) Aust Torts Rep 69,114; (1993) 178 CLR 309; *Grundmann v Geogeson* (1996) Aust Torts Reports 81-396; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183; *Bellino v Australian Broadcasting Corporation* (1998) Aust Torts Reports 81-479; [1998] QCA 113

41 See for instance *John Fairfax Publications Pty Ltd v O'Shane* (2005) Aust Torts Rep 82-789; [2005] NSWCA 164 at [82]-[90], [213]-[249] in relation to the reasonableness requirement.

42 (1991) 23 NSWLR 374 at 383-388.

2. If the defendant intended to convey any imputation in fact conveyed it must, subject to exceptional cases such as where it is under a duty to pass on, without endorsement, the defamatory report made by some other person, have believed in the truth of that imputation.

3. If the defendant did not intend to convey any particular imputation in fact conveyed, it must establish:

   (a) that (subject to the same exceptions) it believed in the truth of each imputation which it did intend to convey; and

   (b) that its conduct was nevertheless reasonable in the circumstances in relation to each imputation that it did not intend to convey but which was in fact conveyed

   If, for example, it were reasonably foreseeable that the matter complained of might convey the imputation which the jury finds was in fact conveyed, it will be relevant in determining reasonableness to inquire whether the defendant gave any consideration to the possibility that the matter complained of would be understood as conveying such an imputation, as will its belief in the truth of that particular imputation and what steps it took to prevent the matter complained of being so understood.

4. The defendant must also establish:

   (a) that, before publishing the matter complained of, it exercised reasonable care to ensure that it got its conclusions right, (where appropriate) by making proper inquiries and checking on the accuracy of its sources;

   (b) that its conclusions (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information that it had obtained;

   (c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and

   (d) that each imputation intended to be conveyed was relevant to the subject about which it gave information to its readers.

   The extent of the inquiries referred to in subparagraph 4(a) depend upon the circumstances of the case, in particular the nature and the source of the information which the defendant has obtained, and whether the position, standing, character and

> opportunities of knowledge of the informant (as perceived by the defendant) are such as to make its belief in the truth of that information a reasonable one."

47. It remains to be seen whether these judicial interpretations of s.22 of the New South Wales Act will be directly imported into the interpretation of s.30 of the uniform Act.[43] Section 30(3) lists a number of factors which the Court may take into account in determining whether the defendant acted reasonably. The relevant factors are:

(a) the extent to which the matter published is of public interest; and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and

(c) the seriousness of any defamatory imputation carried by the matter published; and

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and

(f) the nature of the business environment in which the defendant operates; and

(g) the sources of the information in the matter published and the integrity of those sources; and

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

48. Hopefully, Australian courts will interpret s.30 with the same flexibility encouraged by the House of Lords in its recent consideration[44] of the category of common law defence recognised in *Reynolds v Times Newspapers Ltd*.[45] But on any view concerning what amounts to "reasonable" conduct, the new Act removes the extensive protection provided by the Griffith Code to publishers, large and small, to report and discuss matters of public interest.

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43 Gould, "*The more things change, the more they stay the same … or do they?*" (2007) 12 MALR 29.

44 *Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC 359; [2006] UKHL 44; followed and applied in *Charman v Orion Group Publishing Group Ltd* [2007] EWCA CIV 972.

Common law qualified privilege

49. It is in the public interest that on certain occasions, people should be allowed to communicate freely when it is their duty to communicate what they know or believe, or when it is necessary to communicate in the protection of some interest. The protection is "qualified" because it will be lost if the plaintiff proves that the defendant abused the privilege, for example, if the publication is actuated by malice or is made for an improper purpose.

50. If an occasion of qualified privilege exists, then the publication is protected, notwithstanding that the imputations conveyed by it are untrue and would not have been made if reasonable care had been taken to check their accuracy.

> "In such cases, no matter how harsh, hasty, untrue or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury."[46]

51. The elements of the defence of qualified privilege at common law were restated by the High Court in *Bashford v. Information Australia (Newsletters) Pty Ltd*.[47] In that case, McHugh J stated:

> "At common law, a defamatory statement receives qualified protection when it is made in discharge of a duty or the furtherance or protection of an interest of the maker of the statement or some person with whom the publisher has a direct business, professional or social connection, and the recipient of the statement has a corresponding duty to receive or interest in receiving it."[48]

52. The Act does not affect the continued operation of the defence of qualified privilege at common law and the category of common law qualified privilege recognised in *Lange v Australian Broadcasting Corporation*[49] to communicate with respect to government and political matters. The defence in *Lange*, unlike the traditional defence of qualified privilege at common law, requires the defendant to prove that its conduct was reasonable

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45 (2001) 2 AC 127; Cf *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373 in which the New South Wales Court of Appeal declined to adopt to approach in *Reynolds.*

46 *Huntley v Ward* (1859) 6 CB (NS) 514 at 517 cited in *Gatley on Libel and Slander*, 10th Ed, para 14.4.

47 (2004) 218 CLR 366.

48 ibid at para. [53].

53. Historically, common law courts declined to extend the defence of common law qualified privilege to mass communications, save in exceptional circumstances. A critical issue over the next decade is whether judges in Australia will follow the lead provided by the House of Lords and develop a practical defence of common law qualified privilege that provides adequate protection to individuals and corporations to participate in public communications without the fear that, if sued, they will have to prove that their conduct was reasonable in all the circumstances. Participants in public debate rarely can satisfy this test.

Defence of honest opinion (s.31)

54. This provision applies if the defendant proves that:

(a) the matter was an expression of opinion rather than a statement of fact; and

(b) the opinion related to a matter of public interest; and

(c) the opinion was based on proper material.

55. The first issue is whether the matter is recognisable as an expression of opinion. The section creates a statutory defence in three different situations, depending on whether the matter was an expression of opinion:

(a) of the defendant;

(b) of an employee or agent of the defendant;

(c) a person ("the commentator") other than the defendant or an employee or agent of the defendant.

56. The defence only applies if it is an opinion based on "proper material". This will occur if it is based on material that:

(a) is substantially true; or

(b) was published on an occasion of absolute or qualified privilege; or

(c) was published on an occasion that attracts the protection of a defence under ss.28 or 29.

An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such other material as is proper material.[50]

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[49] (1997) 189 CLR 520.

[50] Section 31(6).

57. A defence is established by s 31 is defeated if, and only, the plaintiff proves that:

(a) in the case of the defendant's expression of opinion, that the opinion was not honestly held by the defendant at the time the defamatory matter was published;

(b) in the case of the expression of opinion by an employee or agent of the defendant, that the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published; or

(c) in the case of the expression of opinion by a commentator, that the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.[51]

58. The statutory defence is additional to the common law defence and is substantially based upon the New South Wales statutory defence of comment.

