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Farewell To Justice David Levine

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

THURSDAY 31 MARCH 2005

FAREWELL TO JUSTICE DAVID LEVINE

1 **McCLINTOCK**: I understand the judgment your Honour has just given is in fact your Honour's last judicial act in a long judicial career. I have been deputed by the practitioners in the defamation area to farewell your Honour on your Honour's last day as a Judge of this Court.

2 All of us here have appeared before your Honour many times over 18 years. In my case, I just recall that I first was before your Honour in the District Court at Penrith against Mr Rares in 1989. It was not a very interesting professional negligence case.

3 There are a couple of things about your Honour's career as a barrister and a Judge I would wish to highlight. Your Honour came to the Bar in 1971 and practised until your Honour's appointment in the District Court in 1987. Before your Honour took silk, your Honour held the Fairfax junior retainer. I had a quick look yesterday through the New South Wales Law Reports for the 1970s and early 1980s and I saw many cases where your Honour was led for Fairfax by Mr T E F Hughes QC who has asked me to express his deep regret he cannot be here. He is occupied in the District Court. I also noted a number of cases where your Honour was led for Fairfax by Mr D A Hunt QC. I will refrain from any explicit comment on their contrasting styles or the very different demands each must have placed on your Honour.

4 I first recall your Honour appearing in the defamation list in 1983 when I first came to the Bar. I recall the bi-weekly defamation lists which your Honour, Mr Evatt and Mr Sackar presided over with occasional interruptions from Mr Justice Hunt. As I mentioned, your Honour accepted appointment to the District Court as a young silk aged 43 in 1987. That was something of a family tradition. Your Honour's father, Judge Aaron Levine, was a very distinguished member of the District Court Bench in the 1960s. I must say your Honour's father must have had a considerable degree of judicial courage, as does your Honour. I recall, and wish to mention, your Honour's father's directions to the jury in the Heatherbrae Abortion Clinic case which is the foundation of the modern Australian law on abortion. That decision must have taken considerable courage in the 1960s.

5 I also recall your Honour's father's acquittal on appeal in the mid-1960s of Richard Walsh, Richard Neville and Martin Sharpe after they had been convicted by a Magistrate of committing an act of indecency on the Tom Bass sculpture in Hunter Street. It seems surprising that they were ever prosecuted and convicted but that decision too must have taken some courage in the 1960s.

6 That same courage, honesty and straight forwardness has been exemplified by your Honour's career on this Bench in this Court to which your Honour was appointed in 1992. It is easy for those of us who practice before your Honour in defamation cases to forget that perhaps the bulk of your Honour's work was in difficult criminal trials. My brother appeared before your Honour in what I know was his and your Honour's first Judge alone murder trial in 1993 or 1994. I remember his gratified surprise when your Honour disbelieved the police officers and acquitted his client. I will refrain from repeating the facts of the death in question.

7 Mr Molomby told me yesterday about a client of his in a Judge alone trial before your Honour who, after your Honour had convicted him of murder, demanded that your Honour sentence him to death. It must have been tempting but your Honour declined the request. As I understand, he is still languishing in the New South Wales prison system.

8 These cases, of the very many criminal trials you did, illustrate another characteristic of your Honour

that I wanted to mention which is your Honour's willingness to undertake the hard cases and to do the hard work. People like me who practice in the civil area are often unaware of how really hard criminal cases are, particularly for the Judge and counsel for the defendant. Your Honour's willingness to do the hard work did not stop with crime. It extended to defamation work and there are many defamation cases your Honour undertook which many Judges would have dreaded. There have been your Honour's years of service in the defamation list. It can't be easy putting up with us all for so many years.

9 That leads me to the fourth judicial characteristic of your Honour which I want to mention which is your Honour's courtesy. It has always been a pleasure appearing before your Honour. I can only recall one case where your Honour lost your temper with me, which is a remarkably low strike rate. We are all grateful for your Honour's patience and forbearance towards us over the years and your Honour's courtesy.

10 The number of us present here from the second most senior law officer of the State down, is testimonial to the affection that we hold and will continue to hold for your Honour.

11 I do not know how your Honour is going to spend your Honour's retirement. I suspect it is not going to be retirement at all, simply a departure from one occupation to another. We all wish your Honour well in your retirement and thank your Honour for putting up with us all for so long.

12 **HIS HONOUR:** Thank you, Mr McClintock. I have been persuaded on this occasion by what you have said and have formed a favourable view.

13 I am gratified and honoured that the Solicitor-General is here. I have known Mr Sexton for almost the whole of my career at the Bar and certainly on the Bench. There are others whom I wish to identify as particularly pleasing me by their presence: Mr Evatt, who is giving the proceedings his usual attention at the rear of the court; one of the most senior and formidable common law advocates who it was my privilege, duty and occasional agony to put up with for two and a half years, namely, Mr Stitt. I am especially grateful that there is present one of my oldest friends in the profession and one of my oldest colleagues in the judiciary, His Honour Judge Ken Taylor, with whom I sat in the District Court and who regularly has been an acting Judge of this Court. There are many familiar faces amongst the attorneys and counsel.

14 Whilst I am saddened by my departure from the Court, I have no regrets at the end of four decades of active participation in the legal profession, including seventeen and a half years as a member of the judiciary.

15 I happen to hold the view that the citizens in this State are in the best of hands as far as their Judges and Courts are concerned, and are in the best of hands as far as are concerned the members of the legal profession whose duty it is to serve them. The difficultly is having that view broadcast and understood especially by many who are either ignorant of the virtues to which I have just referred or are consciously blind to them.

16 The most insidious development in the administration of justice over the last seventeen and a half years has been the intrusion of the culture of modern public sector management. However I and my colleagues, especially Mr Justice Sully, steadfastly have resisted this evil which leads me to say this as to what I shall do after today. The parameters of the paradigm of the protocol I shall erect, as I lead myself by my own example, (to quote a recent memorandum from the Director-General of the Attorney General's Department), will permit me to confront, address and resolve the future challenges, all of which lie ahead of me.

17 The second consequence of my retiring from judicial office is that after seventeen and a half years I have told my children that they can call me *"dad"* or *"father"* again, or whatever name they have been reflecting upon over that period. I look forward to being addressed from time to time by my given name and my wife Agnes will be the first to remind me of it.

18 I have been assisted by splendid associates and tipstaffs. They have assisted me, and I happen to know they have assisted members of the profession who have appeared in my court, and I happen to know that they have permitted me to enjoy an excellent relationship with the executive branch of the Court.

19 I wish to pay tribute, as I am always happy to do, to the court reporters I am especially pleased that Pam McMillan is recording this morning's proceedings as we first met many years ago when I was a Judge of the District Court on circuit in Grafton. If I may say so, and I will, she represents the service at its very best.

20 I am touched by everyone's presence here this morning. I wish those who are persisting in their career in the law every success. I trust they will never lose sight of the most precious component of everything for which we stand, namely, the protection of the rights of the members of our society.

21 I will adjourn.

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Defamation Practice: Change and Reform

plus a change …?

UNSW Law School
Continuing Legal Education Conference
Friday 16 March 2001
The Hon. Justice David Levine Rfd
Supreme Court of NSW
Defamation List Judge

Introductory Note

This paper, to a great extent, restates many matters that publicly have been subject of discussion in the area of procedural reform. The paper *does not* deal with matters of substantive law. It is an overview for practitioners.

The accompanying material being SCR Pt 67 (without commentary), Practice Note 114 and Practice Note 118 are provided for ease of reference. Also appended is the substance of the text of a memorandum circulated in the Common Law Division as a guide to the conduct of the Defamation List.

I acknowledge the assistance of Sally Traynor, Common Law Division Researcher in the preparation of this paper and the utility of the *"Gazette of Law and Journalism*" in its provision of "*Quantum Tables*" and s 7A trial results.

Some Changes

The amendments to the *Defamation Act 1974,* in 1994, were introduced in the Legislative Council on 22 November that year by the Honourable J P Hannaford, the then Attorney-General. His second reading speech included the statement that the Bill "*will achieve significant reforms in the area of defamation law*". He said that *"what is proposed is at an early stage in the defamation action a jury will be required to answer two questions. The first is whether the imputations alleged are conveyed by the published material. The second is whether, if the answer to that question is yes, the imputations are defamatory. If the jury answers either of those questions 'no', the judge will then give judgment for the defendant"* (H5472).

