



# Costs issues in defamation proceedings

By Phillipa Alexander

**T**he issue of costs in defamation proceedings has a longstanding history, with *Hansard* recording a Second Reading Speech on 30 April 1886 in relation to a Bill to limit costs in defamation actions to verdicts of more than 40 shillings.

The Bill was intended to benefit defendants who, if unable to pay the verdict or costs, could be imprisoned for up to a year. Verdicts of only a farthing had seen journalists sent to goal because of their inability to pay the claimant's costs.

While defendants are no longer imprisoned for non-payment of costs, legislation in all states and territories<sup>1</sup> now contains uniform costs provisions that are specific to defamation actions. Section s48A of the *Defamation Act 1974* (NSW), the precursor to the current s40 of the *Defamation Act 2006*, was enacted following the defeat of a private member's Bill that sought to limit plaintiffs recovery of substantial legal costs where only minimal damages had been recovered. While the government rejected the Bill as too prescriptive (worrying that it would inhibit impecunious plaintiffs from taking proceedings against wealthy defendants), it accepted an amendment to the proposed s48A, providing for the court to take account of the way the parties had conducted their cases in awarding costs.

As stated by the Parliamentary Secretary:<sup>2</sup>

'The normal costs rule is that the successful party recovers costs on a party:party basis. Typically, this amounts to about 60 to 80 per cent of their actual legal costs. Both the Supreme and District Courts have a general discretion as to the amount of costs to be paid by parties, including the award of indemnity costs. Indemnity costs are usually awarded where there has been a flagrant breach of procedural rules by the unsuccessful party and can amount to 80 to 90 per cent of actual costs. In practice, indemnity costs are seldom awarded.'

The Bill adds s48A to the *Defamation Act* which requires the court to consider an order for costs on an indemnity basis where it forms the view that there has been an unreasonable failure on the part of either the plaintiff or the defendant to resolve the matter. For example, a plaintiff would be at risk of an indemnity costs order if he or she were not to accept an offer of correction or apology where the offer was reasonable. A defendant would be at risk of an indemnity costs order were it not to make a settlement offer when it would have been appropriate to do so. ... While the addition of s48A(2) into the Act will provide greater discretion to a judge in awarding costs in instances where parties have been recalcitrant than currently exists, s48A(1) makes it abundantly clear that in awarding costs the court may take account of the way the parties have conducted their case. The court will be able to take into account such matters as whether either party has used their significantly more powerful financial position in a way that

hinders the effective discharge of justice.'

Section 40<sup>3</sup> currently provides:

- '(1) In awarding costs in defamation proceedings, the court may have regard to:
- (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), and
  - (b) any other matters that the court considers relevant.
- (2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise):
- (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff – order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff, or
  - (b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant – order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.
- (3) In this section:
- "settlement offer" means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made.'

The costs provisions were adopted by all states and territories as part of the uniform defamation provisions.

Although s48A<sup>4</sup> came into force in NSW on 17 February 2003, it was not until 2007 that it received judicial consideration. In response to a defendant's application in reliance on s48A, Graham J of the Federal Court ordered that there be 'no order as to costs in relation to the proceedings generally' where the parties had been variously successful and unsuccessful on the issues.<sup>5</sup>

In 2008, the application of the section was discussed in three judgments. The first case, *Photi v Target Australia Pty Ltd* (No. 3),<sup>6</sup> involved a plaintiff's application for indemnity costs in reliance on s40. The plaintiff based his claim on the defendant's late pleading of a defence of qualified privilege, which delayed judgment by almost six months; the abandonment of a s13 defence and, in closing submissions, the abandonment of a s7A defence. Gibson DCJ considered that delay to the final resolution of the proceedings was conducive to injustice and ordered the defendant to pay part



of the plaintiff's costs on an indemnity basis.

Both the plaintiff and defendant sought orders under s48A in *Hennessy v Lynch* (No. 4).<sup>7</sup> Gibson DCJ noted two 'particular evils' in s48A,<sup>8</sup> the misuse of either a plaintiff's or defendant's superior financial position; and that a court must order costs of and incidental to the proceedings on an indemnity basis where a defendant had unreasonably failed to make a settlement offer or to agree to one proposed by the plaintiffs.

The parties made several offers of compromise, with the verdict of \$16,000 less favourable to the plaintiff than the plaintiff's lowest offer of \$50,000 and more favourable to the defendant than the later second offer of \$20,000. The plaintiff's argument – that the provisions of the *Defamation Act* must prevail over the regulations contained in the *Uniform Civil Procedure Rules* (UCPR) in relation to offers of compromise – was rejected by Gibson DCJ since s48A reinforces the offer of compromise provisions in the UCPR rather than limiting them.<sup>9</sup> Her Honour ordered the plaintiff to pay the defendant's costs on an indemnity basis from the date of the second offer of compromise.

The defendant submitted that s48A also disentitled the plaintiff from recovering costs for the period prior to the offer of compromise owing to the plaintiff's conduct of the proceedings. While Gibson DCJ recognised that the factors in s48A could operate by way of 'strong justification' to depart from the usual rule that a successful party should not have to pay some part of an unsuccessful opponent's costs, she was not prepared to make such an order in this case.<sup>10</sup> As the plaintiff had succeeded on three out of the four claims for defamation, the defendant was ordered to pay three-quarters of the plaintiff's costs up to the date of the defendant's second offer of compromise.

