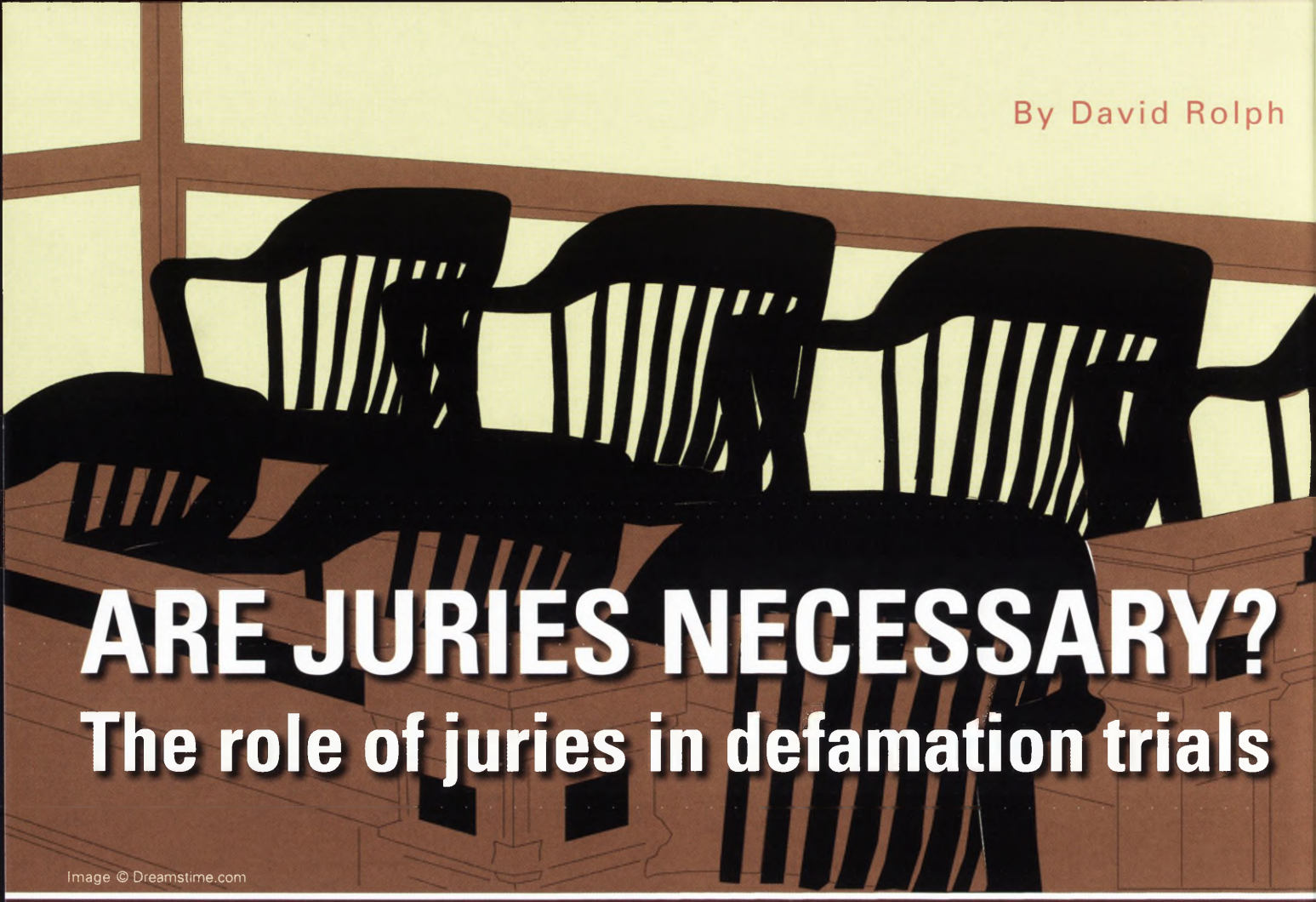
By David Rolph



ARE JURIES NECESSARY?

