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Disruptor Edition

Defamation Trials: Why Plaintiffs are Rush(ing) to File in the Federal Court

Richard Leder (Partner), Sanjay Schrapel (Senior Associate) & Conor O'Beirne (Law Graduate), Corrs Chambers Westgarth consider developments in defamation practice in Australia following the decision in *Crosby v Kelly*[1] (*Crosby*) where the Federal Court of Australia decided that it has jurisdiction to hear defamation matters. A number of early advantages for plaintiffs may exist.

Principally, a plaintiff in a defamation matter can—by closely considering whether to file in the Federal Court or a Superior Court of a State or Territory—effectively elect whether they wish to have a trial by judge or jury.

This advantage is likely an unexpected consequence that flows from the decision in *Crosby*, and is one, which is increasingly being taken up by plaintiffs who choose to file in the Federal Court. This advantage is, in most cases, unable to be recouped elsewhere by a defendant – the proposition of running a trial in front of a group of jurors, whose values, beliefs and attitudes are representative of the community at large, is a fundamentally different proposition to presenting a case before a judge.

It is an advantage which is, on its face, contrary to the legislative intent that underpins s.21 of the *Defamation Acts* as enacted in all States and Territories bar South Australia (**Uniform Acts**).

The more recent decision of the Full Federal Court in *Wing v Fairfax*[2] (***Wing***) cements this restriction on defendants invoking their right under the *Uniform Acts* to have the matter tried by a jury after the issuing of proceedings in the Federal Court, In this context, this article examines the legal landscape surrounding the use of juries in defamation trials, and looks at how a plaintiff can elect whether their claim will be heard by a jury simply by choosing whether to bring their claim in the Federal Court or a State/Territory Superior Court.

Ultimately, while there are other strategic imperatives that might otherwise inform the decision to issue proceedings in a particular jurisdiction, depriving defendants of the chance to have their matter decided by members of the public is arguably not in keeping with the ethos of the *Uniform Acts*, and presents a potential unfair advantage to plaintiffs.

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1 [2012] FCAFC 96.
2 [2017] FCAFC 191.

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Editors' Note

And just like that, we're here. The final edition of the *Communications Law Bulletin* for 2018.

It's been a game-changing year in our areas of law, and we have labelled this edition a special "**disruptor**" edition. In keeping with that theme, we have spoken with and received contributions from some of our best and brightest - and most disruptive - young lawyers. CAMLA President, **Martyn Taylor** interviews CAMLA Young Lawyers Chair **Katherine Sessions** about #younglawyerperspectivesaboutthelegalprofession. **Immy Yates** interviews young barrister **Maddie Hall** about her experience recently moving to the media bar. **Erika Ly**, President of The Legal Frontier NSW, comments on how disruptive technologies are likely to change the profession. And we catch-up with an old friend, former Young Lawyers Chair **Sophie Ciufo**, in-house at Viacom NYC, about young lawyers travelling abroad early in their careers.

We publish **Anna Belgiorno-Nettis's** article which won the CAMLA Young Lawyer essay competition, in which she asks whether the *Broadcasting Reform Act* gives up on democracy. Minters' **Karla Nader** discusses EU antitrust actions against **Google** and **Amazon**, and her colleague **Kosta Hountalas** comments on the EU Directive for Copyright in the Digital Single Market. Our friends at Corrs, **Richard Leder** and **Sanjay Schrapel** write about the right to privacy in light of **Sir Cliff Richard's** claim against the **BBC**, as well as litigating **defamation claims in the Federal Court**. We have a piece from former CLB-editor **Valeska Bloch** and her colleagues at Allens about the right to hack back. **Kate Simpson** considers international non-compete clauses within employment contracts, and Ashurst's **Julie Cheeseman** reports on the **Wagner** judgment.

