Tell Them They're Dreaming

Media Defendants and the Defence of Triviality

Katherine Giles looks at the defence of triviality, and whether much has changed in the 40 years since Morosi v Mirror Newspapers Ltd

It has been 40 years since the case of *Morosi v Mirror Newspapers Ltd*[1] ('*Morosi*') and the succinct thirty word defence of triviality, whilst interesting, is still of little comfort to media defendants:

> 'It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.'[2]

In *Morosi*, the media defendant, Mirror Newspapers, relied on the statutory defence of triviality when sued by Juni Morosi for publishing the claim that she had a 'romantic attachment' with the Treasurer, Dr Jim Cairns.[3] The court held that the statutory defence of triviality 'is concerned with "the circumstances of the publication" and the likelihood of harm.'[4] The circumstances of publication are the circumstances at the time of publication, and the likelihood of harm arising means the absence of a real chance or real possibility of harm, and not whether the harm did actually arise.[5]

It was held to be a defence to trivial actions for defamation, and was limited to publications made to a small group rather than 'a vast number of unknown people'. The court noted: 'It would be particularly applicable to publications of limited extent, as, for example, where a slightly defamatory statement is made in jocular circumstances to a few people in a private home.'[6] It would not be very helpful to a media defendant publishing to the public at large, even where a publication is made in jocular circumstances, and where it is unlikely that any harm to reputation would arise from the publication.

In addition to examining the circumstances at the time of publication and considering the likelihood of harm, the triviality must relate to the 'circumstances of the publication' and not the reputation of the person defamed—or any pre-existing 'bad' reputation.[7] The circumstances of publication include: the publication itself; the occasion and surrounding of circumstances of the defamatory statements; the extent of the publication; and the number and identity of the recipients and any knowledge that they had of the plaintiff such that the plaintiff would be unlikely to suffer any harm.[8]

Media defendants have continued to have little success relying on the defence of triviality. This was demonstrated in *Cornes v Ten Group Pty Ltd*[9], where the defence of triviality had limited application; even when comedy (as argued by the defendants) was involved. During a live interview in the Channel Ten television program *Before the Game*, the comedian Mick Molloy made what he argued was a joke about Nicole Cornes, and the bounds of her relationship with an AFL player. Cornes sued Molloy and Channel Ten for defamation, and was successful.

The defendants argued that it was joke, that did not contain a defamatory imputation, and an ordinary reasonable viewer would not have understood the joke as defamatory. They also relied on the defence of triviality. Peek J fleetingly dismissed the defence of triviality, stating that it was 'quite obvious that this defence cannot be made out in this case.'[10] Noting that the serious nature of the defamatory comment and the circumstances were both relevant, Peek J stated:

> 'I can understand that what might appear on its face to be a relatively serious defamatory comment might possibly qualify for this defence in quite different circumstances, say, of a very limited publication to a few persons in a room in circumstances where each of such persons believed that the statement was not true. Such statement would still be defamatory but might be rendered trivial by the fact that it could positively be established that it had very little deleterious effect. The present is not such as

1 [1977] 2 NSWLR 749 ('Morosi').

2 Section 33, *Defamation Act 2005* (NSW), (VIC), (QLD), (TAS), (WA), (VIC); section 139D, *Civil Law (Wrongs) Act 2002* (ACT); section 30, *Defamation Act 2005* (NT); and section 31, *Defamation Act 2005* (SA).

3 Section 13, *Defamation Act 1974* (NSW).

4 Morosi, 799.

5 Ibid. With reference to *Parker v Falkiner* (1889) 10 LR (NSW) 7, 10; 5 WN 57, 61. See also *Chappell v Mirror Newspapers Ltd* (1984) Aus Torts Reports 80-691, 68,947 ('Chappell'); *Jones v Sutton* (2004) 61 NSWLR 614, 624 ('Jones'); and *Barrow v Bolt* [2015] VSCA 107, [34] ('Barrow').

6 [1977] 2 NSWLR 749, 800.

7 Chappell, 68, 947.

8 Morosi, 800.

9 [2011] SASC 104.