Section 7A provides:

> *"(1) If proceedings for defamation are tried before a jury, the court and not the jury is to determine whether the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and, if it is, whether the imputation is reasonably capable of bearing a defamatory meaning.*
>
> *(2) If the court determines that:*
> *(a) the matter is not reasonably capable of carrying the imputation pleaded by the plaintiff, or*
> *(b) the imputation is not reasonably capable of bearing a defamatory meaning, the court is to enter a verdict for the defendant in relation to the imputation pleaded.*
>
> *(3) If the court determines that:*
> *(a) the matter is reasonably capable of carrying the imputation*

> *pleaded by the plaintiff, and*
> *(b) the imputation is reasonably capable of bearing a defamatory meaning, the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory.*
>
> *(4) If the jury determines that the matter complained of was published by the defendant and carries an imputation that is defamatory of the plaintiff, the court and not the jury is:*
> *(a) to determine whether any defence raised by the defendant (including all issues of fact and law relating to that defence) has been established, and*
> *(b) to determine 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.*
>
> *(5) To the extent that section 88 of the Supreme Court Act 1970 applies to proceedings for defamation, it applies subject to the provisions of this section".*

The "*s 7A"* trial is to be understood as the trial by jury as provided for in subsection (3) "… *the jury is to determine …"* and subsection (4) *"If the jury … defamatory of the plaintiff, …"*

The shadow Attorney-General the Honourable J W Shaw Q.C. expressed the Opposition's "*basic difficulties*" with this legislative proposal: "*we think it suffers from significant flaws"*. He said "*it is odd and certainly needs explanation*" (H75839).

Amendments were duly enacted and came into effect with respect to publications after 1st January 1995 (see however s 58 and Schedule 3 Part 2).

The other principal amendment was the enactment of s 46A which provides:

> *"(1) In determining the amount of damages to be awarded in any proceedings for defamation, the court is to ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded.*
>
> *(2) In determining the amount of damages for non-economic loss to be awarded in any proceedings for defamation, the court is to take into consideration the general range of damages for non-economic loss in personal injury awards in the State (including awards made under, or in accordance with, any statute regulating the award of any such damages)".*

This section has received some attention in the following judgments of the Supreme Court: ***Tingle & Anor v Harbour Radio Pty Limited & Anor*** [1999] NSWSC 461 (Kirby J, 20 May 1999); ***Goldsworthy v Radio 2UE Sydney Pty Limited*** [1999] NSWSC 547 (Dunford J, 9 June 1999); ***Green v Schneller*** [2000] NSWSC 548 (Simpson J, 19 June 2000); ***Vacik Distributors Pty Limited & Anor v Australian Broadcasting Corporation & Anor*** [2000] NSWSC 732 (Sperling J, 18 August 2000).

Some observations I make as to s 46A are these: first, section 46A, it can be understood, was to some extent, founded in the extraordinary litigation between Mr Carson and Fairfax (***Carson v John Fairfax & Sons Limited*** (1993) 178 CLR 44; ***Carson v John Fairfax & Sons Limited*** (1994) 34 NSWLR 72 - see LRC 75 pp 120-122 for a discussion of the latter judgment). Secondly, the two major areas of the award of damages for non-economic loss are of course for injuries sustained in the workplace or in motor vehicle accidents. No doubt for what were perceived to be good economic reasons affecting the State, the community and industry the new legislation in those two areas provided "*tables"* and "*caps"*. An interesting aspect for the purposes s 46A is that the *Motor Accidents Compensation Act* 1999 s 134 provides for the award of non-economic loss to be calculated as at the date of the award and the *Workers Compensation Act 1987* s 151G provides for the award to be calculated as at the date of injury. The third observation to be made is where in the scheme of things lies the recent jury verdict of an award of general damages in the sum of $700,000 on 14 February 2001 in ***Paul Martin Hogan v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & 1 Or*** (cf. ***Crampton***

v Nugawela (1996) 41 NSWLR 146)?

In September 1995 the Law Reform Commission presented its report, (Report 75) on Defamation taking into account the amendments that had been enacted late in the year before.

It was not until 1999, in a real sense, that actions that were governed by the new legislation commenced to be listed for hearing. It was in the year 2000 that the first clutch of what are now known as *"section 7A*" trial was heard. (In ***Marsden v Amalgamated Television Services Pty Limited Pty Limited,*** the "*whole"* trial commenced on 1 February 1999. There were three weeks of legal argument and the "*s 7A*" jury component took 4 days from 22 February 1999).

Notwithstanding, or possibly because of the recent amendments, the Defamation List in the years 1995 to 2000 was preoccupied with the kinds of "*arguments"* which I have described as "*sterile*". The Defamation List seemed to be an arena in which plaintiffs and defendants appeared to be competing for non-existent prizes in drafting, point-taking, nit-picking and the loss of sight of the objective of the remedy being pursued. The number of actions litigated at trial was disproportionately low compared to the resources of the Court expended upon the resolution of "*arguments*" of such issues in the Defamation List, no doubt, at the expense of the then resources of the litigants. On 31 August 1999 during the course of my remarks launching the Law Journal of the Law School of the University of Technology, Sydney, I employed language a little more florid in the expression of my frustration at the developments just referred to. What was said however was not really new: in ***Allen & Rochfort v Australian Consolidated Press Limited*** on 16 December 1970, Jacobs JA (as he then was) on an interlocutory pleading appeal to the Court of Appeal felt constrained to remark that "*the present application is … part of the battle of tactics into which in my experience defamation actions in this State more and more descend"* (p 1). The opening lines of a judgment delivered by Yeldham J on Friday 23 September 1988 in ***Allen v John Fairfax & Sons Limited*** were: "*This is yet another matter which, in my view, shows the somewhat absurd complexity which, these days, attends defamation actions".*

The need for change in procedure became patent.

The model of a jury determining the issue of fact as to imputations being conveyed and their being defamatory had, in effect, been established consequent upon the decisions of the Court of Appeal in ***Radio 2UE Sydney Pty Limited v Parker*** (1992) 29 NSWLR 448 and ***TCN Channel 9 Pty Limited v Mahoney*** (1993) 32 NSWLR 397; see also Hunt CJ at CL in ***RZ Mines (Newcastle) Pty Limited v Newcastle Newspapers Pty Limited & Anor*** (unreported, 16 November 1994).

The model erected by the Legislature demanded procedural changes to ensure that the resources both of the litigants and the Court be devoted, upon the initiation of proceedings, to the isolation and clarification of the issues to be determined by the jury in its new and exclusive role. It was perceived in the light of the profligate waste of resources and the continual re-listing of matters in the Defamation List that there was a necessity to corral interlocutory applications ("*arguments"*) for disposition on essentially two occasions.

The first occasion would be that to deal with all matters that would resolve the issues to be tried by a jury.

The second would be post the s 7A trial, when issues thrown up by the continuation of pleadings, discovery and interrogatories could be dealt with. Upon their being dealt with, the balance of the trial would be fixed for hearing.

In respect of both components it was decided that the pleadings should disclose in full complete particulars of the case each party was making at the relevant stage of the proceedings (now see SCR Pt 67 rr 17, 18 and 19 as amended, for example). That requirement for disclosure led inevitably to a collateral requirement: the litigation of those issues could only be aided by the exchange of what are presently called *"witness statements"*.

Further, the intention to restrict to essentially two occasions the opportunity for argument led inevitably to the formalisation of a requirement that the parties exchange outlines of objections and complaints and submissions in support and in reply (SCR Pt 67 r 12A).

At the time of preparing this paper I do believe it can be said that, overall, the management of

defamation actions to the point of s 7A trials has been successful (in this context I make no remark as to the merits of the outcomes of such trials). Also at present no sensible observation can be made as to the management of the balance of the action post the s 7A trial up to and including the final trial.

Insofar as defamation actions constitute approximately 16% of the work of the Common Law Division of the Supreme Court and in the light of the processes of both devolution of jurisdiction and list clearances, it can with confidence be said that s 7A trials will be listed with some promptitude after the initiation of proceedings and the balance of the trial hearings will be fixed within an acceptable period after the conclusion of the jury component.

