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23 February 2011

Director
Legislation, Policy & Criminal Law Review
NSW Department of Justice & Attorney General
GPO Box 6
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Dear Director,

I refer to the review by the Attorney General of the *Defamation Act 2005*. As you may be aware I have spoken about the operation of the Act on more than one occasion. My views on a number of issues were expressed in my paper "Eloquence and Reason – are juries appropriate for defamation trials?" I attach a copy.

I appreciate that since publishing my paper the question of the continuing role of juries has been discussed on a number of occasions. My views have not changed from those expressed in the paper.

I also enclose a copy of a short judgment I wrote in *Channel Seven Sydney Pty Ltd v Mahommed (No2)* [2011] NSWCA 6 dealing with costs in defamation proceedings.

I would be pleased to discuss any of these issues with you.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'P. McClellan'.

The Hon Justice Peter McClellan
Chief Judge at Common Law

Eloquence and Reason - are juries appropriate for defamation trials?

**The Hon Justice Peter McClellan
Chief Judge at Common Law
Supreme Court of New South Wales**

**4 November 2009
Sydney**

Eloquence and Reason

In his lecture "The Rise (and Fall?) of the Barrister Class", published as part of the series "Rediscovering Rhetoric" the Hon Michael McHugh QC laments the passing of the golden age of the Bar. In part of his thesis he suggests that eloquence in argument in courts has been replaced by reason. The well known barrister has been replaced at the centre of public attention by media personalities. The "great advocates" who McHugh identified, generally displayed their eloquence before juries. As the judges came to insist that counsel confine their address to the evidence in the case, reason has replaced the rhetorical flourish. The change is but a mirror to other developments in the law which are themselves a response to changes in the general community.

Most of the audience will be aware that I have on more than one occasion questioned the wisdom of the recent increase in the role of juries in defamation trials. Unlike some in this room I did not spend any significant part of my life at the bar in defamation law either as an advisor or litigator. I was an interested bystander to a process which I suspected was clumsy and expensive. Vindication of reputation, undoubtedly important to those unreasonably damaged appeared a complex and

time consuming exercise. It seemed to involve finding the imputation, pleading it and then defending the pleading against the defendant's argument that it should be struck out. Identifying and debating the nuance, even nuance upon nuance, was an essential skill of the defamation lawyer.

There is a sense of romance about defamation. It sits comfortably with Michael McHugh's vision of the golden age. An important person, perhaps famous, takes on the media baron who has allegedly traduced his or her reputation. The great trial advocates were employed to vindicate the reputation of the libelled or defend the great media interests of the day. Powerful persons were pitted against powerful corporations. In those days, everyone who could read, read newspapers. There was no television and newspapers and magazines were a powerful source of material by which to build up or tear down the reputation of a public figure. Column inches were devoted to detailed reports of trials. The quick grab of television, where a story without a picture is not reported, or the top and tailed vignettes of the modern newspaper were yet to emerge.

Newspapers, although some remain important, are diminishing in significance. For most there has been a reduction in sales and readership. Fewer stories are covered and reports of trials are generally confined to murder or terrorism. Magazines have been impacted. Some which were weekly have become monthly. Many have gone altogether. The internet is quickly becoming the most powerful source of information in many societies. And Australia is no exception.

The romantic notions associated with defamation are enhanced by the prospect of a jury of ordinary people sitting in judgment on the reputation of a fellow citizen. Seventy years ago the role of the jury in defamation trials was the subject of vigorous exchange between two of the great lawyers of the time. It was at the Australian Legal Convention in 1936 where Justice Evatt and Mr Robert Menzies QC clashed. Their different perspectives on the need for juries reflected their particular social and philosophical perspectives. The jury had for many years been accepted as the friend of the powerless against the power of the State (including judges) and more fortunate citizens. It is a perspective with diminishing resonance today. Justice Evatt's paper was entitled "The Jury System in Australia".¹ It was a scholarly if lengthy defence of the jury system in both civil and criminal trials. Summary trial for criminal offences was criticised. Justice Evatt's fundamental thesis was that "in modern times the jury system is to be regarded as an essential feature of real democracy".² His Honour endorsed the words of Lord Atkin who, when speaking particularly of civil trials, described the jury system as "the shield of the poor from the oppression of the rich and powerful".

