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Review of Model Defamation Provisions
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Following this brief introduction are my responses to questions raised by the Council of Attorneys-General's Discussion Paper of February 2019.

As a barrister based in Sydney I have conducted numerous defamation trials over the last thirty years, and been involved in many more cases that have settled.

I write with considerable concern for the position of plaintiffs, which it seems to me in both the current and past debates, has been seriously overshadowed by the position of defendants. Defendants include powerful corporations with a strong interest to unite in a common cause. Plaintiffs are mostly scattered individuals who do not know each other. Defendants with commercial interests in communication have a strong continuing reason to want to influence defamation law favourably to them. Plaintiffs as dispersed individuals mostly hope never to have anything to do with the law again. Defendants are well financed; plaintiffs on the whole have few resources. Consequently, there are various lobby groups to represent the interests of defendants, but not of plaintiffs. Commercial defendants are often really talking about freedom for defamatory speech, or freedom from liability for defamation.

Defendants control the avenues of public debate, which is heavily skewed in favour of the reforms they seek.

Extreme, even hysterical, statements that bear no relationship to reality have been published in recent times. For example, that our defamation law is a "Frankenstein's monster" and that "if you were starting from scratch, the

defamation laws you would draft would bear no relationship at all to those we are saddled with.” Many of those who have made or endorsed such statements should know better. Such statements seem to me designed to create a climate of anxiety so that change to the law is seen as necessary, and more easily accepted.

It is notable that large sections of our law are left entirely uncriticised by even these bleak critics. The defence of qualified privilege at common law, for example, probably the defence most relied on in everyday affairs, and the defence of fair report, which gives the media a massive free kick at sometimes great prejudice to the individual, pass entirely without question. So much for “no relationship at all”.

The aspects that receive the most publicity are those where the commercial communicators desire change in their own interest. Some of the publicity has included the fact that in recent years there has been an increase in actions involving electronic publications. It would be surprising if there had not been. Electronic technology has made available to almost everyone a means of instant and costless communication whose very ease encourages intemperate and ill thought communication on the spur of the moment, the “tweets” of some prominent people being a well known current example. The vulnerability of the individual to serious defamation has been increased enormously, with no matching improvement in the ability to obtain a remedy. The power and intrusiveness of electronic communication can be overwhelming. Misused as in “trolling” it has on occasions even provoked suicides. Its effect in the area of defamation can be no less devastating.

I am not attempting to address here all of the issues raised in the Discussion Paper, but those to which my experience most relates.

Yours sincerely,

Tom Moloney

REVIEW OF MODEL DEFAMATION PROVISIONS

Question 3

The single publication rule

1. Developments in technology over the last thirty or so years have made radical changes in the terrain over which the law of defamation operates. Once, written communication to numerous people required the time and effort to make copies of a publication and achieve their individual physical delivery, whereas now a message can be delivered to millions of people in multiple countries almost instantaneously at the flip of a button. The result is that to defame is much cheaper and easier, while securing a remedy for the victim is much more difficult. Often the victim does not even know for a considerable time that the publication exists, and, once known, it is often extremely difficult to establish where and how far it has been distributed. The internet allows cheap and easy access for extremely damaging communication to the crank, the vindictive, the malicious and the mischievous.
2. Putting a communication on the internet can be like the action of the farmer who in 1859 released 24 rabbits at Winchelsea in Victoria. Within 40 years they were all over Australia and there was no chance of getting them back. (Though a bequest from his widow gave Melbourne the Austin Hospital, some recompense for the rabbit plague). Once on the internet, the communication usually stays, like a rusting container of nuclear waste, waiting to burst forth.
3. Of course, there is a distinction between putting a communication on a website, where it will sit unknown unless people choose to access it and read it, and sending a communication directly to people. However these two

processes easily become combined, as when someone sends to someone else a communication that the first person has found on a website, or a link to it.