59. To the extent that the defence reflects the defence of fair comment at common law[52] the Court is unlikely to take a narrow view of what is a matter of "public interest". At the very least it will be understood to refer to the conduct of a person engaged in activities that either inherently, expressly or inferentially invite public criticism or discussion.[53] But it probably has a far wider operation, in accordance with the views expressed in *London Artists v Littler*.[54]

60. Like the previous statutory defence of comment under the 1974 New South Wales Act, the section does not refer to a comment that is "fair". Instead, notions akin to the concept of "fair comment" at common law are imported by the requirement that the opinion be based upon "proper material". Leaving aside an opinion that is based on material that was published on an occasion of absolute or qualified privilege or that attracted a defence under ss.28 or 29, an opinion will be based on "proper material" if it is based on material that is substantially true. If the opinion is based upon facts that are misstated then it will not be based on "proper material". This is similar to the situation at common law where the defence of fair comment does not apply if the

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51 Section 31(4).

52 The Explanatory Notes to the *Defamatory Bill 2005* state that the defence, at least in relation to opinions personally held by the defendant largely reflected a defence of fair comment at general law.

53 *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 220.

54 (1969) 2 QB 375, 391

facts on which the comment is based are not true or are incomplete. In such a case it is impossible for the reader to make a proper assessment of the comment and, at common law, such a comment is not "fair".

Common law defence of fair comment

61. The defence of fair comment at common law has been recently reviewed by the High Court in *Channel Seven Adelaide Pty Ltd v Manock*.[55] The majority judgment of Gummow, Hayne and Heydon JJ restates the conventional view that the defence of fair comment at common law only applies if the comment is based on true facts that are stated, sufficiently indicated or notorious. It was open to the Court to adopt the more liberal views expressed by McHugh J in *Pervan v North Queensland Newspaper Company Pty Ltd* which permitted the defence to apply provided the *subject matter* of the comment or the "substratum of fact" was sufficiently indicated.

62. Courts and commentators have repeatedly recognised that the defence of fair comment at common law protects "the paramount importance of encouraging and protecting freedom of expression and discussion, especially in relation to matters of public interest".[56] Lord Denning described it as "one of the essential elements which go to make up our freedom of speech".[57] In summing up to a jury, Diplock J (as he then was) stated:

> "The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?"[58]

63. In *Channel Seven Adelaide Pty Ltd v Manock*[59] Gleeson CJ reminded us that the protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech, and, in this context, "fair" does not mean objectively reasonable. His Honour stated:

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55 [2007] HCA 60; (2007) 241 ALR 468.
56 *Pervan v The North Queensland Newspaper Company Limited* (1993) 178 CLR 309 at 328.
57 *Slim v Daily Telegraph Ltd* (1968) 2 QB 157 at 170.
58 *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743 at 747; [1958] 2 All ER 516 at 518.
59 (supra) at [3].

> "The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to which any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts."

By contrast, the majority judgment of Gummow, Hayne and Heydon injected an element of reasonableness into the defence, which has the potential to restrict the availability of the defence in practice. Their Honours[60] adopted the position that a comment could not be fair "if the opinion is one that a fair-minded person might not *reasonably* form upon the facts upon which it is put forward is being based". This approach asks whether the opinion is one that "a reasonable and honest" person might in the circumstances have thought or said.[61]

Defence of innocent dissemination (s.32)

64. The common law provides a defence of innocent dissemination where the defendant can prove that it did not know that the publication contained the defamatory matter complained of, that it did not know that the publication was of such a character that it was likely to contain defamatory material and that this absence of knowledge was not due to negligence on its part.[62] The defence originates from *Emmens v Pottle*.[63] At common law the defence has the potential to protect distributors of newspapers and magazines, libraries and others. Traditionally, it was of little use to printers but modern technology means that printers often have no knowledge of the contents of what they print and possibly qualify for the defence.[64] The defence has a potential application to internet service providers.[65] But it was of no assistance to a television station that relayed live a network current affairs program.[66] This is because the High Court found that television station had the ability to control and monitor the material it re-broadcast and chose to broadcast live.

65. Section 32 of the *Defamation Act*, 2005 provides a similar defence to a "subordinate distributor" who:

(a) was not the first or primary distributor of the matter;

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60 (supra) at [88]-[90].
61 Ibid at [90].
62 *Thompson v Australian Capital Television Pty Ltd* (1986) 186 CLR 574.
63 (1885) 16 QBD 354 at 357, 358.
64 *McPhersons Limited v Hickey* [1995] Aust Torts Rep 83-348.
65 *Godfrey v Demon Internet Ltd* [2001] QB 201.
66 *Thompson v Australian Capital Television Pty Ltd* (supra).

(b) was not the author or originator of the matter; and

(c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.[67]

Subordinate distributors include booksellers, newsagents and others who traditionally have been able to avail themselves of the defence of innocent dissemination at common law. The list of who is potentially a "subordinate distributor" includes a broadcaster of a live program (whether on television, radio or otherwise) in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter. It also extends to:

> "An operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control."

66. The categories of persons mentioned in s.32(3) are not necessarily "a subordinate distributor" for the purpose of the section. Section 32(3) simply provides that a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in one or more of the capacities mentioned in s.32(3). Still, the section carries the potential of extending the defence of innocent dissemination to broadcasters who struggle to attract the defence of innocent dissemination at common law and also to internet service providers and internet content hosts.

67. A "subordinate distributor" still must make out the element of the defence. The first element is that "the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory". An immediate problem is that a "subordinate distributor" may readily appreciate that a publication is defamatory, but assume that it is defensible.

68. The second element requires proof that the defendant's "lack of knowledge was not due to any negligence on the part of the defendant". This raises a significant policy issue about the extent to which internet service providers, internet content hosts and other "subordinate distributors" should be required to monitor and moderate the content of what they publish. This policy issue has been a contentious one in different

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[67] Section 32(2).

legal systems. At the very least, it requires internet service providers and contents hosts to develop policies and procedures as to what should be done when they receive a complaint alleging that defamatory matter is being published by them. Australian courts, like courts in other liberal democracies, will confront these issues. Persons who are defamed on the internet have good reason to complain when they are the victim of malicious and hateful attacks that remain available for public consumption and re-publication. Arguably they are entitled to ask courts to "shoot the messenger" when the messenger continues to publish the message after receiving a complaint. On the other hand, the maintenance of freedom of communication via the internet is jeopardised if internet service providers and internet content hosts are required to "pull" allegedly defamatory material simply upon receiving a complaint. Internet content hosts who do not monitor material may be deprived of the protection of the section because they have the "capacity to exercise editorial control over the content of the matter (or over the publication of the matter)" before it is first published.[68] But if they fail to monitor content they are at risk, based on the High Court's decision in *Thompson v Australian Capital Television*, of not attracting the defence because their lack of knowledge is due to negligence on their part. If they do monitor content, then it can be said that they know, or ought reasonably to have known, that the matter was defamatory.

