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Review of Model Defamation Provisions
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Submission - Council of Attorneys-General: Review of Model Defamation Provisions – Question 10

Dear members of the Defamation Working Party

Thank you for the work that you have undertaken to date in reviewing the Model Defamation Provisions and for calling for submissions in response to the Discussion Paper (February 2019, available at: <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>>).

Question 10(a) of the Discussion Paper provided:

Should the Model Defamation Provisions be amended to provide greater protection to peer reviewed statements published in an academic or scientific journal, and to fair reports of proceedings at a press conference?

My view is that amendments to the Model Defamation Provisions be amended to provide greater protection to peer reviewed statements published in an academic or scientific journal, and to fair reports of proceedings at a press conference are necessary to better protect bonafide participants in legitimate scientific debate in Australia from potential liability in defamation.

To assist the Working Party in its consideration, please find attached to this letter a copy of a recent scientific journal article that I published on the defamatory potential of ad hominem criticism: guidance for advocacy in public forums. The citation details are:

Finn Hugh C. (2018) The defamatory potential of ad hominem criticism: guidance for advocacy in public forums. *Pacific Conservation Biology* 25(1), 92-104. <<https://doi.org/10.1071/PC17022>>

The article is available Open Access from the journal's website: <http://www.publish.csiro.au/PC/PC17022>

The article may assist the Working Party in identifying the range of contexts in which potentially defamatory statements may be made in the course of scientific debate. In particular, the article discusses the circumstances in which:

- (1) critiques of the methods, analyses and conclusions of an expert could be potentially defamatory, drawing on United Kingdom case law; and
- (2) a critique of a single item of work (e.g. a report) support a more general imputation about the competence of an expert.

Please feel free to contact me with any queries of if any further information would assist.

Kind regards,

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The defamatory potential of *ad hominem* criticism: guidance for advocacy in public forums

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Abstract. *Ad hominem* criticism seeks to discredit an argument by attacking the qualities of the arguer, rather than the merits of the argument. Although there are compelling reasons to avoid *ad hominem* criticism, it may sometimes be appropriate as a means of responding to ‘expert’ arguments advanced in public forums. However, conservation biologists should evaluate the defamatory potential of any proposed *ad hominem* criticism and consider whether the criticism: (1) impugns a person’s reputation in a trade, profession or business; (2) has a factual grounding that is based on evidence that could be used in court; and (3) is better formulated as a statement of opinion than as a statement of fact. From a defamation perspective, the purpose and context for an *ad hominem* criticism is critical and conservation biologists should always consider whether, if viewed objectively, their conduct in making the criticism would be assessed as fair-minded, reasonable, and supportive of debate over an issue of public interest. Isolated and unsupported *ad hominem* remarks should not be made. Conservation biologists should also be aware that there are circumstances in which critiques of the methods, analyses, logical approaches, and conclusions of an expert could be said to be defamatory of that person, but that courts also recognise the importance of scientific debate. Conservation biologists should carefully consider the wording of any proposed *ad hominem* criticism, particularly in terms of the precise facts to be alleged and the particular evaluative words or phrases to be applied, and should also ensure that the criticism has a proper purpose, is well supported, and clearly distinguishes between comments that express an opinion and those that state a fact.

Additional keywords: argument, conservation biology, defamation, environmental decision-making, public debate

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Introduction

The personal attacks on the distinguished district judge and our colleagues were out of all bounds of civic and persuasive discourse – particularly when they came from the parties. It does no credit to the arguments of the parties to impugn the motives or the competence of the members of this court; *ad hominem* attacks are not a substitute for effective advocacy.¹

The ‘advocacy’ referred to above differs, of course, from the kinds of advocacy that conservation biologists typically undertake. In the norm, conservation biologists advocate outside of courtrooms and to audiences other than judicial officers. Even so, the basic principle expressed in Judge Bybee’s remark – that *ad hominem* criticism is unpersuasive and tends to obstruct rather than enable debate – is relevant to conservation biologists considering whether to use *ad hominem* criticism in their advocacy efforts in public forums.

Certainly, *ad hominem* criticism has clear limitations as a means of advocacy (Hoggan and Litwin 2016). It operates, for

example, through the creation of doubt and uncertainty rather than by the contribution of positive knowledge and thus might, in the end, do relatively little to improve understanding and positively dispel misinformation. And, for obvious reasons, it tends to inflame rather than to moderate debates.

Nonetheless, there are circumstances, if narrow, when *ad hominem* criticism will be legitimate and compelling. The principal objective of this article is to provide some basic guidance about the defamatory potential of *ad hominem* criticisms to those conservation biologists who may wish to advance such criticisms in public debates over environmental decisions and policy choices. The article addresses five main issues relating to defamation and advocacy in public forums:

- (1) how *ad hominem* criticisms can be said to injure a person’s reputation in a business, trade or profession;
- (2) why *ad hominem* criticisms should have a strong factual foundation;
- (3) why *ad hominem* criticisms are often better expressed as statements of opinion than as statements of fact;

¹The quote is drawn from the dissenting opinion of Judge Bybee in *Washington v Trump* 853 F 3d 933 (9th Circuit, 2017), an appeal case before the United States Court of Appeals (9th Circuit).

- (4) whether a critique of the methods, analyses, logical approaches, and conclusions of an expert could be said to be defamatory of that person; and
- (5) whether a critique of a single item of work from a person could support a more general criticism of that person.

The article also suggests a set of circumstances that might constitute reasonable grounds for making an *ad hominem* criticism in a public forum.

The article provides a general overview of these issues as they relate to defamation law in Australia. Readers should be alert to differences in defamation law in other jurisdictions, although the main points of the article are broadly applicable elsewhere. For readers requiring practical guidance about writing online, Pearson (2012) provides a useful guide to the law of defamation in blogging and social media contexts. Professional legal advice should be sought if conservation biologists require guidance that is specific to their circumstances or if legal action is threatened or anticipated (see also Martin 2017).

The use of *ad hominem* criticism to respond to arguments advanced in public forums

Put simply, *ad hominem* ('to the person') criticism seeks to discredit an argument by attacking the qualities of the arguer, rather than the merits of the argument (Walton 1998, 2008; Walton *et al.* 2008; Dahlman *et al.* 2013). In political campaigns at least, *ad hominem* criticism can be an effective rhetorical strategy (e.g. see #PUNDITS at <http://www.trumptwitterarchive.com/>). However, persons who engage in *ad hominem* criticism in public debates are sometimes rebuked for engaging in character assassination, with Lunde (2014) suggesting, for example, that *ad hominem* criticism has evolved to the point where the objective of attacking an argument is now merely the means by which a critic seeks to justify their real objective, which is to mount a personal attack on a particular individual, and to use the cloak of public debate to conceal their own 'ugly prejudices'.