Fundamental to the realisation of the optimism just expressed is the requirement both under the Practice Note 114 and Practice Note 116 that no action will be allowed to "*die*" or "*linger*" but rather will be listed, unless circumstances otherwise apply, every six months.

Proceedings from Initiation to Conclusion of s 7A Trial

The amendments to SCR Pt 67 and the Practice Note itself reflect the policy of change to underpin the speedy, just and cheap resolution of disputes.

Particular attention should be paid to the new SCR Pt 67 r 12: for example, 1(e) which provides that the plaintiff is required to particularise the part or parts of the matter complained of relied upon by the plaintiff in support of each pleaded imputation. This reflects the Court's view that as far as the Court is concerned all issues should be disclosed in the pleadings and the practice hitherto of the exchange of a request for and the supply of such particulars be eliminated as unnecessary, time wasting and expensive.

A further example of the new pleading requirement is SCR Pt 67 r 12(d) relating to proper particulars of identification.

SCR Pt 67 r 12 seeks to have exposed at the commencement of proceedings the full particularisation of the case the plaintiff brings and which will have to be determined by the jury.

SCR Pt 67 r 12A provides for the formalisation of the requirement that there be exchanged notices in relation to disputes. A practice has developed, and it is to be commended, that the notification of disputes be in a form headed in the action and the notice be described as a "*Notice pursuant to SCR Pt 67 r 12A"*.

Ideally any matter in dispute on an issue to be determined by the jury should be resolved on the first return day in the Defamation List.

In this regard these observations can be: no case will be set down for a s 7A trial until all issues in dispute have been resolved; secondly, upon the listing of the s 7A trial it can be taken that no further applications or disputes will be entertained especially on the date fixed for the empanelling of the jury. It really should go without saying that the greater care and common sense applied to the drafting of imputations will ensure the speedy listing of the s 7A trial. (I add that if anxiety attends the drafting of the imputations in terms of merely seeking to avoid issues that the defendant might raise substantively, or by evidence in relation to credit and damages, then serious consideration should be given to whether or not the action is viable at all).

The resolution of matters in dispute in relation to the pleading of the cause of action and collateral matters (particulars of identification, true innuendos) will depend obviously, upon the nature of the dispute, the quality of the submissions, idiosyncratic judicial technique and the demands of the list.

Upon the resolution of the issues relating to the Statement of Claim directions will be given and orders made for the s 7A hearing. A defendant will be required to file a defence to the issues to be determined by the jury so that issue is, in fact, joined and there is a justiciable matter for determination by that tribunal. It can be taken that in the event of the plaintiff succeeding, leave to amend will automatically be granted to the defendant. I hasten to add that insofar as the plaintiff may well have included in the Statement of Claim particulars relevant to the issue of damages, first, time will not be wasted arguing about the adequacy of such matters before the s 7A trial and secondly, the normal considerations as to

entitlement to amend will apply to these "*continuing*" factors, aggravation and where appropriate, claims for special damages or damages by way of loss or custom.

In circumstances where there is no issue as to identification, particularly in mass media publications, the Court expects no serious issue to arise as to publication. Such defendants should readily make the appropriate admissions.

Where issues of identification and true innuendos arise, outlines of evidence will be required to be exchanged. The reality, of course, is that it is hardly likely that the defendant will be tendering evidence on these issues.

In relation to issues of fact to be determined by the jury see, for example, as to identification - ***Cinevest Limited & Anor v Yirandi Productions Pty Limited*** [1999] NSWSC 1089 (Adams J, 5 November 1999); liability for publication - ***Bishop v State of New South Wales*** [2000] NSWSC 1042 (Dunford J, 8 November 2000). I query now the correctness of my own decision in ***Chinatown Enterprises Pty Limited v Maxims Entertainment Pty Limited*** (unreported, 30 November 1995) as to "*translation"* not being a matter for determination by the jury.

As to "*witness statements*" the structure of such documents has not been in any way formalised. This can be a matter for further consideration and discussion. One model could be Pt 32 of the Civil Procedure Rules (England). The forensic advantages in having at least a signed statement by a witness on an issue are obvious.

The conduct of the s 7A trial is in the hands of the trial judge.

It is to be noted however that amendments to the *Jury Act* over recent times have given rise to situations of interest. Section 42A provides that "*each party*" to the proceedings has the number of peremptory challenges without restriction that is equal to half the number of jurors required to constitute the jury for trial. On its face this means that if there are three plaintiffs and one corporate newspaper defendant together with four journalists sixteen challenges are available. The question of the representation of a "*single interest*" does not appear to arise under this provision.

Challenges are made from the bar table on a "*first in best dressed*" basis (s 45).

Section 57(2) of the *Jury Act* now provides in respect of "*majority verdicts"* that the term "*verdict*" includes a reference to any specific question put to the jury by the Court.

Should the jury be directed as to the requirement for unanimity? In a recent s 7A trial, a jury having been deliberating for an hour asked whether a majority answer would be acceptable (***Whelan & Anor v John Fairfax Publications Pty Limited & 2 Ors*** - 14 February 2001). The jury was directed in effect that the law (by reference to s 57) requires the answers to be unanimous but that if, after four hours, unanimity could not be achieved, majority answers could be received. The jury was specifically directed that the time limit referred to should on no account constitute any impediment to the free exercise of each juror's conscience on the one hand nor compel a compromise on the other. The situation is, of course, starkly different to that which applies in a criminal trial and one which does not lend itself, in my view, to the application of or the adoption of what is known as the "*Black*" direction (***Black v The Queen*** (1993) 179 CLR 44 at 50).

Section 57A makes provision for the decision by the Court of any matters in respect of which the jury is unable to agree.

Perhaps the most curious provision as far as s 7A trials are concerned, is s 38(8) which provides:

> *"Before the selection of the jury at a civil trial, the judge must, subject to the regulations:*
>
> *(a) direct the parties to the proceedings to inform the jurors on the panel of the nature of the action and the identity of the parties and of the principal witnesses to be called by the parties, and*
> *(b) call on the jurors on the panel to apply to be excused if they consider that they are not able to give impartial consideration to the case".*

(I know of no regulations).

The then Attorney-General (The Hon. J W Shaw Q.C.) in the Second Reading Speech on 9 April 1997 in relation to this sub-section said as follows:

> *"Currently, section 38(7) of the Jury Act only provides a trial judge with a discretion to make such an announcement. This bill will remove that discretion so that trial judges are required to make such an announcement prior to the commencement of every case of the details concerning that case, including the names of the witnesses to be called, so that the jurors may seek to be excused should they feel that they are unable to give an impartial judgment in the proceedings, is preferable to the more haphazard method of the parties attempting to discover such a relationship through the naming of jurors in court"* (H7261)

In a s 7A trial where no witness is to be called (which I would assume to be the normal case), the practical application of this mandatory provision can be questioned. If it is put into effect, obviously, counsel should not avail themselves of their right under the section to make some form of preliminary address. The nature of the action satisfactorily can be explained by the trial judge as can the task the jury will be called upon to perform.

A practical way of dealing with the requirements of this section is for the trial judge to repeat the parties' names, explain that it is a defamation action, explain the issues the jury will have to determine (explain the irrelevance of truth/falsity, right/wrong), then call upon counsel to add anything if they have anything to add, and then for the judge to comply with s 38(8)(b). See, for example, ***Marsden v Amalgamated Television Services Pty Limited*** [1999] NSWSC 26; ***Packer v Australian Broadcasting Corporation & 3 Ors*** [2001] NSWSC 20.

Some practical hints: the parties should have prepared and agreed a set of questions to be answered by the jury. Usually this is non-contentious. The plaintiff should have available the original publication (for example, the newspaper), videotape or sound tape and in respect of any special requirements for the tendering of the evidence (video machine, etc.) make inquiries of the trial judge's associate as to availability. I make these observations without commenting upon any question of admissibility. (AND, please remember copies for the Court reporter!)

Post Section 7A Hearings

Upon the conclusion of the s 7A trial favourably to the plaintiff, it is for the trial judge to make orders and give directions for the further conduct of the case.

