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NEW DEFAMATION LAWS

OVERVIEW OF THE NEW ACT AND THE NEW CAUSE OF ACTION FOR DEFAMATION

DELIVERED

BY

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AT A BAR ASSOCIATION OF QUEENSLAND

CONTINUING PROFESSIONAL DEVELOPMENT SEMINAR

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Introduction

1. This paper introduces changes made by the *Defamation Act*, 2005. It also discusses the new cause of action for defamation, the restrictions on corporations suing for defamation, choice of law rules, the new procedure for offers of amends and the reduced role of the jury in defamation actions. Mr Mulholland QC will address defences, remedies and costs.

Key changes

- The Act is the result of an agreement reached between the Attorneys-General of the States and Territories to enact uniform laws of defamation in Australia.
- The Act is no longer a Code. Although it is a comprehensive statute, the general law applies except to the extent that the Act provides otherwise. As a consequence, defamatory matter is defined by the common law, not by the Act. Common law defences, such as the common law defence of qualified privilege can apply.
- Many corporations are excluded from suing in defamation.
- Substantive defences have been modified and modernised.
- Truth alone is a defence.
- There is a new defence of contextual truth.
- The statutory defence of qualified privilege now requires a defendant to prove that its conduct in publishing the defamatory matter was "reasonable in the circumstances". This substantially narrows the scope of statutory qualified privilege compared to some of the provisions under s.16 of the 1889 Act which did not require the defendant to prove that is conduct was reasonable in the circumstances.
- There is a cap on damages for non-economic loss of $250,000.
- Exemplary damages are abolished.
- Civil actions for defamation must be commenced within one year, subject to an extension of up to three years.
- There are new provisions dealing with criminal defamation.

The background to the changes

2. The uniform defamation laws that have been passed by State and Territory legislatures are not the product of a report by any law reform commission. They are the product of a rushed process undertaken by the Attorneys-General of the States and Territories to head off a threat by the former Commonwealth Attorney-General,

Mr Ruddock, to introduce a Commonwealth Act. Although the State and Territory Ministers published a discussion paper, it was a light-weight document. Within a few months of its circulation the State and Territory Ministers publicly released their model for a new defamation Act. There was no accompanying report that explained why some decisions were reached. The uniform legislation is the product of compromises reached by politicians behind closed doors in order to produce uniform legislation rather than have the Commonwealth enact its own Defamation Act.

3. The legislation was accompanied by Explanatory Notes. But they say very little about how the Act should be interpreted. A comparison between the Act and the *Defamation Act*, 1974 (NSW) shows that the legislation was heavily-influenced by the New South Wales Act. The model legislation was drafted by officers of the New South Wales government. In some instances the Explanatory Notes state in terms that its provisions are based upon provisions of the *Defamation Act*, 1974. For example, the new statutory defence of qualified privilege in s.30 is said to be based on provisions of s.22 of the *Defamation Act*, 1974 (NSW). In other instances, the provisions of the new Act can be seen to be drawn largely from the 1974 New South Wales Act. As a result, judicial interpretations of the *Defamation Act*, 1974 (NSW) are likely to prove influential in the interpretation of the 2005 uniform legislation.

Application of the 2005 Act

4. The Act commenced on 1 January 2006. Subject to s.49(2) it applies to the publication of defamatory matter after 1 January 2006.

5. Leaving aside the complexities of s.49(2), the basic position is that the 2005 Act applies to the publication of matter after 1 January 2006 and the previous law of defamation continues to apply to causes of action in the same way as it would have applied to those causes of action had the Act not been enacted, namely to any cause of action that accrued before 1 January 2006.

6. Section 49(2) deals with a situation in which a cause of action for defamation accrues after 1 January 2006 and that cause of action accrues because of the publication of the same, or substantially the same, matters on separate occasions and those other causes of action accrued before 1 January 2006. Provided the post-1 January 2006 action

accrued no later than one year after the date on which the pre-1 January 2006 action accrued, the new Act does not apply to the post-1 January 2006 cause of action.