69. In addition, an internet service provider or an internet content host may be able to attract the statutory protection provided by the *Broadcasting Services Act*, 1992 (Cth), Schedule 5, clause 91 which provides that the law of a State or Territory or rule of common law or equity has no effect to the extent that it subjects an internet content host or internet service provider to liability in respect of hosting and publishing internet content in a case in which the internet content host or internet service provider was not aware of the nature of the intent content, or requires or would have the effect of requiring an internet content host or internet service provider to monitor, make inquiries about or keep records of content. Under this provision the internet content host or internet service provider has the onus of proving a lack of awareness of the nature of the internet content. But it is not required to prove that its lack of knowledge was not due to any negligence on its part. Potential liability arises, however, once it becomes aware of the content and does not remove it. The internet

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[68] Section 32(2)(c); 32(3)(g).

content host and internet service provider will have protection from civil liability if it has acted in compliance with an industry code registered under the Act.[69]

Defence of triviality (s.33)

70. Under the Griffith Code the defence of triviality only applied in respect of oral defamations.[70] Section 33 of the 2005 Act provides:

> "It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm."

A similar statutory defence of triviality have been the subject of extensive consideration by the New South Wales Court of Appeal over the years.[71] The defence is not limited to mildly defamatory comments and potentially extends to serious imputations, provided they are published in circumstances where the plaintiff is unlikely to sustain any harm. Such circumstances may be where the recipients know the plaintiff well or for some other reason are able to make their own judgment of the matter complained of and are likely to dismiss it out of hand. The quality of the circumstances of the publication is determined at the time of publication, and not whether the defamed person in fact suffers harm.[72]

71. The defence obviously has greater application to publications of limited extent, such as statements made in jocular circumstances to a few people in a private home.[73] Oral defamations may have a greater chance of attracting their defence than a written defamation.

72. The defence depends upon the quality of the circumstances of the publication itself and calls for a judgment about whether they were likely to cause harm. Circumstances arising before or after the publication may not be relied upon for this purpose,[74] and therefore earlier publicity given to the plaintiff that may have led to the plaintiff having a tarnished reputation are not "circumstances" within the meaning of

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69 *Broadcasting Services Act*, 1992, Schedule 5, clause 88. The Internet Industry Code of Practice has been registered under the Act.

70 *Defamation Act*, 1889, s.20.

71 *Morosi v Mirror Newspapers Ltd* (1977) 2 NSWLR 749 at 800; *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Rep 80-691; *King V Mergen Holdings Pty Ltd v McKenzie* (1991) 24 NSWLR 305; *Jones v Sutton* (2004) 61 NSWLR 614; [2004] NSWCA 439.

72 *Jones v Sutton* (supra).

73 *Morosi* (supra) at 800.

the defence.[75] Still, the personal knowledge of recipients is a relevant circumstance in that someone who has personal knowledge of the person defamed may be unlikely to be affected in their estimation of the plaintiff. Prior bad reputation is generally not one of the circumstances of publication to be taken into account, but it may be taken into account in an appropriate case as one of the circumstances of publication.[76]

73. Because the section looks at the circumstances at the time of publication to consider the likelihood of harm ensuing, the defence does not depend upon whether the plaintiff's reputation was in fact harmed and evidence of the plaintiff's hurt feelings is not relevant to the statutory defence.[77] The risk of repetition is a relevant circumstance.[78]

74. The scope for the defence of triviality to apply was recently recognised by the Queensland Court of Appeal in *Doelle v Bedey*.[79]

REMEDIES

Damages

75. The 2005 Act builds upon well-established principles concerning the basis upon which compensatory damages are assessed at common law.

76. A plaintiff in a defamation action may seek to recover specific economic loss. Aside from specific economic loss, general compensatory damages are awarded as a consolation for the personal distress and hurt caused to the plaintiff by the publication, reparation for the harm done to the plaintiff's personal and (if relevant) business reputation and to vindicate the plaintiff's reputation.[80] Vindication looks to the attitude of others to the plaintiff and the sum awarded must be at least the minimum necessary to signal to the public the vindication of the plaintiff's reputation.

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74 *Morosi* (supra) at 799.
75 *Chappell* (supra) at 68,947.
76 *Jones v Sutton* (supra) at [26]-[31].
77 *Jones v Sutton* (supra) at [38].
78 *Jones v Sutton* (supra) at [55].
79 [2007] QCA 395; on appeal from [2007] QDC 134; see also *Hennessy v Lynch (No 3)* [2007] NSWDC 268 at [62]-[87] for a helpful summary of the defence of triviality under s.13 of the *Defamation Act*, 1974 (NSW).
80 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150; *Carson v John Fairfax & Sons Limited* (1993) 178 CLR 44 at 60.

77. In *Uren v John Fairfax & Sons Pty Ltd*[81] Windeyer J stated that compensatory damages serves two purposes: to vindicate the plaintiff to the public and as consolation for a wrong done. In *Carson's* case the High Court discerned three purposes to be served by a damages award:

> "Specific economic loss and exemplary or punitive damages aside, there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that 'the amount of a verdict is the product of a mixture of inextricable considerations'. The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation.
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> The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation. 'The gravity of the libel, the social standing of the parties and the availability of alternative remedies' are all relevant to assessing the quantum of damages necessary to vindicate the appellant."[82]

78. In the same case, Brennan J observed that damages by way of vindication of reputation are not added to the damages assessed under other heads.[83] Although, as Windeyer J stated, an award of damages operates as a vindication of the plaintiff to the public and as consolation to the plaintiff for a wrong done, this does not require cumulative components of damages. The same sum can operate as vindication, compensation and solatium.[84] A sum assessed to compensate may also provide vindication. However, the award in total must be sufficient to satisfy the purposes for which damages for defamation are awarded: vindication of reputation, compensation for injury to reputation and solatium for injured feelings.[85]

79. General damages may be aggravated or mitigated by the manner in which the defamatory matter was published and by the subsequent conduct of the defendant. A prompt apology may mitigate damages. The absence of an apology may require a

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81 (1965-66) 117 CLR 118 at 150.

82 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61 per Mason CJ, Deane, Dawson and Gaudron JJ.

83 Ibid at 72.

84 Ibid.

85 Ibid.

more substantial award to vindicate reputation and console the plaintiff. If there is a lack of bona fides in the defendant's conduct or the defendant's conduct is improper or unjustifiable, a plaintiff may be entitled to aggravated damages. This is described as the rule in *Triggell v Pheeney*[86] and dictates the circumstances in which an award of aggravated compensatory damages may be made. The Court has to consider whether the defendant's conduct is not bona fide, is improper or is unjustifiable. Any one element will suffice as a precondition for an award of aggravated damages.

80. A plaintiff is not required to prove that his or her reputation has in fact been damaged. Once the plaintiff proves that he or she has been defamed and defeats any defences, some injury to reputation is presumed and does not have to be established by evidence.[87]

81. At common law, damages can range from a contemptuous award to an extremely generous award, far in excess of the general damages which might be assessed at common law for crippling or devastating personal injuries. Ultimately, the quantum of damages depends upon the court's assessment of the effect which the publication and the defendant's conduct has had upon the plaintiff. For example, a publication with a limited circulation may still result in the award of substantial damages if the court takes a dim view of the defendant's conduct and concludes that the defendant was malicious.[88]

82. Hayne J in *Rogers v Nationwide News Pty Ltd*[89] warned of the dangers of drawing direct comparisons between particular cases:

> "Two of the three purposes served by an award of damages for defamation are to provide consolation to the person defamed for the *personal* distress and hurt which has been done, and reparation for the harm done to *that* person's reputation. Necessarily, then, the amount awarded for defamation should reflect the effect which the particular defamation had on the individual plaintiff. It follows that the drawing of direct comparisons between particular cases is apt to mislead, just as

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86 (1951) 82 CLR 497.

