But the real crunch points are electronic data bases and photocopying. The MEAA has put a proposal that the proprietors be allowed to exploit information data bases for their own use, including commercial uses, in return for the payment of a continuing copyright allowance, either weekly or annually. However the journalists are seeking a profit sharing arrangement when data bases are licensed to third parties.

In relation to photocopying the argument is likely to turn on the percentage shares of the rights, as the publishers have asserted that they hold copyright in the published form, while the journalist holds copyright in the work's contents. There is also a dispute about what should happen to payments for rights where the author cannot be identified. The proprietors are very reluctant to sign up the Copyright Agency Limited, the collecting body which currently administers payments on behalf of the journalists.

The parties are expected to report back to the Minister in September with the outcome of their talks. It will be difficult for them to find common ground, but equally, the Government will be reluctant to intervene. This is not an issue which will be resolved quickly and even if the proprietors convince the Government of the strength of their case, the vagaries of the Senate make passage of amendments uncertain.

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The seven figure ouch

Paul Reidy and Nicholas Pullen review the second Carson trial and the issues for the media including the Court's decision on the use of personal injury verdicts

It's finally over. On 10 July 1994 Nicholas Carson's defamation proceedings against John Fairfax & Sons Limited were settled. In the Court of Appeal, Counsel for Fairfax read the following apology:

"On April 21 1987 and May 6 1988, The Sydney Morning Herald published articles which a jury has found to convey defamatory imputations about Mr Carson. The imputations were false and very serious. John Fairfax and Sons has not previously apologised to Mr Carson for the serious hurt which the publications caused him. John Fairfax has instructed me to say to this honourable court in Mr Carson's presence that John Fairfax and Sons sincerely apologises to Mr Carson for having published the imputations. John Fairfax and Sons assures the court and Mr Carson that it did not intend to convey the imputations against Mr Carson and wholly withdraws them".

In a statement released by Carson he said the *"jury was correct to award me the verdict that they did on the material before them"*. However, he acknowledges that *"the verdict is vulnerable and could be overturned"*.

That statement marked the end of a saga which began over seven years ago on 21 April 1987 with the publication of an article in the Sydney Morning Herald by John Slee. It had involved a one week Supreme Court jury trial, an appeal to the Court of Appeal and then the High Court, a re-trial before a jury in the Supreme Court for another two weeks and then another appeal to the Court of Appeal. Added on to that there were the interlocutory skirmishes - the separate trials on the capacity of the articles to convey the imputations, the arguments about discovery and interrogatories and the admission of evidence. All in all an extraordinary piece of litigation.

Now that it is over, media defendants should sit back and ask a few hard questions: why did Carson get a record combined verdict of $1,300,000?; and what issues does the Carson case raise about the conduct of future defamation trials?

the jury's verdict was huge

At a combined total of $1.3 million ($500,000 for the first, and $800,000 for the second, action) it was more than double the previous record verdicts given to Carson at his first trial and almost 10 times the record verdict given to former Police Commissioner Kel Glare in Victoria in 1992. It was even more significant given the orders of His Honour Justice Levine that Fairfax pay $147,098 interest and Carson's costs (on a party/party basis to September 1993 and thereafter on an indemnity basis).

the articles

On 21 April 1987, the Sydney Morning Herald included on its leader page a commentary by John Slee headed "Dr Rajski a war on many fronts".

As Carson later told the jury he immediately forwarded a letter to the Herald's Editor in Chief requesting the publication of an apology. The Herald declined to publish that apology but offered to publish a statement correcting two factual errors in the article. Carson did not accept that offer and after further haggling about apologies Carson commenced proceedings in May 1987.

On 6 May 1988, a further comment piece by John Slee appeared on the paper's leader page, headed "The Criminal Phase of Rajski case". This time, without delay, Carson filed further proceedings against the Herald.

the imputations

The imputations found to be defamatory from the first article were that Carson:-

(i) wrongfully attempted to intimidate Dr Metcalf by threatening to sue him for defamation over a medical report written by him; and

(ii) wrongfully brought defamation proceedings in his own name against Mr Arthur Carney, a solicitor for the sole purpose of causing Mr Carney to forthwith cease to act for his client, Mr Rajski.

The imputation before the jury from the second article was that Carson:-

(i) was wrongfully a party to a conspiracy with Mr Moshe Yerushalmy to obstruct the course of justice by evading service of criminal process.

the second trial - Carson's case in chief

Carson gave evidence over 3 days. He said he was appalled by the publication of the first article, *"It made me very angry and wounded because it was just, it seemed to be so wrong that something that was false could just be published like that"*. Of the second article he said *"I was just absolutely astounded when that was published, it was just such a wild allegation all I could think was this was just a vendetta against me, an attack on me, telling a lie to besmirch me"*.