Defining defamation – common law principles

7. The Act does not define the circumstances in which a person has a cause of action for defamation. Instead, the tort of defamation at common law applies. In determining whether words are defamatory there are two stages, first to decide what the words mean and then to decide whether that meaning is defamatory. The courts have developed a number of tests for determining what is defamatory. No definition commands complete acceptance. In 1936 Lord Atkin said that "Judges and textbook writers alike have found difficulty in defining with precision the word 'defamatory'".[1] Seventy years later there is still no comprehensive definition. Gatley contains several paragraphs about what is defamatory.[2] Definitions include statements that are to the plaintiff's discredit.[3] A frequently cited formulation is that of Lord Atkin in *Sim v Stretch*, namely, words that "tend to lower the plaintiff in the estimation of right-thinking members of society generally". Defamation is sometimes defined in terms of an imputation which tends to cause a person to be hated or despised or which causes the plaintiff to be shunned or avoided. But then one has to accommodate cases of ridicule, so that publishing a statement that exposes the plaintiff to ridicule is said to be defamatory.[4]

8. Whether a publication is defamatory depends upon the understanding of "the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation".[5]

9. The new Act's resort to common law definitions of what is defamatory in place of the definition of "defamatory matter" contained in s.4 of the 1889 Act means that it is no longer sufficient to prove that the publication conveyed an imputation concerning a

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1. *Sim v Stretch* (1936) 52 TLR 669.
2. *Gatley on Libel and Slander*, 10th edition, paras 2.2-2.9.
3. *Youssoupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 at 584; Brown *The Law of Defamation in Canada*, para 4.2(2).
4. *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443; *Brander v Ryan* (2000) 78 SASR 234; *Gatley*, para 2.3.
5. *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506.

person “by which the person is likely to be injured in the person’s profession or trade”. This is the component of the definition “defamatory matter” under the 1889 Act which extended the Act beyond any common law definition of defamatory matter.[6] This is because at common law words which injure a person’s business are not defamatory unless they injure the person’s reputation.[7]

“Right-thinking members of society generally” or a section of the community?

10. As noted, the issue of defamation is determined by asking whether "a hypothetical referee"[8] would understand the published words in a defamatory sense. Justice Brennan stated in *Lamb's* case[9] that:

> "The moral or social standard by which the defamatory character of an imputation is determined is not amenable to evidentiary proof; it is pre-eminently a matter for the jury to give effect to a standard which they consider to accord with the attitude of society generally."

The Explanatory Notes to the Bill cite Lord Atkin’s definition of what is defamatory in *Sim v Stretch* and Justice Brennan’s judgment in *Lamb’s* case. In doing so the new Act probably should be taken as rejecting what has been described as the “sectionalist” approach favoured by the New South Wales Court of Appeal in *Hepburn’s* case[10], and the approach favoured by Mr Ruddock in his draft Commonwealth Act. Rather than asking what ordinary decent folk in the community, taken in general, would think, the Ruddock proposal permitted a plaintiff to succeed if his or her reputation was affected in the estimation of a "substantial and reputable section of the public".

11. The defamation lawyer's Bible – *Gatley on Libel and Slander* states:

> "Words are not defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right-thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right-thinking man is not

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6 See *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.

7 *Gatley*, para 2.9.

8 variously described in the leading cases as "reasonable men", "right-thinking members of society generally" or "ordinary men"

9 *Readers Digest Services Pty Ltd v. Lamb* (1982) 150 CLR 500 at 506. (emphasis added).

10 *Hepburn v. TCN Channel 9 Pty Ltd* (1983) 2 NSWLR 682

> actionable within the law of defamation. If the words only tend to bring the plaintiff into odium, ridicule or contempt with a particular class or section of society they are not defamatory. *A fortiori* [all the more] the words are not defamatory if the standard of opinion of the particular section of the community is one which the courts cannot recognise or approve." [11]

Incidentally, some courts take the view that courts cannot recognise or approve prejudices which are in fact widely held. So, an English court has said that it is not defamatory to say of a person that his father is a criminal and a fugitive from justice.[12]

12. The test of asking whether a publication has lowered the plaintiff in the estimation of right-thinking members of society *generally* is fairly well established.[13] But a different view was adopted by the New South Wales Court of Appeal in *Hepburn*[14] where the issue was whether an imputation that a medical practitioner was an abortionist was defamatory. One member of the Court of Appeal stated that, as abortion is regarded as wicked by a <u>substantial</u> part of the population, to describe a person as an abortionist may bring the person into hatred, ridicule or contempt of ordinary reasonable people. Another judge said that a plaintiff can complain of words which lower him in the estimation of "an appreciable and reputable section of the community"[15]. Although the judges did not cite overseas authority, their views are reflected in some American cases. In 1909, Justice Holmes stated that if a publication:

> "obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote … No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm".[16]

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11 *Gatley on Libel and Slander* 10th ed. para. 2.10

12 *Robson v News Group Newspaper Limited* unreported Queens Bench Division 9.10.95

13 A number of courts have emphasised that "it is not enough to prove that the words rendered a publication obnoxious to a limited class: it should be proved that the words are such as would produce a bad impression on the minds of average reasonable men": *Leetham v. Rank* (1912) 57 SJ 111 at 112 (Court of Appeal) cited in *Gatley* (supra) para. 2.11.