In an advocacy context, there are several reasons why conservation biologists may wish to avoid *ad hominem* criticism. First, conservation biologists may prefer to conduct themselves as model advocates who invariably exhibit qualities of civility and rationality when debating issues, particularly in public forums where they will often be seen to represent the scientific or environmental professions (Pielke 2007; Kahan 2010). Second, conservation biologists who use *ad hominem* criticism may be seen as unprofessional or unethical and their professional reputation or standing in the community may suffer as a result. Third, as citizens, conservation biologists have a moral duty not to cause unreasonable harm to the reputation of others, which extends to avoiding comments that might unjustifiably impugn the competence or fitness of a person to act in a particular trade, profession or business. Fourth, *ad hominem* criticism tends to invite a response in kind, which can lead to a series of accusations and counter-allegations, even within circles of scientific professionals (Tallis and Lubchenco 2014). Finally, there is always some risk that persons who are subject to *ad hominem* criticism may decide to sue in defamation.

Nonetheless, *ad hominem* criticism can be a legitimate argumentative strategy in some circumstances. *Ad hominem*

criticism may be a reasonable means to refute an argument put forward by another person if the personal characteristics of that person are relevant to the issue under discussion (Walton 2008). For example, in political campaigns a candidate's statements or commitments are often questioned on a basis of poor character or previous impropriety. Likewise, a person's character may sometimes comprise the actual subject matter of the argument, as when issues of credibility or integrity arise. *Ad hominem* factors may also provide an expedient means of distinguishing between two equally compelling arguments or equally strong analyses, particularly if the decision-maker is subject to time or information constraints (Johnson 2009). Similarly, defects in a person's intellectual 'character', such as a tendency to be dogmatic or to avoid considering alternatives, can be relevant to evaluations of arguments proposed by that person (Battaly 2010). Some *ad hominem* criticism may also have a plausible psychological basis, as human decision-making is often influenced by conflicts of interests, cognitive biases, and other issues relating to our competence or motivation as a decision-maker (Dahlman *et al.* 2013; Kahan 2013; Sinatra *et al.* 2014; Mandel and Tetlock 2016). In a scientific context, there is broad acceptance that attributes such as the competence, interests and previous conduct of scientists and critics are relevant when evaluating questions about transparency and integrity. For example, Lewandowsky and Bishop (2016) proposed 10 'red-flag areas' relating to the characteristics of scientists and critics and of their conduct (e.g. expertise, conflicts, use of insults or libel) that could be used to distinguish between constructive scrutiny and instances of harassment or other abuse. Finally, in a world where everyone is an expert (Nichols 2017), *ad hominem* criticism can provide a means, if imperfect, to encourage appropriate regard for – as well as robust evaluation of – scientific expertise in public debates.

Questions about the legitimacy of *ad hominem* criticism are particularly acute in public forums, where conservation biologists may wish to refute or discredit arguments made by 'experts' in public debates relating to particular decisions (e.g. assessments of the possible impacts of proposed developments) or policy choices (e.g. whether to allow coal seam gas mining in certain areas). Such 'expert' arguments are, at base, an effort by a particular person to persuade a decision-maker or policy-maker, or the community generally, to accept a particular conclusion, evaluation, opinion or recommendation. Arguments about environmental decisions or policies often involve some sort of descriptive (*the current state of things is V*), predictive (*if W happens, then X will occur*), normative (*we ought to do Y*), or evaluative (*Z is good*) claim. The quality of an argument reflects, to a large degree, the way in which those claims are articulated and the evidence – scientific or otherwise – advanced to support them.

Advocacy in public forums differs from advocacy in academic and professional contexts in several key respects. First, conservation biologists may need to respond to arguments presented in a diverse range of contexts and advanced by a broad range of persons who have – or who profess that they have – specialised knowledge or skills relevant to the subject matter to which the argument relates. Examples of such public forums include: letters to the editor, social media, blogs, online news and information forums and networks, presentations at public

meetings, radio interviews, and traditional news media (e.g. author-written opinion pieces or news articles based on comments supplied to journalists). Persons that might profess to advance an ‘expert’ argument in those forums include: scientists, consultants, landholders, businesspersons, industry representatives, government employees, developers, politicians, lawyers, spokespersons for environmental organisations, company directors, community members, representatives of community groups, and retired professionals.

Advocacy in public forums is also different because of the format in which arguments may be presented. In scholarly or professional contexts, authors or speakers may have the length of an article or a presentation in which to develop their argument. In contrast, ‘experts’ communicating in public forums will often need to present an argument in an extremely concise or attenuated form and frequently with few or no supporting references (or other relevant supporting material). The abbreviated or incomplete form in which arguments are presented means that the factual or methodological information necessary to properly assess the strength of the argument’s claims may be absent and, further, that the expert’s process of reasoning may be inadequately described (Jansen and Sulmasy 2003). As a result, the plausibility of an argument will often rely, to some degree, on the authority, credibility and reliability of the expert who advances it, rather than on any substantive evaluation of the merits of the argument itself. Arguments in public forums may, for example, contain conclusory statements that are not supported by reference to relevant explanatory information or scientific authorities or to specific empirical findings.

A final difference between advocacy in public and academic/professional contexts is that people who are subjected to *ad hominem* criticism in public forums may respond to the criticism in ways that are idiosyncratic and difficult to predict (Martin 2017). Non-scientists may know little about (or care little for) the mores by which scientists or environmental professionals go about debating issues in scholarly or professional contexts. Persons who have a strong personal commitment to an issue or a substantial financial stake in a particular outcome may simply view *ad hominem* criticism as a direct threat to those interests and respond in a manner that, to the conservation biologist, may seem disproportionate or inappropriate. Proponents of a particular argument may sometimes seek to use legal action to restrain or deter those who speak out against that argument (Dickman and Danks 2012; Martin 2017). As Justice Le Miere observed regarding defamation suits in *Leighton v Garnham [No 4]* [2016] WASC 134 (29 April 2016) (Supreme Court of Western Australia):

Defamation actions may be used as a tactic in public debate mainly for the purpose of silencing the opposition. Such actions are popularly referred to as SLAPP suits - Strategic Litigation Against Public Participation. In the environmental context, a defamation writ may be used by a developer as a tactic to silence residents or environmental groups opposing the development (paragraph 67).

It should be noted, however, that the risk of a person responding to *ad hominem* criticism by suing in defamation is perhaps less a question of whether the criticism *has* defamed that person than whether that person *believes* that the criticism has defamed

them, and then how strongly that person feels about the perceived slight to their reputation as well as their attitude to using legal action to seek redress. The modern online world is awash in material that could potentially be actionable in defamation but, for whatever reason, only a minute fraction of that material is ever acted upon in a way that leads ultimately to the commencement of legal proceedings.

That said, conservation biologists should appreciate the inflammatory potential of *ad hominem* criticism. There are at least two features of the sting of *ad hominem* criticism worth considering. First, we tend to believe that a person’s conduct reflects underlying features of their character or competence rather than the circumstances in which that conduct occurs, even though circumstantial factors are typically more important than dispositional factors in the psychology of human decision-making (Ross and Nisbett 2011). Thus criticisms of a person’s conduct tend also to imply (or be seen to imply) that there is something defective or deficient about the person as well. Second, persons who are criticised will often claim that *ad hominem* criticisms convey meanings that are more negative or more broadly evaluative of that person’s character or conduct than the critic might have intended. As a practical example, the first column in Table 1 presents examples of *ad hominem* comments while the second column presents possible interpretations of those comments. Meaning is a shared and slippery beast, and conservation biologists should always be attentive to the precision of language and the provision of context when advancing *ad hominem* comments.