10 Ibid, [113].

case for any number of obvious reasons.'[11]

The limited nature of the defence is also demonstrated by *Barrow v Bolt,*[12] where a journalist was able to rely on the defence of triviality; but only because the defamatory imputations were 'mild' defamatory imputations about a complainant to the Australian Press Council and were published to a small audience of two people (being the journalist's employer and an Australian Press Council officer) via an intra-office email. Further, the defendant proved that the plaintiff was unlikely to suffer any harm to his reputation. The relevant circumstances were referred to as follows:

> '… In particular, I refer to the following circumstances. The impugned email went only to two persons. I consider that the tenor of the email makes it clear that the author was expressing his personal opinion, rather than saying that the plaintiff has been declared to be a vexatious litigant. Although the email did not contain the factual foundation for the opinion, its recipients, Mr Armsden and Mr Herman were aware of at least some of it, and I consider that it is likely they would have seen the opinion for what (in my view) it was. It is also clear that the defendants were responding to one of many complaints made by Mr Barrow to the APC. There is no evidence of any "grapevine effect" or the likelihood of same at the time of publication. The only "leakage" of the impugned email was caused by the plaintiff himself who published it on his website.'[13]

Beyond the references to opinion, it is clear that the circumstances will ultimately depend on the facts, and the wider the publication the more unlikely the defence will be available. Where relevant the circumstances will also include the chance of republication — including the 'grapevine effect,' where the allegation is repeated from person to person and to a potentially larger group of people.[14] Although, any subsequent media focus on pleadings filed in court in public documents and the subsequent legal proceedings is not relevant.[15]

In recent years there has been speculation that the defence of triviality has scope for application to internet and other social media publications, where 'circumstances of publication' and 'harm' can be interpreted to reflect the, sometimes, limited nature of social media publications, and the different character of these publications.[16] In *Prefumo v Bradely,*[17] Corboy J noted that internet and social media publications lacked 'formality and consideration… often in a language that is blunt in its message and attenuated in its form. That will affect what is regarded as defamatory and the potential for harm.'[18] The opposite argument could be made for the circumstances of publication via the internet or social media, when the internet provides global and limitless publication, and social media posts can spread quickly. Again, even if the circumstances of a social media publication can be characterised accordingly (and as yet, this is not the case), this of little application to media defendants more generally. Indeed, writing extrajudicially, Judith Gibson notes that this is yet to be tested, and will hopefully be the subject of legislative reform including a test for serious harm.[19] Judge Gibson argues that, the defence of triviality, 'remains a defence of very limited ambit, particularly since the ambiguity as to what any harm at all means remains a bone of contention.'[20] Further, a test for serious harm may also provide reprieve for media defendants seeking to rely on the defence of triviality.

As demonstrated in *Bleyer v Google*[21] ('*Bleyer*'), serious harm is not yet a hurdle and as interesting as the defence of triviality is, it is only a defence. In *Bleyer*, a case before McCallum J in the Supreme Court of NSW, the plaintiff commenced defamation proceedings against the defendant Google on the basis of seven publications comprising two kinds of defamatory matter allegedly published by Google: firstly, in a snippet of a web page in a search result; and secondly, in a full web page hyperlinked and identified in a search. The plaintiff was only able to demonstrate that these publications had been accessed by three people. By notice of motion, Google sought an order to stay permanently or to dismiss summarily the defamation proceedings on the basis that the costs and resources involved in litigation would be an abuse of process and wholly disproportionate to the vindication of the plaintiff's reputation. Much of the argument focussed on the application of the decision of the English Court of Appeal in *Jameel (Yousef) v Dow Jones & Co Inc*[22] ('*Yousef*'), where it was held that an insignificant level of publication meant that there was not

11 Ibid.
12 [2013] VSC 599.
13 Ibid, [71].
14 Jones, [60].
15 Ibid, [54]. See also *Smith v Lucht* [2015] QDC 289, [52] ('Smith No.1').
16 Kim Gould, 'The statutory triviality defence and the challenge of discouraging trivial defamation claims on Facebook', 19(2) *Media Arts Law Review* 113.
17 [2011] WASC 251, [43].
18 Ibid.
19 Judith C Gibson, 'From McLibel to e-Libel: Recent issues and recurrent problems in defamation law', *State Legal Convention* (30 March 2015), 14-17.
20 Ibid, 17.
21 [2014] NSWSC 897 ('Bleyer').
22 [2005] EWCA Civ 75; [2005] QB 946.

