

# Guess Who's Back: The Reform of the Statutory Defence of Contextual Truth

By Jeremy Harrison

Since the *Defamation Act 2005* (the 2005 Act) replaced the *Defamation Act 1974* (the 1974 Act), courts have laboured over the proper construction of the statutory defence of contextual truth, found in s 26 of the 2005 Act. Parliament has reacted to those decisions by enacting the *Defamation Amendment Act 2020* (the Amendment Act), which has not yet come into effect.

## What is the statutory defence of contextual truth?

To establish defamation, a plaintiff must prove that the defendant published defamatory matter concerning the plaintiff to another person.

However, there are a number of defences which the defendant may then attempt to establish in order to escape liability. For example, proving that the defamatory imputations conveyed by the matter of which the plaintiff complains are 'substantially true' under s 25 of the 2005 Act.

In an action for defamation, *the plaintiff* decides which imputations to complain (or not to complain) about. Therefore, hypothetically, if:

- the matter imputed that the plaintiff occasionally disobeys public car parking regulations in some minor fashion (the less defamatory imputation); and, also, is a serial child rapist (the more defamatory imputation); and,
- the plaintiff anticipates that the defendant is likely to be able to prove the truth of the more defamatory imputation but is unlikely to be able to prove the truth of the less defamatory imputation,
- the plaintiff might well only complain of the less defamatory imputation.

This scenario was perceived to potentially cause unjust results because the defendant could become liable despite the fact that the plaintiff's reputation would not be further harmed by the less defamatory imputation in view of the (truthful) more defamatory imputation.



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The statutory defence of contextual truth entitles the defendant to plead that *other* truthful imputations were also conveyed by the matter. The defendant would escape liability via the statutory defence of contextual truth if the less defamatory imputation caused no further harm to the plaintiff's reputation given the truth of the more defamatory imputation.

## The first mischief arising from s 26 of the 2005 Act

The first mischief arising from s 26 of the 2005 Act which has resulted in the reform addressed below is that decisions such as *Fairfax Media Publications Pty Ltd and Others v Kermode* (2011) 81 NSWLR 157; [2011] NSWCA 174 have interpreted s 26 to mean that it prohibits a defendant, in the defendant's filed defence, from pleading any imputation that has been pleaded by the plaintiff in the statement of claim (a practice referred to as 'pleading back').

This construction of s 26 of the 2005 Act caused some surprise among defamation practitioners because previously a defendant was permitted to (and regularly did) 'plead back' pursuant to the statutory defence of contextual truth contained in the prior legislation, s 16 of the 1974 Act.

## The second mischief arising from s 26 of the 2005 Act

The second mischief arising from s 26 of the 2005 Act is that decisions such as *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77 (*Kazal*) decided that, in the balancing exercise prescribed by s 26(b) – between 'imputations of which the plaintiff complains' and, on the defendant's side of the scale, 'other imputations... that are substantially true' – imputations pleaded by the plaintiff weigh in favour of the plaintiff even if the defendant proves those imputations to be substantially true. Similarly, in *Mizikovsky v Queensland Television Ltd* [2014] 1 Qd R 197; [2013] QCA 68 the Queensland Court of Appeal held that a plaintiff could utilise defamatory imputations which had been found to be substantially true in order to defeat a defence of contextual truth.

However, there has been some resistance to the above-mentioned second mischief. In *Born Brands Pty Ltd v Nine Network Australia Pty Ltd* (2014) 88 NSWLR 421; [2014] NSWCA 369, Basten JA (with whom Meagher JA and Tobias AJA agreed) expressed an alternative view at [86]:

*'... that the tribunal of fact must consider holistically the effect of the defamatory matter on the reputation of the plaintiff, deciding at the end of the day whether, by reference to the imputations pleaded by both plaintiff and defendant, any imputations which have not been shown to be substantially true cause any further harm to the reputation of the plaintiff once the effect of the substantially accurate imputations has been assessed.'*

This view found the support of Emmett JA and Sackville AJA in *Federal Capital Preston Australia Pty Ltd, The v Balzola* [2015] NSWCA 285.

Similarly, in *Chel v Fairfax Media Publications (No 6)* [2017] NSWSC 230 (*Chel*), Beech-Jones J observed at [43]:

*I cannot conceive of any rational reason for allowing a plaintiff to rely on the set of damning imputations they pleaded that were also found to be true to defeat a defence of contextual truth.*

However, in *Kazal*, Gleeson JA concluded that *Chel* was ‘wrongly decided’ in that Beech-Jones J had concluded that *Mizikovsky* (a decision which supported the second mischief noted above) was ‘plainly wrong’.

In *TCN Channel Nine Pty Ltd and Others v Pahuja* [2019] NSWCA 166 (*Pahuja*) this controversy continued with Basten JA maintaining at [69] that:

*An alternative approach has regard to the sequential determination of the issues in a defamation trial. The imputations pleaded may be found by the judge or jury not to be conveyed, or, if conveyed, not to be defamatory. If an imputation fails at either of these points, one never reaches s 25; in other words, the jury (or judge) will never be asked to consider whether it is substantially true. It seems uncontroversial that such an imputation will fall away for all further purposes in the trial; however, it must follow that the reference in ss 25 and 26 to ‘the defamatory imputations of which the plaintiff complains’ is **not to a fixed and immutable group of imputations**’ (emphasis added).*

### The reform of the statutory defence of contextual truth was overdue

It may well be that the drafters of s 26 of the 2005 Act never intended to prohibit defendants from pleading back nor prohibit a court from utilising imputations pleaded by the plaintiff and proved to be true to weigh in favour of the defendant for the purposes of the balancing exercise contemplated in s 26(b).

It is perhaps difficult to see how the objective of protecting the true reputation of an individual while balancing the concept of freedom of speech is advanced by denying a defendant the opportunity to utilise the facts, matters and circumstances relevant to an imputation proved to be substantially true.

### The reformulated statutory defence of contextual truth

On 28 July 2020, a notice of motion was filed in the New South Wales Legislative Assembly to introduce the *Defamation Amendment Bill 2020* (the Bill), which became the Amendment Act. On 29 July 2020, a second reading speech regarding the Bill was delivered to the Legislative Assembly and, on 6 August 2020, a second reading speech was delivered to the Legislative Council.

On 11 August 2020, the Amendment Act was assented to. Clause 26 of Sch 1 to the Amendment Act contains the reformulated

statutory defence of contextual truth.

Relevantly, however, to date, the Amendment Act has not yet commenced. The Amendment Act will commence on a day or days to be appointed by proclamation: Amendment Act, s 2.

The statutory defence of contextual truth provides, quite plainly, that ‘[t]he contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.’ This appears to enable defendants to once again plead back.

Further, the reformed defence does not include some of the words which were used in s 26 of the 2005 Act and caused the mischief described above. Most notably, the words ‘in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations’ do not appear in the reformulated statutory defence of contextual truth.

It would also appear to follow that an imputation pleaded by a plaintiff which is later proved to be true by a defendant at trial will weigh in favour of the defendant in the balancing exercise which continues to operate in the reformulated statutory defence of contextual truth.

The future should see a clear improvement in the utility of the statutory defence of contextual truth compared with the hamstrung effect of the defence under s 26 of the 2005 Act. BN



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