87 Tobin and Sexton *Australian Defamation Law and Practice*, para 20,005.

88 See, for example, *Evans v Davies* (1991) 2 QdR 489, general damages of $95,000 retrial ordered on appeal. A spectacular award of damages was upheld by the New South Wales Court of Appeal in *Crampton v Nugawela* (1996) 41 NSWLR 176 in which a plaintiff doctor was awarded $600,000 by a jury over the publication of a letter which was published to a meeting of 22 people and re-published "on the grapevine".

89 [2003] HCA 52 at para [69]; (2003) 216 CLR 327.

> the drawing of direct comparisons in personal injury cases can also mislead. Comparison assumes that there is sufficient identity between the effect which each defamation had on the particular plaintiff, whereas in fact circumstances alter cases … The amount allowed in each case should reflect the subjective effect of the defamation on the plaintiff."

83. Building upon these principles, s.34 of the 2005 Act provides that in determining the amount of damages to be awarded in any defamation proceedings, the Court is to ensure that there is "an appropriate and rational relationship" between the harm sustained by the plaintiff and the amount of damages awarded. A near identical provision in the *Defamation Act*, 1974 (NSW) was explained by the High Court in *Rogers v Nationwide News Pty Ltd*.[90] It overturned the decision of the New South Wales Court of Appeal that had held that the plaintiff was entitled only to damages of $75,000. The High Court restored the trial judge's award of $250,000 and emphasised the importance of a person's reputation which, in a case of a professional person such as the plaintiff in those proceedings could be "his whole life".[91]

84. The statutory precursor to s.34 may have been intended to place a brake upon large awards of damages that were far in excess of awards of general damages awarded in common law claims for severe personal injuries. If this was the section's purpose it was not achieved in New South Wales over a ten year period.[92] Courts continue to place a high value upon reputation, especially upon the reputation of professional persons whose work and life depends upon their reputation for honesty and integrity.

Damages for corporations

85. As previously noted, there are substantial restrictions upon the right of a corporation to sue for defamation under the 2005 Act. Provided a corporation is entitled to sue, it need not prove special damage to establish its cause of action.[93] The entitlement of a trading corporation to sue for general damages without being required to plead and prove special damages was confirmed by the House of Lords in *Jameel v Wall Street Journal Europe SPRL*.[94] For instance, Lord Bingham stated:

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90 (2003) 216 CLR 327.

91 *Crampton v Nugawela* (1996) 41 NSWLR 176 at 193.

92 *John Fairfax Publications Pty Ltd v O'Shane (No 2)* [2005] NSWCA 291 at [38]-[39].

93 *Halsbury's Laws of Australia Defamation* paras 145-160; Tobin & Sexton *Australian Defamation Law and Practice* para 3017.

94 [2006] UKHL 44; (2007) 1 AC 359; (2006) 4 All ER 1279; [2006] 3 WLR 642

> "...a trading company with a trading reputation in this country may recover general damages without pleading or proving special damage if the publication complained of has a tendency to damage it in the way of its business."[95]

The House of Lords, by majority, declined to overturn the rule. The restatement by the House of Lords that a trading company does not need to plead and prove special damage, but that it "must show that it is liable to be damaged in a way that affects its business as a trading company",[96] is consistent with the Australian authorities.

86. A trading corporation may commence proceedings in relation to a publication that is likely to injure its trading or business reputation or goodwill.[97] But a corporation cannot be injured in its feelings. As Lord Reid said in *Lewis v Daily Telegraph Ltd*[98] "it can only be injured in its pocket". In the case of a trading corporation it has been said that it cannot recover damages for injury "to its reputation as such": it must suffer injury in the way of its business.[99]

87. One line of authorities is to the effect that a corporate plaintiff must prove that it has been "injured in its pocket" to entitle it to sue. The competing view is that a corporation about which a defamatory imputation has been published may sue, but that damages are to be assessed having regard to the financial and commercial considerations by which a corporation's reputation is ordinarily assessed, and that if no proof is tendered of a specific loss, the assessment of damages is made on the material available to the court and the view which it forms of the loss likely to have been suffered by the company as a consequence.[100] In the case of a trading corporation, if the court is not satisfied that the nature and extent of the defamatory publication has caused significant harm to its trade or goodwill, then the damages may be only nominal.[101]

88. The view that a corporation must be "injured in its pocket" to be entitled to sue is found in recent Australian cases such as *New South Wales Aboriginal Land Council v*

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95 Ibid at [17].
96 Ibid at [95].
97 Ibid.
98 (1964) 1 AC 234 at 262.
99 *Australian Broadcasting Corporation v Comalco Ltd*; compare *Andrews v John Fairfax & Sons* (1982) NSWLR 225 at 254; *New South Wales Aboriginal Land Council v Jones* (1998) 43 NSWLR 300.
100 *Kay v Chesser* (1999) 3 VR 55.
101 *Feo v Pioneer Concrete (Vic) Pty Ltd* (1999) 3 VR 417 at [57].

Jones,[102] *The Development and Environmental Professional's Association v John Fairfax Publications Pty Ltd*[103] and *Electrical Trade Union of Employees Queensland & Anor v National Electrical Contractors Association & Anor*.[104]

Damages for non-economic loss limited (s.35)

89. Section 35 provides that unless the Court otherwise orders under ss.35(2) the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is $250,000 or the amount that is adjusted in accordance with s.35(3) which provides for an annual indexation based upon changes in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults over the preceding year.

90. In one of the first awards of damages under the 2005 Act, Bell J in *Attrill v Christy*[105] awarded $110,000 to a plaintiff who complained about statements made about him to a journalist that were rebroadcast on *A Current Affair*. In determining the relevance of the statutory cap[106] Bell J approached the matter on the basis that the maximum damages amount provided by s.35 was to be understood as fixing the outer limit of damages for non-economic loss (in cases which do not warrant an award of aggravated damages), and by analogy with the approach explained by Hayne J in *Roger's* case awards for non-economic loss were to find a place within a range marked out in this way. Bell J observed that this was not to say that an award of the maximum damages (in a case not warranting an award of aggravated damages) was to be reserved for the worst defamation imaginable.

State of mind of defendant generally not relevant to awarding damages (s.36)

91. The Court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff. For instance, the fact that the defendant was malicious does not *per se* affect the level of damages. But the plaintiff's knowledge that the defendant was malicious may increase the plaintiff's hurt feelings and consequential need for compensation. The defendant's malice may

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102 (1998) 43 NSWLR 300.
103 (2004) NSWSC 92 BC 200400634.
104 [2007] QDC 077.
105 [2007] NSWSC 1386 (19 December 2007).
106 which had been increased to $267,500 on 15 June 2007.

result in persistence in the defamatory allegation or a refusal to apologise and, in these ways, the defendant's state of mind may indirectly result in a greater award.

