

Honest Opinions - Are They Still Defensible?

Richard Potter, barrister at Ground Floor Wentworth Chambers, considers the defence of Honest Opinion.

It has not gone unnoticed amongst those who practise in the area of defamation, that the High Court has not determined a defamation case since 2012.¹ Prior to that there had been a fairly rich seam of cases every year or two and one wonders whether that had anything to do with the former practices of certain members of the High Court which would have included defamation work.²

What has this to do with the defence of honest opinion? Only that one of the last decisions of the High Court in this area of the law, concerned this defence, namely *Channel Seven Adelaide v Manock* (2007) 232 CLR 245. This case was prior to the commencement of the national uniform state and territory defamation laws in 2005 and so was determined under the common law.³

However, the case remains very relevant today as the common law defence has not been ousted by the statutory defence of honest opinion⁴ and various issues under the statutory defence remain to be decided through historical fair comment authorities. Examples are the determination of the distinction between statements of fact and expressions of opinion⁵ and whether the true facts upon which the

opinion is based must be stated in the publication or notorious.⁶

Before examining this and other recent cases, it is worth recapping the essentials of this defence. The 2005 Act cured a perceived problem with the defence in the 1974 Act, namely that the 1974 comment defence could be hamstrung by the plaintiff deliberately drafting an imputation which could not be taken as an expression of opinion (rather than statement of fact). Under that Act, the cause of action was the imputation itself,⁷ so the comment/opinion had to be the imputation itself as opposed to the words of the publication giving rise to the imputation.⁸

A colourful example of this phenomenon was *Meskenas v Capon* (1993) 1 MLR 5 (District Ct, 28 September 1993) where the artist Vlaslas Meskenas sued the director of the Art Gallery of NSW, for describing his portrait of Rene Rivkin as 'Yuk'. Capon raised the defence of comment, but in cross-examination admitted that he did not intend to convey the imputations pleaded by the plaintiff (which related to the plaintiff's competence as an artist). Justice was eventually served by a derisory award of damages to the plaintiff but the problem continued until 2005.

Under the 2005 Act, the cause of action is the publication of 'defamatory matter'⁹ and the opinion (following the principles of common law) is now to be found in the words of the publication giving rise to the imputation.¹⁰

Another issue yet to be tested under the 2005 Act is whether the common law notion of 'fair' comment is imported into the 2005 Act when deciding whether the opinion is based on 'proper material' (as very generally defined in section 31(5)). The usual basis of an opinion (constituting proper material) is a series of true facts which are contained or referred to in the publication or alternatively are notorious.¹¹

Under the common law defence there is an objective test (after determining (a) whether it is comment and not fact, and (b) the subject matter is one of public interest). There is a wealth of authority in Australia and overseas¹² to the effect that the objective part of the test for fair comment is not just whether a fair minded person could be capable of basing this opinion from the facts, but a fair minded person who may also be *biased or prejudiced*. In other words the opinion of a crank is equally defensible.¹³

1 The last one was *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534 on the issue of common law qualified privilege.

2 Examples which come to mind are *McHugh J*, *Gleeson CJ* and *Callinan J*, but it should be mentioned that current Justice Gageler, was junior counsel for the ABC in *Lange v ABC* (1997) 189 CLR 520.

3 South Australia was a common law state for defamation prior to 2005.

4 Sections 6 and 24 make this clear.

5 *Harbour Radio v Ahmed* (2015) 90 NSWLR 695 per the Court at [37].

6 *Ibid* at [41].

7 Section 9, *Defamation Act 1974*.

8 Confirmed by the Privy Council in *Lloyd v David Syme* (1985) 3 NSWLR 728 at 735-736.

9 Sections 8 and 31, *Defamation Act 2005*.

10 *Harbour Radio* at [44].

11 *Manock* at [5] and *Harbour Radio* at [41]-[42]. Proper material also includes material published under qualified privilege or fair report (section 31(5)).

12 *McGuire v Western Morning News*[1903] 2 QB 100 at 109, *Reynolds v Times Newspapers* [2001] 2 AC 127 at 193(HL), *Turner v MGM Pictures Ltd* [1950] 1 All ER 449 at 461, *Merrivale v Carson* (1887) 20 QBD 275 at 281, *O'Shaughnessy v Mirror Newspapers Ltd* (CA) (1970) 72 SR NSW 347 at 361, *Cheng v Tse Wai Chun* [2001] 57 HKCU 1, *Branson v Bower* [2002] 2 WLR 452 at 456, *John Fairfax Publications v O'Shane* [2005] NSWCA 164 at [16] and *Hawke v Tamworth Newspaper Co* [1983] 1 NSWLR 699 at 714.

13 Per Diplock J In *Silkin v Beaverbrook* [1958] 1 WLR 743 at 747.

The word 'reasonably' is not present in section 31(5) ('..an opinion is based on proper material if it is based on matter that: (a) is substantially true etc') yet is included in 31(6) which permits a defendant to still succeed even if not *all* the facts are true but the opinion is reasonably based on those facts which are true.

