

Bad reputation AFTER THE EVENT

Evidence of a plaintiff's bad or good reputation should be extended to after publication of the defamatory material in assessing the mitigation of damages, argues JASON DONNELLY.



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A NUMBER OF IMPORTANT legal questions regarding aspects of defamation law were raised in last year's decision by Kirby J in *Mahommed v Channel Seven Sydney Pty Ltd* [2009] NSWSC 631. One of the key legal issues considered is whether a court, in considering mitigation of damages for defamatory published material, can take into account evidence of the bad reputation of the author, in circumstances where that evidence considers the bad reputation of the plaintiff after publication of the defamatory material in question.

Mitigation of damages

It is clear that the conduct of either the plaintiff or the defendant may act to mitigate damages by decreasing the damage suffered by the plaintiff as a result of the defamatory publication.¹ Evidence of the bad reputation of the plaintiff is admissible for the purposes of mitigation of damages.² In the decision of *Mahommed*, the defendant submitted that the plaintiff's

reputation was substantially impaired by the effect of a series of findings by Palmer J in the decision of *Steele-Smith v Liberty Financial Pty Ltd*,³ despite the fact those adverse findings were made after the publication of the defamatory material in *Mahommed*.

His Honour Kirby J in *Mahommed* held that he could not take into consideration the adverse findings of Palmer J in *Steele-Smith* in relation to the bad reputation of Mr Mahommed (the plaintiff), on the basis that he was bound by the NSW Court of Appeal decision in *Rochfort v John Fairfax & Sons Ltd*,⁴ which had determined that evidence of bad reputation is

action, I do not believe Palmer J's findings are relevant in mitigation".⁷

There are at least three important reasons why a court, when considering mitigation of damages in a defamation proceeding, should be permitted and indeed obliged to consider evidence of the bad reputation of the complainant adduced after publication of the defamatory material. Although the foregoing point is clearly inconsistent and at odds with the principle in *Rochfort*, there is merit in the argument that *Rochfort* should no longer be followed.

Contra cases

First, there are various decisions in Australia and overseas which have either not followed *Rochfort* or been critical of the decision to the extent that the court in that case had determined that evidence of the bad reputation of the plaintiff in mitigation of damages in defamatory proceedings is limited to pre-publication of the defamatory material. In *Middendorp*

"Overseas jurisprudence in this area has clearly recognised the difficulty with the reasoning in *Rochfort*."

evidence "accumulated from one source or another over the period of time that precedes the occasion of the libel that is in suit".⁵ In any event, if his Honour were not bound by the decision of *Rochfort*, Kirby J appeared reluctant to take into consideration the adverse findings of the plaintiff's purported bad reputation by Palmer J in *Steele-Smith*, on the basis that a judge's reasoning is only an opinion, and not "virtually indisputable".⁶ Accordingly, his Honour held that "for the purposes of this

*Electric Co Pty Ltd v Sonneveld*⁸ Gillard J of the Supreme Court of Victoria said: "I respectfully disagree with the ruling in *Rochfort*'s case as it does not grapple with the true basis for the admission of the conviction, and proceeds on an assumption that because the facts showed that the convictions occurred prior to publication, the principles should be confined to that situation. That, in my view, does not logically follow."

For Gillard J in *Middendorp*, to exclude

evidence of convictions that affect the reputation of a complainant in defamation proceedings, prior to the assessment of damages and after publication of the defamatory material, would be to deprive the court of material relevant to the vindication of the complainant's case.⁹ Gillard J was of the view that to do otherwise would fail to take into account one of the objects of damages, which is to restore the plaintiff's reputation in the eyes of those who know him and the community generally.¹⁰

In *John Fairfax & Sons Ltd v Kelly*¹¹ McHugh JA said: "A plaintiff in [a defamation action] sustains loss for each day that the defendant fails to pay the appropriate damages to him. ... In many cases the award will reflect an amount for continuing injury to feelings and reputation to the date of verdict. Hence the amount awarded may, and usually will, be higher than the amount which would have been awarded as at the date of publication or even as at the date of the writ."