a real and substantial tort. McCallum J examined Australian decisions relying on or considering *Jameel*, concluding that whilst useful none provided a basis for determining the issue of staying or dismissing a defamation action as an abuse of process and proportionality.[23] In particular, McCallum J considered the case of *Bristow v Adams,*[24] where Basten JA did not consider that leave should be given to rouse a novel point contingent on *Jameel* for the first time on appeal, and made reference to the defence of triviality.[25] On the availability of the defence of triviality, McCallum J stated:

> 'In *Bristow*, Basten JA said that account might need to taken of the separate defence provided by s 33 of the *Defamation Act 2005* (NSW), described as the defence of "triviality", and its relationship to the power to stay for abuse of process based on a disproportion between the likely costs of the trail and the possible outcome. Google Inc noted that the defence is unlikely to apply to internet or media organisations: see *Morosi*... I do not think the potential weakness of the defence deals with the point to which Basten JA was referring in *Bristow*. As I understand his Honour's remarks, they are directed to the issue whether a power to stay an action on grounds amounting in effect to a complaint of triviality can comfortably sit alongside the defence of that name.

I do not think the existence of the statutory defence undermined or is inconsistent with the existence of a power to stay proceedings on that basis. The source of the power to stay proceedings as an abuse of process is the institutional authority of the court. Defences protect defendants. The existence of a defence to the action is to little avail to the court in protecting the integrity of its own processes (assuming, as I think I should, that includes the fair and just allocation of finite resources).'[26]

McCallum J ultimately concluded that the court has the power to stay or dismiss an action on the basis of abuse of process, and the proceedings were stayed pursuant to the *Civil Procedure Act 2005* (NSW). However beyond the other considerations raised, with regards to triviality the words '[d]efences protect defendants', illustrate the limitations of the defence of triviality as applicable only after the plaintiff has established a defendant's liability for defamation.

Most recently, we saw the defence of triviality successfully engaged (however, only as a defence), in *Smith v Lucht*[27], otherwise known as *The Castle* case. In this case the District Court of Queensland dismissed the plaintiff's claim for defamation based on an imputation conveyed when the defendant referred to the plaintiff, who was also a solicitor, as a 'Dennis Denuto'. As Moynihan DCJ explained:

> 'Dennis Denuto is a central character in the popular Australian film *The Castle,* which relates to the fictional story of Dale Kerrigan and his family's fight against the compulsory acquisition of their home. Dennis Denuto is the Kerrigan's solicitor. He is portrayed as likeable and well-intentioned, but inexperienced in the matters of constitutional law... His appearance in the Federal Court portrayed him as unprepared, lacking in knowledge and judgment, incompetent and unprofessional. His submission concerning 'the vibe' is a well-known line from the film.'[28]

The relationship and family connections between the plaintiff and the defendant, and the imputations arising from the words 'Dennis Denuto' are, although both extraordinary and perhaps amusing, not relevant to any examination of the defence of triviality. With reference to the defence, Moynihan DCJ concluded:

> 'the defendant has proved, that at the time of the publication of the defamatory matter, the circumstances of publication were such that the plaintiff was unlikely to sustain any harm to his reputation as the statements were confined to two members of his family with whom the defendant was in dispute, and they were able to make their own assessment of the imputation.'[29]

The circumstances of the publication were such that the plaintiff was unlikely to sustain any harm, and any harm was confined to harm to reputation.[30] This again demonstrates the limited application of this defence for media defendants when the 'circumstances of publication' are so limited. Not surprisingly, not much has changed since *Morosi*, and the triviality defence continues to be a defence of very limited application, particularly for media defendants.

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23 *Grizonic v Suttor* [2008] NSWSC 914; *Bristow v Adams* [2012] NSWCA 166; *Manefield v Child Care NSW* [2010] NSWSC 1420; *Barach v University of New South Wales* [2011] NSWSC 431.

24 [2012] NSWCA 166 ('Bristow').

25 Bleyer, [40]-[41]; Bristow, [41].

26 Ibid, [58]-59].

27 Smith No.1. Appeal dismissed in *Smith v Lucht* [2016] QCA 267 ('Smith No 2').

28 Ibid, [17].

29 Ibid, [42].

30 Smith No.2.