The role of juries in defamation trials

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In a recent, thought-provoking paper, speculating on the state of the Australian justice system in 2020, McClellan CJ at Common Law questioned the ongoing role of juries in defamation cases.[1]

His Honour noted the abolition of jury trials in most forms of civil litigation, the notable exception being the 'problem area' of defamation.[2] Given the recent experience in NSW of 'perverse' or unreasonable jury verdicts under the former s7A trial procedure and the introduction of the national, uniform defamation laws, under which some cases now coming before the courts are being decided, it is timely to reconsider the role of juries in defamation trials.

Juries are not perfect, but neither are judges. Juries may lead to inefficiencies, but civil litigation without juries is also susceptible to inefficiencies. Further, the benefits of juries in defamation litigation substantially outweigh any necessary inefficiencies associated with their continued use. Juries should not be viewed as the major problem. The fundamental difficulty for defamation law in this context is its unnecessarily complex and arcane principles and procedures, which juries have to apply and within which they have to operate. This article argues that the real value to be derived from the ongoing participation of juries in defamation trials can best be realised by reforming the principles and procedures of defamation law.

WHAT IS THE ROLE OF THE JURY IN A DEFAMATION CASE?

In order to address whether juries should have a continuing role in defamation trials, it is worth briefly reviewing the historical evolution of their function. Juries have had a long-standing involvement in defamation trials. For centuries, in both the UK and most parts of Australia, juries were the tribunal of fact in defamation cases. This meant that they determined whether the matter complained of bore a defamatory meaning, answered any questions of fact relating to available defences, and assessed any damages payable to the plaintiff.[3]

In the late 1980s and early 1990s, juries awarded large amounts of damages to plaintiffs in a number of high-profile defamation cases. For example, the rugby league footballer, Andrew Ettingshausen, was awarded $350,000 damages for the publication of a naked photograph in *HQ* magazine, and solicitor, Nicholas Carson, was awarded $600,000 damages

in respect of two articles published in *The Sydney Morning Herald*. In the UK, the widow of the Yorkshire Ripper was awarded £600,000 damages when her acceptance of £250,000 for an interview with *The Mail on Sunday* newspaper was criticised in the satirical magazine *Private Eye*; and pop singer, Elton John, was awarded £350,000 damages (including a component of £275,000 exemplary damages) for an article in the *Sunday Mirror* newspaper which alleged that he was on a bizarre diet and was bulimic. By no means the only large jury verdicts in defamation cases, they illustrate a perceived trend at the time. Some of these damages were overturned on appeal, on the basis that they were manifestly excessive.[4]

In NSW, cases involving high or manifestly excessive awards of damages by juries triggered reforms that took the task of assessing damages in defamation cases away from juries and handed it to judges.[5] At the same time, all issues relating to defences were also given to judges. This left juries with the sole task of determining the defamatory meaning of the matter complained of – the threshold issue of liability. This change to the allocation of responsibilities between judge and jury in a defamation trial was introduced by the *Defamation (Amendment) Act 1994* (NSW) s7A and came into effect on 1 January 1995. The s7A trial procedure empanelled a jury solely to determine defamatory meaning. If liability was established, a later trial on the issues of defences and damages would be conducted before a judge sitting alone. This system, which prevailed in NSW for over a decade, has brought the role of juries and jury verdicts into question.

The role of juries in defamation litigation has more recently changed.[6] The introduction of the national, uniform defamation laws, which came into effect across Australia in early 2006, means juries now determine issues of liability and questions of fact relating to defences,[7] while judges determine any damages to be awarded.[8] However, juries are not required to be involved at all, as they were in NSW under the s7A trial procedure. Under the national, uniform defamation laws, either party may elect to have a jury,[9] creating a paradox in NSW. On the one hand, the role of the jury is now expanded to include determination of defences but, on the other hand, it is diminished as it is no longer mandated. Although some defamation trials under the national, uniform defamation laws have been conducted in NSW, notably Mercedes Corby's proceedings against Channel Seven[10] and *Davis v Nationwide News Pty Ltd*,[11] several cases have been conducted without a jury.[12] Perhaps the experience of 'perverse' or unreasonable jury verdicts under the s7A trial procedure, discussed below, might encourage a reluctance on the part of legal practitioners to seek to have a jury in defamation proceedings.