Although McHugh JA did not expressly refer to *Rochfort* in his decision, it is clear that his Honour's reasoning in *John Fairfax & Sons Ltd* is not consistent with the reasoning of *Rochfort*.¹² There are various other authorities that have criticised or doubted *Rochfort*: see, for example, *Amalgamated Television Services Pty Ltd v Marsden*,¹³ *Walter v Alltools Ltd*,¹⁴ *Myer*

Stores Ltd v Soo,¹⁵ *Sadler & State of Victoria v Madigan*,¹⁶ *Television New Zealand v Quinn*,¹⁷ *Roux v Australian Broadcasting Commission*,¹⁸ *ABC v McBride*,¹⁹ *Anderson v Ah Kit*,²⁰ discussion in *Nationwide News Pty Limited v William El-Azzi*,²¹ *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579; *Turner v News Group Newspapers Ltd* [2006] 1 WLR 3469; *Law of Torts in Australia*, Fleming, 9th ed at 662 and *Gatley* 10th ed at para 27.25.

For example, in *Burstein v Times Newspapers Ltd*, an English decision, May LJ expounded the following principle in relation to whether an author of a defamatory publication can adduce evidence of the bad reputation of the plaintiff which post-dates the defamatory material: "For practical purposes, every publication has a contextual background, even if the publication is substantially untrue. In addition, the evidence which *Scott v Sampson* excludes is particular evidence of general reputation, character or disposition which is not directly connected with the subject matter of the defamatory publication. It does not exclude evidence of directly relevant background context. To the extent that evidence of this kind may also be characterised as evidence of the claimant's reputation, it is admissible because it is directly relevant to the damage which he claims has been caused by the defamatory publication" (*Burstein v Times Newspapers Ltd* [2000] All ER (D) 2384 at [42]).

Following the decision of *Burstein*, the court in *Turner v News Group Newspapers Ltd* described the principle expounded by

May LJ as representing "a development of the common law beyond the point which it had reached in 1961".

Further, in *New Zealand*, the court in *Television New Zealand Ltd v Quinn* [2006] EWCA Civ 540 at 51 (per Keene LJ, Moses and Pill LJ agreeing) accepted that since damages for defamation continue to be incurred after the publication of the defamatory material, it follows that evidence referring to a change in the reputation of the plaintiff after the publication date would be relevant.

The relationship between harm and damages

Second, the determination by *Rochfort* that mitigating material occurring after the date of the defamatory publication is inadmissible seems to be inconsistent with the essential purposes of an award of compensatory damages in defamation. The overarching principle in the award of damages in defamation is to ensure an appropriate and rational relationship between the harm suffered by the plaintiff and the damages awarded.²² Surely, the most appropriate and rational relationship between the harm suffered by the plaintiff and the damages awarded must encompass mitigating material occurring after the date of the defamatory publication. To suggest otherwise would be to ignore the fact that the harm suffered by the plaintiff plainly in many cases would continue to occur after the defamatory publication, and, on that basis, if there is truthful evidence of the bad reputation of the plaintiff which has been established



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ENDNOTES

1. *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 72 (per Brennan J); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 151 (per Windeyer J); *Lemaire v Smith's Newspapers Ltd* (1927) 28 SR (NSW) 161.
2. *Wishart v Mirror Newspapers Ltd* [1963] SR (NSW) 745 at 755 (per Brereton J); *Lang v Beardmore* [1968] 2 NSWLR 673 at 687 (per Walsh JA); *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348 at 367 (per Hutley JA, at 380 per Samuels JA).
3. *Steele-Smith v Liberty Financial Pty Ltd* [2005] NSWSC 398 at para [100]-[103].
4. *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16.
5. *Mahomed v Channel Seven Sydney Pty Ltd* [2009] NSWSC 631 at [293].
6. *Ibid* at [335].
7. *Ibid* at [335].
8. *Middendorp Electric Co Pty Ltd v Sonneveld* [2001] VSC 312 at [320].
9. *Ibid* at [338].
10. *Ibid* at [338].
11. *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at [143].
12. See further *Australian Broadcasting Corporation v McBride* (2001) 53 NSWLR 430 at [1], [64]-[75] and [91]-[97].
13. *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1403]-[1406].
14. *Walter v Alltools Ltd* (1944) 61 TLR 39.
15. *Myer Stores Ltd v Soo* [1991] 2 VR 597 at [633]-[634].
16. *Sadler & State of Victoria v Madigan* [1998] VSCA 53 at [63].