Menzies, who is celebrated in Graham Freudenberg's contribution to *Rediscovering Rhetoric*, was of course one of the most powerful advocates of his day.

He replied:

¹ Justice HV Evatt, "The Jury System in Australia" (1936) 10 (Supplement) *Australian Law Journal* 49.

² Justice HV Evatt, "The Jury System in Australia" (1936) 10 (Supplement) *Australian Law Journal* 49 at 67.

"I want to say as one who has practised a good deal before civil juries that the civil jury system ought to be abolished. I make no qualifications on that either. I regard the system as incompetent, unessential and corrupt."³

Menzies illustrated his point by reference to the defamation trial *T J Ryan v The Argus*.⁴ He said:

"Reference was made this evening by his Honour to the well known case of *T J Ryan v The Argus*. The first trial came before Mr Justice Isaacs and a jury. Judges when sitting in appeal examine with infinite care the decision of the trial judge. What happens is this. You take a very good point in the evidence and indicate that there should have been a certain summing up in respect of it. Somebody discovers that what the learned judge said had something of the substance of your suggestion. The jury was presumed to have taken in everything they heard from the learned judge but juries have not always the gift of separating the grain from the chaff. His Honour Mr Justice Isaacs having had long experience in that class of dissection and finding himself presiding in the *Ryan* case proceeded to put 35 questions to the jury in black and white, each jurymen being provided with a type-written sheet. The jury at once proceeded to make the inevitable botch of them. At the re-trial Mr Justice Rich left them to make a general verdict, knowing that they would decide the case on what they thought of Ryan or the other party."

³ Justice HV Evatt, "The Jury System in Australia" (1936) 10 (Supplement) *Australian Law Journal* 49 at 74.

⁴ See *Cunningham v Ryan* (1919) 27 CLR 294 at 295.

Menzies' final contribution to the debate was blunt:

"There is one thing more important than expedition and elimination of appeals, and that is doing justice between the parties, and the sooner we get back to the ideals that justice should be administered according to law and not according to clap trap the better it will be for all."

It is now apparent that apart from defamation cases Menzies' view has prevailed in civil trials. He recognised, as have many others, the difficulties for a jury in applying complex legal concepts to identifiable facts. Menzies' plea for justice administered according to law has echoes today in the claim by many that the object of the trial process, criminal or civil, must be to establish the truth.

I have spoken elsewhere of truth, both perceived and real, and the law.⁵ The law has always recognised and accepted an outcome which may not reflect the real truth. This is changing. A desire to find the real truth will be an imperative of the 21st century. Changes have already occurred and others will follow.

The role of the jury in criminal proceedings has a long history and is deeply entrenched in our legal culture. However, demands for more efficient trial processes and a "true" verdict together with the complexity of the issues in some trials have raised significant questions. Although a part of the statutory framework of criminal law for many years the significance of the requirement for an appellate court to determine whether it has a doubt about a conviction, being a doubt which the jury

⁵ P McCiellan (2006) "Who is Telling the Truth? Psychology, Common Sense and the Law", (2006) *Australian Law Journal* 657.

should have had, has been given greater prominence.⁶ A change in approach has been identified by Kirby J to be a result of the erroneous verdicts in *Chamberlain* and *Mallard*.⁷ Although presently of limited application legislation which allows the Crown, in some circumstances, to appeal from an acquittal is an indication that the general public expect the law to provide a true verdict. The law is now less able to tolerate an acquittal founded upon legal error. In some States “fresh evidence” may be followed by a second trial of a person previously acquitted.

