

Note – Defamation Defences and Juries: *Wilson v Bauer Media (No 6)* [2017] VSC 356

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I INTRODUCTION

During May and June of 2017, the civil jury trial between Australian actress Rebel Wilson and Bauer Media Pty Ltd ('Bauer Media') was heard in the Supreme Court of Victoria. Wilson brought an action in defamation against Bauer Media for damages based on a number of imputations, including that Wilson was a serial liar, arising from articles published in *Woman's Day*, *OK Magazine*, *New Weekly* and *Women's Weekly* in 2015.¹ The trial required a series of procedural rulings to be made. Ruling 6 deals with the issues of whether the:

- 1) Defence of triviality ought to be removed from the jury;
- 2) Defence of partial justification ought to be removed from the jury; and
- 3) Defendant's pleadings could be amended.²

A *Facts*

Bauer Media published eight articles about Wilson in 2015.³ These appeared in various magazines published by Bauer Media.⁴ Wilson alleged that as a result of the publication of these articles and imputations arising out of the articles, she lost her 'star factor' as a Hollywood actress.⁵ The common imputation arising from the articles was that Wilson was a serial liar who had fabricated stories to advance her career.⁶

B *Decision*

To find Bauer Media liable for defamation, the jury had to find on the balance of probabilities, that the articles had been published, were about

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¹ *Wilson v Bauer Media (Ruling No 1)* [2017] VSC 302 (30 May 2017).

² As discussed later, there were three separate amendments requested by the defendants in this ruling.

³ [2017] VSC 302.

⁴ Emma Younger, 'Rebel Wilson Dumped from Trolls Movie "Before Woman's Day Articles Published" Court Told', *ABC News* (online), 29 May 2017 <<http://www.abc.net.au/news/2017-05-29/rebel-wilson-dumped-from-movies-before-articles-court-told/8568928>>.

⁵ *Ibid.*

⁶ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356 (27 July 2017) [38].

Wilson, and contained defamatory imputations.⁷ The jury found Bauer Media liable.⁸ On the issue of whether the statutory defence of triviality should be removed from the jury, Dixon J ruled that it ought to go to the jury.⁹ Dixon J ruled the issue of partial justification related to the assessment of damages, and would be considered by him if and when it became necessary.¹⁰

II REMOVAL OF ISSUES FROM THE JURY (FIRST AND SECOND APPLICATIONS)

Two applications were made to remove issues from consideration by the jury. One was the defence of triviality, the second was the defence of partial justification.¹¹ These issues were considered per s 22 of the *Defamation Act 2005* (Vic) ('the Act'), which sets out the role of judicial officers (henceforth judges), and juries in defamation proceedings.¹² The role of the jury is to determine whether the defendant has published defamatory material about the plaintiff, and whether any relevant defences in the case apply.¹³ Judges are responsible for assessing damages and 'any other unresolved matters of fact and law'.¹⁴ When determining whether the defendants should be granted leave to amend their pleadings, Dixon J considered the issues of triviality and partial justification in the context of s 22.

A Triviality

The defence of triviality is set out in s 33 of the Act, and requires that if the circumstances surrounding the publication of defamatory matter means the plaintiff was unlikely to sustain harm, then the defendant will not be liable for defamation.¹⁵ The question for Dixon J to determine was whether the defence was a matter of fact or law. If it was a matter of only fact, then it would be for the jury to decide.¹⁶ There were three elements of this provision for Dixon J to consider, each of which will be considered in turn.

1 *Defamatory Matter and Circumstances of Publication*

Dixon J identified first that the defence of triviality was intertwined with the question of whether or not the articles were defamatory which, as a

⁷ *Defamation Act 2005* (Vic) s 8.

⁸ Ibid s 21; Emma Younger, 'Rebel Wilson Wins Defamation Case against "Bully" Magazine Publisher Bauer Media', *ABC News* (online), 15 June 2017 <<http://www.abc.net.au/news/2017-06-15/rebel-wilson-wins-defamation-case-against-bauer-media/8609670>>.

⁹ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356 (27 July 2017) [2].

¹⁰ Ibid.

¹¹ Ibid.

¹² *Defamation Act 2005* (Vic) s 22.

¹³ Ibid s 22(2).

¹⁴ Ibid s 22(3).

¹⁵ Ibid s 33; *Smith v Lucht* [2016] QCA 267 (20 October 2016) [7].