17. *Television New Zealand v Quinn* [1996] 3 NZLR 24 at [66] (per McGechan J).
18. *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at [603].
19. *ABC v McBride* (2001) 53 NSWLR 430 at [68]-[75] (per Ipp AJA).
20. *Anderson v Ah Kit* [2004] WASC 194 at [35]-[38] (per Newnes M).
21. *Nationwide News Pty Limited v William El-Azzi* [2004] NSWCA 382 (per Spigelman CJ, Mason P and Beazley JA agreeing).
22. Section 34 of the *Defamation Act 2005* (NSW).
23. *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60, 61 (per Mason CJ, Deane, Dawson and Gaudron JJ, at 70 per Brennan J).
24. *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 139 (per Samuels JA).
25. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 (per Windeyer J).
26. *Ratcliffe v Evans* [1892] 2 QB 524 at 528 (per Bowen LJ).
27. *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 154 (per Brennan J); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 (per Windeyer J).
28. *Broome v Cassell* [1972] AC 1027 at [1125]-[1126] (per Lord Diplock).
29. See further *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 72 (per Brennan J); *Lemaire v Smith's Newspapers Ltd* (1927) 28 SR (NSW) 161.
30. *Scott v Sampson* (1882) LR 8 QBD 491.
31. *ABC v McBride* (2001) 53 NSWLR 430 at [73].
32. *Mahomed v Channel Seven Sydney Pty Ltd* [2009] NSWSC 631 at 335. □

after the defamatory publication, this would indeed reduce the harm suffered by the plaintiff. The reason is simple. The plaintiff's reputation would, in the eyes of the wider community, be tarnished for reasons other than the defamatory publication. Ignorance of such material seems illogical, especially given the fact that the reputation of the plaintiff does not, as a matter of commonsense, stop when defamation occurs.

In *Carson v John Fairfax & Sons Ltd*²³ and *John Fairfax & Sons Ltd v Kelly*²⁴ the court asserted that an amount awarded in damages must signal to the public the vindication of the plaintiff by indicating the baselessness of the allegations. It seems inescapable that mitigating material occurring after the date of the defamatory publication may at least provide some basis for indicating there is some truth in the contents of the defamatory material or that could affect the plaintiff's reputation, and thus justify a reduction in the damages.

In *Uren v John Fairfax & Sons Pty Ltd*²⁵ and *Ratcliffe v Evans*²⁶ it was made clear that the plaintiff is entitled to damages because he was injured in his reputation. If it is accepted that the plaintiff's reputation was injured after the date of the defamatory publication and before determination of damages on lawful grounds (namely, truth), for reasons not connected

to the defamatory material in question, then it seems logical that a court should be able to take such material into account in mitigation of damages. After all, the law of defamation is concerned with the protection of a plaintiff's reputation.²⁷ By failing to take into account in mitigation of damages mitigating material occurring after the date of the defamatory publication, the court would not be properly protecting a plaintiff's reputation. Rather, it would be ignoring evidence of the bad reputation of the plaintiff which clearly is relevant to the plaintiff's reputation, and thus undermine a key purpose for which an award of damages is given in defamation law.