14 *Hepburn v. TCN Channel 9 Pty Ltd* (1983) 2 NSWLR 682

15 ibid. at 694 per Glass JA.

16 *Peck v. Tribune Co* 214 US 185 (1909).

13. Advocates of this approach point out that the traditional test of asking whether the plaintiff was lowered in the estimation of right-thinking members of society *generally* was generated on the assumption of the consensus of moral opinion in society which, if it ever existed, has now disappeared[17]. They also say that the traditional test was simply designed to exclude from the law of defamation reactions that may be described as anti-social or eccentric. But the traditional test appears to have been taken up in the new Act.

<u>"Right-thinking members of society" versus the "ordinary reasonable person"</u>

14. Is there a difference between what the courts describe as "right-thinking members of society" and "the ordinary reasonable person"[18]? When we talk about "right-thinking" people, are we talking about what people <u>actually</u> think, or about what people <u>should</u> think.

15. If we are concerned with what people think, then the 2004 Report of the National Defamation Research Project "Deciding Defamation"[19] is important because it highlights that people are more tolerant and progressive than we tend to think they are. A challenging issue is whether evidence of the attitudes of members of our society and their attitudes towards specific imputations is admissible as evidence. Should the law allow the admission of survey evidence about community attitudes to a variety of social issues? The law resists the notion that the defamatory character of an imputation is amenable to evidentiary proof.

16. But if we cannot prove these things through evidence and have to rely upon judges and juries to give effect to a standard which they consider accords with the attitude of society generally, then we require judges and juries to guess what the attitudes of their fellow citizens are. The "Deciding Defamation" Report suggests that they guess wrongly. We think that our fellow citizens are less tolerant than we are. The Report is heartening when it reveals that our fellow citizens are more tolerant than we give them credit. However, it is alarming that defamation cases are decided on the assumption that people are less tolerant than they in fact are.

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17 *Gatley* (supra) at 212.

18 In *Slatyer v. Daily Telegraph* (1908) 7 CLR 7, disapproval was expressed of the use of "right thinking" except in the sense of a citizen of "fair average intelligence". But the expression "right thinking" has been highly influential in this discourse following Lord Atkin's judgment in *Sim v Stretch* (supra).

19 Communications Law Centre.

The Realist vs. The Moralist Approach

17. Let us assume that judges and juries can accurately ascertain what ordinary people actually think. Do prevailing community views determine whether something is defamatory? Or does the "right-thinking members of society" test, seemingly embraced by the Act, determine what is defamatory according to what people should think ?

18. For example, there is an emerging body of case law to the effect that it is not defamatory to impute that someone suffers from a psychological illness[20]. Mental illness is said to be a misfortune which may cause weak or ignorant person to think less of the sufferer, but ordinary decent people would not take such a narrow-minded view.[21]

19. So, being sensitive to social changes and being conscious of the way that unprejudiced people think, should we conclude that it is not defamatory to say of someone that they suffer manic depression or a borderline personality disorder? Suppose you tell me that you are thinking of employing someone who I know and you ask me about them. I tell you that they suffer from manic depression. Have I defamed the job applicant?

20. If you wear the hat of the potential employer, and are honest about it, then you probably will concede that my disclosure of the applicant being prone to manic depression will make a difference to your estimation of them and may cost the applicant their chances because it has a tendency to diminish your confidence in their ability to do the job. You avoid taking the applicant into your employment.

21. This raises a big issue, and it is the same kind of issue that was confronted last century when the law had to decide whether it was defamatory to say of a woman that she was a rape victim. Should the law recognise the prejudices, often widespread prejudices, that are held in our society and recognise the reality that statements made to people holding those prejudices causes them to think less of certain individuals.

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[20] *Coleman v. John Fairfax Publications Pty Ltd* Unreported, Supreme Court of NSW, Levine J. 25.6.2003.