A jury in a criminal trial receives considerable assistance from the court in understanding how it must approach its task. On occasions, but not always, the directions which must be given are complex and capable of being misunderstood or misapplied by even the most conscientious or intelligent juror. If, as must be acknowledged judges, sometimes experienced judges, make errors when giving their directions it would be naïve to believe that jurors do not sometimes get it wrong. When they do, if the appellate court, without seeing the witness or having the benefit of the atmosphere of the trial and allowing for any benefit which the jury may have had (and that is an elusive concept), has a reasonable doubt the error can be corrected. But Kirby J reminds us that there are occasions where the appellate process has also failed to reach the correct decision.

Out of a concern that juries may misuse information or not reason as the law requires we provide them with instruction to refrain from independent inquiry. Although we reassure them of our confidence in their reasoning as ordinary members of the community we remind them about many commonsense issues and

⁶ *Weiss v R* (2005) 224 CLR 300.

⁷ See the transcript of the special leave application in *Kaliyanda v R* [2007] NSWCCA 300.

warn them about the pitfalls into which the law, with long experience, fears they might otherwise fall. At the end of the process the significant question in any criminal trial is likely to be did he or she do it. Not in itself a complex matter, on occasions the pathway to the answer will present many complex questions.

Civil juries and defamation – pressure for reform

In New South Wales the legislature has abolished jury trials in most civil claims. Juries were seen as inefficient, costly and unnecessary.⁸ Opposition to the change was strident. The response of the Bar expressed by Mr J R Kerr QC in the great debate about the future of litigation in 1961 is of interest. Mr Kerr QC said:⁹

“I have been permitted by Council of the New South Wales Bar Association to indicate to you that the Bar Council is very strongly, and indeed unanimously, of the view that the jury system in civil cases is an invaluable part of our system of administration of justice and must be retained ... the price of abolition of the jury system of trial in civil actions should not be paid in any attempt to avoid delay.”

The change has passed into history without the destruction of citizen rights or corruption of the trial process.¹⁰ The problem area which remains is defamation.

When the Attorney General, Mr Ruddock, put forward his proposal for a federal uniform defamation law in March 2004 the media came out in force to argue for the

⁸ For example, see the second reading speech to the *Courts Legislation (Civil Juries) Bill*, delivered by the then Attorney-General Bob Debus on 28 November 2001 to Parliament on 28 November 2001.

⁹ (1961) 35 ALJ 124 pg 144-145.

¹⁰ See comments following Mr Justice Wallace, “Speedier Justice (and Trial by Ambush)” (1961) 35 *Australian Law Journal* 124 at 140ff, in particular Mr JR Kerr QC at 145.

reintroduction of the jury. The original proposal was that actions for defamation should be determined by a judge alone.¹¹ A group of twenty of Australia's largest media organisations, calling themselves the Combined Media Defamation Reform Group, replied to the proposal and argued that juries should not be abandoned in defamation proceedings. The Group championed the role of the jury as the barometer of the public.¹² The group argued (at page 26):

“the principles of freedom of speech and freedom of the press can be guarded by the public through surrogate, the jury. As Kirby P stated in *John Fairfax & Sons v Carson*:

“This is one cause of action where the New South Wales Parliament has expressly provided for jury trial: see *Supreme Court Act 1970*, s 88. Whereas jury trials in civil claims generally have been abolished or circumscribed, Parliament has enacted that proceedings on a common law claim in respect of defamation “shall be tried with a jury”: cf *Cassell & Co Ltd v Broome*. It may be inferred that this special provision derives from the particular advantage perceived by Parliament in having jury actions, determined by a cross-section of the community rather than by judges whose background and experience is necessarily more limited”

¹¹ Attorney General's Department. "Outline of Possible Defamation Law" March 2004. [http://www.ag.gov.au/www/aqd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~Proposal+-+national+defamation+law.pdf/\\$file/Proposal+-+national+defamation+law.pdf](http://www.ag.gov.au/www/aqd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Proposal+-+national+defamation+law.pdf/$file/Proposal+-+national+defamation+law.pdf)

¹² Combined Media Defamation Reform Group. "Submission in Response to 'Outline of Possible national Defamation Law', Attorney-General's Discussion Paper – March 2004" <http://www.astra.org.au/content/pdf/DefamationSubmissionMay04.pdf>

The Attorney General's Department released a revised outline of a possible national defamation law in July 2004 which substantially adopted the submission of the Combined Media Defamation Reform Group and said "[i]t would seem that the involvement of juries in the substance of trials may contribute to public confidence in a national defamation law. On that basis, there is a good argument for involving juries."¹³ If that was the justification for retaining the jury in defamation cases an appreciation of the Act in practice suggests that it was misplaced.

