Profile: Dr Matt Collins QC

Dr Matt Collins QC is one of Australia's leading media law barristers, and author of renowned texts such as *The Law of Defamation and the Internet* and *Collins on Defamation*. He has appeared in some of Australia's most high profile media law matters, including appearing for Rebel Wilson against Bauer Media, and is currently acting for the ABC in relation to the raid on its Ultimo headquarters in June this year. Dr Collins recently spoke with CAMLA Young Lawyers representative and lawyer at Corrs Chambers Westgarth, Madeleine James, about a range of topics including privacy, contempt, and how to fix our "failing" defamation laws.

MADELEINE JAMES: Your career has seen you represent several major news organisations and networks, not to mention literally writing the book on defamation law. How did you find your way to specialising in this area? What draws you to it?

MATT COLLINS: I fell into media law by accident – a chance file that landed on my desk while a solicitor at a major law firm. I was immediately struck by the weighty issues that are always at play in media cases – the conflict between the right to reputation and freedom of expression – but also by the human element that that conflict invariably carries with it. In my experience, almost every defamation defendant believes they had an entitlement to publish. Often the plaintiff is a household name and the defendant a media organisation upon which we all rely for news. These features make defamation cases endlessly fascinating.

JAMES: You have written previously that several aspects of Australian defamation law are "crying out for legislative correction". Now that the Defamation Working Party has been convened to review the Model Defamation Provisions, what are the key areas you would like to see examined?

COLLINS: I believe our defamation laws are failing in two fundamental ways: they do not provide plaintiffs whose lives can be ruined in a heartbeat, often by posts on social media, with an efficient and cost-effective remedy; and they do not provide adequate protection for public interest journalism upon which the health of our democracy and institutions relies. I would like to see two fundamental reforms: the introduction of a cost-effective declaration of falsity remedy, independent of defamation law, enabling plaintiffs in appropriate cases to obtain quickly a curial finding that something published about them was false; and reversal of the presumption of falsity in defamation law, so as to require plaintiffs to prove the falsity of any imputation of which they complain and bring defamation law into line with comparable causes of action such as misleading and deceptive conduct and injurious falsehood.

JAMES: A point of difference among submissions received by the Defamation Working Party to date is whether to extend the right to sue for defamation to corporations. Do you think corporations should be able to sue for defamation? What impact would such a reform have on the Australian media?

COLLINS: Corporations were historically able to sue for defamation in Australia. Their rights were first curtailed in NSW in 2002, and then throughout Australia from 1 January 2006. The limitations on corporations under the current law depend principally on whether the corporation had fewer than 10 full time or equivalent employees at the time of publication. That limitation is arbitrary and unsatisfying from the perspective of the coherence of the law. It would, to my mind, make more sense to restrict the right of corporations (of whatever size) to sue to those cases where they can prove that a publication has caused serious financial loss.

JAMES: The Defamation Working Party has also indicated that they will consider a number of changes that would align Australian defamation law with UK positions, for example adopting a single publication rule, and changing our approach to qualified privilege. In your experience working in both Australia and the UK, how does Australian defamation law compare to the UK in terms of addressing the reality of modern media?

Collins: Australia's uniform defamation laws were passed in 2005 – the year after Facebook was founded, the year before Twitter was established, and two years before the first iPhone was released.

They are laws that predate the modern internet age. The *Defamation Act 2013* (UK), on the other hand, which commenced operation in 2014, introduced a range of reforms related to online publications, learning from earlier reforms in the United States and elsewhere. Australian law has been left behind, with the result that courts and practitioners here must resort to drawing inapt analogies in internet cases with postcards from the seaside, noticeboards in golf clubs and library card catalogues. The UK reforms are worthy of careful consideration.

JAMES: While you have appeared for numerous defendant media companies in defamation cases, you have also appeared for plaintiffs, notably Rebel Wilson in her suit against Bauer Media. Do you think defamation law fairly balances the interests of plaintiffs and defendants?

COLLINS: If you were starting from scratch, you would not come up with our current defamation laws, whose origins stretch back to the days of the Star Chamber, and depend upon presumptions of falsity and damage that tilt the balance in favour of the plaintiff and leave defences of uncertain application to do almost all of the heavy lifting. A modern defamation law would grapple much more directly with the interests at stake. Has the plaintiff's reputation been damaged? If so, is the public interest in freedom of expression such that, in the circumstances of the particular case, the plaintiff should be deprived a remedy?

JAMES: Your research explores the intersection of freedom of speech and a right to privacy. Does Australian law strike an appropriate balance?

COLLINS: Australian law does not recognise a cause of action for invasion of privacy of the kind that has evolved in countries such as the United States, the United Kingdom, Canada or New Zealand. This has led to distortions in Australia, because plaintiffs whose privacy has been infringed are either left without a remedy, or are forced to attempt to shoehorn their grievance into a claim for breach of confidence or defamation. International law has long recognised that individuals have a fundamental right to privacy. That Australian law does not protect that right is, I think, unsatisfactory.

JAMES: After representing the Australian news organisations and journalists accused of breaching suppression orders made concerning Cardinal George Pell's trial, I would be interested to hear your thoughts on the way suppression orders are currently used, and how effective they can be in the age of digital (and global) media.

COLLINS: The Pell matter is ongoing, so I will not comment on it. I share the widely held view, however, that the prevalence of suppression orders generally, particularly in Victoria, is problematic. I would like to see research undertaken into the extent to which the instinct that pre-trial publicity prejudices potential jurors is sound.

JAMES: Lastly – the media law community was recently abuzz regarding a decision of the Supreme Court of NSW that media organisations can be considered publishers of third-party comments on Facebook. What's your take on this?

COLLINS: Reasonable minds can differ about this question. On the one hand, media organisations choose, for their own commercial reasons, to use third party platforms that they do not control on which third parties are free to post defamatory comments, and could avoid the risk of liability by making different commercial decisions. On the other hand, requiring media organisations to retain control over and pre-moderate all third party comments would reduce diversity and stifle public discourse. I think the balance is better struck in the *Defamation Act 2013* (UK), where proceedings can only be brought against a person who is not the author, editor or commercial publisher of defamatory matter if it is not reasonably practicable to bring an action against the author, editor or commercial publisher. The UK provision presumes, in effect, that defamation proceedings should be brought against the primary publisher, who will also be the party best placed to prosecute any available defences.

Madeleine James is a CAMLA Young Lawyers representative and a lawyer at Corrs Chambers Westgarth