Just since the last edition, so much has happened in this space. **Geoffrey Rush**'s defamation claim against **The Daily Telegraph**'s publisher, Nationwide News was heard in Sydney's Federal Court. **Rebel Wilson**'s application for special leave to appeal the 90% reduction in her award of damages was rejected, meaning that the Court of Appeal's decision that forced the actress to repay $4.1 million worth of damages is upheld. And **Chris Gayle** was awarded $300,000 in defamation damages. This all, as NSW Attorney-General Mark Speakman releases the terms of reference to guide the national **defamation reform** process.

The ACCC and then **Fairfax**'s shareholders approved the **Nine** merger, meaning the end of the publisher's 177-year-old history as an independent entity. It is expected that the new company, called Nine, will begin operations on 10 December 2018.

Meanwhile in the USA, the **White House** revoked press credentials for **CNN's Jim Acosta** after a tense exchange at a news conference, causing CNN to seek emergency restraining orders, effectively reinstating the correspondent's access. **Fox News**, **NBC**, **The New York Times**, **The Washington Post**, and the **Associated Press** filed an amicus brief in support of CNN. The Judge ruled in support of CNN, temporarily restoring access, with further hearings to continue.

SCOTUS discussed the issue of cy pres awards in an internet privacy case involving **Google**. Essentially, class action lawsuits that would involve negligible awards for each member of the class sometimes direct the not-negligible total award to third parties that act in the class's interests, for example a charity. In this case, the $8.5 million settlement was proposed to be directed in large part to organisations that promote internet privacy, rather than to millions of Google users whom the plaintiffs were to have represented in the class action.

Speaking of class actions, **Maurice Blackburn** is launching a case against **Uber** on behalf of more than a thousand taxi and hire car drivers, operators and licence holders, in the Victorian Supreme Court.

Britain referred **Facebook** to Ireland's **Data Protection Commission**, regarding Facebook's targeting functions and techniques that are used to monitor individuals' browsing habits, interactions and behaviour across the internet and different devices.

Data privacy in Australia has recently focused on the controversial online medical records system. Australians had until 15 November 2018 to opt out of the **My Health Record** system, but the opt-out period was extended until 31 January 2019, following several issues on the website. And then there's the **encryption laws**.

With all that happening in the background, it's perhaps no surprise that we've been busy here at CAMLA. We had our **AGM** on 27 November 2018 at Baker McKenzie, and we're open for entries for the 2019 **CAMLA Essay Competition** (details inside). Enjoy your summer, and we look forward to seeing you in 2019!

Victoria and Eli

Federal Court jurisdiction to hear defamation claims

Section 19 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) establishes when the Federal Court is vested with original jurisdiction to hear a matter. It is a superior court of record and a court of law and equity,[3] and by virtue of Section 39B of the *Judiciary Act 1903* (Cth), the Federal Court is seen as a court of general jurisdiction in civil matters.[4]

The decision in *Crosby* confirmed that the Federal Court has jurisdiction in 'pure' defamation matters. In a paper, delivered in 2006 , Justice Rares flagged that the Federal Court has jurisdiction to hear any pure defamation matter in circumstances where:

- the publication involves, and the defence raises, the implied constitutional freedom of communication on government and political matter; or
- there is an interstate (or international) publication, (there is an argument that s 11(5) of the Uniform Acts engages s 118 of the Constitution, such as

3 Section 5(2), *Federal Court of Australia Act 1976* (Cth).

4 Justice Steven Rares, 'Defamation and the Uniform Code' (Speech at the Media Law Conference, Marriott Hotel Sydney, 26 October 2006).

to enable each jurisdiction to 'apply the provisions of s. 11 of the Uniform Acts as substantive modifications of the laws of each jurisdiction and the common law of Australia'.)[5]

The Federal Court in *Crosby* determined the jurisdictional issue along similar, but ultimately different, lines. It was recognised that if the defendant filed a defence relying on an implied freedom of political communication,[6] then the matter would more clearly fall within the jurisdiction of the Federal Court.[7] However, despite being given leave to file a defence relying on the implied freedom of political communications, the defendant failed to do so. The question for the court then became whether, by virtue of the cross-vesting legislation acts and their interplay with the Constitution, the Federal Court had jurisdiction.