4. There are many circumstances where a communication may be placed on a website, and not noticed, or not noticed very much, until later events draw attention to it.
5. Some commentators have placed significance on the fact that on occasions a very limited number of people have had access to defamatory material on the internet. No absolute judgment can be made merely from the size of the audience. “For Oscar Wilde posing as sodomite” was seen by only one person other than its author and its subject. The case that followed was not a good idea for other reasons, but it was never suggested that there had not been sufficient publication to found a serious case. In recent years I had to advise someone, well qualified for a position that required unusual qualifications, but who missed out on it because of material placed nine years previously on a website of which he had not even been aware. This is a stark example of the essential unfairness and unreality of a single publication rule. If such a rule had been in operation, my client, finding out about the publication more than three years (the outer limitation period) after it had been posted, could never have done anything about it.
6. It is somewhat paradoxical that the technological developments that have created a much greater risk of exposure to defamation, and much greater difficulty in securing an adequate remedy for it, are used by some as a reason for instigating a single publication rule. That is a rule that limits liability for publication. In fact, it is a rule which eliminates liability for the continuing publication that is an inherent part of the internet. The imperative in the technology of the internet is exactly the opposite, that there should be continuing liability for continuing publication. Those who make the argument for the single publication rule are nearly all associated with commercial

interests which would benefit from liability for publication being limited in this way.

7. The effect of a single publication rule is simple: a matter is deemed to have been published only once, at the time it is first read, even by a sole person. Thus, something put on the internet, no matter how grossly defamatory, no matter how damaging, no matter how wrong, no matter how malicious, if it goes unnoticed by the person affected for three years can never be sued on, no matter how much publicity or notoriety it comes later to attract, and can remain there immune forever. This consequence is radical and utterly unjust.
8. One could even have the circumstance where a defendant, though sued successfully for an on line publication, refused to take it down, and could not be sued again for its continuing presence. That is not a fanciful scenario. *Gacic v John Fairfax Publications Pty Ltd* [2015] NSWCA 99 documents how the defendant removed the publication sued on, but then reinstated it. (see [234] to [249]).
9. The single publication rule would also create a quite impossible situation for anyone subjected to the same defamation in multiple online publications, a phenomenon that is increasingly common. Simply sending a concerns notice to each of the publishers could be a major task, but if they refused to take the publications down, as often enough happens, it would be both impractical and expensive to begin actions against all of them. For many affected people, the expense would be prohibitive. The economical and manageable course would be to begin an action against one, probably the most obvious or worst, then upon winning that, use the threat of similar actions to persuade the remaining publishers to remove their publications. Pursuing the case to verdict would take at least a year, by which time, if there were a single publication rule, it would be too late to begin actions against the other publishers. Thus if there were a single publication rule, a person affected by multiple on line publications would have no choice but to begin actions for all

of them. This is both oppressive and wasteful, and yet another demonstration of the inappropriateness of such a rule.

10. The imposed rule that would limit liability is entirely artificial and does not reflect reality. It is the very opposite of what the technology demands, which is that liability continue for as long as the technology allows the publication to continue. (Publication, that is, in the real sense of being communicated to individual people, not in the artificial sense proposed by the single publication rule). After all, it is within the power of the person who put it on the internet to take it off. And even in the cases where that would not be fully effective, a fundamental question remains – in the ultimate interests of justice, who should suffer the detriment, the person who put the defamation around, or its victim?

Question 4

Offers to make amends

11. The offer to make amends is a quite radical procedure that extends far beyond the costs penalty provisions applying to normal offers. The making of a reasonable offer to make amends that is not accepted by the plaintiff operates as a complete defence. That is, the plaintiff, even though otherwise winning every issue in the case, and perhaps winning them convincingly against a weak or even unmeritorious defence, loses entirely because of failing to accept a reasonable offer. There is no equivalent pressure placed on a defendant. The offer to make amends procedure operates to the potential prejudice of plaintiffs only.

12. The consequence for a plaintiff of not accepting a reasonable offer made under the offer to make amends procedure is so much more serious than the penalty for not accepting a reasonable offer made otherwise that one would expect there to be a significant difference in the conditions prescribed for such an offer. Indeed there is, but unfortunately it has been obscured by the

decision in *Bushara v Nobananas Pty Ltd* [2012] NSWSC 63, which, with all respect to Justice Nicholas, is clearly wrong.

13. Section 18(1)(b) of the Defamation Act provides that an offer to make amends is a defence if among things “at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer”. In ordinary language, the phrase “at any time” may have either of two meanings. It may mean always, at all times, as in “No parking at any time”, or it may mean at some particular time “she could arrive at any time”. An offer would be open “at any time” in the latter sense if it were open for only a very short time. It is inherent in any offer that at some time its maker must be ready and willing to carry it out, otherwise it would not be an offer. Thus, interpreted as meaning “at some time” the subsection adds nothing to what would be the situation anyway. This renders the subsection completely ineffective. The correct meaning of “at any time” in this context must be “at all times”. The words “at any time” should be replaced by “at all times”.