Without limiting the field, the categories of persons who might respond to *ad hominem* criticism by suing in defamation include (1) those who feel genuinely aggrieved by the criticism and who are not placated by any prelitigation efforts to resolve the issue (e.g. offers of apology or to retract the allegedly defamatory material), and (2) those who see legal action as a means for discouraging public criticism of them. As an example of the latter, the former Premier of Queensland, Campbell Newman, sued the radio broadcaster Alan Jones for defamation during the January 2015 Queensland state election campaign on a basis that comments by Mr Jones had, among other things, implied that Mr Newman had prostituted himself by approving a coal mine after a coal company had given \$700 000 to Mr Newman’s political party, but then discontinued the legal action in April 2015 after his party lost the state election (Australian Broadcasting Corporation 2015; Solomons 2015; Thomas 2015).

What is *ad hominem* criticism?

As an argumentative strategy, the ultimate aim of *ad hominem* criticism is not to disparage the arguer but to undermine the argument itself (Walton 1998; Walton 2008). As the plausibility of an expert argument may depend on the personal authority, reliability or credibility of the expert who advances it, *ad hominem* criticism seeks to undermine that aura of expertise, trustworthiness, and goodwill (see Horton *et al.* 2016) by calling into question the capacity of the expert to have avoided errors and to have made correct or appropriate choices in the process of reasoning towards a particular conclusion or opinion (Battaly 2010; Dahlman *et al.* 2013).

Table 1. Examples of *ad hominem* criticisms that might be made in public debates about environmental decisions or policy choices

The first column contains statements that impugn or disparage an expert in some way. Depending on the context, the statements in the first column could be specific to particular circumstances or could be more general in application. The second column suggests general qualities of the expert or their conduct that the expert might claim are implied by or could be inferred from the statement in the first column. The statements in the second column use evaluative phrases that ascribe a negative or adverse quality to the expert or their conduct

Statement or comment expressly states or reasonably implies that the expert:	The statement or comment could be interpreted to mean that the expert:
presented information in a misleading or deceptive manner	is dishonest or lacks integrity
did not consider information which was inconsistent with a particular position	is dishonest or lacks objectivity
failed to disclose a relevant financial or personal conflict of interest	is unethical or deceptive
invariably provides conclusions, evaluations or opinions that confirm or are otherwise consistent with a particular position	is biased or partial
interpreted findings in a manner that supported the interests of a source of funding for them	is not objective or independent
overstated the probability or consequence of an event because of a lack of relevant experience	is not reliable or credible
lacked the requisite knowledge or skills to [insert a professional task: e.g. devise an appropriate sampling design, carry out a certain procedure, conduct relevant statistical analyses, properly evaluate the findings]	is not competent
exaggerated the significance of a finding because they had a commercial interest in further research into or monitoring of an issue	is not independent or trustworthy
produced work which was seriously flawed or erroneous	is incompetent
routinely produces work which does not conform to a relevant professional standard	is unprofessional (or is negligent)
was indifferent to the risk of [undesirable event] occurring	was reckless (or was negligent)
does not possess the professional standing he or she claims to have	is dishonest (or is a charlatan)
does not possess a requisite professional qualification	is unfit to engage in a business, trade, or profession
is a/an [insert disqualifying circumstance or characteristic]	is unfit to engage in a business, trade, or profession
claims to believe in X but acts in a way which is inconsistent with X	is hypocritical
people avoid person A because of [insert an adverse circumstance involving A or a negative characteristic of A]	is disreputable
cannot be trusted to fulfil promises or meet obligations	is untrustworthy
breached professional duties by [insert conduct]	has committed professional misconduct (or unprofessional conduct)
believes in Y [and a person cannot believe in Y and properly act as an expert in this situation]	is biased or prejudiced
often ignores laws that apply to a particular activity	acts unlawfully
breached a statutory provision (or regulation) by [doing a certain act or engaging in certain conduct]	has acted unlawfully
wanted to achieve a particular outcome regardless of the empirical findings	did not act in good faith
presents him or herself as a 'real scientist' (or a 'genuine expert')	is a fraud or charlatan

Ad hominem criticism often involves an assertion that an expert lacks some essential quality or possesses some inappropriate or objectionable one. The criticism may identify some particular aspect of the character, conduct or circumstances of the expert as deficient or defective, thus calling into question the competence, credibility, motivation, fitness or propriety of the expert. Table 1 presents examples of *ad hominem* comments that might be made about experts who advance arguments in public debates about an environmental decision or policy choice.

While there are a number of ways in which an expert could be said to be relevantly defective or deficient, *ad hominem* criticism might commonly involve an allegation that for some reason (e.g. inappropriate beliefs, improper interests, insufficient expertise) the expert applies methods or analyses, or uses processes of reasoning or interpretation, or employs ways of selecting and presenting information, that are erroneous, biased, ineffective, inappropriate, misleading, subjective, dishonest, unreasonable or otherwise unsatisfactory for the purpose of rendering an acceptable expert conclusion, evaluation, opinion or recommendation for a particular subject matter.

The basic formula of an *ad hominem* criticism might look something like this:

- (1) the expert is deficient or defective because {state reasons A, B, ...};
- (2) the expert is therefore fallible and liable to error;
- (3) the expert's argument should therefore be treated as unreasonable or implausible, or as weak and lacking cogency; and
- (4) the expert's argument should therefore not be accepted, or at least should not be accepted solely on the basis of the expert's assertion.

Broadly speaking, the qualities of an expert that might affect their capacity to make a reasonable argument in a public debate about an environmental issue are those relating to the expert's competence and motivation (Dahlman *et al.* 2013; Kahan 2013; Sinatra *et al.* 2014; Mandel and Tetlock 2016). A defamation case in the Supreme Court of New South Wales, *O'Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289 (15 September 2016) ('*O'Brien*'), provides an instructive example of how a critical assessment of the competence and motivation of an expert can call into question the reliability of their

arguments. The case stemmed from two news articles published in *The Sun-Herald* (an Australian newspaper) in 2013 which alleged that toxic substances had been found in a reserve in Sydney, and the subsequent critique of those articles by the Australian Broadcasting Corporation (ABC) media analysis program, *Media Watch*.

In preparing the two articles the journalist, Natalie O'Brien, had relied on the views of Andrew Helps, a director of Hg Recoveries Pty Ltd, who had communicated to Ms O'Brien that he had a 'long history in environmental management' and that he was 'an environmental disaster management expert'. Justice McCallum, who heard the matter at trial, found that while the articles quoted Mr Helps and a lawyer with the National Toxics Network, neither of them was 'even a scientist, let alone one with appropriate academic qualifications and experience in the specialised field of assessment of site contamination' (paragraph 114). Further, her Honour found that Mr Helps had a 'vested interest in whipping up community support for further testing' of the site (paragraph 146) and observed that:

It was not wise for an investigative journalist to rest on Mr Helps's views alone. It is my assessment of the evidence that he was not a reliable source for the assertions made in Ms O'Brien's articles. I am also satisfied that he did not have the independence required of an expert; he had a commercial interest in talking up the risk of contamination and clearly held the [NSW Environmental Protection Authority] in contempt (paragraph 124).

How can *ad hominem* criticism defame a person?