It is to be borne in mind in seeking directions from the trial judge at the conclusion of the s 7A trial that there really are limited "*continuing*" components in a defamation action. For example, the defences of privilege, comment (s 13), are in reality judged as at the time of the publication. As far as the plaintiff is concerned "*continuing*" aspects are any claim by way of special damages (or a cognate claim), aggravated damages and evidence of malice. For a defendant the "*quest for truth*" may continue. Nonetheless the requirement now is that all matters must be particularised in the respective pleadings accompanying the averment of substantive cases or matters in defeasance. It will be for the trial judge to determine an appropriate timetable, failing agreement of the parties. A matter of critical importance is that any such "*timetable*" will not be open-ended and the matter will be listed in the Defamation List conveniently following the conclusion of the steps ordered and directed to be taken.

Readiness & Final Directions Hearings

(Practice Note 114. 25)

It need hardly be remarked that, unfortunately, the likelihood of an action being ready to be set down upon listing for the Readiness and Final Directions Hearing will be the exception rather than the rule. I repeat, however, the objective is to have listed on one occasion all issues to be resolved and for those issues to be argued on the one occasion.

Compliance with the Rules as amended, especially in regard to the particularisation in pleadings and with the Practice Note, is expected of the profession (as it will be of litigants in person), to attain the objective of the sensible, cheap expeditious litigation of the real issues.

Thus, the practical effect of the Practice Note and Rules changes cannot yet be judged in regard to post-s 7A trials.

Trite though it is to say, the new Practice Note whilst demanding, is nonetheless flexible. Abuse however of either its spirit or its terms will lead to sanctions as to costs and indeed as to the identity of the person whose liability it will be to pay.

It is the duty of the profession to ensure that the client's cause is litigated quickly, cheaply and sensibly in the sense of the real issues only being adjudicated upon.

ADR: Part 7B *Supreme Court Act,* 1970

The Law Reform Commission strongly supported the idea of mediation in defamation actions: see Report 75 Chapter 14.

Since the publication of that Report Part 7B of the *Supreme Court Act* has been introduced to provide for compulsory mediation. Practice Note 118 promulgated on 8 February 2001 now applies.

I myself have availed myself of the enactment compulsorily to refer to mediation one matter only: ***Waterhouse v Perkins & 3 Ors: Waterhouse v Perkins & 4 Ors*** [2001] NSWSC 13. This was a pre-1995 action of immense complexity and was referred to mediation in terms of the peculiar facts attending it. I did not accept that an argument against mediation is that that process cannot bring about vindication. How can this be known?

The 1994 amendments, at the very least, can be said to provide a discrete point of time at which mediation seriously can be considered in the event of a publication being found to be defamatory. There is anecdotal evidence that voluntary mediation has been successful: ***Lee Bryant & 19 Ors v Nationwide News Pty Limited*** is an example.

Another "*point of time"* will be after the Readiness Hearing when all the issues are clear.

Certainly in non-media cases ADR should be viewed as an attractive alternative to the full scale litigation of an action or at least a mechanism for issues refinement.

Conclusion

None of the foregoing, as I have said, has taken account of matters of substantive law. Indeed the Practice Note and Rules changes evolved in the context of existing substantive law.

None of the changes cannot on any reasonable basis be viewed as impeding the application of the substantive law. For example, during the course of discussions prior to the promulgation of the Practice Note, questions were raised as to how it would affect the "*newspaper"* rule. The short answer, at present, is that it does not.

It can be taken that some time in early 2002 the Practice Note and procedures thereby created and the operation of the amended rules will be considered again (there is continuing monitoring in the meantime), in the light of what is anticipated will be a body of data available from the approximately 18 months of operation of the changes in practice.

On the other hand it cannot be vouchedsafe that there will be no peremptory Parliamentary intervention, well considered or otherwise, as occurred in 1994.

****

PART 67—DEFAMATION

Application
9 This Part applies to proceedings for defamation.

Interpretation
10(1) In this Division, unless the context or subject matter otherwise indicates or requires, ''defence'' includes any matter of privilege, protection, justification or excuse.

(2) In this Division, ''imputation in question'', in relation to any defence, means the imputation as to which the defence is pleaded.

Statement of claim
11(1) A statement of claim shall not include any allegation that the matter complained of or its publication was false, malicious or unlawful.
(2) A statement of claim:
(a) shall, subject to subrule (3), specify each imputation on which the plaintiff relies;
and
(b) shall allege that the imputation was defamatory of the plaintiff.
(3) A plaintiff shall not rely on two or more imputations alleged to be made by the defendant by means of the same publication of the same report, article, letter, note, picture, oral utterance or thing, unless the imputations differ in substance.

(4) *****

(5) The time to be limited for a defendant to enter an appearance shall be on or before the date of hearing fixed by the notice under rule 11A.

Motion for directions
11A(1) The plaintiff shall, on commencing the proceedings, move on notice for a hearing for directions under Part 26 and rule 11B of this Part.
(2) The notice and the statement of claim shall be served not less than 21 days before the date of hearing fixed by the notice.

Directions
11B Without limiting the generality of Part 26, the Court may, where the proceedings are before it for directions pursuant to rule 11A:
(a) abridge, extend or fix the time for filing a defence or the time for the doing of any other thing;
(b) where Division 8 of Part 3 of the Defamation Act 1974 applies (which Division relates to an offer of amends), exercise its powers under that Division;
(c) make orders pursuant to Part 31 rule 2;
(d) set the proceedings down for trial.
(e) *****

Pleadings
11C Upon the filing of a notice of motion under rule 11A for a hearing for directions, all times for pleading shall, unless the Court otherwise orders, cease to run and no pleadings shall thereafter be filed or served except so far as the Court may direct.

Particulars: publication and innuendo
12(1) The particulars required by Part 16 rule 1 in relation to a statement of claim shall include:
(a) particulars of any publication on which the plaintiff relies to establish the cause of action, sufficient to enable the publication to be identified;
(b) particulars of any publication, circulation or distribution of the matter complained of or copy of the matter complained of on which the plaintiff relies on the question of damages, sufficient to enable the publication, circulation or distribution to be identified;

(c) where the plaintiff alleges that the matter complained of had a defamatory meaning other than its ordinary meaning—particulars of the facts and matters on which the plaintiff relies to establish that defamatory meaning, including:

(i) full and complete particulars of the facts and matters relied upon to establish a true innuendo; and

(ii) by reference to name or class, the identity of those to whom those facts and matters were known;

(d) where the plaintiff is not named in the matter complained of—particulars of identification of the plaintiff together with, by reference to names and addresses or class of persons, the identity of those to whom any such particulars were known; and

(e) particulars of the part or parts of the matter complained of relied upon by the plaintiff in support of each pleaded imputation.

(2) There shall be filed and served with the statement of claim and any amended statement of claim and referred to in it, where applicable:

(a) a legible photocopy of the original publication or, in the case of an internet, e-mail or other computer displayed publication, a printed copy;

(b) a typescript, with numbered lines, of:

(i) if the original publication is in English—the text of the original publication; or

(ii) otherwise—a translation of the text of the original publication; and

(c) a description of any other written material other than words.

(3) Subrule (2) (b) shall be complied with in respect of radio and television publications.

Disputes

12A(1) A defendant, not less than 7 days before the return date of the notice of motion filed under rule 11A, must file and serve on each other party who has an address for service in the proceedings a notice of the subject of any objection or other dispute in relation to any matter pleaded or particularised in the Statement of Claim, identifying with particularity the nature of the objection or other dispute and providing an outline of submissions in relation to it.

(2) A plaintiff who is served with a notice under subrule (1) must, not less than 2 days before the return date of the notice of motion, file and serve on each other party who has an address for service in the proceedings a notice stating its position in relation to the objection or matter in dispute and providing an outline of submissions in relation to it.

Defence generally

13(1) Subject to rules 14 to 17, a defendant shall plead any defence specifically.

(2) Where two or more imputations are complained of, a defence under section 15 (2) or section 16 (2) of the Defamation Act 1974 shall specify to what alleged imputation or imputations it is pleaded.

Truth generally

14 Subject to rule 13 (2), a defence under section 15 (2) of the Defamation Act 1974 is sufficiently pleaded if it alleges:

(a) that the imputation in question was a matter of substantial truth; and

(b) either:

(i) that the imputation in question related to a matter of public interest; or

(ii) that the imputation in question was published under qualified privilege.