¹⁶ Ibid s 22.

matter of fact, a question for the jury.¹⁷ Dixon J highlighted this by reference to the defendant's submissions,¹⁸ each of which on this point related to the tone and substance of the magazine articles, and particularly the 'light' language they employed.¹⁹ Dixon J sets out the principles governing the operation of s 33 of the Act per *Bolt v Barrow*,²⁰ which required examination of: the time of publication; content, extent of publication and nature of relationships with the plaintiff; whether there is an absence of a real chance of harm; the circumstances of publication; and whether the material is actually defamatory.²¹

In relation to these requirements, Bauer Media submitted that whether or not the circumstances of publication were unlikely to cause harm to Wilson required an assessment of community standards.²² Further, Bauer Media argued there was a prima facie case on which the jury could reasonably find the defence of triviality.²³ The test for whether a defence can be removed from a jury was applied from Kirby J's reasons in the High Court case of *Swain v Waverly Municipal Council*.²⁴ The background to this test is set out for clarity. Kirby J and Callinan J separately explained the reasoning behind the standard for the removal of an issue from a jury in *Naxakis v Western General Hospital*.²⁵ Kirby J in *Naxakis v Western General Hospital* explained that determining whether there is a prima facie case, a judge should ignore what inferences they themselves would draw from the facts, and leave the jury to draw their own inferences.²⁶ Kirby J further opined that the judge ought to presume the jury will favour the plaintiff's evidence.²⁷ Callinan J relied on similar principles to those expounded by Kirby J, but noted that if reasonableness were to form part of the jury's deliberation, the outcome would often differ to the findings of the judge.²⁸ Hence, a judge should be reluctant to remove a question from a jury's deliberation.²⁹

On the test established by *Bolt v Barrow*, Wilson submitted that the defence of triviality should not be open to the jury given the role of mass media and potential readership of the articles in this case.³⁰ Wilson also submitted that this case should be distinguished from the line of cases ending most

¹⁷ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356 (27 July 2017) [7].

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ [2015] VSCA 107 (21 May 2015).

²¹ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356 (27 July 2017) [25].

²² *Ibid* [8].

²³ *Ibid* [12].

²⁴ (2005) 220 CLR 517, 580.

²⁵ (1999) 197 CLR 269, 289, 310–11.

²⁶ *Ibid* 289.

²⁷ *Ibid.*

²⁸ *Ibid* 310–11.

²⁹ *Ibid* 289, 311.

³⁰ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356 (27 July 2017) [21].

recently with *Smith v Lucht*.³¹ In *Smith v Lucht*, an email was distributed about the plaintiff to family members of the plaintiff.³² The email referred to the plaintiff as Dennis Dennuto, the somewhat incompetent lawyer from the classic Australian film *The Castle*.³³ At trial, the email was found to be defamatory.³⁴ As the recipients knew the plaintiff, the recipients were unlikely to repeat the comments and could consider the comments in the context of their relationship with the plaintiff.³⁵ Wilson submitted because the majority of the people who read articles about her, did not know her, the articles had no context, and therefore the imputations were not trivial.

Dixon J noted there was merit to the submissions put forth by Wilson and Bauer Media,³⁶ but ultimately held that issue of triviality remained open to the jury given the value judgments required to be made.³⁷

2 Meaning of ‘Harm’

After determining that the defence of triviality should be considered by the jury, Dixon J clarified the meaning of ‘harm’ per s 33 of the Act. As a starting point in this analysis, Dixon J noted that ‘harm’ is not defined in the Act, and proposes two alternative definitions. The broad meaning would include any harm and would extend to hurt feelings, while a narrower interpretation limits harm to damage to reputation.³⁸ Dixon J accepted the view of the majority in the Queensland Court of Appeal case of *Smith v Lucht*, that harm is limited to damage to reputation.³⁹ Dixon J noted the Victorian Court of Appeal in *Bolt v Barrow* contemplated the possibility of harm including both hurt feelings and damage to reputation.⁴⁰ However, Dixon J explained *Bolt v Barrow* left the question open as to the definition of harm, while *Smith v Lucht* adopted the narrow interpretation.⁴¹ Despite endorsing the position set forth in *Smith v Lucht*, Dixon J declined to resolve the issue given the nature of the evidence in this case.⁴²

B Partial Justification

Wilson applied to remove the issue of partial justification from the jury on the three occasions Bauer Media had raised it, arguing it was an untenable defence given there was only one imputation for each of the three occasions.⁴³

³¹ [2016] QCA 267 (20 October 2016).