The possibility of being sued for defamation, though objectively unlikely, is a risk that arises when an argument is criticised in a public forum in a way that impugns or disparages – or, more relevantly, is *believed* to impugn or disparage – the person who advanced the argument. Thus, it should be no surprise that the tensions between free speech and the law of defamation are often remarked upon (see, in an Australian context, Pullan 1994; Walters 2003; Green 2014; Rolph 2016; Bachelard 2017). That tension exists in Australia, as Rolph (2016) noted, because 'it is relatively easy to sue for defamation and relatively difficult to defend such a claim. All a plaintiff will need to demonstrate is that the defendant published material that identified the plaintiff, directly or indirectly, and that it was disparaging of their reputation'.

That said, the reality of defamation proceedings is that they are often long and complex and, further, are not always very plaintiff-friendly. Defamation suits may 'backfire', for example, if they are seen as unjust or as contrary to free speech, or are legally misconceived (Gray and Martin 2006; Ogle 2007; Beresford 2015). Defamation actions are also costly to litigate and it is not uncommon for successful plaintiffs to discover that their personal contractual liability for legal costs (i.e. to their own solicitors and legal counsel) exceeds anything they receive by way of an award of damages (which may be nominal or minimal unless the defamation is severe) and any award of costs from the court.

In general, plaintiffs for defamation actions in Australia will be real people (or what the law calls 'natural persons'). Public

disquiet over SLAPP (Strategic Litigation Against Public Participation: Ogle 2007, 2010; Dickman and Danks 2012) actions in Australia in the 1990s and early 2000s contributed to statutory reform of defamation law across all Australian jurisdictions in the mid-2000s. A consequence of those legislative reforms is that large corporate entities no longer have a cause of action for defamation in any Australian state or territory. However, not-for-profit corporations and small corporations with fewer than 10 employees can still generally sue for defamation, as can individual directors or employees of corporate entities. Similarly, while local government bodies and other governmental or public authorities cannot sue in defamation, employees of those entities may be able to.

Defamation proceedings often have intense pretrial disputes over the 'pleadings' (i.e. the court documents that present the parties' proposed claims and defences). Often these arguments are, quite literally, a question of semantics as the parties debate the precise meanings (or 'imputations') that arise from the allegedly defamatory material. A consequence of such disputation is that even if a defendant is ultimately successful in defending a defamation action, there can, nonetheless, be some considerable effluxion of time and financial outlay (Bachelard 2017). As Justice Deane observed in his dissenting opinion in the High Court defamation case *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46, (1994) 182 CLR 104:

Quite apart from liability in damages, the direct and indirect costs involved in defending defamation proceedings in a superior court are likely to represent a crushing burden for the citizen who is unable to obtain legal aid from some government source. The result is that the informed citizen who is not foolish or impecunious will inevitably be deterred from making, repeating, or maintaining a statement which causes injury to the reputation of another if there be a perceived risk or actual threat that the publication or further publication of the statement or a refusal to retract it will give rise to defamation proceedings. And that will be so even if the defamatory statement is known or believed to be true (pages 176–177).

While those remarks should not discourage conservation biologists from speaking out, they should emphasise the care and the close attention to the accuracy and propriety of the criticism that ought to be taken when preparing to advance an *ad hominem* criticism (see also Martin 2017).

Although lawyers argue a lot over *how* to distil imputations from allegedly defamatory material, the test of whether a distilled imputation *is* actually defamatory does not have a high threshold. Material may be defamatory of a person if it exposes that person to hatred, contempt or ridicule, or causes them to be shunned or avoided, or tends to lower the standing of that person in the community, or to lower the estimation or esteem in which they are held, or is likely to cause people to think less of the person (see Bennett 2016 for a recent discussion of what is legally capable of being defamatory in Australia). The material may disparage or discredit the person in the eyes of a particular group (e.g. their professional peers) or the community generally. Material may reflect adversely not only upon a person's private character, but may also injure a person in their trade, business, office, or profession.

A person's reputation is the focal point for defamation. As the High Court majority in *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16, (2009) 238 CLR 460 ('*Chesterton*') observed '(i)t is disparagement of reputation which is the essence of an action for defamation' (page 476). Their Honours referred to the definition of 'reputation' given in a 1923 defamation text, where the term was said to encompass the 'esteem in which [a person] is held, or the goodwill entertained towards him, or the confidence reposed in him by other persons, whether in respect of his personal character, his private or domestic life, his public, social, professional, or business qualifications, qualities, competence, dealings, conduct, or status, or his financial credit' (page 466). The majority in *Chesterton* noted that a person's reputation 'comprehends all aspects of a person's standing in the community' including their reputation in a business, trade or profession.

Assuming that an *ad hominem* critique does not disparage an expert's personal character, it is the potential injury to the expert's professional reputation that is likely to be the relevant issue. Material that relates to the trade, business, or profession of a person may defame that person if the material attributes to them either the presence of some quality which would be detrimental to the successful conduct of the particular trade, business or profession or the absence of some quality which is essential to it (*Thorner v Samuels* 122 Misc 139, 203 NYS 316 (1923) (Supreme Court of New York)). For example, in *Mularczyk v John Fairfax Publications Pty Ltd* [2001] NSWCA 467 (12 December 2001), a defamation appeal in the New South Wales Court of Appeal, Justice of Appeal Beazley said that the 'imputation of dishonesty alleged was the absence of a quality which, I consider, must be taken as being an essential attribute of a teacher in the proper performance and discharge of his or her professional duties' (paragraph 34). Likewise, in *Crampton v Nugawela* [1996] 41 NSWLR 176, a defamation appeal in the Supreme Court of New South Wales, Acting Chief Justice Mahoney said that '(i)n some cases, a person's reputation is, in a relevant sense, his whole life. The reputation of a clerk for financial honesty and of a solicitor for integrity are illustrations of this' (page 193). Material may be defamatory of a person not only if it attributes certain conditions or characteristics to the person, but also if it identifies some act that the person has done, or course of conduct that they have engaged in, that would injure that person's reputation in their business or profession (see *Capolingua v Nationwide News Pty Ltd* [2016] WASC 156 (24 May 2016)).

A person's professional competence and their fitness to engage in a trade, profession or business are integral aspects of their reputation. As the majority observed in *Chesterton*, material may be defamatory where the 'words reflect upon the person's fitness or ability to undertake what is necessary to that business, profession or trade' (page 468). Similarly, in *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 (England and Wales Court of Appeal), a well-known English defamation case, Lord Pearson observed that 'words may be defamatory of a trader or business man or professional man, though they do not impute any moral fault or defect of personal character ... if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity' (pages 698–699). Matters that might impugn the professional competence or fitness of a person (or their *bona fides*)

include allegations of: conflicts of interest (or competing interests), negligence, lack of integrity, dishonesty, corruption, criminal or unlawful acts or omissions, professional misconduct (or unprofessional conduct), personal impropriety or wrong-doing, lack of professionalism, conduct falling well below standards for the trade, profession, or business, involvement in prior disciplinary proceedings or professional complaints or investigations, involvement in some notorious event or situation, personal circumstances (e.g. drug or alcohol addiction) that ought to disqualify the person, lack of a relevant professional qualification, exclusion from or suspension by a professional body, association with notorious persons, or a serious lack of objectivity or bias because of a personal belief or ideology.