In cross-examination by Maurice Neil QC for Fairfax, Carson agreed he was still friends with each of his reputation witnesses. He was still a senior partner at Blake Dawson Waldron and he had been invited onto the Board of the Sydney Dance Company. Carson did not agree with Neil's suggestion that he had resigned from a public company to focus on his legal practice. He said, *"I was asked to leave the Board by the main shareholder, the Commonwealth Superannuation Fund because I did not have a big enough commercial profile"*.

Carson called four witnesses who had testified at his first trial.

Three of those witnesses are lawyers and former presidents of the Law Society of New South Wales: Kim Garling, Rod McGeoch and Brian Thornton. The fourth witness is an investor, Peter Horrobin.

Thornton, McGeoch and Garling each described the conduct imputed of Carson in each article as highly improper. Garling thought the imputations in the first article were so serious he avoided Carson for several months following its publication. Horrobin said the second article was worse than the first and implied that Carson *"is a criminal and has engaged in criminal conduct"*.

Carson also called his partner Hugh Keller. Keller silenced the courtroom as he testified about Carson's reaction to the articles, *"This thing's destroying me"*.

Finally, Carson's Counsel T.E.F. Hughes QC read a transcript of the evidence given at the first trial by former Supreme Court Judge Anthony Larkins. The Judge had died in 1989. He rang Carson on the day of publication and told him *"unless he got an assurance of a full retraction or an apology, he would have to sue to protect his name"*.

Fairfax's case

Fairfax called John Slee who had been joined by Carson as a defendant to the second action.

In chief, Slee said he had not intended to convey the imputations found by the jury and that he had not deliberately lied when writing the articles.

In the course of a lengthy, and at times very heated cross-examination by Hughes QC, Slee was asked about each of the imputations. Of the first article he said, *"In the express terms of the imputations as you have composed them they are false"*. They were however, *"pretty close to the truth"*. When questioned about the imputation relating to Mr Carney, Slee said, *"I still think its true"*.

Slee had not apologised to Carson even after the first trial, *"I doubt anything would come of it."* Slee said, *"It was unrealistic"* for Hughes QC to suggest rule 10 of the Journalist Code of Conduct obliged him to apologise. Rule 10 says a journalist should do her/his utmost to correct any published or broadcast information found to be harmfully inaccurate.

Carson in reply

Carson was appalled by much of Slee's testimony. *"Here's Mr Slee coming into the witness box and saying he intended to publish those lies and affirming them and repeating them, even though he half grudgingly concedes they are false which he must know they are"*.

Carson's record verdict

Three hours after retiring, the jury's verdict was announced.

It is suggested that there were four factors at play, each of which contributed to Carson's huge verdict:

- the non-publication of an apology acceptable to Carson right up to the very end of the second trial;
- the demeanour of John Slee in the witness box and his evidence that the imputations found to have arisen (at least from the first article) were close to the truth;
- the fact that the jury was not given a range of figures on which to base its verdicts; and
- the evidence Carson was able to put before a jury - of Garling the former Law Society President, avoiding him after the publication of the first article, of the Olympics hero McGeoch who has shared a joke at Carson's own expense and of Keller, his partner, the man who had seen the effect on Carson of the libels.

Issues for the media

It is almost impossible to read a jury and as difficult to know with any certainty which way a case should be run. To one jury a defendant in Fairfax's position who says at trial little more than *"I'm sorry"* may win the day, but to another jury this may be interpreted as hypocritical and self serving. It may result in a huge verdict.

It is suggested however, that a media defendant's exposure to a "huge or freak" verdict typified by Carson's case could be limited (but only in a similar case) by addressing each of the factors at play which we have identified in Carson's case.

an apology

The High Court's decision in Carson makes it clear that failure to apologise of itself does not aggravate damages. However, as confirmed in a decision of Justice Levine in the course of the second trial, in all the circumstances of

a particular case failure to apologise can aggravate damages.

Apologies are as a consequence still very useful tools for a media defendant. Not only do they serve the very real and practical end of placating an angry plaintiff but they also eliminate one matter that a plaintiff might otherwise point to at a trial.

However, the issue is not always straight-forward. Carson's case is a classic example.

Carson maintained throughout the trial that he never got the apology he wanted. Fairfax originally said an apology was not needed because the imputations did not arise. Subsequently they published an apology to address what they perceived as Carson's concerns. Carson did not accept that apology for two reasons.

Firstly, he thought it was cynical because proceedings had, by then, been filed. Secondly and more importantly he said it was *"too little - too late"*. Too little because it didn't retract all the allegations. Too late because it appeared in December 1987 some eight months after the first article. Fairfax says it did not know proceedings had been filed when it originally offered to publish the apology. They also queried how Carson could complain about the apology not retracting the sting of an imputation when the imputations were only settled later after capacity arguments.