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid* [12].

³⁶ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356, [27]–[30].

³⁷ *Ibid.*

³⁸ *Ibid* [31].

³⁹ *Ibid* [36].

⁴⁰ *Ibid* [33].

⁴¹ *Ibid* [33], [36].

⁴² *Ibid* [36].

⁴³ *Ibid* [40]; *Defamation Act 2005* (Vic) s 22(3).

For each of the three occasions partial justification was raised, Wilson submitted the sub-parts amounted to one imputation.⁴⁴ McColl JA in *Fairfax Media Publications Pty Ltd & Ors v Kermode* adopted the requirements for a pleading of partial justification set out by Gillard AJA in *Herald & Weekly Times Ltd v Popovic*.⁴⁵ Gillard AJA explained that in order for a defendant to successfully plead partial justification, the defendant must:

- prove the whole of defamatory sting or stings are true;
- the words complained of must be true in substance and in fact, however, if a fact is immaterial or trivial and in no way alters the defamatory sting of the publication, then the truth does not need to be proven; and
- the defendant may only justify part of the publication is true, if the imputation arises from part of the publication that is separate and distinct from the rest of the publication.⁴⁶

Wilson argued that on the application of this test, Bauer Media had no separate and distinct imputation to prove the truth of, and could not rely on, partial justification as a defence.

Dixon J accepted Wilson's submission that Bauer Media ought to have submitted a *Hore-Lacy* pleading, rather than partial justification if they wished to have an issue of fact to put to the jury.⁴⁷ A *Hore-Lacy* pleading is where the defendant seeks to justify an imputation from the publication, where the meaning that is not 'substantially different from, or more injurious than, the meanings alleged by the plaintiff'.⁴⁸ The *Hore-Lacy* pleading is a derivation or narrowing of the Polly Peck defence.⁴⁹ The Polly Peck defence is where a defendant asserts an alternative imputation from the publication and argues that their imputation is correct and not defamatory.⁵⁰ In order to prevent the creation of false issues and lengthening a trial with the admission of additional evidence, in addition to maintaining compliance with statutory procedural rules, the *Hore-Lacy* defence has been preferred.⁵¹ Given this context, Dixon J then turned back to the issue of whether the issue ought to be removed from the jury.

Dixon J explained the question of whether all imputations are substantially true is a question for the jury.⁵² As Bauer Media only sought to justify part

⁴⁴ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356, [41].

⁴⁵ *Fairfax Media Publications Pty Ltd & Ors v Kermode* (2011) 81 NSWLR 157, 170.

⁴⁶ *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 63.

⁴⁷ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356, [41]. Contextual truth (the Act s 26) was raised by Wilson, however, this was not addressed by Dixon J.

⁴⁸ *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667, 689.

⁴⁹ *Ibid* 686–7.

⁵⁰ *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 16.

⁵¹ *David Syme & Co Ltd v Hore Lacy* (2000) 1 VR 667, 686–7.

⁵² *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356, [54].

of the imputations, this characterised partial justification as a plea in mitigation and an issue for the judge.⁵³

III AMENDMENTS TO PLEADINGS

This section briefly considers the proposed amendments to the defendants' pleadings. Bauer Media made three applications to amend their pleadings. The first two applications pertain to justification; the first amendment in relation to a *Hore-Lacy* pleading, the second in relation to s 25 of the Act and common law justification simpliciter.⁵⁴ The third application to amend pleadings was in relation to the schedule of particulars.⁵⁵ The first application to amend was unsuccessful, as the proposed pleading Bauer Media wished to submit was not a *Hore-Lacy* pleading.⁵⁶ For the second application, Dixon J allowed the pleadings to be amended to include a common law and statutory justification defence.⁵⁷ The third application to amend was unsuccessful as the information was no longer relevant and could prejudice Wilson.⁵⁸

A *First and Second Proposed Amendments*

The first proposed amendment by the defendant followed the ruling of partial justification, with the defendant seeking to alter their partial justification pleading to a *Hore-Lacy* defence.⁵⁹ Bauer Media, in their amendment submitted that there were three separate lies imputed from the article, rather than the one sting that Wilson was a serial liar.⁶⁰ Wilson submitted that such a change was futile, as it was a lesser meaning than the imputation she had put forth, and being a lesser meaning, was partial justification.⁶¹ Wilson also argued that the imputation was substantially different and therefore a *Hore-Lacy* defence could not apply.⁶² A *Hore-Lacy* defence can only apply where an imputation put forth by the defendant is not substantially different from or more injurious than the imputations put forth by the plaintiff, Dixon J accepted Wilson's submissions agreeing that it was unlikely to affect the outcome.⁶³

The second proposed amendment followed the denial of leave to make the first proposed amendment.⁶⁴ Bauer Media sought to plead the Act's s 25 justification, common law justification simpliciter, and a varied *Hore-Lacy*

⁵³ Ibid.