14. Once this is understood, other issues disappear. The defendant may, if it wishes, withdraw an offer to make amends, and replace it with another offer, or not. But nothing done by the plaintiff, even to the extent of an explicit rejection, can cause the offer to terminate. That is entirely within the control of the defendant, but if the defendant wishes to be able to rely on the offer as a defence, it must be maintained open all the way to the trial. That is entirely consistent with a provision imposing such a radical penalty on an otherwise successful plaintiff.

Timeframe for making offer to make amends

15. The phrase “as soon as practicable” in Section 18(1)(a) is potentially ambiguous and should be amended. I suggest that it be replaced by “as soon as reasonably possible” rather than allowing the offer to be made in all cases

as late as the outer 28 day limit. While it is true that in some cases defendants need time to assess their position and obtain advice, in other cases it is plain that a mistake has been made, and there is no basis for such a delay.

Question 5

Offers to amend and jury prejudice

16. I am not at all sure that serious prejudice is likely to be caused by the jury's knowing that an offer was made. It could be explained that offers are often made as "a deal" to avoid the expense and risk of a trial, just to dispose of the matter. Juries customarily have to deal with positions that may readily appear contradictory, such as a defence to an imputation that has been argued by the defendant not to have been conveyed.
17. If the defence of offer of amends were put before the jury only after other defences had been decided, the evidence in some cases would have to be reopened, because the plaintiff would have been affected by the exchange of correspondence leading to the offer.

Question 6

Other issues relating to offers to make amends

18. Supply of the URL of the defamatory material assists the rapid resolution of the complaint, and should be required as part of the process.
19. I think there is a simple proposition that a publisher who does not offer an apology does not really understand the meaning of making amends.
20. There is no basis for indemnity costs if the plaintiff begins proceedings before the expiration of the time allowed for an offer to make amends. The offer can still be made, and will still win the day if it deserves to do so. No extra expense is caused by the early filing.

Question 9

Contextual truth

21. The idea behind the defence of contextual truth is simple: plaintiffs do not deserve to succeed if, though the publication says something damaging about them that is untrue, that untrue part really does them no harm because there is another more serious allegation about them in the publication, and that other allegation is true. Thus someone who complains of having been wrongly accused of shoplifting could be met with a successful defence if the publication also said that the person is an armed robber, and it is true that the person is an armed robber. If the plaintiff in this example pleads only the imputation that he is a shoplifter, it is left to the defendant to plead in defence the contextual imputation that he is an armed robber. According to the accepted interpretation of the 1974 NSW Act, which is the origin of this defence, the defence was also available if the plaintiff pleaded both the shoplifter and armed robber imputations. In those circumstances the defendant could rely on a plaintiff's imputation proved true (armed robber) to defend one that could not be proved true (shoplifter).
22. Unfortunately, the drafting of s.26 of the current Act requires the imputation or imputations on which the defendant relies to be "in addition to the defamatory imputations of which the plaintiff complains", which restricts the defendant to relying on imputations not pleaded by the plaintiff. Thus, in the example given above, the defendant can rely on the armed robber imputation as a defence if it is not pleaded by the plaintiff, but not if it is. This is absurd, and needs to be remedied, and there seems to be general agreement on this.
23. There is another problem in the interpretation of this section, not referred to in the Discussion Paper, but that needs to be remedied. There is a division of views at appeal level about the application of the section. The issue is what the damage caused by the true contextual imputation or imputations should be weighed against. One view is that it is all of the plaintiff's imputations,

whether proved true or not, the other view is that it is only the plaintiff's imputations that are not proved true.