In the end, a federal code was not created. Individual states have adopted 'uniform' defamation legislation. Some but not all of the states adopted the format put forward by the Combined Media Defamation Reform Group. In all jurisdictions juries are no longer involved in assessing damages, which was the approach taken in NSW in 1974. This was the position supported by the Combined Media Defamation Reform Group. The perception was that juries were too generous to plaintiffs.¹⁴ There were a number of cases in both Australia and the UK where juries had awarded substantial sums, and appellate courts intervened to set aside the jury verdicts on the grounds that the sums awarded were manifestly excessive.¹⁵

The role of the jury is not uniform across the states. In the majority (NSW, Qld, Tas, Vic, WA) either party may elect to have a jury.¹⁶ In these states juries are given the task of determining the imputations and the defences ie liability. However, the

¹³ Attorney General's Department. "Outline of Possible Defamation Law" July 2004 at 28. [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~0+0+defamationV5+19+August.pdf/\\$file/0+0+defamationV5+19+August.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~0+0+defamationV5+19+August.pdf/$file/0+0+defamationV5+19+August.pdf)

¹⁴ Rolph, David. "A Critique of the National, Uniform Defamation Laws" (2008) 16 *Torts Law Journal* 207 at 240.

¹⁵ *Australian Consolidated Press Ltd v Ettinghausen* (unreported, NSW CA, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993) and *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.

¹⁶ S 21(1) DA (NSW), (Qld), (Tas), (Vic), (WA)

Northern Territory abolished jury trials in defamation cases when it introduced the uniform legislation. (NB that the number of defamation trials with juries in the NT is 1). Similarly in South Australia and the ACT the current defamation legislation contains no reference to trial by jury.¹⁷

Defamation Trials in NSW – recent problems

The 1974 New South Wales *Defamation Act* provided for what became known as a “7A trial”, where the jury determined the defamatory imputations, if any, but the judge determined issues related to the defences and damages. There were problems. Between 1999 and 2006 in 43% of cases (13 cases) where jury verdicts were challenged, the verdict was overturned by the Court of Appeal.¹⁸ This led to criticisms of the “split trial” process. In *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50; (2003) 201 ALR 77 at [119] - [120] Kirby J said:

“Although it is possible for oral evidence to be given before the jury in proceedings conducted in accordance with s 7A of the Act, normally this is not done. Typically, the proceedings follow the course adopted in the trial of Mr Rivkin's case. In such a hearing, there is nothing before the jury that is not equally before the appellate court.

What jury members make of this procedure is impossible to say. Perhaps they expect plaintiffs to give evidence, at least of the hurt they have suffered and even to deny the truth of the defamatory imputations pleaded. Perhaps they

¹⁷ Rolph, David. “A Critique of the National, Uniform Defamation Laws” (2008) 16 *Torts Law Journal* 207 at 226.

¹⁸ See for example, *Gardener v Nationwide News Pty Limited* [2007] NSWCA 10; *Mahommed v Channel Seven Sydney Pty Ltd* [2006] NSWCA 213; *Aleksandra Gacic & Ors v John Fairfax Publications Pty Limited & Anor* [2006] NSWCA 175; (2006) 66 NSWLR 675; *Charlwood Industries Pty Ltd v Brent* [2002] NSWCA 201 and *Boniface v SMEC Holdings Limited and Others* [2006] NSWCA 351.

expect the publisher to call evidence justifying the matter complained of. How they react to the artificial and telescoped task assigned to them is a matter for speculation. The fact that most trials, like Mr Rivkin's, involve little more than the tender of the matter complained of means that one of the normal reasons for particular restraint against appellate disturbance of jury verdicts is absent in such cases. There is no reason for the appellate court to make allowance for the advantages that the jury had in having seen or heard witnesses over the course of a lengthy trial. Whilst the jury continues to enjoy a symbolic function, because its members come from the general community, there remains a real risk, heightened in the s 7A procedure, that they may misunderstand their task."