Truth: contextual imputations

15 Subject to rule 13 (2), a defence under section 16 of the Defamation Act 1974 is sufficiently pleaded if it:

(a) alleges either:

(i) that the imputation in question related to a matter of public interest; or

(ii) that the imputation in question was published under qualified privilege;

(b) specifies one or more imputations on which the defendant relies as

being contextual to the imputation in question;

(c) as to each imputation on which he so relies:

(i) alleges either that it related to a matter of public interest or that it was published under qualified privilege; and

(ii) alleges that it was a matter of substantial truth; and

(d) alleges that, by reason that the imputations on which the defendant so relies are matters of substantial truth, the imputation in question did not further injure the reputation of the plaintiff.

Qualified privilege

16(1) This rule applies:

(a) to a defence under Division 4 of Part 3 of the Defamation Act 1974; and

(b) subject to subrule (2), to any other defence of qualified privilege.

(2) This rule does not apply to a defence under Division 5 of Part 3 of that Act (which Division relates to protected reports etc.) or under Division 6 of that Part (which Division relates to court notices, official notices etc.) or under Division 7 of that Part (which Division relates to comment).

(3) A defence is sufficiently pleaded if it alleges that the matter complained of was published under qualified privilege.

Comment

17(1) This rule applies to a defence under Division 7 of Part 3 of the Defamation Act 1974.

(2) A defence is sufficiently pleaded if, as to the matter it alleges was comment, it:

(a) either:

(i) alleges that that matter was comment based on proper material for comment and upon no other material; or

(ii) alleges that that matter was comment based to some extent on proper material for comment and represented an opinion which might reasonably be based on that material to the extent to which it was proper material for comment;

(b) alleges that that matter related to a matter of public interest; and

(c) either:

(i) alleges that that matter was the comment of the defendant;

(ii) alleges that that matter was the comment of a servant or agent of the defendant; or

(iii) alleges that that matter was not, and in its context and in the circumstances of the publication complained of did not purport to be, the comment of the defendant or of any servant or agent of the defendant.

(3) The particulars required by Part 16 rule 1 shall include:

(a) particulars identifying the material upon which it is alleged that that matter alleged to be comment was comment and identifying to what extent that material is alleged to be proper material for comment;

(b) as to material alleged to be proper material for comment, particulars of the facts, matters and circumstances on which the defendant relies to establish that allegation.

(4) *****

(5) Where a defendant relies on a defence under section 33 of the Defamation Act 1974 (which section relates to comment of a servant or agent of the defendant), the particulars required by Part 16 rule 1 shall include particulars identifying the servant or agent of the defendant whose comment it is alleged to be.

(6) Subrules (3) and (5) do not limit the operation of rule 18.

Particulars of defence

18(1) The particulars of defence required by Part 16 rule 1 shall, unless the Court otherwise orders, include particulars of the facts, matters and circumstances on which the defendant relies to establish:

(a) that any imputation, notice, report, comment or other material was or related to a matter of public interest;

(b) that any imputation or matter was published under qualified privilege;

(c) that any imputation or contextual imputation was true or was a matter of substantial truth;

(d) that any material being proper material for comment was a matter of

substantial truth.

(2) Where a defendant intends to make a case in mitigation of damages by reference to:

(a) the circumstances in which the publication complained of was made;

(b) the reputation of the plaintiff;

(c) any apology for, or explanation or correction or retraction of, any imputation complained of;

(d) any recovery, proceedings, receipt or agreement to which section 48 of the Defamation Act 1974 applies, the defendant shall give particulars of the facts, matters and circumstances on which the defendant relies to make that case.

(3) Where a defendant intends to show, in mitigation of damages, that any imputation complained of was true or was a matter of substantial truth, the defendant shall give particulars identifying the imputation, stating that intention, and of the facts, matters and circumstances the defendant relies upon to establish that the imputation was true or was a matter of substantial truth.

(4) The particulars required by subrules (2) and (3) shall be set out in the defence, or, if that is inconvenient, shall be set out in a separate document, referred to in the defence and that document shall be filed and served with the defence.

Malice etc.: reply and particulars

19(1) Where a plaintiff intends to meet any defence:

(a) by alleging that the defendant was actuated by express malice in the publication of the matter complained of;

(b) by relying on any matter which, under the Defamation Act 1974, defeats the defence, then:

(c) the plaintiff shall plead that allegation or matter of defeasance by way of reply; and

(d) the particulars required by Part 16 rule 1 in relation to the reply shall include particulars of the facts, matters and circumstances on which the plaintiff relies to establish that allegation or matter of defeasance.

(2) The plaintiff must give:

(a) particulars of facts, matters and circumstances upon which the plaintiff will rely in support of a claim for aggravated damages; and

(b) particulars of any claim the plaintiff makes by way of:

(i) special damages; or

(ii) any claim for general loss of business or custom, or cognate claim.

(3) The particulars required by subrule (2) shall be set out in the reply, or, if that is inconvenient, shall be set out in a separate document, referred to in the reply, and that document shall be filed and served with the reply.

20 *****

Statement in open Court

21 Where proceedings for defamation are settled, a party may, with the leave of the Court, make in open Court a statement approved by the Court in private.

Offer of amends: determination of questions

22 The Court may hear an application and determine any question pursuant to section 39 of the Defamation Act 1974 in the absence of the public.

PRACTICE NOTE No 114

COMMON LAW DIVISION

DEFAMATION LIST

Application

This Practice Note (other than paragraph 3), and recent amendments to Pt 67 of the Rules, will apply to proceedings for defamation commenced on or after 1 September 2000.

Practice Note 14 and the notes thereto will continue to apply to other defamation proceedings, subject to the application of s 76A of the *Supreme Court Act* 1970 and Pt 15A and Pt 26 r 1, but will not apply to proceedings to which this Practice Note applies.

Paragraph 1(1) of Practice Note 51 (which relates to subpoenas) shall have no further application to defamation proceedings, whenever commenced.

The Court may direct that this Practice Note apply to any proceedings suitable to be entered in the Defamation List.

The Court may direct that proceedings be removed from the Defamation List, in which case:

(a) this Practice Note shall not continue to apply to the proceedings except to the extent, if any, that the Court may direct; and
(b) any orders made or directions given prior to removal shall not be affected.

Listings & Hearings

It is intended that proceedings will normally be before the Court on the following occasions:

(a) the return date of the Notice of Motion for Directions (Pt 67 r 11A);

(b) the trial of issues as provided for by s 7A(1)(3) of the *Defamation Act 1974* ("the s 7A trial");

(c) the Readiness & Final Directions Hearing fixed when directions are given at the conclusion of the s 7A trial;

(d) the trial of the balance of the proceedings.

No more than 6 months will be permitted to elapse between steps 6(a) and (b), (b) and (c), and (c) and (d). If the proceedings are not listed in accordance with this Practice Note, the Rules or directions, the Court will call up the proceedings for management or disposal.

Notice of Motion for Directions

The Notice of Motion for Directions to be served with the Statement of Claim will fix a return date not less than 28 days from the date of filing.

Statement of Claim

Full and complete particulars as required by Pt 67 r 12 must be furnished.

Return Date of Notice of Motion for Directions

Pt 67 has been amended to ensure that early notice is given of the position of each party in relation to any objection or other dispute in relation to any matter pleaded or particularised in the Statement of Claim. The Defamation List Judge will hear and determine any such matter.
On the return date of the notice of motion:

(a) the defendant will be required to state whether it admits publication of the matter complained of; and
(b) the parties will be required to state whether they dispense with matters requiring formal proof for the purposes of the s 7A trial.

Upon the resolution of issues identified at the return date of the notice of motion, and the determination of all issues as to form and capacity of imputations, the proceedings will be set down for the s 7A trial.

Directions as to s 7A trial

Directions will be given by the Defamation List Judge as to the preparation of the proceedings for the s 7A trial, including the exchange of witness statements (for example expert reports, including reports by expert translators), in respect of each party's case in chief.

Those directions will not, otherwise than in exceptional circumstances, require any party to give interim discovery, or authorise any party to administer interrogatories, in relation to s 7A trial issues.

S 7A trial

Upon the s 7A trial being listed for hearing, its conduct will be a matter for the trial Judge.

Direction by the s 7A trial Judge

Upon the completion of the s 7A trial, the trial Judge will give further directions for the conduct of the proceedings.

Directions will be given by the s 7A trial Judge in relation to remaining pleadings, discovery and interrogatories. It is to be recognised that, otherwise than in the most exceptional cases, the parties can plead notwithstanding any perceived defects in the other side's pleadings or the particularisation therein.