Why *ad hominem* criticisms should have a strong factual basis

Consider the following statement and, in particular, the first and concluding sentences:

We are well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, especially salt- and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of not more birds, but more birders. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.

That statement was published in April 1972 by Robert S. Arbib, Jr as a foreword to an issue of *American Birds*, a bimonthly journal devoted to the birds of North America which was then published by the National Audubon Society. Mr Arbib, the journal's editor, and other members of the National Audubon Society were concerned about scientists who advocated that the continued use of DDT was acceptable because the results of the annual Audubon Society Christmas Bird Count showed an increase in the number of birds observed over the preceding 30

years despite the increasing use of pesticides in that period. Mr Arbib's statement was subsequently reported in August 1972 by the journalist John Devlin in an article in *The New York Times*. The newspaper article, along with Mr Arbib's foreword in *American Birds*, eventually led to a defamation trial and then to an appeal before the United States Court of Appeals for the 2nd Circuit, *Edwards v National Audubon Society, Inc.* 556 F 2d 113 (2nd Circuit, 1977) ('*Edwards*').

The defamation proceedings in *Edwards* were unusual in that Mr Arbib did not name any scientists in his statement. Ultimately, Mr Arbib had provided Mr Devlin with the names of scientists mentioned in a journal article by Roland Clement, a Vice President of the National Audubon Society, which had been published in the *Boston College Environmental Affairs Law Review* in January 1972 (Clement 1972). The article, entitled 'The Pesticide Controversy', had described several 'distorted' and 'extreme' claims based upon the Christmas Bird Count that had been made by scientists said to support the use of DDT. Mr Devlin subsequently published the names of those scientists in *The New York Times* article. Although the scientist plaintiffs in *Edwards* were ultimately unsuccessful in their defamation action, conservation biologists should understand that *ad hominem* criticism can still be defamatory of a person even if the text of the criticism does not name or otherwise expressly identify that person. The law of defamation in Australia is such that a 'nameless' *ad hominem* comment may still defame a person if at least some recipients of the comment would nonetheless be able to identify that person using extrinsic information, such their personal knowledge of the relationship between the critic and that person.

The *ad hominem* crux of Mr Arbib's statement is, of course, the 'paid liar' comment in its first and concluding sentences. Such a comment is clearly capable of being defamatory because it impugns the motives (or competence) of persons who advance certain arguments. Further, the meanings of the phrases 'paid "scientist-spokesmen"' and 'someone who is being paid to lie' are clear enough on their face. Indeed, as Chief Judge Kaufman observed in his opinion in the appeal judgment in *Edwards*: 'No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid* to lie implies corruption, and not merely a poor opinion of his scientific integrity'.

Remarkably, however, Mr Arbib did not have any factual basis for the allegation. Chief Judge Kaufman noted that, at trial, Mr Arbib had testified that he had 'never intended to portray anyone in particular as a venal prevaricator' and that the comment 'merely expressed his belief that many supporters of DDT use were spokesmen for the pesticide industry' even though Mr Arbib knew of no one in particular that he could 'with assurance call a "paid liar"'.

The next section will further discuss why the factual foundations for *ad hominem* allegations are particularly significant in a defamation context. However, two points may be made here. First, it is often exceedingly difficult to prove that something is 'true' about a person in a defamation proceeding, particularly where the information needed to substantiate an allegation is not easily accessible (e.g. evidence of financial linkages between particular scientists and particular pesticide companies) or where the allegation involves an evaluation of that person's character, expertise, performance, or other personal attribute. A

second, and related, issue is that a defendant in a defamation proceeding will not generally be able to prove anything about the mental state or thought processes of the person they have criticised. Thus, *ad hominem* criticisms that impute motives or intentions to an expert, or which attempt to characterise what the expert might have been thinking at a particular point in time or in relation to a particular task are inherently problematic.

On that basis, Mr Arbib's statement that 'you are in the presence of someone who is being paid to lie' fails because it does not adequately articulate a factual basis for the allegation, while the statement that a person 'is parroting something he knows little about' fails both because of its lack of a factual grounding and possibly also because it imputes something about the mental state or intention of a person.

However, the fact that defendants may find it difficult to establish certain issues of fact in a defamation proceeding does not mean that conservation biologists should avoid making allegations about conflicts of interest, or a person's lack of relevant expertise, or other similar matters. But these accusations should be carefully formulated. Thus, by way of an example, an allegation of a substantive conflict of interest should be advanced on the basis of factual evidence as to the objective circumstances of the expert or their conduct at a particular point in time along with specific submissions as to the relevant content of the competing or conflicting duties or interests that were (or are) impinging on the expert – and not on the basis of assertions about the expert's subjective state of mind or intention (e.g. that the expert 'wanted' an outcome that was supportive of the interests of a funding source).

Why *ad hominem* criticisms are often best presented as a statement of opinion

In a defamation context, the question of whether an *ad hominem* criticism makes a statement of fact about the person or states an opinion about that person is important because it affects the defences that might be available to the critic, namely common law or statutory justification ('truth') or common law fair comment/statutory honest opinion.

Broadly speaking, if a proposed *ad hominem* criticism would allege that, as a *statement of fact*, the expert did a certain act or is a certain type of person or has a certain quality, then the conservation biologist needs to be in a position where they could prove that the allegation is 'true' using relevant evidence (e.g. documents, statements of persons who witnessed the conduct in question) which could be used in legal proceedings if necessary. That evidence should either be at hand or be otherwise readily accessible and must also be admissible in court (e.g. not based on hearsay).

If, however, a proposed *ad hominem* criticism would allege something about the expert that is not a straightforward issue of fact, the preferable approach is to present the criticism as a *statement of opinion* that is based upon a clear set of supporting facts. Thus, for example, if a proposed *ad hominem* criticism would, as a statement of opinion, attribute a certain quality to the expert or otherwise evaluate the expert's character, conduct or circumstances, then the conservation biologist should be sure to:

- (1) clearly present the characterisation of the expert as an 'opinion' rather than as an allegation of fact;

- (2) give the specific facts which underlie that opinion; and
- (3) indicate the evidence upon which those facts are based.

It is vital that the opinion be clearly framed as a comment on particular supporting facts, such that a reasonable person who encountered the material would typically say, 'I do/do not agree with that comment'.

Comments that are statements of opinion about the character, conduct or circumstances of the expert are evaluative judgments, in that they attribute a certain value (i.e. merit, worth, quality, or significance) to a subject matter (Fournier 1995; Scriven 1995, 2015). As such, the comments should: (1) indicate clear criteria for the evaluation (e.g. the specific skills or areas of knowledge that are relevant to the conduct being evaluated); (2) identify a relevant standard against which the expert is to be judged (e.g. the level of expertise that would be expected of a particular sort of 'expert' in the circumstances); and (3) provide the facts or other information that underlie the overall attribution of value to the character, conduct or circumstances of the expert.