Exemplary or punitive damages cannot be awarded (s.37)

92. Section 37 abolishes the awarding of exemplary or punitive damages for defamation.

Factors in mitigation of damages (s.38)

93. Section 38 contains a number of matters which may be taken into account in mitigation of damages.

Costs (s.40)

94. Division 4 of the Act contains provisions in relation to costs. They include express recognition of the fact that the Court may have regard to the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings). Section 40(2)(a) envisages that costs may be awarded on an indemnity basis if the Court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff. Similarly, s.40(2)(b) envisages that costs will be awarded on an indemnity basis to a successful defendant if the Court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant. A settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced) that was a reasonable offer at the time it was made.

The role of the jury (ss.21 and 22)

95. Either party in a defamation action may elect for the proceedings to be tried by jury. Under s.21 the court may order that the action not be tried by jury if the trial requires a prolonged examination of records or involves any technical, scientific or other issue that cannot be conveniently considered or resolved by a jury.

96. Importantly, s.22 redefines the role of the jury in defamation proceedings. The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established. If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judge and not the jury determines the

amount of damages (if any) that should be awarded to the plaintiff and "all unresolved issues of fact and law relating to the determination of that amount". In short, it is for the judge, not for the jury to determine damages.

97. Section 22(5)(b) provides that nothing in s.22 requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judge. As a result, it will be for the judge to determine whether an occasion of privilege exists, subject to the resolution of disputed questions of fact by the jury.[107] In that context, the borderline between disputed questions of fact which are for the jury to decide and the essential elements of the defence which are for the determination of the judge are not always clear.[108]

98. Leaving aside the traditional role of the judge in determining whether an occasion of qualified privilege exists, subject to any jury finding on the issue of malice, and the judge's function in determining whether a defence should be allowed to go to the jury,[109] defences are determined by the jury.

99. Is the jury to be asked a series of specific questions about matters such as:
    (a) the defamatory meanings that it found were conveyed;
    (b) the precise basis upon which particular defences were not established?

100. Section 22 does not affect any law or practice relating to special verdicts.[110] We are faced with the centuries old tension between those who favour asking juries to answer a series of specific questions and those who think the jury should be asked a few general questions.[111] In Queensland the Court of Appeal has encouraged judges to limit the questions asked of juries,[112] but in practice juries are often given a lengthy series of questions to answer.

101. Once the jury determines the questions left to it, it is for the judge to determine the amount of damages (if any) that should be awarded.

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107 *Adam v Ward* (1917) AC 309 at 318; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 205.

108 cf *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511 which related to the defence of statutory qualified privilege.

109 For instance, determining whether words are capable of being recognised as an expression of opinion: *Gatley*, para 34.14.

110 Section 22(5)(a).

111 See *Otis Elevators Pty Ltd v Zitas* (1986) 5 NSWLR 71.

112 *Ahrens v Queensland Railways* [1997] 2 QdR 1.

102. As noted, the 2005 Act provides that the court is to disregard "the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff".[113] It is not difficult to imagine circumstances in which a defendant's malice, recklessness or other state of mind will affect the feelings of the plaintiff and the harm suffered by the plaintiff.

103. The possibility exists for a jury to be asked to record findings on questions such as malice in determining substantive defences. But in some cases questions such as malice will not be an issue for the jury. Similarly, the jury may not have been required to determine aspects of the defendant's conduct which are relevant to the assessment of aggravated damages.

104. The new division of responsibility between judges and juries opens up interesting questions about what questions juries should be asked and the form in which they should be asked them. Once the jury is discharged, the judge has to determine "all unresolved issues of fact and law relating to the determination of the amount of damages". There is a risk that this will invite a new round of addresses by counsel about the facts of the case and the extent to which a jury's answers on liability issues can be said to have resolved issues of fact concerning the defendant's conduct that are relevant to the assessment of damages.

Interlocutory injunctions

105. The 2005 Act does not regulate the jurisdiction of the Court to award interlocutory and final injunctions.

106. The principles governing applications for interlocutory injunctions in defamation cases were considered by the High Court in *Australian Broadcasting Corporation v O'Neill*.[114] That decision confirms that interlocutory injunctions are awarded with great caution. Some of the factors that influence courts in this regard are:

(a) the public interest in free speech;

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113 Section 36.

114 [2006] HCA 46; (2006) 227 CLR 57.

(b) the fact that in defamation cases the outcome of the trial is likely to turn upon disputed questions which are typically an issue for jury decision, such as a defence of justification.

107. It has been said that this cautionary approach is simply a matter of practice and that there are no fixed rules. However, Gummow and Hayne JJ in *O'Neill* were critical of the "flexible" view of the exercise of the interlocutory injunction power. The more "rigid view" is exemplified in the decision of Walsh J in *Stocker v McElhinney (No 2)*.[115] That approach has been adopted in Queensland.[116] According to these principles, an interlocutory injunction will not issue if there is **any real ground for supposing** that the defendant may succeed upon one of its defences.

108. Questions of privilege and malice cannot be conveniently tried on an interlocutory application.[117] It has been said that where a plaintiff must prove malice to succeed in the action, the evidence of malice has to be "absolutely overwhelming" for the court to intervene to restrain publication by way of an interim injunction.[118]

109. The nature of the evidence that a defendant is required to bring forth at the interlocutory hearing in order to persuade the court that there is a ground for supposing that he may succeed upon such a defence is uncertain. In some cases the practice has been, in effect, that it is sufficient for the defendant to assert that it intends to rely upon such a defence. In *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd*,[119] it was said:

> "I conclude that a defendant is not required on an application such as this to lead the evidence upon which he relies to establish the defences asserted. In some cases, particularly where such defences are not clear from the matter complained of itself, or from the circumstances of its publication as established by the plaintiff, or otherwise, it will be advisable for a defendant to produce some evidence to permit the Court to say that those defences have some prospect of success. Even then, the evidence need not be such that the defence is thereby proved;

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115 [1961] NSWR 1043 at 1048.

116 *Shiel v Transmedia Productions Pty Ltd* [1987] 1 QdR 199 at 204-5. Although in *Hansen v The Australian Broadcasting Corporation* (unreported, Court of Appeal 28.09.98) the Court of Appeal left open the possibility of a more flexible rule.

117 *Gatley on Libel and Slander*, 10th Edition, para 25.7 citing *Quartz Hill Consolidated Gold Mining Company v Beall* [1882] 20 Ch D 501 at 509.

118 *Gatley on Libel and Slander*, 10th Edition, para 25.7 citing Griffiths LJ in *Herbage v Pressdram* [1984] 1 WLR 1160 at 1164.

119 (1981) NSWLR 344 at 354; See also *Shiel* (supra) at 206.

> all that is needed is sufficient to suggest the defence in a manner and with circumstances which show that there is a case for consideration by a jury or the trial judge, as the case may be."