The procedure was also criticised in *John Fairfax Publications Pty Ltd v Gacic* [2007] HCA 28; (2007) 230 CLR 291 at [13].

I doubt whether Robert Menzies would have wholly agreed with these criticisms. I suspect his response would have been that the bifurcated process of the 7A trial provided the opportunity to identify errors which were occurring at the "imputation" stage of the trial, being errors which are masked once the complexities of the defence are introduced. The general verdict disguised the particular errors. My own speculative view, and we are of course engaged in speculation, is that Menzies would be likely to be correct.

There have been nine defamation trials in the Supreme Court under the 2005 Act. The first was heard in 2008. Seventy four cases are awaiting hearing if they do not

settle. In *Davis v Nationwide News* [2008] NSWCCA 693 the question as to whether or not the evidence in relation to liability should be heard separately from the evidence in relation to damages was considered. The defendant in that case decided in the interests of efficiency and appropriate disposition of the trial that it would not object to all of the evidence being heard by the jury. A different course was taken in *Corby v Channel 7 Sydney Pty Limited* [2008] NSWSC 245. However, that matter settled and there was no reasoned decision published in relation to the procedure which had been adopted.

In *Greig v WIN Television NSW Pty Limited* [2009] NSWSC 876 I decided that the trial should not be split. I said:

“At present, of course, I have no knowledge of the evidence which will be given in this case. However, Senior Counsel for the plaintiff assures me that the plaintiff and four to six witnesses will be called in the plaintiff's case. Each of those persons, he indicates to me, will give evidence in relation to questions of liability and also to varying degrees in relation to the issue of damages. They will each be cross-examined, and Mr McClintock tells me, questions relating to their credit will arise. Plainly, if this is the case questions of credit will be relevant to both issues of liability and damages. Accordingly, if their evidence was split and they give evidence on two occasions, there is the prospect of different conclusions by the jury and myself as the trial judge on those matters. If a person gave evidence in the hypothesised trial on liability and was cross-examined as to their credit, the jury has one body of evidence from which to assess that matter. If that person gives evidence on a separate

occasion in relation to the issue of damages, and credit issues are again raised, as presumably they would be the evidence of the witness relevant to damages may be different and, indeed quite different, to that which the jury heard in relation to questions of liability. It seems to me that would be an intolerable situation. The jury must have available to it all of the evidence relevant to any issue which it must resolve."

The complexities of defamation law

Australian defamation law has been described by Justice Ipp as "the Galapagos Islands division of the law of torts".¹⁹ Steven Rares QC has remarked that "The law of defamation is a complex maze for the initiate, let alone the novice."²⁰ In *Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35 Blackburn J of the Supreme Court of the Australian Capital Territory said:

"As to publication in New South Wales, I am far from confident that I have succeeded in finding my way through the labyrinthine complexities of the defamation law of that State. It is an unpleasant feeling to know that one is lost; I am not sure that it is not equally unpleasant to be unsure whether one is lost or not."

One of the primary benefits from abolishing civil juries, which was recognized by Robert Menzies,²¹ was that a judge must give reasons which can be reviewed in the appellate process. A jury verdict remains substantially impenetrable. The jury's

¹⁹ Justice David Ipp AO, Themes in the Law of Torts: Paper given at the Judges' Review Conference 2007: Past, Present and Future Perspectives on the Law at the Westin Hotel

²⁰ Rares, Steven. "Can I Say that?" (2004) 25 *Aust Bar Rev* 45 at 45.