Still, Carson was able to go to the jury at great length in the circumstances of this case about Fairfax's failure to publish the apology he wanted. In doing so, his Counsel reminded the jury that Fairfax had still not published an acceptable apology even though a jury ruled against them in the first trial.

As this case shows it's never easy, but for a media defendant, as long as there are no admissions, it can be helpful to apologise early, prominently and completely.

evidence from the journalist

Calling any witness exposes that person to the perils of cross examination. With Hughes QC in full cry those perils may be more significant in a case such as Carson. But there is a further matter which should be borne in mind when that witness is a journalist. Once the journalist is in - he/she is in for all purposes and this includes questioning about his/her sources.

In the course of his cross-examination Slee was asked about sworn answers to interrogatories filed in the proceedings.

Consistent with the *"newspaper rule"* those interrogatories did not identify Slee's sources who were simply referred to as Source A, Source B etcetera. Fairfax's counsel objected to a question about Slee's source on the basis of relevance and the High Court's decision in *John Fairfax & Sons Limited -v- Cojuangco* saying that case reserves a discretion to a trial Judge not to compel disclosure of a journalist's source unless it is necessary to do justice between the parties.

In a judgement given at the conclusion of argument Justice Levine dismissed the objection and directed Slee to answer the question.

His Honour said Slee's sources were relevant because Slee had gone into the witness box to dispel the allegation made by Carson that he was telling a deliberate lie. *"It seems quite clear to me that not only has the witness's credit become the subject of examination by Mr Hughes, but also the nature of the witness's belief in the truth of the imputation ... This is clearly relevant to the issue of damages"*.

In these circumstances disclosure was also necessary to do justice between the parties to test Slee's evidence.

Justice Levine did not accept a further suggestion from Fairfax's counsel that would have allowed Slee to give the evidence in confidence pursuant to Section 80 of the Supreme Court Act. His Honour said, *"Considerations of public policy or the policy of the law in relation to the Courts at all times generally being open the public... in my view, transcend even considerations of public policy that might affect confidentiality which, from time to time, the Court is prepared to afford to a journalist in relation to his sources"*.

In the end, Slee avoided the contempt problems that have faced other journalists by obtaining a release from his sources. In Court the following day he named Reg Blanch and Clarrie Briese.

comparable verdicts

The position of a media defendant is not made any easier by the Court's decision on the use of comparable verdicts, particularly personal injury verdicts.

His Honour declined to direct the jury in relation to awards of general damages in personal injuries cases and also directed counsel not to address the jury on that point.

In his written Judgement handed down after the trial on 13 May 1994 Justice Levine reviewed the High Court's decision in these proceedings.

His Honour placed particular emphasis on the distinction deliberately drawn by the High Court between appellate comparisons of personal injuries verdicts and comparisons at trial. He said, *"It is my view that the decision of the High Court in this litigation provides no authority in relation to the trial judge's function in this area.* And; *"it is my view that so much of what their Honours constituting the majority said* [about a trial judge giving an indication to the jury on personal injuries verdicts] *can best be described as obiter..."*.

As such their Honours comments about use of personal injuries verdicts' at trial were really "suggestions". There were very good reasons for not following such suggestions. For example, Justice Levine asked rhetorically *"... will the parties have to reach some agreement beforehand? Or will it be the case that the defendant will ... address the jury on one series of cases the plaintiff on another and the judge on both and/or perhaps his/her own selections?"*

His Honour concluded, *"I do not see myself as the trial judge in these hearings bound by any authority requiring me to give directions to the jury on personal injury general damages awards; I do not see that there exists a discretion in the matter and nor do I consider that the High Court (in Carson) has done anything more than point to or possibly 'suggest' at best that consideration maybe given to 'an indication'. The decisions I have examined certainly make clear the appellate Court's approach. It is the majority judgment in Coyne however, in my respectful opinion, which presently, for the trial judge, articulates the dangers and lack of helpfulness of 'comparison' directions especially, in my view, in the context of the real risk of compromising the clear constitutional role of the jury in this State"*.

The practical problems raised by Justice Levine are very real. Indeed these problems highlight the main issue. The whole debate on the use of personal injury verdicts is prefaced on the assumption that those verdicts offer some rational guide for a jury's deliberations. This of itself presumes:

(i) that the general damages component of present personal injury verdicts are fair and equitable;

(ii) that the impact of legislative caps on damages in workers compensation and motor vehicle accident cases can be effectively isolated in considering these verdicts;

(iii) that the harm addressed by this component of personal injury verdicts is, if not identical, then substantially the same as the harm suffered by a plaintiff in a defamation action; and

(iv) that comparisons to personal injury verdicts are of more assistance than comparisons to other damages - say for passing off or wrongful dismissal or better still other defamation cases.