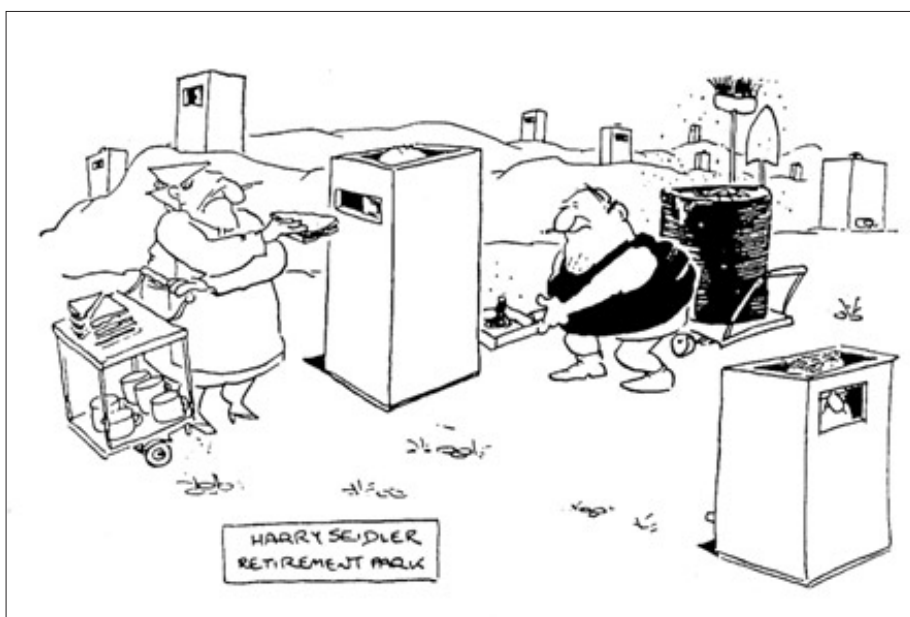
There is no decision yet which clarifies this (for example by importing the 'fair' comment notion from the common law authorities above) but it would be very difficult to determine whether an opinion is based on true facts (proper material) without an objective test being applied. In *O'Brien v ABC* [2016] NSWSC 1289, the common law defence succeeded so there was no need to consider the statutory defence in any detail. An appeal of that decision is underway and at the time of publication is being considered by McColl, Macfarlan and Leeming JJA of the NSW Court of Appeal.

Defeating honest opinion

The plaintiff still has an opportunity to establish subjectively that the opinion was not in fact honestly held by the commentator. It is tempting to consider that this equates to malice in the sense of improper motive but a commentator may have a spiteful motive but still honestly hold his or her opinion. In the words of Lord Nicholls of Birkenhead: 'Honesty of belief is the touchstone'¹⁴

Opinion of an employee/agent or commentator

The 2005 Act usefully extends what used to be the defence of comment of a stranger into the uniform law with a number of changes. Section 31(2) permits a defendant to rely on an opinion of an employee or agent. But the defeating section at 31(4) (b) only allows the plaintiff to defeat the defence if they can establish that the defendant (employer) did



not believe that the opinion was honestly held by the employee – a virtually impossible task which now necessitates the joinder of journalists personally (whose own honest belief is put into question rather than that of their employer).

Comment and satire

Comment or honest opinion has long been the shield of the satirist or the reviewer. Patrick Cook's celebrated cartoon of the Harry Seidler retirement village (pictured above) is one such example.

In *Kemsley v Foot* (1952) AC 345, Lord Porter considered that reviews of public performances or works of art need not describe in detail the facts upon which the review is based (the nature of a review is to inform those who have not seen it and do not know this detail). The rationale is that such works are 'submitted to public criticism.'¹⁵ The defendant in *Manock* sought to extend this argument to a television promo sued upon as there were no facts stated or referred to upon which to base an opinion. It was argued by the plaintiff that to extend existing principles beyond the requirement that the facts must be 'stated,

referred to or notorious' would be a radical change to the law. In the end, the High Court concluded that there was no need to consider Lord Porter's dictum in *Kemsley* as the law in Australia remains as stated in *Pervan v North Queensland Newspapers* (1993) 178 CLR 309.¹⁶ In other words, there must be facts expressly stated, referred to or which are publicly notorious. *Kemsley* still therefore appears to remain as a possible exception where artistic performances or exhibitions are submitted for public criticism.

Conclusion

The defence of honest opinion is still regarded as one of the central foundations of free speech in Australia. The over-used aphorism "I disapprove of what you say, but I will defend to the death your right to say it"¹⁷ has no better applicability to the opinion of a biased or prejudiced person. However, the technicalities built around this defence make it difficult in practice to utilise. The necessity for the facts on which it is based to be apparent to the reader/viewer/listener and the fine line between what is opinion and what is a statement of fact continue to make this a rarely successful defence.

¹⁴ *Tse Wai Chun v Cheng* [2000] HKCFA 86 at [75].

¹⁵ (1952) AC 345 at 355.

¹⁶ per Gummow, Hayne and Heydon JJ at [71]-[72].

¹⁷ Quote by Evelyn Hall from *The Friends of Voltaire*, published 1906.