From the perspective of other jurisdictions, such as Victoria, where juries could previously determine all questions of fact in a defamation proceeding, including the assessment of damages, the national, uniform defamation laws represents a reduction in the role of juries. However, South Australia, the ACT and the Northern Territory do not make provision for juries in defamation cases. In South

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Australia and the ACT, juries in civil proceedings have long been abolished.[13] In the Northern Territory, the government used the introduction of the national, uniform defamation laws as an opportunity to abolish juries in defamation trials.[14] This suggests that some smaller jurisdictions consider juries in defamation cases to be inessential. This diversity of approach to the use of juries is an aspect where the national, 'uniform' defamation laws are not so uniform, and should be addressed in any further reform process.

THE COMPLEXITY OF DEFAMATION LAW

McClellan CJ at CL suggests that returning to juries the task of determining questions of fact relating to defamation defences is a 'mistake'.[15] His Honour identifies particularly >>

the complexity of the defences in their current form as a reason why juries might readily fall into error.[16] With respect, rather than being a reason for not having juries, this recognition should lead to reform of the substance of defamation law. Defamation law is notoriously and needlessly complex. Writing extra-curially, Ipp JA has characterised defamation as 'the Galapagos Islands Division of the law of torts'[17] – a view endorsed by Kirby J in *Channel Seven Adelaide Pty Ltd v Manock*.[18] Yet, in order to be legitimate, defamation law should be comprehensible to jurors, not just to legal practitioners specialising in the area. In his companion piece to McClellan CJ at CL's paper, the Chief Justice of Western Australia noted that the community perception of the Australian legal system is one that is 'out of touch, expensive, slow, technical, complex, and in many respects incomprehensible'.[19] Reduced to their essence, however, the principal defences to defamation should be readily understood by jurors.

- The defence of justification accepts that no harm is done to the plaintiff's reputation by telling the truth about him or her.
- The defence of fair comment provides that a plaintiff must endure expression of opinions about himself or herself in the interests of freedom of speech, so long as those opinions relate to matters of public interest and are not made for an improper motive.
- The defences of privilege accept that, in certain circumstances, the protection of the plaintiff's reputation must be subordinate to other public interests.

Defences to defamation are particularly important because it is at this stage of the defamation trial that the interest of the plaintiff in protecting his or her reputation is balanced against the defendant's interest, and the broader societal interest, in protecting freedom of expression. Rather than removing the task of determining questions of fact relating to defences from jurors, it would perhaps be more appropriate to reform the defamation defences themselves.

UNREASONABLE JURIES OR FLAWED PROCEDURES?

McClellan CJ at CL also suggests that 'the greatest benefit for litigants' from abolishing juries in civil proceedings is the facilitation of appeals. Unlike a judge, a jury does not provide reasons for its verdict. A judgment can be more readily appealed against than a jury verdict. A jury's verdict has (or should have) the benefit of finality, but nonetheless remains 'substantially impenetrable'.[20]

The impenetrability of jury verdicts has recently been a problem for the NSW Court of Appeal, with a recent spate of appeals against 'perverse' or unreasonable jury verdicts. This phenomenon should not be used as a reason to get rid of juries. The problem of unreasonable jury verdicts in NSW defamation cases cannot be ignored,[21] with over 30 challenges to jury verdicts in the last eight years.[22] There

have been three High Court challenges to unreasonable or 'perverse' jury verdicts from NSW defamation cases in the last six years – two decided and one pending.[23] According to McClellan CJ at CL, '[s]ince 1999, 43 per cent (13 cases) of challenged jury verdicts have been overturned by the Court of Appeal'.[24]