In practical terms the use of comparisons to personal injury verdicts appears to be an expedient way of capping the damages awarded in defamation actions. It may be of benefit in appellate reviews of jury verdicts, but it is, for the reasons identified by Justice Levine of less benefit at a trial. It is doubtful such comparison would be made to personal injury verdicts if they were greatly in excess of defamation verdicts.

It is suggested that the real concern of media defendants, (ie: the size of defamation verdicts), should be addressed directly by the Parliament rather than the Courts by an amendment to the NSW *Defamation Act 1974*. This could outline the range of figures (subject say to CPI fluctuations) to be put to the jury and the procedure a trial judge is to adopt in putting those figures to a jury. Failing this, the Courts need to reconsider the way a trial judge should guide a jury on damages.

the plaintiff's case

A media defendant can not do much about this - all they can do is limit the evidence before the jury by objections as to admissibility and hope that their own case does not add any fuel to the fire.

In many ways Carson's record verdicts reflect the type of evidence he had been able to obtain about reaction to the articles from friends and colleagues. In the end, this perhaps more than anything else explains these verdicts, and it is in this area that a media defendant is most exposed - with no knowledge of the type of evidence a plaintiff will call in support of her/his case until that evidence, in the form of her/his testimony, is heard echoing through the Court.

That being so, the decision of a media defendant to go to trial will always be a gamble - it will always be a toss of the coin, to see just what the next jury does.

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narrowcasting for radio

Elizabeth Burrows tours the Australian Broadcasting Authority's discussion paper

Recently, the Australian Broadcasting Authority issued a Discussion Paper *(the Discussion Paper or Paper)* dealing with narrowcasting for radio in order to assist potential radio narrowcasters in their understanding of the category definitions.

The *Broadcasting Services Act 1992 (the Act)* provides for the regulation of subscription and open narrowcasting licences under sections 17 and 18. There is considerable uncertainty surrounding the criteria to be used in deciding whether a service is a narrowcast service. This uncertainty is compounded by inadequacies in the opinions provided by the ABA on service categories.

what are narrowcasting services?

Services may be narrowcasting services if their reception is limited by audience, location, duration, or appeal of programming, or because of some other reason.

In addition, subscription narrowcasting services must only be available on payment of subscription fees, and subscription fees must be the predominant source of revenue.

Because narrowcasting services are part of the class licence regime, and the provider need only comply with the conditions determined by the ABA and Schedule 2 Part 7 of *the Act* rather than applying for a licence, it is particularly important that the boundaries within which narrowcasting services must operate be clearly defined. The *Discussion Paper* offers little assistance in this regard.

categories of service

The *Discussion Paper* gives examples of the factors which establish service categories. The *Paper* states, not very helpfully, that the criteria in section 22 of *the Act* "are a good guide for an aspirant broadcaster in deciding whether or not a proposal would fall within the class licence regime." However the *Discussion Paper* gives little guidance beyond an interpretation of the relevant provisions of *the Act*, similar to that to be found in the Explanatory Memorandum to the Broadcasting Services Bill.

For example, the *Paper* gives as examples of limited locations, "hospitals, doctors' surgeries, shopping centres, schools, pubs and clubs...". Section 17 includes as examples "arenas or business premises", and the Explanatory Memorandum also suggests domestic dwellings in a limited area.

opinions on service categories

The *Paper* aims to assist the application by potential service providers for opinions on service categories under section 21.

Applications for opinions which have been determined by the ABA and which relate to services which have commenced operation can be inspected by arrangement with the Allocations and Renewals Section of the ABA. The ABA also publishes opinions as to service categories in the Commonwealth Gazette, but the opinions contain conclusions rather than reasoning, and the details are limited.

The ABA concluded, in one opinion published in the Gazette this year, that a proposed service fell within the category of open narrowcasting because it was targeted at a special interest group, it provided programs of limited appeal, and its comprehensibility was limited to persons speaking Italian.

The Department of the Parliamentary Reporting Staff's application in relation to a proposed service of unedited coverage of Parliament and parliamentary committees was held by the ABA to be a subscription narrowcasting service - the service would be of limited appeal and was only to be available on the payment of subscription fees. Another Government service, targeted at people with a need for or interest in particular educational and training programs, which was encrypted and required the obtaining of special equipment was held to be within the open narrowcasting category. The requirement that the audience obtain decoding equipment did not prevent it from being an open narrowcast service, but was a factor in the determination that the service was a narrowcast service, because the requirement limited the accessibility of the service.

The extent of the information provided by the ABA reached a particularly low point with the opinion in relation to Montamar Pty Ltd trading as Perpetual Motion Pictures. The ABA stated that the matters considered in reaching the opinion that the service fell within the open narrowcast service category included that "the service will be limited because it provides programs of limited appeal."