Section 40<sup>11</sup> was also considered by McClelland CJ in CL in *Davis v Nationwide News Pty Ltd*,<sup>12</sup> where the plaintiff recovered damages of \$140,000 plus interest of \$10,736. The total verdict of \$150,736 thus exceeded the plaintiff's offer of compromise of \$150,000. *Prima facie*, the plaintiff was entitled to indemnity costs from the day following the making of the offer, in accordance with UCPR 42.14. However, the plaintiff submitted that she should be awarded indemnity costs for the entire proceedings, as the defendant failed to make a reasonable offer of settlement (its only offer being that each party should walk away from the proceedings).

His Honour acknowledged that the court should depart from the provisions of UCPR 42.14 and 'otherwise order' only where the circumstances of the case are exceptional. But for considerations arising from s40, McClelland CJ in CL considered that the usual rule should apply.<sup>13</sup>

While the defendant submitted that it had made a settlement offer, McClelland CJ in CL considered that the definition of 'settlement offer' in s40(3) required a reasonable offer to provide for an apology and a sum for compensatory damages, as it should have been apparent to the defendant at the time of the publications that the plaintiff had been defamed and that she would recover damages.<sup>14</sup>

The defendant's argument that the plaintiff's costs should be reduced because she was not successful in relation to all

pleaded imputations was rejected by the court, although it was noted that, had an offer been made that provided for compensatory damages, the argument may have had force. McClelland CJ in CL noted that the reasonableness of such an offer would then require consideration, having regard to the prospects of success in the entire proceedings.<sup>15</sup>

Finding that the defendant had unreasonably failed to make a settlement offer within the meaning of s40, his Honour awarded the plaintiff indemnity costs for the entire proceedings.

In conclusion, when acting for a plaintiff it is important to take into account the requirements of s40. A plaintiff is unlikely to want to hinder the early resolution of the proceedings leading to an adverse costs order under s40(1). But to support a successful plaintiff's claim for costs on an indemnity basis for the entire proceedings under s40(2) (a), s/he should make a reasonable settlement offer. If the defendant unreasonably fails to agree to such a settlement offer, then, except in exceptional circumstances, the court must order the costs of the proceedings to be assessed on an indemnity basis. Where a plaintiff is unsuccessful, the failure to accept a reasonable settlement offer made by the defendant will result in the plaintiff being liable for the defendant's costs of the proceedings on an indemnity basis.

The question of what constitutes a 'reasonable' settlement offer will vary according to the circumstances of the case. While the Parliamentary Secretary<sup>16</sup> indicated that a plaintiff would be at risk of an indemnity costs order if s/he were not to accept an offer of correction or apology where the offer was reasonable, McClelland CJ in CL<sup>17</sup> considered that a reasonable offer would have provided for an apology and a sum for compensatory damages.

Rejection of a defendant's settlement offer that provides for compensatory damages may also place plaintiffs, who do not succeed on all pleaded imputations, at risk of a reduction in their recoverable costs. As noted by McClelland CJ in Eq,<sup>18</sup> the probability of success in the entire proceedings may be a factor to be taken into account in determining whether an offer was reasonable. ■

**Notes:** 1 See s40 *Defamation Act 2006* (NSW), s40 *Defamation Act 2005* (Vic), s40 *Defamation Act 2005* (Qld), s40 *Defamation Act 2005* (WA), s38 *Defamation Act 2005* (SA), s40 *Defamation Act 2005* (Tas), s139K *Civil Law (Wrongs) Act 2002* (ACT), s37 *Defamation Act 2006* (NT). 2 The Hon. Ian Macdonald (Parliamentary Secretary) Second Reading Speech, Legislative Council, 5 December 2002. 3 *Defamation Act 2006* (NSW). 4 *Defamation Act 1974* (NSW). 5 *National Auto Glass Supplies (Australia) Pty Ltd v Nielsen & Moller Autoglass (NSW)* (No. 9) [2007] FCA 1826 (23 November 2007). 6 *Photi v Target Australia Pty Ltd* (No. 3) [2008] NSWDC 14 (22 February 2008). 7 *Hennessy v Lynch* (No. 4) [2008] NSWDC 15 (29 February 2008). 8 *Ibid*, per Gibson DCJ at [26]. 9 *Ibid*, at [41]. 10 *Ibid*, at [47]. 11 *Defamation Act 2005* (NSW). 12 *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946 (12 September 2008). 13 *Ibid*, per McClelland CJ in CL at [23]. 14 *Ibid*, at [30]. 15 *Ibid*, at [31]. 16 See note 2. 17 *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946 (12 September 2008) at [30]. 18 *Ibid*, at [31].

**Phillipa Alexander** is a specialist in legal costs with Costs Partners. **PHONE** (02) 9006 1033  
**EMAIL** [Phillipa@costspartners.com.au](mailto:Phillipa@costspartners.com.au).