24. This problem arises only if there is more than one imputation pleaded by the plaintiff. Take the previous example with the shoplifter/armed robber imputations, but add this. The plaintiff pleads that the publication conveys that he is (i) a drug dealer and (ii) a shoplifter. The defendant pleads the contextual imputation that he is an armed robber. Assume that it is proved true that the plaintiff is an armed robber and a drug dealer, but not that he is a shoplifter. One view is that the defence succeeds if, given the harm done by the armed robber imputation, the plaintiff is done no more harm by all the imputations he has pleaded, that is, the drug dealer and shoplifter imputations. The other view is that the drug dealer imputation should not be included, because by being proved true it has been separately defended, and therefore that only the plaintiff's imputation not proved true (the shoplifter) should be taken into account.
25. The origin of this defence is the previous NSW Act. Under that Act, where the cause of action was the imputation, it made ready sense that the imputation proved true should not be taken into account. It seems that the intention behind the defence was to continue this approach, but the drafting of the section cannot easily be read to support it. That is the reason for the divergent interpretations now taken. In *O'Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289, McCallum J reviewed the conflict briefly, and said that "it makes no sense to allow a plaintiff to meet the defence by relying on an imputation of which the plaintiff complained but which has been proved substantially true" (para 159). That approach would be achieved by a section in these terms:

It is a defence to the publication of defamatory matter if the defendant proves that:

- (a) *one or more imputations carried by the matter is or are substantially true, irrespective of whether it is the plaintiff or the defendant who has proved such imputation or imputations to have been conveyed, and*
- (b) *any imputation or imputations pleaded by the plaintiff and not proved true do not further harm the reputation of the plaintiff because of the substantial truth of that imputation or those imputations.*
- (c) *for the purposes of this section, imputations pleaded by the plaintiff or for the purpose of this defence by the defendant may be taken into account.*

Question 11

Statutory Qualified Privilege

26. It has been a standard complaint by commercial defendants for many years that the statutory qualified privilege defence (s. 30 of the NSW Act), is completely ineffective because the courts set the test of reasonableness too high. This is never accompanied by an analysis of cases where the defence has failed, and for good reason, because such an analysis would show overwhelmingly that when media defendants fail with this defence, it is indeed because their publication has not been reasonable.
27. It is simply not true that this defence is ineffective. I have myself succeeded with it for publications to the general public on two occasions. The first, many years ago under the predecessor of the current section, s. 22 of the 1974 NSW Act, (where the test was the same), was for a book of my own (*Seary v Molomby* [1999] NSWSC 98). The second, towards the end of 2018, was for 20 electronic publications (a large blog, two comments on the blog and seventeen tweets) (*Benhayon v Rockett (No 8)* [2019] NSWSC 169). The complaints about this defence are not soundly based.
28. The defence provided by Section 4 of the UK Defamation Act 2013 (“Publication on matter of public interest”) relies heavily on considerations of reasonableness. It covers very much the same ground as our defence of

statutory qualified privilege. It is probably narrower, because it is confined to statements on a matter of public interest, whereas the publications to which our defence can apply do not have that limitation. The assessment of reasonableness is very much as occurs in our cases. See for example the recent interesting case of *Economou v de Freitas* [2018] EWCA Civ 2591 at [74] to [113]. To have two statutory defences covering essentially the same ground is unnecessary and would cause waste and confusion.

Question 12

Defence of honest opinion

29. There is a fundamental problem in the drafting of Section 31 that has not been considered in the Discussion Paper. The defence is provided “to the publication of defamatory matter”. Since the earliest cases dealing with this section, judges have acknowledged a problem. In *Holmes v Fraser* [2008] NSWSC 570, Simpson J spoke of “a real difficulty in application” (at [56]). The problem is that the section appears to require that the whole publication (being the “matter”) is an expression of opinion, rather than that the opinion be constituted by the words conveying the defamatory imputation or the imputation itself (where there is a difference between these two). Simpson J said: “On a literal construction of s 31, there is little, if any, room for concluding that “matter”, as it is used in s 31(1), ought to be construed as meaning the imputation or imputations found to have been conveyed, (as distinct from the publication as a whole) although such a construction would present the most workable result.” (at [59])

30. In *Tabbaa v Nine Network Pty Ltd (No 10)* [2018] NSWSC 468 the drafting of the section allowed an argument by the defendant that, in relation to a television programme where a defence of justification had failed (four of twelve imputations not having been proved true), the finding by the jury that one of those imputations had been expressed as an opinion based on proper

material established a defence to the whole thirty minute programme. The plaintiff accepted this position at trial. On a motion to set aside the verdict by the plaintiff under UCPR Rule 36.16 the trial judge, while refusing to allow the motion, was of the opinion that the defendant's view of the law was not correct. He also did not accept the plaintiff's view. The view he himself then took has not, as far as I know, been taken by anyone else. His consideration of the issue at paras 70 to 78 shows eloquently how much the section is in need of amendment.