By relying on s 9(3) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth), the Federal Court concluded that it had the jurisdiction to hear and determine those matters which were within the jurisdiction of the ACT Supreme Court.

Since *Crosby* and the subsequent decision in *Hockey v Fairfax Media Publications Pty Limited*[8] (which was the first time the Federal Court awarded damages in a pure defamation matter), the Federal Court has held that the publication in a territory (amongst other places) endows the Federal Court with jurisdiction to hear the matter[9] and apply the law of the jurisdiction with the closest connection to the harm occasioned.[10]

The consequence is that plaintiffs are now confidently, readily and increasingly filing defamation actions in the Federal Court.

The Uniform Acts

In 2004, under threat of a draft Commonwealth Defamation Act proposed by then Attorney-General Phillip Ruddock, the States and Territories agreed on a draft Defamation Bill to be enacted in each State and Territory, which became the *Uniform Acts*.

Section 21 of the *Uniform Acts* provides that the default position in defamation actions is that, unless ordered otherwise by the judge, either party can elect for there to be a trial by jury. The strict parameters within which a judge may otherwise order a trial to proceed by judge alone are indicative of the uniform parliamentary intent between all States and Territories[11] to preserve the rights of either party to have their case tried by a jury.

In conjunction with addressing the 'miscellany' of previous state-based legislation, this supposed legislative intent is displayed by the relevant explanatory memoranda which describe the section as continuing to preserve the use of juries in defamation proceedings.[12]

While the default position of s 21 is for (upon either party's request) a jury trial, judicial discretion has been ascribed to ensure that those disputes which are inappropriate for a jury are heard by a judge alone. Specifically, these are trials that are expected to:

- require a 'prolonged examination of records'[13]; or
- involve 'any technical, scientific or other issue' not convenient for consideration by a jury,[14]

and are therefore an exception to the default position.

The Supreme Court of Queensland recently applied s 22 in *Wagners v Harbour Radio Pty Ltd*.[15] In that case Applegarth J held that, because of the volume and complexity of material to be considered, as well as the need to consider complex expert evidence about the causes of the failure of the Wagner embankment during the 2011 Grantham floods, 'a jury trial in this matter will take longer and be more expensive than a trial without a jury'.[16]

Section 22 of the *Uniform Acts* further bolsters this goal. By clearly delineating between the respective roles and responsibilities of juries and judges in defamation proceedings, the *Uniform Acts* evince an intention for the questions of whether:

- a publication is defamatory;
- any aggravating circumstances are made out; and
- any defences apply,

to be determined by juries, as a representation of the broader community.

This accords with the overarching goals of the *Uniform Acts*, which are to ensure that, so far as possible, decisions about conclusions that an 'ordinary reasonable reader' may make are made by those members of the community who form the pool of 'ordinary reasonable readers'.

5 *Ibid*, 2-3.
6 *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199
7 *Crosby*, above n 1, [11].
8 [2015] FCA 652.
9 *Wing, above n 2,* [13].
10 Uniform Act, s 11.
11 Save for South Australia, where civil jury trials have been abolished: *Juries Act 1927* (SA) s 5.
12 Explanatory Memorandum, Defamation Bill, 10.
13 *Defamation Act 2005* (Vic) s 21(3)(a).
14 *Defamation Act 2005* (Vic) s 21(3)(b).
15 Partner Mark Wilks and Special Counsel Jim Micallef acted for the Wagner family in this matter.
16 [2017] QSC 222 at [75].

Juries in the Federal Court

There is a tension between s 21 of the *Uniform Acts* and s 39 of the *Federal Court Act*.

While the default position of the *Uniform Acts* is for defamation actions to be tried by jury, s 39 of the *Federal Court Act* provides for the opposite: unless ordered otherwise, civil trials in the Federal Court shall be by a judge without a jury.