Each side's pleadings must contain full and proper particulars required by the Rules and as directed. No allowance will be made in those directions for the exchange of particulars by correspondence.

It should not be assumed that liberty to apply will be granted.

The s 7A trial Judge will fix a Readiness & Final Directions Hearing before the Defamation List Judge no later than 6 months after the s 7A trial.

Particulars in Defence and Reply

Full and proper particulars must be provided with the Defence and Reply of all matters required by the Rules and as directed, unless the Court otherwise orders.

Discovery & Interrogatories

By reason of the parties' obligation to properly particularise their respective cases in the pleadings, it will be expected that all issues, at the time of the filing of the Reply, will have been exposed to enable the parties to comply strictly with Rules and directions as to discovery and inspection.

Except by leave, interrogatories shall be no more than 30 in number (Pt 24 r 1).

Notification of matters in dispute

The directions given by the s 7A trial Judge will include directions as to the notification by each side to the other prior to Readiness & Final Directions Hearing of all matters in dispute following the conclusion of the pleadings, discovery and interrogatories. That notification will be required to be specific and to include an outline of submissions in relation to each matter in dispute.

Readiness & Final Directions Hearing

At the Readiness & Final Directions hearing the Defamation List Judge will:

(a) determine matters in dispute referred to in paragraph 24; and
(b) give directions as to the preparation for the trial of the balance of the issues, including service of witness statements, return dates for subpoenas and notices to produce, and making of admissions.

Trial of the Balance of the Issues

The conduct of the trial of the balance of the issues will be for the trial Judge. This trial is to be a trial in the strict sense and not an occasion for the parties to seek to ventilate any interlocutory matters. If the matter is not ready for trial, the trial Judge will determine whether the trial should proceed or be vacated at the cost of any party found by that Judge to be in default.

Other Interlocutory Proceedings

As stated above, the liberty to apply which hitherto has been automatically available in the conduct of the Defamation List will not be available. If, at any stage, apart from the return date of the Notice of Motion for Directions or the Readiness & Final Directions Hearing, a party seeks interlocutory relief, that relief should be sought formally by the filing of a notice of motion returnable in a Defamation Directions List no earlier than 14 days from the issue of the notice of motion. With that notice of motion must be filed an affidavit containing relevant matters by way of evidence in support of the relief sought, together with an outline of submissions, to which the opposing party must respond in writing no later than 3 days before the return date.

General

The following Practice Notes and Rules will be of particular relevance to the conduct of the Defamation List:

(a) Practice Note 85 (Injunctions Against Publication);

(b) Practice Note 105 (Use of Technology in Civil Litigation);

(c) Practice Note 107 (Photocopy Access);

(d) Practice Note 108 (Costs Orders Against Practitioners);

(e) Pt 36 r 4A (Witness Statements)

(f) Pt 36 r 13C (Expert Witnesses);

(g) Pt 39 (Court Appointed Experts).

PRACTICE NOTE No 118

MEDIATION

Referrals generally
1 Part 7B of the Supreme Court Act has been amended to permit the Court at any stage of the proceedings by order to refer parties to mediation where, in the opinion of the Court, mediation appears appropriate.

2 It is not the intention of the Court that mediation will be ordered in all proceedings. In considering whether proceedings are appropriate for mediation the Court may, as set out in paragraph 3(b) below,

refer them to a registrar to discuss with the parties the advantages and appropriateness of mediation.

3 By its own motion or on the motion of a party or on referral by a registrar the Court may, after hearing the parties:

A. notwithstanding that the parties, or any of them, do not consent to mediation, make an order pursuant to s110K and appoint a mediator, being a person agreed upon by the parties or, failing that, a person nominated by the Court;

B. refer the proceedings to a registrar who is on the Chief Justice's list of mediators to meet with the parties to discuss mediation and report back to the Court with, if appropriate, a recommendation as to whether the proceedings are suitable for mediation; or

C. refuse to order mediation.

4 The parties themselves may, at any time, agree to mediation, nominate a mediator and request the Court to make appropriate orders.

5 Parties are required to inform the Court of the outcome of mediation ordered pursuant to s110K of the Supreme Court Act.

Referral to a registrar
6 Where the Court refers proceedings to a registrar the parties will be notified by the registrar of the time and place for an information session. It is anticipated that the information session will take no more than 15 to 30 minutes. Parties as well as their representatives must attend the session.

7 At the conclusion of the information session and if the parties agree to mediation the registrar will make the necessary orders. If the mediator is to be a registrar, directions may be given for the filing and serving of position statements and any documents, reports, valuations etc which will assist the parties and the mediator. A direction will generally require all parties to the mediation to exchange relevant material not less than seven days before the mediation.

8 Where the parties do not agree to mediation or to a mediator, the registrar will report to the Court the outcome of the information session with his or her recommendation.

Proceedings case-managed by registrars
9 A registrar may, at his or her discretion, refer proceedings which, in the opinion of the registrar, are suitable for mediation, to the Court notwithstanding that the parties, or any one of them, do not consent to mediation.

Memorandum

To: Common Law Division Judges

From: The Hon. Justice David Levine
Defamation List Judge

RE: The Defamation List

1. Relevant legislation and other provisions are:
(a) *Defamation Act 1974*
(b) SCR Pt 67
(c) Practice Note 114

2. The 1994 amendments to the *Defamation Act 1974* provide in s 7A for the trial by jury only of the issue of whether the publication carries an imputation, whether that imputation is defamatory and whether the matter was published by the defendant. Accordingly, the reformed practice is directed at the expeditious listing of what is known as the s 7A trial. In the strict sense the s 7A trial is the whole trial. The initial phase of the litigation however, and its management, is directed to so much of the trial of the defamation action as is to be heard by the jury. Hereinafter that will be referred to as the s 7A trial.

3. The operation of the Rules and the Practice Note should bring it about that on the first return day of the Notice of Motion (in the Defamation List) which is served with the Statement of Claim, issues between the parties as to "*form"* and "*capacity*" of the imputations will have been disclosed by the exchange of notices and outlines of submissions.

I do not propose to go into any substantive law components as to questions of "*form*" or *"capacity*" (see ***Amalgamated Television Services Pty Limited v Marsden*** (1998) 43 NSWLR 158).

4. An imputation (which is the cause of action (s 9)) must be "*proper in form*". The "*form*" of an imputation is usually attacked on the basis that it is "*embarrassing"* by reason of it being, for example, ambiguous, rhetorical or containing proscribed words such as "*wrongfully*" or *"corrupt*".

The point to be made is this: upon a finding that an imputation is "*bad in form*", the imputation is "*struck out"* as embarrassing. If "*form*" is the only issue, leave to replead is usually granted.

. The question of "*capacity*" is a question of law: thus SCR Pt 31 r 2 applies and an order for the separate determination of that question of law is made (usually by consent).

6. If it is found as a matter of law:

(a) that the imputation is capable of being carried by the matter complained of and is capable of being defamatory: it should be so held and the order is that that imputation "*will go to the jury*".
(b) if as a matter of law it is found that the matter complained of is incapable of carrying the imputation or, whilst capable of carrying the imputation, the imputation is incapable of being defamatory, the order to be made is that there be a verdict for the defendant on that imputation (that is, in respect of that cause of action) - see s 7A(2).
(c) whether leave to re-plead is granted (usual), is a matter for the judge.

7. In summary therefore:

(1) If the imputation is bad in form - it is struck out (with leave to re-plead).
(2) if the imputation is capable of being carried and it is capable of being defamatory, it goes to the jury.
(3) if the imputation is incapable of being carried or is incapable of being defamatory, (if capable of being carried), there is a verdict for the defendant on that cause of action (see s 7A(2)) (with leave to re-plead if appropriate).