[21] ibid. at para.[9]; compare the defamatory imputation that someone is insane.

22. Should people who are actually shunned, ridiculed or avoided be entitled to sue for defamation? Should the law of defamation concern itself simply with what people think ? Or should it also concern itself with what people should think ie the views of the "right-minded"? One academic commentator described this as a contest between the realist approach and the moralist approach. Should the law take a moral stand, and refuse to recognize prejudicial attitudes, even if this means that victims of prejudice, whose reputations are injured, and who are shunned, ridiculed and avoided cannot sue?

23. The Act does not decide these questions. Nor does the extrinsic material indicate whether the realist or moralist position reflects the law. We are left with the common law to determine what is defamatory. No test commands acceptance. But the Explanatory Notes cite as their first example of the tests that have been used to determine what is defamatory Lord Atkin's test, namely words that "tend to lower the plaintiff in the estimation of right-thinking members of society generally". If this is the test to be applied, we are concerned with what are assumed to be views held by the general community, rather than a section, even a reputable and sizable section, of it, and we consider what "right-thinking" members of society think.

The cause of action for defamation

24. The decision in *Robinson v Laws*[22] emphasised the importance of the imputation in the definition of "defamatory matter" under the 1889 Act. The Court of Appeal's interpretation of the 1889 Act had the practical effect of making the law in Queensland not terribly different from the law in New South Wales which made each imputation a separate cause of action.

25. A welcome change in the uniform defamation law is s.8 which provides that a person has a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than one defamatory imputation about the person is carried by the matter.

26. But the practical consequences of this change should not be exaggerated. Defamatory imputations will still be with us, and except in the clearest of cases, a plaintiff will be required to plead or at least particularise the "imputation" or "meaning" which is

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[22] [2003] 1 QdR 81 at 93 para [49].

alleged to have been conveyed by the publication.[23] The fact that the Act provides for a single cause of action for multiple defamatory imputations in the same matter does not mean that there will not be contests about the precision with which imputations are pleaded[24] or the capacity of publications to convey those imputations.[25]

27. Pleaders will still need to take care in pleading defamatory imputations since the plaintiff is bound by those imputations.[26]

New limitation period

28. The 2005 Act amends the *Limitations of Actions Act*. Under s.10AA an action on a cause of action for defamation must not be brought after the end of one year from the date of publication. But s.32A enables an application for an order extending the limitation period. A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within one year from the date of publication, extend the limitation period to a period of up to three years from the date of the publication.

29. In other words, the current limitation period of six years is replaced by a limitation period of one year which may be extended if the court is satisfied that it was not reasonable in the circumstances for the plaintiff to commence the action within the one year period.

Limitations on the right of corporations to sue

30. A corporation has no cause of action for defamation under the new Act unless it was "an excluded corporation" at the time of publication.[27] A corporation is an excluded corporation if:

    (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators; or

    (b) it employs fewer than ten persons and is not related to another corporation,

    and the corporation is not a public body.

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23 From a technical point of view "imputation" is the preferred technical term to "meaning" since extrinsic matters may give rise to implications which go beyond the "meaning" of the words in their ordinary sense.

24 *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135; *Magub v Hincliffe* [2004] QSC 4.

25 For recent examples of this see *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186; *Channel Seven Adelaide Pty Ltd v DJS* [2006] SASC 10.

26 *Chakravarti v Advertiser Newspaper Ltd* (1998) 193 CLR 519; *Robinson v Laws* (supra) at para [47].

27 *Defamation Act*, 2005, s.9(1).

31. The Act picks up the definition of whether a corporation is "related to" another corporation from s.50 of the *Corporations Act*. Where a body corporate is:

    (a) a holding company of another body corporate; or

    (b) a subsidiary of another body corporate; or

    (c) a subsidiary of a holding company of another body corporate;

    the first-mentioned body and the other body are related to each other.