The New South Wales defamation case *O'Brien* contains an instructive example of the value of clearly expressing *ad hominem* criticisms as either a statement of fact or a statement of opinion. In *O'Brien*, Justice McCallum assessed whether an imputation of 'irresponsible journalism' was conveyed as a fact or as comment or opinion in the *Media Watch* program, and observed that:

I am satisfied that the viewer (or reader) would understand that attribution to be conveyed as the comment or opinion of the presenter [Mr Paul Barry]. Indeed, in my view, the matter complained of provides a textbook illustration of the operation of the defence of fair comment. The structure of the programme is to present, factually, something that was reported in the media; to present, factually, what is said to be wrong with it and to pass comment on the appropriateness of the relevant conduct by reference to a normative standard for the media. The programme makes several comments as to what *The Sun-Herald* 'should' have done or 'should' do. The tone of the programme is the tone of critique. With great respect to Mr Barry, his manner of presentation is, dare I say, opinionated. I am satisfied that the ordinary reasonable viewer (and reader) would have understood his remarks, in their defamatory meaning, as his comment or opinion, not fact.

Specifically, the reader would have understood Mr Barry to be stating (as fact) that Ms O'Brien prepared an article reporting that toxic substances had been found at levels that pose a risk to the public; to be stating (as fact) that she failed to consult experts as part of her preparation of that article; to be stating (as fact) that she got it wrong and to be making the comment or expressing the opinion, based on those facts, that her conduct was irresponsible and created unnecessary concern in the community (paragraphs 61–62).

In this context, it is also instructive to revisit *Edwards* and consider whether the 'paid liar' comment might be reformulated into a more acceptable form. Although the issue was not relevant to the defamation proceedings in *Edwards*, it is likely that the 'paid liar' comment would have been taken as a statement of fact rather than as a statement of opinion because the text of the foreword in *American Birds* did not (1) contain any factual basis

for the allegation and (2) state or otherwise indicate that that allegation was Mr Arbib's opinion. The text below suggests a recasting of the concluding sentence (the revised text is underlined):

... the simple and truthful fact that what we are seeing is result of not more birds, but more birders. Those scientists who have persisted in misinterpreting the results of the Christmas Bird Counts certainly have had time to learn from our patient and repeated explanations (both in correspondence to them and in information we have published about the Christmas Bird Counts) of how the information should be used. In my opinion, their conduct in continuing to promulgate their views without any reference to, or constructive engagement with, our repeated criticisms evinces a lack of professional integrity in this regard. They are free, of course, to independently analyse the Bird Count data and then to reach their own independent conclusions, but the relevant professional standards for scientific objectivity in these circumstances requires them to at least consider the interpretations we have suggested to them and then to respond to our views (by critiquing them, if necessary) in the course of any public communications they may make advancing their own views.

This alternative version of the 'paid liar' comment may still be defamatory of any individuals that could reasonably be said to have been identified by the comment. However, this version lays out the factual basis for the *ad hominem* comment and more clearly presents the allegation as a statement of opinion rather than as a statement of fact. The revised text uses the phrase 'in my opinion', for example, and specifically sets out a clear standard of evaluation for the conduct in question. An advantage of the clear expression of the comment as a statement of opinion is that certain defences to defamation (namely fair comment and honest opinion) become more feasible to make out. Further, even though the statements in the alternative version may still be defamatory of persons, any potentially defamatory meanings would be at a lower level of seriousness than in the original version.

As a general guide, conservation biologists may often find that, in the course of formulating *ad hominem* criticisms, they can readily replace a particular evaluative phrase (e.g. 'recklessly argued') that is both highly derogatory and difficult to prove, with another evaluative phrase (e.g. 'concluded without adequate empirical foundation') that is more precisely stated and less easily cast as a personal attack, and that is also more straightforward to establish on the basis of a comparison between the specific conduct of the expert (which the text of the criticism describes) and a relevant standard for that conduct (which the text of the criticism also sets out). It should now be clear that *ad hominem* criticisms should never stand by themselves (e.g. as a sort of 'offhand' comment) but should always be accompanied by relevant factual and explanatory material.

Can critiques of the methods, analyses and conclusions of an expert be defamatory?

It is sometimes the case that even criticisms that are directed to the methods, analyses or logic applied by an expert, or to the

Table 2. Some of the meanings that the claimants in the Welsh–English libel case *Bowker v The Royal Society for the Protection of Birds* [2011] EWHC 737 (QB) (25 March 2011) (England and Wales High Court), argued were: (a) capable of being conveyed by three documents (an email, a written critique, and a letter) communicated by staff of the Royal Society for the Protection of Birds, and (b) defamatory of them

The court found that the meanings were not capable of being conveyed by the words used in the three publications. The words in bold below are the main evaluative phrases in the proposed meanings

Field methods

- **recklessly used** particularly intensive yet completely untried and untested field methods, about which [name of the person making the comment] was most concerned and which he would never condone, involving unprecedented and dangerous levels of disturbance to black grouse chicks and juveniles, such methods being the most likely cause of a decline in the numbers of black grouse at Lake Vyrnwy
- **incompetently measured** broods at a time of year that was too late to draw any meaningful comparisons with other sites and studies
- **incompetently used** an inaccurate lek count for the year 2000, which renders their entire study worthless

Disclosure of methods

- **improperly failed** to declare such methods in their published paper
- **dishonestly misled** readers of their published paper by **deliberately omitting** important information about the methods that had been included in a preceding report
- **dishonestly** (or at least **incompetently**) **presented** the results of their study in a scientific paper as if the results were of value when they knew (or at least should have known) that the results were biased and misleading

Analyses

- **incompetently neglected** to consider environmental effects as a reason for the reported low breeding success
 - **incompetently neglected** to consider rainfall as a reason for the reported low breeding success
 - **cynically** (or at least **incompetently**) **attributed** the low black grouse survival rate (that they had most likely caused themselves) to predators
-

conclusions that they reach, can bear upon the competence of that expert in a way that might be considered defamatory of them. For example, in a Welsh–English case, *Bowker v The Royal Society for the Protection of Birds* [2011] EWHC 737 (QB) (25 March 2011) (England and Wales High Court), the claimants (Mr and Mrs Bowker), who specialised in grouse fieldwork, brought an action in libel against the Royal Society for the Protection of Birds (the RSPB) on the basis of three documents (an email, a written critique, and a letter) that had been published (i.e. communicated) in October 2007 by RSPB staff. The three documents all contained critiques, in various form, of a peer-reviewed scientific paper about black grouse conservation that the claimants and one other person had published in September 2007 in the journal *Wildlife Biology* (Bowker *et al.* 2007). The claimants argued that the three RSPB publications conveyed several meanings that were defamatory of them (Table 2). At an early stage of the defamation proceedings, the RSPB applied to the court for an initial ruling as to whether the words in the publications were capable of bearing the meanings the claimants argued for (i.e. the pleaded meanings). The RSPB's application was successful and the matter never progressed to a trial. In her reasons for decision, Justice Sharp observed, in relation to one of the RSPB publications:

I turn next to the question whether the Grant email is arguably defamatory of the Claimants, albeit not in the pleaded meanings. It is arguable in my view that it is ... albeit at a lower level of seriousness than that contended for at present. In particular, while the relevant words are arguably capable of reflecting adversely on the Claimants' capabilities and judgment, I do not consider even when read in the context of the RSPB Critique, as I have said, that they are capable of 'imputing any moral default or defect of personal character' on their part ... But in my view, the Grant email arguably raises questions as to the Claimants' judgment and abilities as field workers (but *not* their bona fides) in using high

disturbance methods which may have affected the mortality of chicks which their fieldwork was supposed to measure. In addition, it is arguable in my view that a reasonable reader (bearing in mind the nature of the readership in question) could also conclude the words reflected on their abilities by suggesting they had coauthored a paper for publication in a peer-reviewed journal which fell below the generally accepted standard for such work, by failing to detail the methods which were fundamental to the results (paragraph 55).