However, the question remains as to whether the real problem, which led to such a sustained level of apparently unreasonable juries, lay with the juries themselves. There seems to be a broad consensus that the flawed and artificial s7A trial procedure is to blame. As Gleeson CJ and Crennan J observed in their joint judgment in *John Fairfax Publications Pty Ltd v Gacic*,[25] '[t]he s7A procedure seems apt to give rise to that kind of jury error'.[26] The s7A jury trial was highly artificial – after the jury was empanelled, each side addressed the jury on the meaning of the matter in question, the trial judge directed the jury and the jury retired to consider its verdict.[27] Witnesses were rarely called at s7A jury trials, as the focus was purely on what the matter meant which, in the ordinary course of events, could not be the subject of evidence. The s7A jury trials created, according to McHugh J in *John Fairfax Publications Pty Ltd v Rivkin*,[28] a 'detached – and some would say unreal – atmosphere of a jury trial on documentary evidence'.[29] Such jury trials usually lasted one or two days at most. In *Harvey v John Fairfax Publications Pty Ltd*,[30] Basten JA suggested that it was the artificiality of the s7A trial procedure that provided the impetus for so many interlocutory challenges to allegedly unreasonable jury verdicts.[31] If it is the trial procedure, which has now been changed, that was the problem, there seems to be no need to get rid of juries in defamation cases. It is not only defamation law that is complex, but also the procedure of defamation trials.

THE ROLE OF THE JURY IN A DEFAMATION TRIAL

Leaving aside the complex principles and procedures of defamation law, the virtue of retaining a link to the wider community in which reputations are actually experienced, explains the long, consistent tradition in Anglo-Australian defamation law enshrining the role of the jury in a defamation trial.[32] In *Safeway Stores plc v Tate*, Otton LJ described the right to trial by jury in a defamation case as 'not a matter of mere procedure, but an important and substantive legal right'.[33] Considered to be representative of the community,[34] juries are better able than judges to reflect community values and social and moral attitudes,[35] which they need to apply in determining whether or not a matter is defamatory.[36]

At the centre of defamation law is the hypothetical referee – the ordinary, reasonable reader, listener or viewer – who represents the standard by which defamatory meaning is assessed. A useful distillation of the characteristics of the ordinary, reasonable reader is provided by Hunt J (as his Honour then was) in *Farquhar v Bottom*:[37]

> 'the ordinary reasonable reader is a person of fair, average intelligence…who is neither perverse…nor morbid or suspicious of mind…nor avid for scandal…This ordinary reasonable reader does not, we are told, live in an ivory tower. He can, and does, read between the lines, in the light of his general knowledge and experience of worldly affairs…It is important to bear in mind that the ordinary reasonable reader is a layman, not a lawyer, and that his capacity for implication is much greater than that of a lawyer.' (footnotes omitted)

Both in terms of interpreting defamatory matter and assessing the defamatory quality of imputations conveyed by the matter, a jury is closer to the ordinary, reasonable reader than a judge.[38]

Given that defamation law is premised upon the ordinary, reasonable reader, who is cast in terms more closely identifiable with a layperson than a lawyer, there is a clear benefit to having ordinary members of the community actually applying these principles in practice. It overcomes the difficulties of a trial judge having to apply these principles, which can lead to some tortuous reasoning – judges having to divest themselves of their legal training and imagine themselves as 'ordinary, reasonable readers'.[39] It also overcomes the difficulties of a trial judge having to assess whether community attitudes have changed on particularly contentious issues. For example, a number of recent decisions by judges have suggested that an imputation of homosexuality is still capable of being defamatory but, when juries are asked to determine whether such an imputation is in fact defamatory, they have decided it is not.[40] >>

Juries reflect prevailing community values and societal attitudes, crucial to defamation law.