⁵⁴ Ibid [57], [66].

⁵⁵ Ibid [88].

⁵⁶ Ibid [64].

⁵⁷ Ibid [86].

⁵⁸ Ibid [100].

⁵⁹ Ibid [57].

⁶⁰ Ibid [60].

⁶¹ Ibid [61].

⁶² Ibid [62].

⁶³ Ibid [64]; (2000) 1 VR 667, 689.

⁶⁴ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356, [65].

defence in the alternative.⁶⁵ As Dixon J allowed the justification modifications, the *Hore-Lacy* defence was not considered. In determining whether Bauer Media could amend their pleadings to include justification, Dixon J considered the question of whether the jury could find the substance of the article to be substantially true.⁶⁶ It is noted this is analogous to the prima facie case requirement for triviality to remain an issue discussed above. However, the language used by Dixon J differed on this issue, asking whether it would be open to the jury to find that the statements in the article were substantially true.⁶⁷ Given the question of fact as to what constituted material information in the article, Dixon J allowed the amendment.⁶⁸

B *Third Proposed Amendment*

The third proposed amendment was in relation to the particulars and inclusion of information that was arguably no longer relevant. This proposed amendment differed in focus to the first and second proposed amendments. While the first and second amendments were in relation to the formulation of legal pleadings, the third proposed amendment concerned the inclusion of facts in pleadings. At the outset of this section of the judgment, Dixon J noted the parties had agreed on a number of issues, but still requested one issue for determination,⁶⁹ namely whether the contested information was relevant to the pleadings as a whole. Dixon J noted as the information was only relevant to abandoned pleadings and could also prejudice Wilson, it should be struck out from proceedings.⁷⁰ This finding by Dixon J reiterates the role of defamation law to reinstate the reputation of harmed parties. By only including relevant information in proceedings, the risk of further harm to the plaintiff's reputation is mitigated.

IV COMMENT

Although both applications to remove issues from the jury hinged on the interpretation of the Act s 22, the approach taken by Dixon J differed for each issue. The statutory defence of triviality was determined to be a question for the jury at the outset.⁷¹ The question then became whether, the question should be removed from the jury, which depended on whether there was a prima facie case to answer.⁷² By contrast, partial justification is a common law defence which is relevant via s 24 of the Act.⁷³ The

⁶⁵ Ibid [66].

⁶⁶ Ibid [81], [82].

⁶⁷ Ibid [74].

⁶⁸ Ibid [81].

⁶⁹ Ibid [89].

⁷⁰ Ibid [88], [99].

⁷¹ Ibid [7].

⁷² Ibid [8].

⁷³ *Defamation Act 2005* (Vic) s 24.

consideration for Dixon J was how the defendant used the defence in this particular set of circumstances.⁷⁴ Dixon J explained that, as partial justification was used as a plea in mitigation, it related to the assessment of damages and therefore was an issue for the judge.⁷⁵ In summary, when considering whether an issue should be removed from the jury in defamation cases, the first point of reference is s 22 of the Act to identify which issues are for the judge and which are for the jury.⁷⁶ The second step is to determine which category each issue falls in.⁷⁷ The nature of this assessment was determined by how the parties have characterised the issue in their pleadings and the circumstances of the case.⁷⁸

The amendments to pleadings in this case highlights the nuances of defamation law. The first and second proposed amendments hinged on the distinction between statutory and common law defamation defences.⁷⁹ Yet neither the first or second proposed amendments were assessed in light of the purpose of defamation actions. By contrast, the third proposed amendment relied on the role of defamation proceedings in a broader context.⁸⁰ When the three proposed amendments are considered together, they demonstrate that while defamation law is a technical area of law, underlying the proceedings of defamation cases is the fundamental purpose of protecting a person's reputation.

⁷⁴ *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356, [40].

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, [66], [74], [81], [82].

⁸⁰ *Ibid.*, [88], [99].