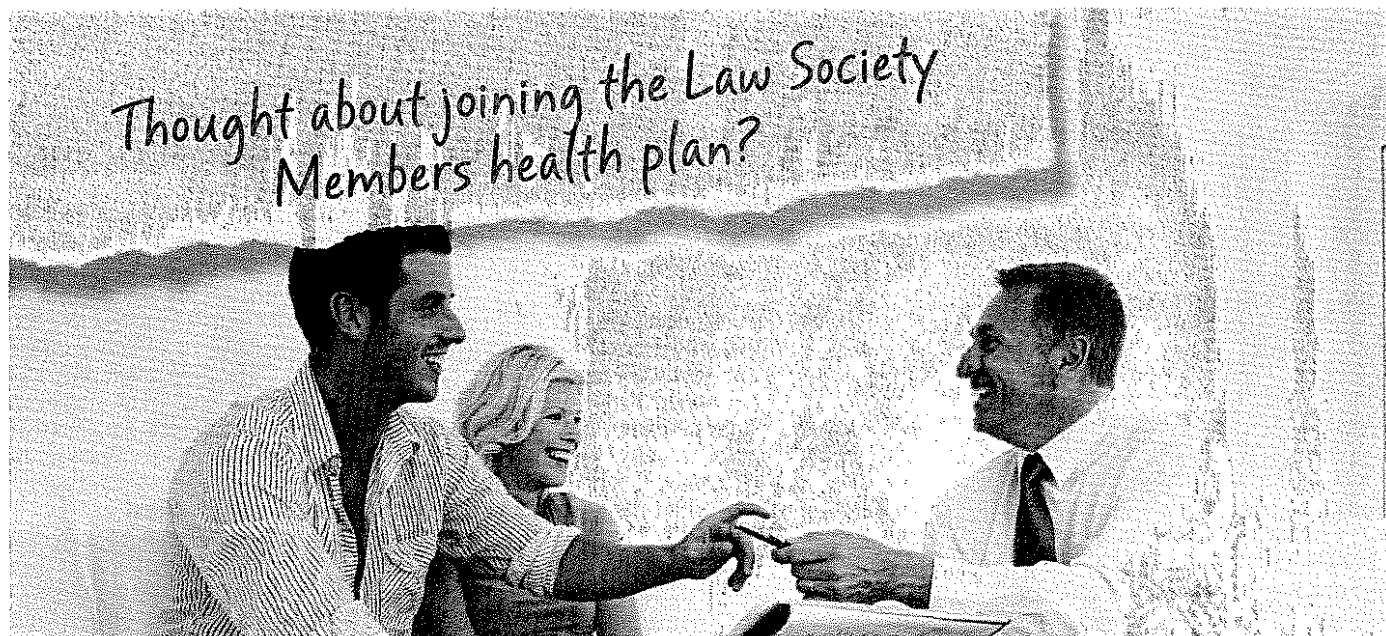
Inadmissibility of evidence of bad reputation

Third, it seems peculiar that damages may be affected by the conduct of a defendant after publication of the defamatory material, yet not by evidence of the bad reputation of the plaintiff after publication. As was made clear in *Broome v Cassell*,²⁸ for example, a subsequent repetition of the defamatory material by the defendant can increase damages and a publication of an apology can reduce them.²⁹ On that basis, it seems contradictory that adverse conduct by the author of the defamatory publication can affect damages, yet certain evidence of the bad reputation of the complainant after

publication cannot be considered in damages. As was made clear by Cave J in *Scott v Sampson*,³⁰ the damage which a plaintiff has sustained must depend entirely on the estimation in which he or she was previously held.

Conclusion

Once it is accepted that damages for defamation continue to be sustained after publication of the defamatory material in question, then, to borrow the words of Ipp AJA in *ABC v McBride*,³¹ "it should follow that evidence referring to a change in the reputation of the plaintiff after the publication date would be relevant". The admission of such material would, as Kirby J said in *Mohammed*,³² "involve an expansion of the categories available in mitigation of damages". It is disappointing that his Honour declined to express a view in the form of dicta in relation to the soundness of the principle in *Rochfort*. While overseas jurisprudence in this area, such as the decisions of *Burstein v Times Newspapers Ltd* and *Turner v News Group Newspapers Ltd* in England, and *Television New Zealand Ltd* in New Zealand have recognised the difficulty with the reasoning in *Rochfort*, the jurisdiction of NSW has appeared content, at least to date, to continue with the application of *Rochfort*. □



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