31. I suggest that the most practical option is that mentioned by Simpson J, that is, that the defence should be expressed to be available to defend the imputations. Otherwise, in a publication conveying several defamatory imputations indefensible as true, a defence may be constituted by any one of them being proved to have been conveyed as an opinion based on proper material; alternatively, in a publication conveying several defamatory imputations found to have been conveyed as opinions, a defence could be constituted by proving any one of them alone to have been based on proper material, even though the others failed. These results seem quite absurd, and cannot have been intended.

Should the proper material be specified in the publication?

32. It is appropriate to go back to the essential rationale of the defence:

People should be free to express their opinions so long as:

- (a) they make clear that what they are expressing is an opinion, not a statement of fact.
- (b) they identify their basis for the opinion, so that others can decide for themselves whether or not they agree.

This can be achieved only if the basis of the opinion is identified in the publication.

To change the defence to fit patterns of use of new technology is to allow the technology and its manufacturers to dictate rights.

33. It is not imposing a novel burden to insist that if a person wishes to circulate defamatory material of another, the person should reflect carefully, and ensure that it is properly based. Or should perhaps the truth defence be relaxed for those who don't have time to assess whether what they are saying is correct or not?

Question 13

Joinder of journalists to proceedings against media publishers

34. The Defamation Act 2006 has now been in effect long enough for there to be statistics to show whether or not the feared results have in fact occurred. It seems they have not. But there would be nothing aberrant if they had. If the journalist does not deserve the defence because the journalist did not hold the relevant opinion, there is nothing unfair or anomalous in the journalist being deprived of the defence, while at the same time the publisher is protected because it honestly believed that the journalist did hold the opinion. To change that would either protect unworthy journalists or penalise worthy publishers. There is no reason why the plaintiff should not be able to sue the unworthy journalist, who after all will be the source of the problem.

Question 17

Damages

Multiple proceedings and consolidation

35. When multiple proceedings are instituted by a plaintiff, it is usually for multiple publications of essentially the same defamatory material. If the multiple proceedings were for different defamatory materials, there seems no reason why the plaintiff should not recover separately for each one. Where

the publications sued on are essentially the same, defendants after the first one can claim the mitigation available pursuant to Section 38(1)(d) of the Defamation Act. See the judgment of McCallum J in *Gayle v Fairfax Media Publications Pty Ltd* [2018] NSWSC 1838 at [25] to [28] and [45].

Question 18

Other Issues

Adequate Remedy

36. It has often been remarked that the remedy the courts can offer – an award of damages – does not appropriately deal with the damage caused by defamation.
37. The best remedy by far is a prompt, prominently displayed withdrawal and correction, accompanied by an apology. This has been my experience with many clients. Of course, there will always be cases that could never be resolved this way. The great set piece battles – *Geoffrey Rush v The Daily Telegraph*, *the Wagner Brothers v Alan Jones* – will only ever be resolved through a hearing in court.
38. However, very many cases (I would say the majority) are resolved before trial on negotiated terms that include the publication of an apology. Among those are circumstances where proceedings have not even been filed.
39. There are reforms that could assist the rapid and economical resolution of this category of case which do not seem to have been considered.
40. The uniform legislation contains a provision which, when I first saw it, I thought was very promising. But it has rarely, if ever, been used in the way in which it would be most beneficial, which may indeed be the way intended by its drafters. Section 20 of the Defamation Act 2005 (NSW) provides that an apology cannot be used as an admission of fault or liability. This means that defendants can gain the mitigating effect of a prompt effective apology

without running the risk of having the apology used against them. However, they almost never do so. What happens is that the giving of an apology and its terms become wrapped up in the general settlement negotiations.

41. An effective apology given early would enormously assist negotiations for settlement, on both sides. In my experience many aggrieved parties are surprised at how widely noticed and effective a proper apology turns out to be. Many years ago I had a high flying client who was very seriously defamed by having his name included by mistake in a publication. There were obvious adverse effects on his business even on the day of the publication itself. He was in panic and desperate. The publisher, contacted, acknowledged the mistake, but offered a hard bargain. In effect, a settlement based on a prominent, very full and very fair retraction, correction, explanation, and apology the next day, with legal costs, but nothing by way of damages. My client was indignant. Apart from any issue of special damages for his business loss, which there well could have been, he would easily have got \$2–300,000 damages at trial (but of course, some years later and after more damage had been done). I persuaded him to take the deal on offer. The publisher honoured it the next day. Some months later the client phoned me. “You know, I really didn’t want to do that deal. You really forced me. But you were right. Everyone saw the apology. People rang me up and said how glad they were to see it. All the business came back. So thank you.”