CONCLUSION

The proper procedure for defamation cases has been the subject of experimentation and refinement in NSW over the last two decades, involving changes to the roles for juries. Despite the introduction of national, uniform defamation laws, the substance of defamation law has not changed significantly. Such changes as have occurred have been incremental.[41] The principles of defamation law remain needlessly complex. Although juries no longer play the extensive role they once did in defamation litigation, they still can play a role, particularly in determining the vital question of whether a matter is in fact defamatory of the plaintiff. The use of juries in defamation cases should not be abandoned, as juries can provide a necessary connection to prevailing community values and societal attitudes, which are crucial to defamation law. It is equally to be hoped that the substance of defamation law will be further reformed to make it comprehensible to those who are called to serve as jurors. ■

Notes: **1** Hon Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of NSW, 'The Australian Justice System in 2020', National Judicial College of Australia Conference, 25 October 2008, at 16-18. **2** *Ibid*, 16. **3** See, for example, *Broome v Agar* (1928) 138 LT 698 at 699-700 per Scrutton LJ; *Safeway Stores plc v Tate* [2001] QB 1120 at 1130 per Otton LJ. **4** See, for example, in relation to the *Ettingshausen* litigation, *Ettingshausen v Australian Consolidated Press Ltd* (unreported, CA(NSW), 13 October 1993); in relation to the *Carson* litigation, *Carson v John Fairfax & Sons Ltd* (1991) 24 NSWLR 259; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; *Carson v John Fairfax & Sons Ltd* (1994) 34 NSWLR 72; in relation to the *Sutcliffe* litigation, see *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153; in relation to the *John* litigation, see *John v MGN Ltd* [1997] QB 586. See also Andrew Kenyon, 'Problems with Defamation Damages?' (1998) 24 *Monash University Law Review*, 70. **5** NSW Legislative Council, *Hansard*, 22 November 1994, p5472 (John Hannaford, Attorney-General, Minister for Justice and Vice-President of the Executive Council). **6** For a useful overview of the role of the jury in defamation proceedings in different Australian jurisdictions, see *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 141-3 per Heydon J. **7** *Defamation Act 2005* (NSW) s22(2); *Defamation Act 2005* (Qld) s22(2); *Defamation Act 2005* (Tas) s22(2); *Defamation Act 2005* (Vic) s22(2); *Defamation Act 2005* (WA) s22(2). **8** *Defamation Act 2005* (NSW) s22(3); *Defamation Act 2005* (Qld) s22(3); *Defamation Act 2005* (Tas) s22(3); *Defamation Act 2005* (Vic) s22(3); *Defamation Act 2005* (WA) s22(3). **9** *Defamation Act 2005* (NSW) s21(1); *Defamation Act 2005* (Qld) s21(1); *Defamation Act 2005* (Tas) s21(1); *Defamation Act 2005* (Vic) s21(1); *Defamation Act 2005* (WA) s21(1). **10** Malcolm Brown, 'Put that in your pipe and smoke it: Corby accepts Seven's payout', *The Sydney Morning Herald*, 31 May 2008, 9; Ashleigh Wilson, 'Seven in damages payout to Corby', *The Australian*, 31 May 2008, 2. **11** [2008] NSWSC 693. **12** *Attrill v Christie* [2007] NSWSC 1386; *Martin v Bruce* (2007) 6 DCLR(NSW) 157; *Fraser v Holmes* (2009) 253 ALR 538. **13** *Supreme Court Act 1933* (ACT) s22; *Juries Act 1927* (SA) s5. **14** *Juries Act* 1962 (NT) s6A. **15** See note 1, at 17. **16** *Ibid*. **17** Justice David Ipp, 'Themes in the law of torts' (2007) 81 *Australian Law Journal*, 609, at 614. **18** (2007) 231 CLR 245 at 294. **19** Hon Wayne Martin, Chief Justice of Western Australia, 'Courts in 2020: Should they do things differently?', National Judicial College of Australia Conference, 25 October 2008 at 4. **20** See note 1 