# The correct approach to defamation damages

**Paul Reidy reports on the latest developments in the Carson case**

The High Court by a majority of 4 to 3 recently upheld a Court of Appeal decision to set aside two verdicts totalling $600,000 awarded to Sydney solicitor Mr Nicholas Carson in two defamation actions.

The initial proceedings dealt with articles written by a Mr Slee and published in 1987 and 1988 in the *Sydney Morning Herald*. The actions were heard together. The jury awarded Mr Carson $200,000 after it found that the first article, *"Dr Rajski: A War on many fronts"*, conveyed the following defamatory imputations:

> *"(a) [Mr Carson] wrongly attempted to intimidate Mr Metcalf by threatening to sue him for defamation in respect of a medical report written by him.*
>
> *(b) [Mr Carson] wrongly brought defamation proceedings against Mr Arthur Carney, a solicitor, for the sole purpose of causing Mr Carney to forthwith cease to act for his client, Mr Rajski."*

The jury awarded $400,000 after it found that the second article, *"The Criminal Phase of the Rajski Case"*, conveyed the following imputation:

> *"(a) [Mr Carson] was wrongfully party to a conspiracy with Mr Moshe Yerushalmy to obstruct the course of justice by evading service of criminal process."*

The Court of Appeal by a majority of 2 to 1 set aside both verdicts as excessive and ordered a new trial limited to the question of damages. In appealing to the High Court, Mr Carson claimed the Court of Appeal had erred by:

- Aggregating the two verdicts;
- Comparing defamation damages with personal injury damages; and
- Emphasising irrelevant factors.

Mason CJ, Deane, Dawson and Gaudron JJ made up the majority and delivered a joint judgment. Brennan, Toohey and McHugh JJ delivered separate dissenting judgments.

## Aggregation of the verdicts

The majority found that the Court of Appeal had not erred in examining the damages in aggregate, given the "clear and close relationship between [the two articles]". Both were written by Mr Slee and published in the same section of different issues of the *Sydney Morning Herald*. Both related to the same series of litigation, and their defamatory effect was cumulative. It was therefore "permissible and sensible ... to take account of the aggregate 'harm' suffered by the plaintiff by reason of both of them".

In dissent, Brennan J stated that the first article made Mr Carson "more susceptible to injury by the second" and therefore justified the larger award. Also in dissent, McHugh J found that the verdicts could not be aggregated because the articles were "not of the same purport or effect".

## Analogy with personal injury

Mason CJ, Deane, Dawson and Gaudron JJ approved of use of the analogy with personal injuries on appeal and at trial. Their Honours considered awards of general damages (for pain and suffering) in personal injury cases a "potentially relevant criterion" by which to test whether the jury's award was excessive. This did not mean making any "precise comparisons", nor blurring the distinction between bodily injury and defamation. The essence of the comparison is to "ensure a rational relationship between the scale of values applied in defamation and personal injury cases".

Brennan and Toohey JJ in the minority emphasised the differences between the different actions and damages awarded. Brennan J stated that it was impossible to compare them and that it was not within the judicial province to interfere with jury assessments based on particular evidence. His honour pointed out that personal injury awards were not more accurate than defamation awards. Toohey J felt that it was unreal to extract general damages from total personal injury damages. McHugh J said a jury verdict should only be set aside if "public opinion would be almost unanimous in its condemnation of the verdict".

The majority approach has most recently been used in an appeal in the *Ettinghausen* case, where counsel for ACP compared Ettinghausen's award of $350,000 with that of $275,000 awarded to a boy who lost the head of his penis in a "botched circumcision".

## Other Matters

Although the purpose of a damages award set out by the majority was not disputed, the court's approach varied on the meaning of "vindication". The majority saw the sum for vindication of reputation as "at least the minimum necessary to signal to the public the vindication of the [defamed person's] reputation". It did not consider the issue in any greater detail. However, the minority judges used the vindication element to distinguish defamation damages from personal injury damages.

The majority also found that the 8 month delay before the publisher printed an apology for the first article could not aggravate damages. It merely failed to mitigate them.

In the minority, Brennan J found the delay meant that the defendants were "continuing to assert or not fully withdraw the imputations found to have existed in the first article". McHugh J stated that the jury was "entitled to regard the belated apology of the defendant as inadequate and indeed insulting". The minority justices found the failure to print an immediate apology relevant to malice, and therefore, harm.

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