²¹ Justice HV Evatt, "The Jury System in Australia" (1936) 10 (Supplement) *The Australian Law Journal* 49 at 75.

verdict may bring finality but may not reflect a true understanding of the facts or the correct application of legal principle. Errors if made will be hard to detect. This is not to say that juries do not mostly get it right – but sufficient decisions of judges are overturned on appeal to suggest that juries must sometimes get it wrong. And those 7A jury decisions which have been overturned are an indication that even with proper instruction, when the jury verdict is capable of analysis the error rate is not insignificant.

The defences available to the publisher were not codified by the 2005 Act. The consequence is that juries have to grapple with both statutory and common law defences. There are a multitude of defences expressed in a variety of ways. Some have both statutory and common law forms. It can be expected and experience has already shown that defendants will “dip” amongst them in the hope of striking it lucky.

The complexity of the defences will inevitably produce error. Whether when that error is made by a jury it can be corrected by the appellate court is doubtful. Errors made by a judge who must give reasons are far more readily corrected than errors made by a jury.

The defence of qualified privilege, provided by s 30 of the Act, confirms these complexities. In *Davis v Nation Wide News Pty Ltd* the question arose as to the function of the judge and jury in determining the quality of the conduct of the defendant. Under the common law it is the judge that determines whether or not the defendant has acted in a reasonable manner.²² The position was maintained by s 23

²² See Glass JA in *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 at 387.

of the *Defamation Act* 1974.²³ However, a similar provision was not enacted in the 2005 Act. This was presumably because uniform legislation was being provided (and the 1974 Act was particular to New South Wales). However, in *Davis* I held that s 22(5)(b), which provides that "nothing in this section; requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer" maintained the position of the general law that the judge is to determine reasonableness, there being no indication to the contrary in the legislation. The consequence is that however convenient it might be to ask the jury to bring in a general verdict, where this issue is raised this cannot happen. The outcome of the trial must be framed through the answers which jurors give to individual questions. Of course if a plaintiff pleads more than one imputation individual questions must always be put to the jury. If this is not done the judge will be unable to determine damages.

The number of questions that a jury must answer can be significant and potentially overwhelming. In the *Davis* trials,²⁴ the jury found only two of the nine pleaded imputations. For my own part there was a strong argument that some of the others were made out. When it came to defences, the jury was asked to answer a series of questions confined to the imputations which they found. Those questions covered 11 pages, with a total of more than 40 questions. If the jury had found all of the pleaded imputations the questions would have exceeded 180 and covered at least 50 pages. It would have resembled a multiple choice exam in defamation law at a university. Unfortunately, the option taken by Mr Justice Rich in *Ryan*²⁵ where at the second

²³ See *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511.

²⁴ *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693.

²⁵ *Cunningham v Ryan* (1919) 27 CLR 294.

trial his Honour accepted a general verdict, is not available. And one can legitimately ask would it in any event be acceptable to the litigants or the general public.

In defamation proceedings the jury is required to determine what, if any, imputations have been conveyed, and whether those imputations are defamatory of the plaintiff. They are not asked to determine whether a matter is defamatory by reference to their own, subjective responses to the publication. They are asked to consider the meaning of the publication from the perspective of an 'ordinary reasonable person'. "[T]he law draws on jurors for their collective expertise in the way the broader community thinks, as opposed to perceiving the jury as a sample of the population."²⁶

Asking someone to decide what may be perceived by an ordinary reasonable person has been shown to be a difficult task. In their paper "Rethinking the Defamation Jury", Roy Baker and Julian Leslie studied the jury's role and found that, "the trial process is open to distortion by a phenomenon of social psychology known as the 'third person effect'. This refers to the well-documented tendency for individuals to perceive the adverse impact of the media as greater on others than on the self. More specifically...the tendency of individuals ('the first persons') to believe, that a specified media report will have a greater detrimental effect on the reputation of the subject of the report in the eyes of others ('the third persons')."²⁷ It is arguable that both juries and judges will be affected by this phenomenon. However, it is reported that adults aged 40 and over are significantly less likely to display the effect than

²⁶ Baker, Roy and Julian Leslie. "Rethinking the defamation Jury" (2008) 13 Media and Arts Law Review 422 at 430.