Defining defamation – common law principles

110. The Act does not define the circumstances in which a person has a cause of action for defamation. Instead, the tort of defamation at common law applies. In determining whether words are defamatory there are two stages, first to decide what the words mean and then to decide whether that meaning is defamatory. The courts have developed a number of tests for determining what is defamatory. No definition commands complete acceptance. In 1936 Lord Atkin said that "Judges and textbook writers alike have found difficulty in defining with precision the word 'defamatory'".[120] Seventy years later there is still no comprehensive definition. Gatley contains several paragraphs about what is defamatory.[121] Definitions include statements that are to the plaintiff's discredit.[122] A frequently cited formulation is that of Lord Atkin in *Sim v Stretch*, namely, words that "tend to lower the plaintiff in the estimation of right-thinking members of society generally". Defamation is sometimes defined in terms of an imputation which tends to cause a person to be hated or despised or which causes the plaintiff to be shunned or avoided. But then one has to accommodate cases of ridicule, so that publishing a statement that exposes the plaintiff to ridicule is said to be defamatory.[123]

111. Whether a publication is defamatory depends upon the understanding of "the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation".[124]

112. The new Act's resort to common law definitions of what is defamatory in place of the definition of "defamatory matter" contained in s.4 of the 1889 Act means that it is no longer sufficient to prove that the publication conveyed an imputation concerning a

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120 *Sim v Stretch* (1936) 52 TLR 669.

121 *Gatley on Libel and Slander*, 10th edition, paras 2.2-2.9.

122 *Youssoupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 at 584; Brown *The Law of Defamation in Canada*, para 4.2(2).

123 *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443; *Brander v Ryan* (2000) 78 SASR 234; *Gatley*, para 2.3.

124 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506.

person "by which the person is likely to be injured in the person's profession or trade". This is the component of the definition "defamatory matter" under the 1889 Act which extended the Act beyond any common law definition of defamatory matter.[125] This is because at common law words which injure a person's business are not defamatory unless they injure the person's reputation.[126]

"Business Defamation" and the High Court's decision in *Gacic*

113. Despite the important distinction between the tort of defamation with its concern for injury to reputation (which is reflected in the requirement that the defamatory publication be "of and concerning the plaintiff") and the tort of injurious falsehood with its concern for injury to business, that distinction has been blurred to some extent by the High Court's recent discussion of "business defamation" in *John Fairfax Publications Pty Ltd v Gacic*[127] ("*Gacic*"). Two High Court decisions on the Griffith Code definition of "defamatory matter"[128] tend to liken the action for defamation under the Code with an action for injurious falsehood. In *Channel Seven Sydney Pty Ltd v Parras*[129] the New South Wales Court of Appeal stated that the Code "relevantly equated injurious falsehood and defamation". But the law of defamation does not compensate for statements that simply injure a business. The statement must say something about the plaintiff and have a tendency to injure the plaintiff's reputation.

114. In simple terms, at common law a plaintiff must prove that the defendant published to a third party a statement about the plaintiff of a kind likely to lead the recipient as an ordinary person to think less of the plaintiff.[130]

115. The definition of what is defamatory in the context of a business requires consideration of the High Court's decision in *Gacic*.[131] The case was described in the New South Wales Court of Appeal by Beazley JA (with whom Handley JA and Ipp JA agreed) as a case of "business defamation" in that the plaintiffs' case was that the article conveyed imputations that injured their business, trade or profession as owners

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125 See *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.
126 *Gatley*, para 2.9.
127 [2007] HCA 28.
128 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632.
129 (2002) Aust Torts Rep 81-675; [2002] NSWCA 202 at [44].
130 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 638 per Mason and Jacobs JJ.
131 (supra).

of a restaurant and was defamatory.[132] The New South Wales Court of Appeal emphasised a distinction between "defamation in its generally understood meaning" and "business defamation", and quoted the following passage from *Gatley on Libel and Slander*:[133]

> "Any imputation is defamatory if it would tend to lower the claimant in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally. For instance to say of someone that he is ungrateful would scarcely expose him to hatred, ridicule or contempt, or cause him to be avoided, yet it has been held defamatory. **To say of a person carrying on any trade or profession or holding any office that he is incompetent at it, may not even lower him in the estimation of others, but the words will be defamatory because of the injury to his reputation in his trade, profession or office** … " (Footnotes omitted) (Emphasis added)[134]

116. The Court of Appeal found that a direction given by the trial judge to the jury was wrong because it was incumbent upon the trial judge to direct the jury that, in a case of a business defamation, it did not matter whether the published material lowered the person in the eyes of right-thinking members of the community. The Court went on to conclude that the relevant imputations were defamatory. The imputations were:

> "(a) The respondent sells unpalatable food at Coco Roco
>
> …
>
> (c) The respondent provides some bad service at Coco Roco."

117. The essence of the Court of Appeal's conclusion that these imputations were defamatory appears in the following passage:

> "The food served in any restaurant is its essential business. If the food is 'unpalatable' the restaurant fails on the very matter that is the essence of its existence. This is especially so of a purportedly high class restaurant. To say of a restaurateur of such an establishment that they sold 'unpalatable' food injures that person in their business or calling and because of that, is defamatory."[135]

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132 [2006] NSWCA 175 at [32].
133 10th ed; para 2.7.
134 (supra) at [32].
135 [2006] NSWCA 175 at [56].

118. This passage may be open to the criticism that it appears to define an imputation as defamatory when the imputation injures a person *in their business*, rather than by reference to the fact that it causes, or has a tendency to cause, injury to *business reputation* that in turn is likely to injure the business or trade.

119. The High Court upheld the decision of the Court of Appeal. Gleeson CJ and Crennan J described the case as concerning that form of defamation which involves "injury to business reputation".[136] Gummow and Hayne JJ[137] found no error in the critical passage that I have earlier quoted that "to say of a restaurateur of such an establishment that they sold "unpalatable" food injures that person in their business or calling and because of that, is defamatory". Their Honours noted that the concept of "tendency" pitches the common law test at a fairly low threshold in that it is sufficient that the imputation be such as is likely to cause ordinary decent folk in the community, taken in general, to think less of the plaintiff. Kirby P was sceptical of the approach of creating a category known as "business defamation" but accepted statements that at common law:

> "[D]efamation is concerned to protect the plaintiff's business reputation just as much as his or her personal or social attributes, so that statements which disparage a person in his or her calling will also be branded as defamatory."[138]

120. Callinan and Heydon JJ[139] referred to business reputation and concluded that it was unimaginable that the estimation of the plaintiffs would not be lowered by a statement that they sold unpalatable food and provided bad service at their restaurant, and did so for considerable sums of money.

121. Whilst the High Court specifically endorsed the reasoning of the New South Wales Court of Appeal, references in the separate judgments to "business reputation" serve to indicate that even the category described as "business defamation" is concerned with injury to reputation and not simply injury to the plaintiff's business.