Further, section 40 of the *Federal Court Act* provides the threshold for when a jury trial may be ordered: where 'the ends of justice appear to render it expedient to do so'.

The Federal Court first dealt with this legislative tension in *Ra v Nationwide News Pty Ltd* (***Ra***),[17] when Rares J granted an application by the publisher defendant for a jury trial in defamation proceedings that were issued by a Sydney brothel owner. In describing the parliamentary intent behind Section 39 of the *Federal Court Act* as being policy which 'informs but does not overwhelm the exercise of the discretion',[18] his Honour's decision appears to have been predicated on the notion that as the matter raised questions about the social and moral values of the community, it was appropriate to order a jury.[19]

However, despite Rares J's assessment of s 21 of the *Uniform Acts* and its interaction with s 39 of the *Federal Court Act* in *Ra*, this proposition was rejected by the Full Federal Court (on which Rares J sat) in *Wing*. In *Wing*, the Court held that s 109 of the Constitution regulates the inconsistency between the *Uniform Acts* and the *Federal Court Act*.[20] In that case, it was put to the Court that despite the inconsistency, the Court should still have regard to ss 21 and 22 of the *Uniform Acts* in determining any application for a jury.

Allsop CJ and Besanko J rejected this submission on the basis that the discretion would be exercised inconsistently.

While agreeing with Allsop CJ and Besanko J, Justice Rares' judgement in *Wing* is more critical of the apparent intent behind sections 39 and 40 of the *Federal Court Act*. He notes that as his decision in *Ra* is the first and only time a jury trial has been ordered in the Federal Court's 40 year history, the 'application of the discretion, and litigants' perception of its application, has not been what the Parliament intended'.[21]

Bearing this in mind, framing the question around the 'expedience' of having a jury hear a matter is somewhat self-defeating for a defamation matter. The decision of Allsop CJ and Besanko J in *Wing* notes that judges do not infrequently assess conduct by reference to the standards of the community, or more specifically, a section of the community such as the commercial community.[22]

This very idea that judges are equipped to deal with such questions goes to the heart of answering the expedience question – for if judges see themselves as already considering such issues, it is unlikely that they will find that a trial by a jury would be 'expedient'. Accordingly, while Rares J accepted that the main issue to be considered in *Wing* was the defence of qualified privilege, a matter the *Uniform Acts* reserve for judges,[23] he noted that 'where fundamental community values, namely the right to reputation and the freedom of speech or opinion, clash, it often will be the case that the ends of justice render expedient that a trial of a defamation action be by jury'.[24] The sheer lack of jury trials in the Federal Court suggests that this focus on expedience weighs heavily on Federal Court judges considering whether or not to depart from the ordinary mode of trial prescribed by section 39 of the *Federal Court Act*.

Oral vs. affidavit evidence

As the bulk of evidence in the Federal Court is given via affidavit,[25] initiating defamation proceedings in the Federal Court allows a plaintiff to more closely control not just the narrative of their dispute, but the issues that may arise during trial.

While there are a number of procedural and practical benefits to affidavit evidence, its main pitfall is that enables defamation plaintiffs to better tailor the evidence-in-chief of the witnesses to be called on behalf of their clients. In comparison, as noted by Callinan J in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*,[26] oral evidence 'retains a spontaneity and genuineness often lacking in pre-prepared written material'.

The distinction between a trial proceeding by way of affidavit or by *viva voce* evidence is significant in a defamation trial, where often so much rests on the court's impression of the witnesses and their demeanour. Often, a court will be called upon to make findings as

17 (2009) 182 FCR 148.

18 *Ibid*, [23]. This decision was also informed by the plurality's decision in *Reader's Digest Services Pty Limited v Lamb* (1982) 50 CLR at 505-506.

19 *Ibid*, [19].

20 Wing, above n 2, [21], [28].

21 *Ibid*, [59].