²⁷ Baker, Roy and Julian Leslie. "Rethinking the defamation Jury" (2008) 13 Media and Arts Law Review 422 at 430-431.

younger adults. Given the age of a judge is most likely above 40, they may as a class be less susceptible to the effect than the general population. I wonder whether the media organisations were aware of this research when they made their representations to Mr Ruddock. Perhaps it explains the historical divergence between the quantum of damages awarded by juries and that considered reasonable by judges.

I understand the argument that given the complex matrix which comprises the law of defamation there are many issues which are amenable, some would say best decided, by a community judgment. Leaving aside whether in the compressed learning experience which the jury must undergo in the courtroom the relevant principles can be adequately conveyed and understood, the nature of the decisions are little different to decisions which judges in other contexts make every day. The law is replete with occasions when a judge must assess what is reasonable, fair or rational. The general law of negligence has not failed because juries have gone. Public confidence in defamation law was not eroded because of the judge's role in the "split trial" process. Rather it was thought to have suffered because some juries failed to reach a rational decision in relation to the limited issues which they were asked to decide.

The 2005 Act created a cap on damages. The legislation provides for the annual indexation of the cap, and it now stands at \$294,500. (see s 35 of the *Defamation Act*). That amount may be exceeded where the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages. However, the uniform defamation legislation

continued to deny a plaintiff exemplary or punitive damages, which had been abolished by s 46(3) of the 1974 Act.²⁸

The statutory cap will most likely serve a purpose in creating some consistency in sums awarded for damages. The cap allows a defendant to accurately compute its possible liability at least in damages and conversely the plaintiff his or her possible award. This is no doubt a considerable benefit. However, it has a potential to inflict very considerable injustice when combined with the costs of a jury trial.²⁹

Many if not most persons who have been defamed will have limited resources to risk in pursuit of the vindication of their reputation. In the event that they fail, and experience tells us that the outcome before a jury is to say the least uncertain, they will be required to meet their own costs and almost certainly the costs of the defendant, including fees for senior and junior counsel. One consequence of the cap will be that at least in money terms the real contest in a defamation trial will be about who will pay the costs. Only the rich, very poor, speculatively funded or badly advised will embark on litigation. And that is a process which fails the community. It is one matter to say the community through a jury should make decisions in defamation cases. It is another matter when that ideal operates to deny the average person access to redress at all.

Based on the recent experiences of the court the length of defamation trials where there is a jury is likely to be three times greater than if conducted as a judge alone

²⁸ Rolph, David. "A Critique of the National, Uniform Defamation Laws" (2008) 16 *Torts Law Journal* 207 at 242.

²⁹ Under section 35 *Defamation Act* 2005, damages for non-economic loss are currently limited to a statutory cap of \$294,500.

trial.³⁰ The costs of such a trial, where senior and junior counsel are common place, do not require particulars from me. Everyone in this room can do the mental arithmetic

I have previously discussed the pressures which are being felt by the adversary system. The former Chief Justice of the Australian High Court, Sir Anthony Mason, commented that there has been an "erosion of faith" in the adversary system. In a paper titled "The Future of Adversarial Justice" Sir Anthony said:

"The rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice."³¹

Similar notions are afoot in relation to defamation. The 2005 Act certainly does nothing to dispel them. I have little doubt that the path we have gone down was not the correct one – either from the plaintiff or the defendant's viewpoint. When damages are capped the burdens of the adversary trial with a jury are so great and the result so unpredictable that a further legislative response will be inevitable.

³⁰ This is confirmed by the recent defamation proceedings conducted in *Judy Davis v Nationwide News Ltd* and *Mercedes Corby v Channel Seven Sydney Pty Limited*.

³¹ Sir Anthony Mason, "The Future of Adversarial Justice", a paper given at the 17th AIJA Annual Conference on 6-8 August 1999.

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7. The Plaintiff ripped off \$1 million from a dementia patient.
8. The Plaintiff took advantage of a dementia patient and took everything she had.
9. The Plaintiff swindled Doreen Smith.
10. The Plaintiff is a thief."