These comments by Justice Sharp suggest a certain irony, namely that the greater the deficiency or defectiveness of the particular methods, analyses, logical approaches, or conclusions in question and, thus, the greater the severity of the words that are used to critique them, the more likely it is that those words will convey meanings that are potentially defamatory of the persons responsible for those methods, analyses, logical approaches, or conclusions.

It must immediately be said that the fact that any words of critique might be capable of conveying a meaning that is defamatory of certain individuals does not mean that the persons who state those words will be found to have defamed those individuals. The courts have long recognised the benefits of robust scientific debate and the need to evaluate statements made in the course of scientific debate in an appropriate context. In Australia, for example, the statutory and common law defences of qualified privilege will operate in certain contexts where the exchange of 'scientific' views might occur, particularly where issues of public interest are articulated. However, in Australia, statutory qualified privilege will only be available if the court determines that the conduct of the defendant in publishing the material was reasonable in the circumstances. The considerations that bear upon the issue of reasonableness will vary with circumstances of individual cases, but it may be difficult for a defendant to prove that their conduct was reasonable if, for example, their critique was deficient (e.g. it was

illogical, poorly supported or inaccurate, or it made excessive or specious allegations, or it was otherwise inconsistent with an appropriate standard of care and diligence) or the motivation of the defendant was somehow questionable (e.g. they did not actually believe some or all of the criticisms they advanced, or they made the criticisms principally to publicly embarrass or disparage the expert, or they received some form of financial benefit for making the criticism). Further, at least in an Australia context, the edges of what would be considered to be part of a ‘scientific debate’ are not particularly clear, given the diversity of public forums that now exist outside of traditional scholarly and professional contexts and the range of persons who might now seek to advance an ‘expert’ argument of some kind in relation to a particular environmental decision or policy choice. That should again emphasise the degree of care that ought to be taken when making an *ad hominem* criticism.

Another Welsh–English libel case, *British Chiropractic Association v Singh* [2011] 1 WLR 133 (England and Wales Court of Appeal) (*Singh*), encouraged a process of legislative reform that led to the passage of the *Defamation Act 2013* (United Kingdom). The defendant in *Singh*, a scientist and a science writer, had published an article on the ‘Comment and Debate’ page of the *Guardian* in April 2008 that included the following statement:

The British Chiropractic Association claims that their members can help treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, even though there is not a jot of evidence. This organisation is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments.

The England and Wales Court of Appeal upheld the defendant’s appeal, on a basis that Dr Singh’s statement that there was ‘not a jot of evidence’ to support the claims of the British Chiropractic Association was a statement of opinion and, further, was an opinion that was supported by reasons. The Court of Appeal observed that it would respectfully adopt remarks made by Judge Easterbrook in *Underwager v Salter* 22 F 3d 730 (7th Circuit, 1994), an appeal case before the United States Court of Appeals (7th Circuit), in which his Honour stated that:

[Plaintiffs] cannot, by simply filing suit and crying ‘character assassination!’, silence those who hold divergent views, no matter how adverse those views may be to plaintiffs’ interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation. ... More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path towards superior understanding of the world around us.

Conservation biologists should be aware, then, that critiques of the methods, analyses, logical approaches, or conclusions of an expert have the potential to convey meanings that are defamatory of the expert and, indeed, to motivate an expert to sue in defamation. That said, the defamatory meanings conveyed by criticisms of the methods, analyses, logical approaches, or conclusions of an expert are likely to be less serious and more capable of falling within the penumbra of notions of ‘scientific debate’ and ‘public interest’ than those conveyed by *ad hominem* comments about the expert. That is particularly so if the

facts that comprise or underlie an *ad hominem* criticism are contentious or difficult to prove. For example, in an appellate decision (see *Competitive Enterprise Institute v Mann*, District of Columbia Court of Appeals, 22 December 2016) relating to the ongoing defamation action of the climatologist Michael Mann in the United States (see Adler 2016, 2017, for an overview), Senior Judge Ruiz observed that:

To the extent statements in appellants’ articles take issue with the soundness of Dr Mann’s methodology and conclusions – i.e. with ideas in a scientific or political debate – they are protected by the First Amendment. But defamatory statements that are personal attacks on an individual’s honesty and integrity and assert or imply as fact that Dr Mann engaged in professional misconduct and deceit to manufacture the results he desired, if false, do not enjoy constitutional protection and may be actionable ... Tarnishing the personal integrity and reputation of a scientist important to one side may be a tactic to gain advantage in a no-holds-barred debate over global warming. That the challenged statements were made as part of such debate provides important context and requires careful parsing in light of constitutional standards. But if the statements assert or imply false facts that defame the individual, they do not find shelter under the First Amendment simply because they are embedded in a larger policy debate (pages 57–58).

Those remarks were said in a context of the express constitutional protections afforded to free speech under the First Amendment to the United States Constitution. Nonetheless, they emphasise, in a general way, the value of formulating *ad hominem* criticisms carefully and precisely, particularly where they make allegations about the bona fides of person.

Can a critique of a single item of work support a more general imputation about the competence of an expert?

This question was considered in a defamation case in the Supreme Court of New South Wales: see *Warren v Tweed Shire Council* [2002] NSWSC 211 (22 March 2002) and *Warren v Tweed Shire Council* [2002] NSWSC 1105 (22 November 2002). In essence, the case involved a dispute over whether a document that commented, sometimes critically, on a draft impact assessment report conveyed imputations that were defamatory of the authors of that draft impact assessment report. The two plaintiffs (an environmental consultant and an environmental consulting company, respectively) had sued the first and second defendants (the Tweed Shire Council and another environmental consulting company, respectively) in relation to the publication in April 2001 of material in a document referred to as a ‘Local Environment Study’. The Local Environment Study had been prepared by the second defendant for the Tweed Shire Council as a commentary on a draft Species Impact Statement for a proposed development in the Tweed Shire that the plaintiffs had produced.

In *Warren v Tweed Shire Council* [2002] NSWSC 1105 (22 November 2002), Justice Simpson considered whether to grant leave to the plaintiffs to file an amended statement of claim (a pleading) that pleaded a revised set of imputations, the plaintiffs’ originally pleaded imputations having been ‘struck out’ in

the earlier March 2002 decision by Justice Levine. The first plaintiff pleaded that the Local Environment Study conveyed three imputations which were defamatory of him, namely that he:

- (1) was incompetent as an environmental consultant in that he prepared a draft Species Impact Statement for the use of Tweed Shire Council which failed to identify and consider a significant koala population, failed to give adequate consideration to the requirements of the *Environment Protection and Biodiversity Conservation Act 1999*, and contained an inadequate fauna habitat analysis for a number of species including the Wallum froglet and Wallum tree frog;
- (2) negligently prepared a draft Species Impact Statement [repeats text in (1) above]; and
- (3) as a professional environmental consultant, was guilty of unprofessional conduct in that he prepared a draft Species Impact Statement for the use of Tweed Shire Council which was so seriously deficient that it warranted criticism.