42. This illustrates well, I think, the potential value of the right apology. But it very rarely happens like this, because defendants take a defensive posture, do not seem to appreciate the immense value of the right apology, and insist on using the aggrieved person’s desire for an apology as leverage in the overall settlement negotiations.

43. A proper apology makes reasonable settlement more easily achievable because, for a start, the aggrieved person experiences the effect of it and

usually becomes very much less aggrieved and much more amenable to settlement. Often the person realises that any ongoing effect of the damage has been stopped, and that there is little to worry about for the future. All of this creates a much better settlement climate.

44. The defendant is able to say that the best possible apology has been given, that there is therefore substantial mitigation, and that any amount in compensation is therefore significantly reduced. A defendant who makes a formal offer, whether an ordinary offer or an Offer of Amends pursuant to the Defamation Act, is in a stronger position if the right apology has already been published, because damages have already been mitigated and are unlikely to be regarded as continuing beyond the date of the apology.
45. Unfortunately, there is very little in the system that induces defendants as a general rule to seek an early resolution. Experience has probably taught them, rightly, that playing the waiting game is worth it, because some aggrieved people lose heart and settle more cheaply or just drop off after sufficient time.
46. The costs penalties applying to offers are intended to encourage settlement, but they are ineffective in relation to defendants. Plaintiffs who fail to accept a reasonable offer and get no more than the offer at the end of a trial are at risk of not recovering their own costs from the time of the offer, and of having to pay the defendant's costs over the same period. Those costs can easily exceed the amount of the verdict, and thus cause the plaintiff, though winning the trial, to suffer a significant loss. There is no such pressure on a defendant. All that defendants risk, if they reject a reasonable offer and the damages awarded turn out to exceed the offer, is to have to pay the plaintiff's costs from the time of the offer on an indemnity basis instead of on the ordinary basis. This will normally be only a small difference. Thus, the penalty for not accepting a reasonable offer for a defendant is merely to have to pay an amount extra in costs, whereas for a plaintiff, not recovering his

own costs and having to pay those of the defendant, it can be a practical reversal of the result of the trial.

47. There can also be very strong pressure exerted on plaintiffs through the offer to make amends procedure, as discussed above. There is thus strong pressure on plaintiffs to settle, but very little on defendants. There is in fact a serious imbalance between the position of plaintiffs and the position of defendants. To create an equivalent pressure on defendants would require a rule such as that a defendant who refused a reasonable offer should pay twice the damages awarded. Many of those who agitate reform of defamation law do not mention the imbalance between the position of plaintiffs and that of defendants because they are associated with the interests of defendants.

48. Against this background I have a proposal designed to achieve early settlements much closer to a real remedy by encouraging early and effective apologies. The provisions of Section 20 of the Act should have been enough, but clearly they have not been.

49. A provision that specified the basic elements of an effective apology, and provided that such an apology would be substantial mitigation of damages (I suggest to the extent of at least 50%), would in my opinion be a strong inducement to a change of practice by defendants, and to a change to a climate much more likely on both sides to secure early settlements, without the protracted history of interlocutory arguments that many cases now have before they are settled.

50. I suggest the addition of the following section:

20A(1) The publication by a defendant or prospective defendant of an effective apology mitigates damages (other than special damages) by at least 50%.

(2) For the purposes of this section, an effective apology is one which:

- (a) *is published within a week of the publisher becoming aware that the plaintiff or prospective plaintiff is aggrieved.*
 - (b) *is given the same prominence as the publication complained of.*
 - (c) *is published as nearly as possible to the same audience or readership as the publication complained of.*
 - (d) *withdraws completely and without reservation the defamatory statements complained of.*
 - (e) *acknowledges that the defamatory statements complained of were not true.*
 - (f) *expresses regret for the publication of the defamatory statements complained of.*
 - (g) *apologises for the distress and damage caused to the aggrieved person by the publication of the defamatory statements complained of.*
- (3) *An apology published in the manner sought by the aggrieved person is deemed to satisfy paragraphs (b) and (c) of Subsection (2).*
- (4) *An apology published in exactly the terms sought by the aggrieved person is deemed to satisfy paragraphs (d), (e), (f) and (g) of Subsection (2).*
- (5) *In addition to satisfying the requirements of subsection (2), a publisher must, to benefit from the mitigation provided for by this section,*
- (a) *cease publication of the defamatory statements complained of.*
 - (b) *provide the aggrieved person with a copy of the apology as published.*