at 16. **21** See, for example, David Rolph, 'Perverse jury verdicts in NSW defamation trials' (2003) 11 *Torts Law Journal*, 28; David Rolph, 'Simple Questions, Difficult Juries: Perversity in Australian Defamation Trials after *John Fairfax Publications Pty Ltd v Rivkin*' (2004) 18(3) *Commercial Law Quarterly*, 9. **22** See, for example, *Cinevest Ltd v Yirandi Productions Pty Ltd* (2001) Aust Torts Reports ¶81-610; *Charlwood Industries Pty Ltd v Brent* [2002] NSWCA 201; *Gorman v Barber* (2004) 61 NSWLR 543; *Jones v Sutton* (2004) 61 NSWLR 614; *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 255; *Bennette v Cohen* (2005) 64 NSWLR 81; *Habib v Nationwide News Pty Ltd* (2008) Aust Torts Reports ¶81-938; *Universal Communication Network Inc t/ as New Tang Dynasty v Chinese Media Group (Aust.) Pty Ltd* (2008) Aust Torts Reports ¶81-932; *Channel Seven Sydney Pty Ltd v Mohammed* (2008) 70 NSWLR 669; *Radio 2UE Sydney Pty Ltd v Chesteron* (2008) Aust Torts Reports ¶81-946. **23** *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77; *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291; *Keramianakis v Regional Publishers Pty Ltd* [2009] HCA 18. **24** See note 1 at 17 n60. **25** (2007) 230 CLR 291. **26** *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 298 per Gleeson CJ and Crennan J. **27** See, for example, *Pavy v John Fairfax Publications Pty Ltd* [2004] NSWCA 177 at [22] per Sheller JA; *Channel Seven Sydney Pty Ltd v Mohammed* [2008] NSWCA 21 at [16] per Giles JA. See also *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 304 per Gummow and Hayne JJ. **28** (2003) 201 ALR 77. **29** *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at 94 per McHugh J. **30** [2005] NSWCA 255. **31** *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 255 at [21] per Basten JA. **32** See, for example, *Rothermere v Times Newspapers Ltd* [1973] 1 WLR 448 at 452 per Lord Denning MR; *Sutcliffe v Pressdram Ltd* [1991] QB 153 at 181-82 per Nourse LJ. **33** [2001] QB 1120 at 1131. **34** See, for example, *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at 78 per Gleeson CJ, at 129 per Callinan J; *Pavy v John Fairfax Publications Pty Ltd* [2004] NSWCA 177 at [36] per Sheller JA; *Gorman v Barber* (2004) 61 NSWLR 543 at 547 per Mason P; *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 255 at [29] per Basten JA, at [41] per Hunt AJA. **35** See, for example, *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at 129 per Callinan J; *Pavy v John Fairfax Publications Pty Ltd* [2004] NSWCA 177 at [36] per Sheller JA; *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 255 at [105] per Hunt AJA; *Gardener v Nationwide News Pty Ltd* [2007] NSWCA 10 at [25] per Basten JA. **36** See, for example, *Sarma v Federal Capital Press of Australia Pty Ltd* [2002] NSWCA 93 at [21] per Stein JA; *Channel Seven Sydney Pty Ltd v Mohammed* [2008] NSWCA 21 at [53] per Giles JA; *Mallik v McGeown* [2008] NSWCA 230 at [59] per McColl JA. **37** [1980] 2 NSWLR 380 at 385-86. See also *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258 per Lord Reid; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165-6 per Hunt CJ at CL. **38** *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at 81 per McHugh J. **39** For a recent example, see *Macquarie Bank Ltd v Nationwide News Pty Ltd* [2009] ACTSC 9. **40** See, for example, *Horner v Goulburn City Council* (unreported, SC (NSW), No. 21287 of 1997, Levine J, 5 December 1997); *Kelly v John Fairfax Publications Pty Ltd* [2003] NSWSC 586; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at 109 per Kirby J. **41** David Rolph, 'A critique of the national, uniform defamation laws' (2008), 16 *Torts Law Journal*, 207, at 247.

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