69 The gravity of those imputations is apparent from the damages awards.

70 I would not accept the respondent's submission that the Court should take into account Ms Smith's deception or that the information he gave the appellant prior to the programme which "warrant[ed] its cancellation". The mere stating of the latter proposition, in particular, makes apparent the factual inquiry it entails. The primary judge substantially rejected both propositions when dealing with the respondent's claim for exemplary damages in all states other than New South Wales: see primary judgment at [279], [282] - [286]. In short his Honour held (at [282]) that "the difficulty in [the appellant's] investigation ... was the same as that faced by [the respondent]. Doreen Smith was a practised fraudster. She was very plausible" and (at [285]) that:

"...Mr Mahommed thereafter provided documentation, hoping to persuade Channel 7 that the accusations were false. However, the material was voluminous. It simply demonstrated that there had been a series of loans. It confirmed that Doreen Smith, a old woman, and Tony Steele, a schizophrenic and invalid pensioner, had been represented as having earned significant salaries. The documents did not capture Doreen Smith's real personality, and the representations she had made to Mr Mahommed. Nor did they answer the false suggestion made by Trevor Steele that Mr Mahommed had taken Doreen Smith's money and that of Tony Steele."

71 I would not accept the respondent's submission that he has established any conduct of the sort apparently contemplated by s 48A(1)(a).

72 Nevertheless this is a case, in my view, in which the Court should make a costs order that reflects the degree of success the appellant attained. The appellant established that the respondent had behaved dishonestly in the ways the primary judge summarised at [289]. These too were grave findings which enabled the appellant to achieve some measure of success on issues of both fact and law. It is not a case, however, in which the respondent should be ordered to pay any part of the appellant's cost.

73 Taking the broad and overall view of the outcome of the case adopted by Young J in *AWB Ltd v Cole (No 6)*, in my view the Court should order the appellant to pay 90 per cent of the respondent's costs of the appeal and of and incidental to the proceedings at first instance including the s 7A hearings, as agreed or assessed.

74 **McCLELLAN CJ at CL:** This case illustrates the difficulties faced by a plaintiff who resorts to the courts for redress for damage to his or her reputation. Although some of the procedural difficulties of the 1974 Act have been removed by the 2005 Act proceedings for defamation are complex and involve significant financial risks for the parties. In general, as in the present case, the financial cost of failure will be a greater burden for a plaintiff than a defendant. When the legislation imposes a "cap" on the possible damages the risks to plaintiffs are such that the potential costs, even if the plaintiff succeeds and an order for party and party costs is obtained, will dissuade many potential plaintiffs either from commencing proceedings or prosecuting them at trial.

75 For these reasons there is justification, as the 1974 Act provides, that costs in defamation proceedings should be approached in a different manner to costs in other civil litigation. In the present case McColl JA has concluded that this Court should not entertain an application from the

respondent for indemnity costs. I agree with that conclusion and her Honour's reasons for it.

76 I have been unsure as to whether, notwithstanding the appellant's partial success, both at trial and in this Court the interests of justice required an order that the appellant pay the entirety of the respondent's costs of the trial and the appeal. The appellant succeeded in defending only 2 out of 12 imputations. The imputations on which it failed are set out by McColl JA at [66]. They are grave and both justified the bringing of proceedings and a substantial award of damages.

77 The effect of a confined award for party and party costs must impact upon the respondent's ultimate financial outcome from the proceedings. The possibility of an order for indemnity costs is provided in recognition that an order for party and party costs cannot compensate a party for their entire liability to their legal practitioners. A reduction in an order for party and party costs must further erode the value of an award of damages.

78 In the present case as McColl JA makes plain the appellant has been successful in part in reducing the damages awarded to the respondent. That success resulted in a reduction of the award of damages by \$15,000 or 6.25 per cent of the original sum awarded - a very modest result. I agree with McColl JA that the appropriate order is that the appellant pay 90 per cent of the respondent's costs of the appeal and of the proceedings at first instance including the s 7A hearings.

79 **BERGIN CJ in EQ:** I agree with McColl JA.

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