32. These changes to the right of a corporation to sue for defamation are significant. They also seem completely unprincipled. Why should a corporation with nine employees be able to sue, yet one with ten or a hundred employees not be able to sue? The business of a corporation with ten or more employees can be destroyed by a reckless or malicious defamation and it seems contrary to principle to leave that corporation without a remedy in defamation. This is especially odious in the case of the reckless and malicious conduct of media organisations that are not subject to s.52 of the *Trade Practices Act*, 1974 because they are "prescribed information providers".[28]

Choice of law

33. Section 11 contains detailed provisions about choice of law for defamation proceedings. These relate to publications that occur within a particular Australian State or Territory or in more than one "Australian jurisdictional area". In the case of a multiple publication in more than one Australian State or Territory, the substantive law applicable is the area with which the harm occasioned by the publication as a whole has its closest connection. There are rules in determining the area with which the harm occasioned by a publication of matter has its closest connection.[29] But, for practical purposes, these rules generally do not matter because the law of defamation in each Australian jurisdiction is now the same. Provided the law of defamation remains uniform, their only practical operation will be where the law of a particular jurisdiction contains some additional defence or limitation of liability in a separate statute. An example would be a statute that protects a public official from civil liability for actions taken in good faith and without negligence.

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[28] *Trade Practices Act*, 1974, s.65A.

[29] Section 11(3).

34. Claims for defamation for publications outside Australia will be dealt with under common law rules for choice of law.

35. The new choice of law rules for defamatory publications within Australia apply to the substantive law to be applied, not procedural rules.[30]

Offer to make amends

36. Sections 13 to 18 make detailed provisions for offers to make amends. These provisions are an alternative to offers to settle under the UCPR. A publisher may make an offer to make amends to an aggrieved person. The offer cannot be made if 28 days have elapsed since the publisher has been given "a concerns notice" by the aggrieved person that the matter in question is or may be defamatory, or if a defence in an action for defamation brought by the aggrieved person has been served.[31]

37. A publisher can seek further particulars if the concerns notice does not adequately particularise the imputations of concern.[32]

38. The Act makes detailed provision concerning the content of an offer to make amends. The offer must be identifiable as an offer to make amends under Part 3 Division 1.[33] The offer may be limited to a particular defamatory imputation. The offer must include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited.[34] The offer must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer.[35] It may include an offer to publish or an offer to pay compensation. An offer to pay compensation may comprise one or more of the following:
    (a) an offer to pay a stated amount;
    (b) an offer to pay an amount to be agreed between the publisher and the aggrieved person;

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30 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.
31 *Defamation Act*, 2005, s.14.
32 Section 14(3).
33 Section 15(1)(b).
34 Section 15(1)(d).
35 Section 15(1)(f).

(c) an offer to pay an amount determined by an arbitrator appointed or agreed on by the publisher and the aggrieved person;

(d) an offer to pay an amount determined by a court.[36]

39. If an offer to make amends is accepted and if the publisher carries out the terms of the offer, then the aggrieved person cannot assert or continue to enforce an action for defamation against the publisher.[37]

40. If an offer to make amends is made but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if:

(a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory; and

(b) at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer; and

(c) in all the circumstances the offer was reasonable.[38]

Apologies

41. Section 20 provides that an apology does not constitute an express or implied admission of fault or liability by the person in connection with that matter and is not relevant to the determination of fault or liability. Section 20(2) provides that evidence of an apology made by or on behalf of a person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

42. This is a welcome change to ensure that publishers are encouraged to apologise without the risk of the apology being used against them. But the publisher is able to rely upon an apology in mitigation of damages.[39]

The role of the jury

43. As under the present rules, either party in a defamation action may elect for the proceedings to be tried by jury.

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[36] Section 15(2).
[37] Section 17.
[38] Section 18.
[39] Section 38.

44. Under s.21 the court may order that the action not be tried by jury if the trial requires a prolonged examination of records or involves any technical, scientific or other issue that cannot be conveniently considered or resolved by a jury.

45. Importantly, s.22 redefines the role of the jury in defamation proceedings. The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.

46. If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judge and not the jury determines the amount of damages (if any) that should be awarded to the plaintiff and "all unresolved issues of fact and law relating to the determination of that amount".

47. In short, it is for the judge, not for the jury to determine damages.

48. Section 22(5)(b) provides that nothing in s.22 requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judge. As a result, it will be for the judge to determine whether an occasion of privilege exists, subject to the resolution of disputed questions of fact by the jury.[40] In that context, the borderline between disputed questions of fact which are for the jury to decide and the essential elements of the defence which are for the determination of the judge are not always clear.[41]

49. Leaving aside the traditional role of the judge in determining whether an occasion of qualified privilege exists, subject to any jury finding on the issue of malice, and the judge's function in determining whether a defence should be allowed to go to the jury,[42] defences are determined by the jury.