22 *Ibid*, [44]. Their Honours cited *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 321 ALR 584 and *Commonwealth Bank of Australia v Kojic* (2016) 341 ALR 572 as examples of cases in which they have considered conduct by reference to the standards of the commercial community.

23 Although there remains complex, and unresolved, questions as to which parts of the qualified privilege defence are to be determined by the trial judge, and the jury: see *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [31] to [35] (Dixon J).

24 Wing, above n 2, [56]. Here, Rares J refers back to the decision of Brennan J in *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505-506, being a decision he relied heavily on in Ra.

25 Justice Alan Robertson, 'Affidavit Evidence' (Speech delivered at the College of Law Judges' Series, 26 February 2014).

26 (2006) 229 CLR 577 at [175].

to the credibility of witnesses who will present diametrically opposed positions as to a particular state of affairs – as is currently playing out in Geoffrey Rush's defamation claim, a claim brought in the Federal Court.

Other procedural benefits of litigating in the Federal Court

There are other benefits for plaintiffs associated with the Federal Court finding it has jurisdiction in defamation matters. For one, the Federal Court's docket system, whereby a number of cases are assigned to a single judge who then oversees, and makes directions with respect to, all interlocutory matters before hearing that case.

When accompanied with the time and cost-based benefits of affidavit evidence, it is apparent that in the Federal Court, trials are often shorter, and judgments are obtained more quickly.

Looking forward

While there are a number of practical benefits associated with filing in the Federal Court, the reluctance of that Court to try matters before a jury creates a potentially unfair advantage to plaintiffs in defamation matters.

The very essence of a defamation dispute – being the reputation of the plaintiff in the eyes and estimation of others – is likely to give rise to questions about moral and social values of the community. Through ss 21 and 22 of the *Uniform Acts,* State and Territory parliaments have evinced an intention for such matters to be determined by a jury, and despite the Federal Court's position that it has jurisdiction to hear 'pure' defamation matters, it is clear that the *Uniform Acts* have been drafted with the State and Territory Courts in mind as the ordinary forum for such disputes.

While ss 39 and 40 of the *Federal Court Act* provide an opportunity for defendants to put forward their case that a jury is the most appropriate trier of fact in their case, the fact that no jury has ever been conducted in the Federal Court speaks to the irreconcilability of the intent behind the *Uniform Acts* and the *Federal Court Act*.

The separate benefit to plaintiffs conferred by the Federal Court, being that evidence is generally led in that Court by way of affidavit rather than oral evidence, presents further tactical advantages for a plaintiff, and potentially shields plaintiffs and their witnesses from the bruising effects of going 'off script' in evidence-in-chief. The inverse to this position is that the right to cross-examination remains, and defendants may have better opportunities to find inconsistencies and tensions in a plaintiff's evidence when it is presented to them, months before trial, in a written form.

The tension created between section 21 of the *Uniform Acts* and s 39 of the *Federal Court Act* is likely to persist, and will continue to benefit defamation plaintiffs seeking to avoid a jury trial. On top of the myriad issues that arise in defamation litigation as a consequence of the digital era, this may need to be added to the growing list of reforms to be considered for the next review of defamation law and practice in Australia.

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For seven years, **VICTORIA WARK** has provided great dedication and insight as an editor of the *Communications Law Bulletin*. She has worked tirelessly to source and edit a wide range of articles and provide insight and advice to many contributors as well as thoughtful editorial changes. CAMLA thanks Victoria for her years of service to CAMLA, including three on CAMLA's Board, and wishes her all the best for the future.

ASHLEIGH FEHRENBACH joins Eli Fisher as co-editor of the *Communications Law Bulletin*. Ashleigh is a Senior Associate at MinterEllison. Ashleigh's focus is primarily on technology, intellectual property and privacy law. She has been a member of the CAMLA Young Lawyers Committee for two years and is a regular contributor to the *Communications Law Bulletin*. Ashleigh has a passion for media law and journalism and is also the Co-Vice Chair of the NSW Young Lawyers Communications, Entertainment and Technology Committee.