122. Many communications in the media and elsewhere may injure a plaintiff's business without defaming the owners or operators of the business. A statement that V8 motor

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136 [2007] HCA 28 at [2].
137 (supra) at [52]-[53].
138 Ibid at [80] citing Balkin & Davis, *Law of Torts*, 3rd ed [2004] at 557 [18.2].
139 (supra) at [190].

vehicles or four wheel drive motor vehicles excessively contribute to greenhouse gas emissions may injure the business of motor dealers who sell those vehicles. But such a statement does not necessarily convey any imputation *concerning* distributors of those vehicles or of any particular distributor. We return to the fact that the law of defamation is concerned with distilling a defamatory meaning *about the plaintiff*.

123. Still, it is important to recall the fundamental principle that it is not necessary for a defamatory statement to impute some moral blame or fault to the plaintiff.[140] Gleeson CJ and Crennan J in *Gacic* confirmed this in the context of "business reputation":

> "Their case concerns that form of defamation which involves injury to business reputation, that is, the publication of imputations that have a tendency to injure a person in his or her business, trade, or profession. That the law of defamation affords such protection is not surprising. Suppose someone says: 'X is a thoroughly decent person, but he is showing signs of age; his eyesight is poor, and his hands tremble'. That would not be a reflection on X's character. It would be likely to evoke sympathy rather than hatred, ridicule or contempt. If, however, X were a surgeon, the statement could be damaging. To say that someone is a good person, but a dangerously incompetent surgeon, is clearly likely to injure the person's professional reputation. That is an established form of defamation, and it was not called in question by the parties to the present appeal."

"Right-thinking members of society generally" or a section of the community?

124. As noted, the issue of defamation is determined by asking whether "a hypothetical referee"[141] would understand the published words in a defamatory sense. Justice Brennan stated in *Lamb's* case[142] that:

> "The moral or social standard by which the defamatory character of an imputation is determined is not amenable to evidentiary proof; it is pre-eminently a matter for the jury to give effect to a standard which they consider to accord with the attitude of society generally."

The Explanatory Notes to the Defamation Bill 2005 cite Lord Atkin's definition of what is defamatory in *Sim v Stretch* and Justice Brennan's judgment in *Lamb's* case. In doing so the new Act probably should be taken as rejecting what has been

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140 *Drummond-Jackson v British Medical Association* (1970) 1 WLR 688 at 699.

141 Variously described in the leading cases as "reasonable men", "right-thinking members of society generally" or "ordinary men".

142 *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506 (emphasis added).

described as the "sectionalist" approach favoured by the New South Wales Court of Appeal in *Hepburn's* case,[143] and the approach favoured by Mr Ruddock in his draft Commonwealth Act. Rather than asking what ordinary decent folk in the community, taken in general, would think, the Ruddock proposal permitted a plaintiff to succeed if his or her reputation was affected in the estimation of a "substantial and reputable section of the public".

125. The defamation lawyer's Bible – *Gatley on Libel and Slander* states:

> "Words are not defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right-thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right-thinking man is not actionable within the law of defamation. If the words only tend to bring the plaintiff into odium, ridicule or contempt with a particular class or section of society they are not defamatory. *A fortiori* [all the more] the words are not defamatory if the standard of opinion of the particular section of the community is one which the courts cannot recognise or approve."[144]

Incidentally, some courts take the view that courts cannot recognise or approve prejudices which are in fact widely held. So, an English court has said that it is not defamatory to say of a person that his father is a criminal and a fugitive from justice.[145]

126. The test of asking whether a publication has lowered the plaintiff in the estimation of right-thinking members of society *generally* is fairly well established.[146] But a different view was adopted by the New South Wales Court of Appeal in *Hepburn*[147] where the issue was whether an imputation that a medical practitioner was an abortionist was defamatory. One member of the Court of Appeal stated that, as abortion is regarded as wicked by a substantial part of the population, to describe a person as an abortionist may bring the person into hatred, ridicule or contempt of

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143 *Hepburn v. TCN Channel 9 Pty Ltd* (1983) 2 NSWLR 682.

144 *Gatley on Libel and Slander*, 10th Edition, para. 2.10.

145 *Robson v News Group Newspaper Limited* unreported Queens Bench Division 9.10.95.

146 A number of courts have emphasised that "it is not enough to prove that the words rendered a publication obnoxious to a limited class: it should be proved that the words are such as would produce a bad impression on the minds of average reasonable men": *Leetham v Rank* (1912) 57 SJ 111 at 112 (Court of Appeal) cited in *Gatley* (supra) para 2.11.

147 *Hepburn v TCN Channel 9 Pty Ltd* (1983) 2 NSWLR 682.

ordinary reasonable people. Another judge said that a plaintiff can complain of words which lower him in the estimation of "an appreciable and reputable section of the community"[148]. Although the judges did not cite overseas authority, their views are reflected in some American cases. In 1909, Justice Holmes stated that if a publication:

> "obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote … No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm."[149]

127. Advocates of this approach point out that the traditional test of asking whether the plaintiff was lowered in the estimation of right-thinking members of society *generally* was generated on the assumption of the consensus of moral opinion in society which, if it ever existed, has now disappeared.[150] They also say that the traditional test was simply designed to exclude from the law of defamation reactions that may be described as anti-social or eccentric. But the traditional test appears to have been taken up in the 2005 Act.

"Right-thinking members of society" versus the "ordinary reasonable person"

128. Is there a difference between what the courts describe as "right-thinking members of society" and "the ordinary reasonable person"?[151] When we talk about "right-thinking" people, are we talking about what people actually think, or about what people should think.

129. If we are concerned with what people think, then the 2004 Report of the National Defamation Research Project "Deciding Defamation"[152] is important because it highlights that people are more tolerant and progressive than we tend to think they are. A challenging issue is whether evidence of the attitudes of members of our

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148 Ibid at 694 per Glass JA.

149 *Peck v Tribune Co* 214 US 185 (1909).

150 *Gatley* (supra) at 212.

151 In *Slatyer v Daily Telegraph* (1908) 6 CLR 1 at 7, disapproval was expressed of the use of "right thinking" except in the sense of a citizen of "fair average intelligence". But the expression "right thinking" has been highly influential in this discourse following Lord Atkin's judgment in *Sim v Stretch* (supra).

152 Baker *The rookie and the silk: Learning the "ordinary reasonable person" in defamation law* (2007) 12 MALR 399.

society and their attitudes towards specific imputations is admissible as evidence. Should the law allow the admission of survey evidence about community attitudes to a variety of social issues? The law resists the notion that the defamatory character of an imputation is amenable to evidentiary proof.

130. But if we cannot prove these things through evidence and have to rely upon judges and juries to give effect to a standard which they consider accords with the attitude of society generally, then we require judges and juries to guess what the attitudes of their fellow citizens are. The "Deciding Defamation" Report suggests that they guess wrongly. We think that our fellow citizens are less tolerant than we are. The Report is heartening when it reveals that our fellow citizens are more tolerant than we give them credit. However, it is alarming that defamation cases are decided on the assumption that people are less tolerant than they in fact are.

The Realist v The Moralist Approach

131. Let us assume that judges and juries can accurately ascertain what ordinary people actually think. Do prevailing community views determine whether something is defamatory? Or does the "right-thinking members of society" test, seemingly embraced by the Act, determine what is defamatory according to what people should think?