50. In terms of practice is the jury to be asked a series of specific questions about matters such as:
    (a) the defamatory meanings that it found were conveyed;
    (b) the precise basis upon which particular defences were not established.

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[40] *Adam v Ward* (1917) AC 309 at 318; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 205.

[41] cf *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511 which related to the defence of statutory qualified privilege.

[42] For instance, determining whether words are capable of being recognised as an expression of opinion: *Gatley*, para 34.14.

51. Section 22 does not affect any law or practice relating to special verdicts.[43] We are faced with the centuries old tension between those who favour asking juries to answer a series of specific questions and those who think the jury should be asked a few general questions.[44] In Queensland the Court of Appeal has encouraged judges to limit the questions asked of juries,[45] but in practice juries are often given a lengthy series of questions to answer.

52. Once the jury determines the question left to it, it is for the judge to determine the amount of damages (if any) that should be awarded.

53. The new Act provides that the court is to disregard "the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff".[46] It is not difficult to imagine circumstances in which a defendant's malice, recklessness or other state of mind will affect the feelings of the plaintiff and the harm suffered by the plaintiff.

54. The possibility exists for a jury to be asked to record findings on questions such as malice in determining substantive defences. But in some cases questions such as malice will not be an issue for the jury. Similarly, the jury may not have been required to determine aspects of the defendant's conduct which are relevant to the assessment of aggravated damages.

55. The new division of responsibility between judges and juries opens up interesting questions about what questions juries should be asked and the form in which they should be asked them. Once the jury is discharged, the judge has to determine "all unresolved issues of fact and law relating to the determination of the amount of damages". There is a risk that this will invite a new round of addresses by counsel about the facts of the case and the extent to which a jury's answers on liability issues can be said to have resolved issues of fact concerning the defendant's conduct that are relevant to the assessment of damages.

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43 Section 22(5)(a).

44 See *Otis Elevators Pty Ltd v Zitas* (1986) 5 NSWLR 71.

45 *Ahrens v Queensland Railways* [1997] 2 QdR 1.

46 Section 36.

Conclusion

56. The 1889 Act will remain with us at least some time. It still governs defamations that occurred before 1 January 2006. The new Act is built upon the common law including common law definitions of what is defamatory. Common law defences, such as the defence of qualified privilege at common law, which have not operated in Queensland since 1889 have been brought back to life. The 2005 Act has a heavy New South Wales influence. Many of its provisions are modelled on the 1974 New South Wales Act and case law from the New South Wales reports is likely to be an essential source of reference.

57. The Act modernises the law of defamation and the offer to make amends procedures seeks to encourage the resolution of defamation claims without litigation.

58. Significant changes include severe restrictions upon the corporations that can sue for defamation and the re-shaping of substantive defences: a subject which Mr Mulholland QC will address.

59. On the threshold question of whether a publication is defamatory, we now turn to the common law rather than the definition in s.4 of the 1889 Act. What is defamatory is now defined by the common law, not by a Code. It is no longer enough that an imputation concerning the plaintiff was likely to injure the plaintiff's profession or trade.

60. But in determining whether words are defamatory, we still will be faced with the same disputes about what words mean and whether those meanings are defamatory. The same fights will be had about the meaning of words, the precision with which meanings are pleaded and whether those meanings are defamatory.

61. People will still have disputes about what it means to be said to be under investigation by the police[47] or to be suspected of a crime.[48] Lawyers will continue to argue about whether it is defamatory to say that someone is suffering from a mental illness[49] or that a footballer is "fat and slow" .[50] Is it defamatory to describe an actor as

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47 *Lewis v Daily Telegraph* [1964] AC 234.

48 *Channel Seven Adelaide Pty Ltd v DJS* (supra).

49 *Coleman v John Fairfax Publications Pty Ltd*, unreported, NSW Supreme Court, 25.6.03, Levine J, para [9].

50 *Boyd v Mirror Newspapers Pty Ltd* (1980) 2 NSWLR 449.

"hideously ugly"?[51] Is it defamatory to describe someone as a "colourful Sydney racing identity"? These kinds of questions will confront us under the "born again" common law of defamation just as they did under the Griffith Code.

62. The familiar fights about what words mean and whether those meanings are defamatory will remain.

63. The most significant changes in the Act are to the range and scope of defences. Mr Mulholland QC will now address that issue.

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51 *Berkoff v Burchill* (1996) 4 All ER 1008.