8. It is desirable that there be uniformity in the making of the relevant orders in relation to both form and capacity.

9. Upon the issue of form and capacity being resolved, the litigation is then ready for trial by jury. Pursuant to the Practice Note directions are usually given that require:

(1) that the defendant file a Defence in respect of those issues to be determined by the jury.
(2) that pursuant to Pt 31 r 2 there be separately determined by a jury the issues joined by the pleadings and reserved to that tribunal under s 7A of the *Defamation Act 1974*.
(3) where there is any issue of fact to be resolved by the jury before it comes to the substantive issues to be resolved by it, then the parties are directed to "*exchange outlines*" of evidence together with a direction that subject to the trial judge, no evidence outside the "*outline*" can be lead.
(4) such issues are:
· publication;
· extrinsic facts if a true innuendo is pleaded;
· identification (***Cinevest Limited & Anor v Yirandi Productions Pty Limited*** [1999] NSWSC 1089 (Adams J, 5 November 1999);
· possibly translation: in this last mentioned case it is open, although I have decided otherwise (***Chinatown Enterprises Pty Limited v Maxims Entertainment Pty Limited*** (unreported, 30 November 1995) that the question of translation is part of the issue of "*publication*" and therefore is part

of the issues to be determined by the jury. In this instance it can be envisaged that experts reports might have to be exchanged and appropriate directions should be given.

10. In the absence of issues as to identification, extrinsic facts founding a true innuendo, publication and translation, prior to the matter being sent off for the s 7A trial the defendant should be called upon to admit publication - there is usually no issue in this regard in relation to media publications. If however there is to be an issue in relation to publication, or any other matter of fact to be determined by the jury *it may* be appropriate for orders to be made that the plaintiff is entitled to interrogate (limited to thirty) on those issues.

11. Upon the matter being ready in all respects for trial by jury the matter is then dealt with by way of listing by whatever mechanism is in place in the Common Law Division at the time. It may well be that on each Defamation List day the List Judge or a person in the Registry will provide a range of dates for the immediate allocation of a hearing date for a s 7A trial.

12. The conduct of the hearing of a s 7A trial is entirely a matter for the trial judge. Upon its conclusion in favour of the plaintiff, that is, a jury having found that an imputation is "*in fact*" carried and is "*in fact*" defamatory, the following should happen:

(a) the action is taken out of the Holding List or Hearing List;
(b) directions are then given **by the trial judge** setting a timetable for the filing of an Amended Defence, Reply, discovery and interrogatories and the fixing of a Readiness and Directions hearing in the Defamation List at the conclusion of that timetable.

13. The trial judge should **NOT**, upon a result from the jury favourable to the plaintiff, simply place the matter in the Defamation List.

14. As to the length of time to be allocated to the parties for the remaining steps in the action, that will be a matter for the trial judge. It may be considered useful however, to bear in mind, as far as defences are concerned, that the defences of privilege, comment, protected report and unlikelihood of harm (s 13) are to be determined by facts in existence at the time of publication. It is where a defendant particularly proposes to justify under s 15 or s 16 that some allowance should be made for the preparation of a Defence with proper particulars. That will be a matter for the trial judge.

15. In the event that there is a result to the effect that the plaintiff succeeds on no imputations then the defendant is entitled to a verdict and judgment. That is the end of the case.

16. Any attempt prior to the commencement of a s 7A trial fixed for hearing by a plaintiff to amend the imputations or by a defendant to attack the imputations should be resisted by the judge. The basis upon which the matter has been listed for the s 7A trial is that all such issues have been determined in the Defamation List.

17. Where the trial judge does give directions (see 12(b) above) as to the further progress of the matter, provision should be made for the exchange of notices of dispute and outlines of submissions in relation to any issue that arises during the course of the remaining steps. Such notices should be served prior to the next Readiness/Directions hearing (see Practice Note 114).

18. At a post-s 7A Readiness/Directions hearing any matters in dispute may be dealt with by the Defamation List Judge on that return day on any other Defamation List day. If the matters are of such substance that they cannot with facility be dealt with on a Defamation List day then inquiries should be made of the List Judge as to the practicability of a special fixture before any judge.

19. When after the resolution of all outstanding matters, the case is ready for the "*balance of the trial,*" directions should be given as to the exchange of outlines of evidence, return date for subpoenas and the like. Again, at the commencement of the hearing of the balance of the trial, the trial judge should not be too amenable to any application at that time to raise any matter that thitherto should have been raised prior to the matter being placed in the List for the final hearing.

20. In any Defamation List the parties might have agreed upon a "*timetable"* . This may be before a s 7A trial or after. That timetable should be scrutinised to ensure that it complies with the Rules and the Practice Note in the sense that, for example, no allowance is made for "*requests for particulars*". The purpose of recent reforms is to eliminate those as far as the Court is concerned. The pleadings are now required to contain all proper relevant particulars. Orders and directions in accordance with the timetable can be made by the Defamation List judge provided there is compliance with the Practice

Note and the Rules and above all else provided that there is fixed a date upon which the matter will be returned to the Defamation List for a Readiness Hearing or for argument or for mention.

21. In relation to any matter commenced before 1 September 2000 it will be necessary to give a direction that Practice Note 114 applies to that action. The file should be checked to see whether or not any such direction has been given.

22. The objective of the new Practice Note and amendments to the Rules is to ensure that defamation actions are "*managed*" to the extent that the parties are compelled to work "*out of Court*" with a view to crystallising the issues that can be determined upon one occasion instead of three, four or five before a matter is fixed for hearing either for the s 7A trial or for the balance of the trial.

23. The "*pressure*" should be sustained in the early stages of the action to ensure prompt relegation of it to the Holding List or allocations of a fixture for the hearing by jury of the s 7A issues. It is not uncommon that upon the resolution by the jury of those issues the matter is capable of being resolved otherwise than by litigation of remaining issues. (Note also Part 7B of the *Supreme Court Act* 1970 and Practice Note 118 relating to compulsory mediation).

24. There are remaining in the List some cases involving publication prior to 31 December 1994. These are "*all jury issues*" trials (except for public interest and qualified privilege). If such a trial is listed for hearing, then the appropriate course to be adopted is that the jury determine what would otherwise be s 7A issues before the balance of the case is heard. This conforms with the authority of ***Radio 2UE Sydney Pty Limited & Anor v Parker*** (1992) 29 NSWLR 448 at 473D per Clarke JA.

In relation to these actions, of course, directions in any event can be given to the exchange of outlines of evidence and the like.

25. As a practical matter the conduct of the Defamation List will be a matter for the judge taking it on a particular day. It is my practice however to call through the matters for "*argument*" for estimates, give markings and then proceed to call through the matters for directions. Prior to commencement of the Defamation List, the judge should organise for the Associate to obtain from the List office tables indicating how many matters are in forthcoming Defamation Lists both for argument and for directions so that the Lists on particular days can be maintained at a manageable level (not in excess of 30, including matters for argument, in my experience). It is also desirable for the Associate to contact the List Judge's Associate or an appropriate person in the List office to obtain a range of dates (if available) that may be allocated forthwith by the Defamation List Judge for the hearing of s 7A trials.

26. Matters may be remitted to the District Court pursuant to s 143 of the *District Courts Act*. If a plaintiff applies, the defendant cannot oppose but the decision ultimately rests with the Judge. It is my practice, when I consider it appropriate, to invite the defendant "*to assist*". If the defendant applies the matter can be contested. Each application, of course, is considered on its merits, however as a general rule what I describe as "*major media matters*" remain in this Court as do non-media matters which potentially give rise to important matters of principle.

It is to be borne in mind that defamation actions are tried without a jury in the District Court unless that Court otherwise orders.

27. Your attention is also drawn to Practice Note 85. That essentially provides that the Defamation List Judge is the person first approached in relation to an application for injunctive relief. If the Defamation List Judge is not available, the next step is the Duty Judge.

Print Page Close Window

The Future of Defamation Law

Courts & The Media

The Hon. Justice David Levine RFD
Supreme Court of New South Wales
(Defamation List Judge)

1. UTS Law School is to be congratulated on the fact of the publication the first issue of its Law Review. Particularly is it to be congratulated on its theme: Courts and the Media.

2. Having had an opportunity over the last week to read the journal, I have come to the conclusion that so thorough is its coverage of all aspects of the subject matters there is very little, if anything, that I can now add in a useful way.

3. As has been remarked within the body of the material in the journal the very fact that a forum on the theme took place is eloquent testimony to the changes in attitude and outlook on the part of the Courts and of the Media to their necessary interaction.