The imputations for the second plaintiff (the company) mirrored those imputations. Justice Simpson refused to grant leave to the plaintiffs to file an amended statement of claim in respect of any of the revised imputations that were pleaded. For the first imputation, relating to the allegation of incompetence, her Honour followed the earlier ruling of Justice Levine to the effect that such an imputation was incapable of being conveyed by the Local Environment Study because that matter referred only to one specific piece of work by the plaintiffs (i.e. the draft Species Impact Statement). As regards the third imputation, Justice Simpson observed that the imputation lacked specificity but that, further, there was ‘a difference between a document which makes a criticism of the work of an individual, and one which asserts deficiencies that warrant criticism. In this case the matter complained of [i.e. the Local Environment Study] certainly criticises the work of the first plaintiff but that is not the same as saying that the work “was so seriously deficient that it warranted criticism”’ (paragraph 23).

In *Nationwide News Pty Ltd v Warton* [2002] NSWCA 377 (21 November 2002), the New South Wales Court of Appeal considered the broader issue of whether the specific conduct alleged in a particular case could support a general imputation about a person. The case related to the publication in May 2000 of an article in *The Daily Telegraph* (an Australian newspaper) entitled ‘Bout a sucker punch’ relating to a proposed boxing match between Kostya Tszyu and Julio Cesar Chavez. Justice of Appeal Heydon observed:

The article does not suggest that the plaintiff’s act is other than an isolated act of dishonesty, but it does suggest that it is a most serious act of dishonesty. It involved gambling with one man’s health (that of Chavez), exploiting another man’s reputation (that of Tszyu), doing it only for money, doing it in a way which was attracting great criticism in America, both among the public and the authorities which regulate boxing, and doing it in a manner justifying the arrest of the plaintiff. While a person can do a dishonest thing without being thought a dishonest person, some things are so dishonest that one can infer that only a dishonest person would do them. The

activities attributed to the plaintiff in the article are so extensive, serious and risky that it is open to ordinary reasonable readers to infer that only a dishonest person would have done them (paragraph 61).

It is important, then, for an *ad hominem* criticism to be formulated so that there can be no doubt as to whether the criticism makes only a specific, situation-specific critique of the expert (or, more specifically, an item of their work or an instance of their conduct) or whether the criticism makes some more general critique of the qualities (or lack thereof) of the expert. Statements that are imprecise or lacking in context will leave the door open for persons to claim that the words mean more than what might have been intended or that might have been necessary to achieve the objective of the criticism.

What are reasonable grounds for *ad hominem* criticism when advocating in public forums?

Ultimately, it is for each individual to decide whether a particular circumstance warrants the use of *ad hominem* criticism and to consider the risks and benefits of that approach. This article proposes that conservation biologists should limit the use of *ad hominem* criticism to situations where the proposed criticism would be: (1) legitimately made, (2) properly responsive, (3) well substantiated, (4) plausible, and (5) complementary to a broader critique. Those grounds can be summarised as follows:

- (1) *Legitimately made.* The criticism should be communicated solely for the purpose of contributing to public debate about an issue of public interest. The propriety or good faith of a critic’s motives in advancing an *ad hominem* criticism is relevant in a defamation context because some defences may be unavailable if the conduct of the critic in making the defamatory statements was not reasonable in the circumstances – as when, for example, the critic knew the allegations to be false or made them with an improper purpose or with reckless indifference to their truth or falsity or otherwise lacked an honest belief in what was communicated. Conservation biologists should always advance *ad hominem* criticisms with appropriate care and diligence and give careful consideration to the purpose and value of the criticisms they make. In particular, conservation biologists should give some thought to the standards of professional integrity and collegiality that should apply in the circumstances and consider whether, if viewed objectively, a proposed *ad hominem* criticism could reasonably be seen as gratuitous, irrelevant, improper, or malicious, or as involving innuendo, or as made for some improper purpose or motive. Useful perspective can often be gained by asking professional colleagues and laypersons to comment (on a confidential basis) on a proposed *ad hominem* criticism. Particular care should be taken in circumstances where a conservation biologist could be said to derive some form of financial benefit by making the *ad hominem* criticism.
- (2) *Properly responsive.* The criticism should respond to an argument that is incomplete because the form of the argument lacks key factual or methodological information or adequate detail about the process of reasoning, or is otherwise insufficient to support a robust critique of its merits. If

the argument is adequately presented, then generally there will be no practical necessity for *ad hominem* criticism.

- (3) *Well substantiated*. The criticism should have an adequate factual basis, regardless of whether the criticism constitutes a statement of opinion or a statement of fact. Further, conservation biologists should carefully formulate the context in which *ad hominem* criticism appears so that it presents a clear framework for how the criticism is to be interpreted. For example, it will often be useful for the overall communication in which an *ad hominem* criticism appears to contain a statement of purpose that indicates: (a) how the overall communication (including the *ad hominem* criticism) contributes to public debate about an issue of public interest, (b) the intended audience for the communication, and (c) why the members of that intended audience will have some particular interest in the information being conveyed. Such material may assist in making a defence of qualified privilege available in certain circumstances.
- (4) *Plausible*. The criticism should propose a plausible link between the qualities of expert that are impugned and the plausibility or soundness of the argument that the expert has advanced. This linkage will generally relate to the competence or motivation of the expert. Such a linkage adds a vital component of reasonableness to the *ad hominem* criticism. Without such a link, the *ad hominem* criticism may amount to, or be interpreted as, a mere personal attack.
- (5) *Complementary*. The criticism should not generally be presented in isolation or as the primary component of a response to an expert argument but, rather, as one component of a broader critique of the expert argument, on a basis that criticisms should first consider the merits of an argument to the extent possible and then, if the circumstances warrant, proceed to the making of *ad hominem* criticisms.

A final point is to reiterate that particular care must be taken when making allegations about the bona fides of a person. Although it is appropriate and very much in the public interest for conservation biologists to speak out when, for example, an expert has engaged in some level of impropriety or misconduct or has failed, without good reason, to disclose a significant conflict of interest, conservation biologists are not, by training or experience, investigative journalists. Martin (2017) provides some useful practical guidance for conservation biologists who wish to speak out about issues that may raise some controversy or dispute.

Conclusion

Ad hominem criticism can be an effective strategy for discrediting an argument advanced in a public forum. However, the circumstances in which *ad hominem* criticism will be appropriate are relatively narrow and careful thought should be given to the risks and benefits of directing a critique towards the qualities of an expert rather than to the merits of their argument. If the advantages do seem to outweigh the risks, then conservation biologists may wish to consider some of the points made here, particularly the importance of providing a strong factual basis for the criticism and the value of presenting the criticism as a statement of opinion based on a clear set of facts. Critically, *ad hominem* criticisms should never be deployed as an informal or

rhetorical remark, but only as a carefully considered and well supported comment.

Conflicts of interest

The author declares no conflicts of interest.

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