- (c) *advise the aggrieved person of the names and addresses of all persons who have the right to republish the defendant's publication complained of.*
- (d) *require all persons who have the right to republish the defendant's publication complained of to cease such publication and to publish also the apology published by the defendant.*
- (6) *This section does not limit the extent to which an apology, either pursuant to this section or otherwise, may mitigate damages.*
- (7) *The principles of mitigation as they would be without the existence of this section continue unchanged.*

Death of a Party

51. The traditional common law rule was that an action in tort terminated with the death of either party. This rule has been progressively abolished for other torts, but is continued for defamation actions by Section 10 of the Defamation Act.

52. The rule has two quite distinct aspects that deserve to be considered separately. Unfortunately this does not appear to have occurred.

53. There is no justification at all for why the death of a defendant should terminate an action. I do not know of any justification ever put forward. The position of the defendant who dies has been swept up with that of the plaintiff who dies, which raises different considerations.

54. There is no reason why the estate of a defendant who dies should not inherit the liability of a defamation action, just as it would inherit the liability of an action in contract or any other tort, such as negligence. While the death of the defendant could cause some disadvantage through the absence of the defendant as a witness, that sort of disadvantage can occur in relation to all the other numerous actions that are continued.

55. The termination of an action can cause great unfairness. A plaintiff may have spent considerable funds preparing a case, or even conducting it at trial, before the death of the defendant. All such costs are irrecoverable. A plaintiff could be waiting for a reserved judgment when a defendant disappeared. All the costs of the trial would be lost.
56. Alternatively, the judgment might be delivered; the plaintiff might lose but have a perfect appeal point, yet be unable to pursue the appeal because the defendant dies. Equally, if the plaintiff won but the defendant had the perfect appeal point, there is no reason why the defendant's estate should not be allowed to pursue it.
57. Although such a scenario is likely to occur only infrequently, it could inflict serious injustice on those involved. Whenever a defendant dies, whether before the commencement of the action, during the preparation for trial, during the trial, after the trial but before judgment, after judgment but before appeal, during the appeal process, or during a retrial, should make no difference. The defendant's estate should carry the liability for the action.
58. The position of the plaintiff who dies, which appears to have dominated the debate on this issue, is of course different. Here, too, however, there is a distinction that appears to have been overlooked. There is no strong argument for being able to begin a case on behalf of a dead person, remembering that such cases if allowed could be brought on behalf of people who never even knew of the defamation and never suffered its effects in their lifetimes.
59. However, a case begun on behalf of a living person who dies before its conclusion raises different issues. In this instance, the person knew of, and suffered from, the defamation, and thought seriously enough of it to begin an action. The termination of such an action through the death of the plaintiff could, depending much on how far it had advanced, inflict serious injustice on either party, each of whom would be unable to recover the costs incurred

to that point. A defendant who had lost a trial, and was waiting on the reserved judgment from an appeal that looked unusually promising, would nevertheless lose the verdict and the costs of both proceedings if the plaintiff died before judgment. If Ms Rebel Wilson had died before the delivery of the appeal judgment in her case, her estate would have kept the \$4 million.

60. I suggest that a case begun on behalf of a living person should be allowed to continue through all subsequent stages, including appeals and retrials, even if the person later dies. As a practical matter, the death of the plaintiff is likely to lead to a rapid settlement in nearly every case. This would be assisted by a specific provision that in such a case, damages are not available for damage to reputation continuing after the person's death.

61. I therefore suggest that Section 10 should be amended to abrogate entirely the old common law rule in relation to defendants who die, and in relation to plaintiffs whose action has been begun while they are alive.

62. My proposed draft is:

Section 10

(a) Proceedings in defamation may be commenced and/or maintained against the legal representative of a person who is dead exactly as if the person were alive.

(b) Proceedings in defamation may not be commenced on behalf of a person who is dead.

(c) Proceedings in defamation may be maintained on behalf of the estate of a person who is dead if they were commenced when the person was alive.