132. For example, there is an emerging body of case law to the effect that it is not defamatory to impute that someone suffers from a psychological illness.[153] Mental illness is said to be a misfortune which may cause weak or ignorant person to think less of the sufferer, but ordinary decent people would not take such a narrow-minded view.[154]

133. So, being sensitive to social changes and being conscious of the way that unprejudiced people think, should we conclude that it is not defamatory to say of someone that they suffer manic depression or a borderline personality disorder? Suppose you tell me that you are thinking of employing someone who I know and you ask me about them. I tell you that they suffer from manic depression. Have I defamed the job applicant?

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153 see the argument in *Coleman v John Fairfax Publications Pty Ltd* [2003] NSWSC 564; and see *Emerson v Walker* [2001] WASC 7 at [32].

154 Ibid at para [9]; compare the defamatory imputation that someone is insane.

134. If you wear the hat of the potential employer, and are honest about it, then you probably will concede that my disclosure of the applicant being prone to manic depression will make a difference to your estimation of them and may cost the applicant their chances because it has a tendency to diminish your confidence in their ability to do the job. You avoid taking the applicant into your employment.

135. This raises a big issue, and it is the same kind of issue that was confronted last century when the law had to decide whether it was defamatory to say of a woman that she was a rape victim.[155] Should the law recognise the prejudices, often widespread prejudices, that are held in our society and recognise the reality that statements made to people holding those prejudices causes them to think less of certain individuals?

136. Should people who are actually shunned, ridiculed or avoided be entitled to sue for defamation? Should the law of defamation concern itself simply with what people think ? Or should it also concern itself with what people should think ie the views of the "right-minded"? One academic commentator described this as a contest between the realist approach and the moralist approach. Should the law take a moral stand, and refuse to recognize prejudicial attitudes, even if this means that victims of prejudice, whose reputations are injured, and who are shunned, ridiculed and avoided cannot sue?

137. The Act does not decide these questions. Nor does the extrinsic material indicate whether the realist or moralist position reflects the law. We are left with the common law to determine what is defamatory. No test commands acceptance. But the Explanatory Notes cite as their first example of the tests that have been used to determine what is defamatory Lord Atkin's test, namely words that "tend to lower the plaintiff in the estimation of right-thinking members of society generally". If this is the test to be applied, we are concerned with what are assumed to be views held by the general community, rather than a section, even a reputable and sizable section, of it, and we consider what "right-thinking" members of society think.

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155 *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 52 TLR 581; Leslie Kim Treiger-Bar-Am *Defamation law in a changing society: the case of Youssoupoff v Metro-Goldwyn Mayer* (2000) 20 Legal Studies 291. In *C v Queensland Newspapers Pty Ltd* [2004] QDC 147, McGill DCJ found

Emerging Issues`

138. The 2005 Act transforms Queensland defamation law into a new, uniform national defamation law. The Griffith Code, with its statutory definitions of what is defamatory, its de facto restrictions on the publication of sensitive private facts and its ample statutory qualified protection defences to report and discuss matters of public interest, is gone. In its place is a new Act, based largely upon the 1974 New South Wales Act in terms of defences, and the revival in Queensland after more than a century of the common law of defamation.

139. The High Court will continue to guide the development of defamation law, as it has done in recent cases involving interlocutory injunctions, "business defamation" and "fair comment". But it, and lower courts, have yet to resolve the extent to which the statutory defence of qualified privilege in s.30 of the Act or the defence of qualified privilege at common law provides practical protection to the media and citizens to robustly participate in discussing matters of public interest. This is a critical issue in the decade ahead. The *Defamation Act*, being a uniform Act, will be interpreted by courts in all Australian jurisdictions. Single judges and intermediate appellate courts in one Australian jurisdiction will follow to the interpretation given to the Act by intermediate appellate courts in another Australian jurisdiction unless convinced that the interpretation is plainly wrong, in accordance with the principles discussed in *Australian Securities and Investment Commission v Marlborough Gold Mines Ltd*.[156]

140. Emerging issues for trial and appellate courts are how the law of defamation responds to new technology, including the ability of individuals and organisations with limited resources to host and otherwise publish material on the internet. Media law has developed over the last century through the paradigm of media publications in the form of newspapers, radio and television broadcasts.[157] Historically, citizens could only publish information, including opinions, to the world at large if they gained access to one of these forms of mass media. These days, an individual with a computer and the limited resources required to host a website, literally can publish

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that an imputation that the plaintiff was dishonoured by her father having an unlawful sexual relationship with her over a substantial period of time was not capable of being defamatory.

156 (1993) 177 CLR 485.

157 The prevalence of newspaper and magazine articles that are preserved and republished on the internet through archive copies generates interesting challenges to publishers and courts in circumstances in which a plaintiff sues in respect of the continuing availability of the words complained of on the

statements to the world at large. Voluntary associations and others host chat rooms. Internet editions of newspapers facilitate the posting of readers' comments practically instantaneously without the same degree of control over the content of letters to the editor in the form of a traditional newspaper. These developments raise for consideration by the courts the extent to which publishers, large and small, and "subordinate distributors" should be liable for the publication of defamations that originate from third parties. These third parties and the unmoderated content of much of the material that is posted on the internet has the potential to vastly expand freedom of communication. It also has the potential to irreparably harm the reputations, businesses and professions of innocent persons, and cause individuals enormous distress.

141. In 1958 Lord Diplock told a jury that "the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury". Fifty years later the basis of our public life, and our commitment to freedom of speech, should be the same, despite the High Court's recent injection of an element of reasonableness into the defence of fair comment. New forms of communication and the prevalence of blogs, enables cranks and enthusiasts to communicate information to the world at large in a manner which soap box orators could not have imagined in 1958. The law of defamation has yet to come to terms with the extent to which communications by individuals which are careless, exaggerated, obstinate or prejudiced should be protected by defences of qualified privilege and fair comment that were shaped in a different mass media environment.

142. Typically, the crank or enthusiast who publishes false and defamatory statements on the internet is either "judgment proof" in the sense of not having the means to meet a judgment for damages and costs or oddly welcomes the opportunity to be sued. Persons who are defamed by such publications do not relish the prospect of suing such individuals for little practical benefit. Their consideration, and the consideration of their lawyers, turns to internet service providers, internet content hosts and others whose services permit these kind of defamations to be published to the world at large.

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defendant's website. See: *Lukowiak v Unidad Editorial SA* [2001] EMLR 1043; *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805; (2002) 1 All ER 652; [2002] QB 783.

The emerging issue for lawyers, judges and policy-makers is the extent to which the law of defamation should permit aggrieved claimants to "shoot the messenger".[158]

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[158] see, for instance, the decision of the Californian Supreme Court in *Barrett v Rosenthal* 40 Cal.4th 33, 146 P.3d 510, 51 Cal.Rptr.3d 55 (Cal. Sup. Ct., Nov. 20, 2006) which held that held that defendant, a "user of interactive computer services", was immune from liability under Section 230 of the *Communications Decency Act.* The defendant had posted an article written by a third party on the newsgroups of two websites