4. Before turning to the theme of the remarks I propose to make in exploitation of this occasion, there are two papers on which I wish to comment. First is that of Professor Flint. His chapter on judicial restraint contains nothing with which I disagree. I merely wish to say, additionally, it is, of course, quite open to a judicial officer to act in one way that should not attract the label either of “legislator” or “sociologist”, namely simply to make recommendations for law reform. This quite frequently occurs: the recommendation arises from the judge being in the best position to observe the operation of statute law in the actual vital circumstances of a litigated case. For example, the Jury Act was recently amended to require parties in a civil action to announce the names of witnesses prior to the empanelling of the jury. The amending legislation at the same time abolished challenges to jurors in civil cases. Under the 1994 amendments to the Defamation Act, 1974 the only issue for the jury to determine is whether or not a given publication in fact carries the pleaded imputations (and whether they are defamatory). There is arguably no room for the operation of the new section of the Jury Act. In a trial earlier this year, I delivered a ruling that the amendment to the Jury Act simply had no application and could have no rational application. Indeed, to apply it strictly could be quite counter-productive given that the issue for the jury involved the calling of no evidence from any person at all.

5. In the criminal law in particular the judge performs a function that might well attract, but wrongly, the description “sociologist”. In sentencing, (the most difficult task for common law trial judges), elements of personal and general deterrence are, as a matter of principle, components of the process. They cannot be applied in a sensible way, without, to put it simply, judges being aware of what is going on in the community. Judges are aware of what goes on in the community, not merely because they are members of the community. They are informed from without and within the judicial system. The criminal justice they administer is quintessentially for the benefit of the community. In these kinds of areas it would not be a lack of judicial restraint but rather an abdication of judicial responsibility for judicial officers to be silent. This is principled activism - it is but the performance of judicial duty - but founded upon and circumscribed by the evidenced facts of each case in a recognised context. I do not take anything that Professor Flint said in his paper to indicate that he would have any view to the contrary.

6. Professor Sally Walker’s paper on the Courts, Parliamentary Privilege and the Media is worthy of special acknowledgment. I am presently engaged in the writing of a judgment on this very subject. I have been inundated with written submissions and have folders of photocopies of reported cases. How welcome was Professor Walker’s paper when I read it: there it all is and it will be of much assistance to me in coming to the view that I will have to form on a very difficult question in this particular case. It might well be the first reference in a judgment which cites this journal.

7. It is however to Mr Richard Ackland's paper that I wish to devote a few moments. He concludes by saying "there is much about which the media should be legitimately concerned in view of the recent spate of restrictive, uncreative, unimaginative judicial determinations". Mr Ackland said this in the context of his topic The Law & Freedom of the Media and his discussion of the decisions of the High Court in Theophanous and Chakravati and of the Supreme Court of Queensland in the Pauline Hanson case.

8. If that sentence was repeated by substituting the words "trial judges" for "the media", it would have equal pertinence.

9. I think it fair to say that by reason of the development of the substantive law of Defamation in New South Wales since the 1974 Act, and appellate intervention both active and resigned and the excruciating and sterile technicalities attending its practice, it has virtually come about that there can no longer be seen to be a remedy in tort for the wrong, or a mechanism for the assertion of the right of free speech in any sensible, reasonable, practical way.

10. There might have been good reason in 1974 for enacting that the imputation will be the cause of action. But a quarter of a century ago I really do not think it could have been foreseen that the rights of litigants, on both sides of the record, would have been so adversely affected by the developments to which I have referred.

11. Fortnight after fortnight I have to deal with arguments concerning whether a pleaded imputation is proper in form and is capable of arising from the relevant publication. The vocabulary of the Defamation List now includes words used with increasing frequency: "Jesuitical, casuistry, weasel words" and the best of all, "epexegetical".

12. The tort of defamation is intended to provide a remedy for a person whose reputation has indefensibly been injured by the publication of something disparaging of that person's good name. It boils down to determining what the publication means. Or it should. The amount of the Court's time, let alone litigants' resources, expended profligately in the determination of what words, sentences and phrases mean is positively scandalous; and this is at the initiation of proceedings. Contextual imputations then raise their heads and the same arid arguments are advanced for and against their availability as to form and capacity. Matters of principle have been elevated to an obsessive preoccupation, the playthings of forensic ingenuity, fantasy and imagination, at the expense of the early, quick and cheap litigation of real issues that affect the people involved in libel actions.

13. From time to time I have tried judicially and judiciously to say that the nonsense must end. Not because of any pre-disposition on my part to the agonies a plaintiff must undergo in prosecuting an action; not because of a view I have formed of the resources available to a media defendant in the taking of technical points as part of some suspected campaign or strategy to keep a plaintiff out of Court. I have done so because it simply no longer makes any sense to me. It makes no sense to me in the wide and important context of the administration of justice which should involve the speedy and efficient and fair resolution of disputes.

14. To bring about statutory reform, history has shown to be a long slow process. The 1994 amendments to the Defamation Act 1974, which I regard as a hasty, reactive legislative spasm, removed the most important issues from the jury and took us back two hundred years to the enactment of Fox's Libel Act.

15. The one issue left to the jury is the one that is the most complex and artificial and from the position of the detached and reasonable observer, ridiculous. The question is not simply what does a publication mean and whether what it means is defamatory. The jury has to determine, in the no doubt novel environment for the jurors of the courtroom and the jury room, whether the words that constitute the imputation carefully crafted by lawyers, are in fact carried by the publication complained of to ordinary reasonable people.

16. To suggest the repeal of s 9 of the Defamation Act 1974 with consequential amendments is no doubt heretical. To suggest a focus not merely upon dealing with the complexity of cases, but more importantly upon the elimination of the complexities, would in many quarters also been seen as heretical. Unless however this is done the tort of Defamation will be dead, the remedy will be dead,

the rights will be dead, and the interests both of the community and of the media ill-served and thus, the administration of justice and the Rule of Law, at the very least, profoundly compromised.

17. Whether or not the area of privacy law will offer the mechanism for relief or the basis for asserting, in another way, freedom of speech could be the subject of discussion.

18. In this context I can announce that measures will be taken over the forthcoming months to change the mechanisms for and the practices of the conduct of Defamation actions in the Supreme Court - from being subject merely to Directions in the Defamation List to more intense Case Management. The newly introduced Professional Negligence List will serve as a model although, of course, account will have to be taken of differing strains in principle and practice in each area of litigation. Emphasis will be placed upon the early determination by the jury of whether or not pleaded imputations in fact are found and are found to be defamatory. The merits of this course are obvious: the plaintiff will know whether there is a case and the defendant will know precisely the causes of action it has to defend. In the event of the plaintiff being successful thereafter there will be a regime of directions and management involving strict compliance with rules of practice to enable and empower the Court to bring it about that the remaining issues will speedily and above all else, more cheaply, be disposed of.

19. It is often argued, of course, that Case Management is inimical to the adversary system. There comes a time, however, when the administration of justice and thus society as a whole can no longer afford to leave totally in the hands of lawyers and their clients the conduct of their cases. Often this is so because the litigants themselves as well as their lawyers appear to lose sight of the objective which they seek to achieve namely, the just and fair determination of their asserted claim. The wood is lost sight of by reason of the trees, the doughnut by reason of the hole.

20. When the model is at an advanced stage of preparation comments will be called for from members of the profession and all interested persons. But the reality is: change there will be. This change will not be at the expense of litigants' rights, it will not be an unprincipled exercise in forensic or, indeed, economic rationalism. Rather it will be directed towards the triumph of common sense and indeed good sense in the interest of fairness, justice and access to the law.

21. I am confident that even Mr Ackland would not gainsay at least the good intentions behind these proposed reforms.

22. I am particularly pleased to participate in this evening's event not only as the Defamation List Judge of the Supreme Court of New South Wales. I am President of the Arts Law Centre of Australia which enjoys a special relationship with this University and particularly with the Faculty of Business and the Postgraduate Diploma in Arts Management, in the provision by Arts Law of expert lecturers in the areas of copyright, contracts, business structure, agency and employment. I am not embarrassed on the occasion of the launch of a law journal dealing with the Media and the Courts to put in the well deserved praise for the Arts Law Centre and for this University and their combined efforts towards artistic and cultural achievement which in its own way also reflects the civilised democratic society of which the Rule of Law and freedom of speech are fundamental components.

23. The legal profession and the media will be well served by Volume 1 of the University of Technology Sydney's Law Journal. The community as a whole will be well served by the maintenance of the high standard of contributions as exemplified in this first issue which I am privileged now to launch.

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