

# NSW Law Reform Commission

## REPORT 75 (1995) – DEFAMATION

### Table of Contents

Table of Contents .....	1
Terms of Reference and Participants .....	2
Executive Summary .....	4
List of Recommendations .....	5
1. Introduction .....	9
2. The Objectives and Context of Defamation Law .....	16
3. Judge and Jury .....	28
4. The Cause of Action .....	38
5. The Public Figure Test .....	46
6. Remedies Other Than Damages .....	52
7. Aspects of Damages .....	68
8. Requested Corrections as a Defence .....	75
9. Innocent Dissemination .....	83
10. Qualified Privilege and the Constitutional Defence .....	86
11. Absolute Privilege .....	93
12. Protected Reports .....	103
13. Procedural Issues .....	110
14. Alternative Dispute Resolution .....	114
Appendix 1: Defamation Amendment Bill 1995 .....	118
Appendix 2: List of Submissions Received .....	164
Appendix 3: Seminars and Conferences Attended By Commissioners and Staff... ..	166
Appendix 4: Select Bibliography .....	167
Table of Legislation .....	170
Table of Cases .....	180
Index .....	189

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### 3. Judge and Jury

3.1 Central to any reform of the law of defamation is a determination of how the decisions which must be made in defamation litigation should be distributed between judge and jury (assuming that the jury is retained as part of the decision making process). This determination raises fundamental theoretical and practical issues. Theoretical considerations centre on the socio-political role of the jury in defamation litigation; while practical considerations focus on the feasibility and manner of segregating discrete issues which may arise at trial for assignment either to the judge or to the jury.

3.2 The socio-political role of the jury is founded on the notion of the jury as an appropriate barometer of public opinion to determine whether the matter in question is defamatory and, if it is, what amount of damages should be awarded. From a historical perspective, the role of the jury in defamation matters is intrinsically bound up with the protection of free speech, with juries figuring as watchdogs of democratic rights against unrepresentative governments.<sup>1</sup> After the passage in England of *Fox's Libel Act* of 1792,<sup>2</sup> the jury's increased role in libel cases was seen as among the central principles of freedom of speech and freedom of the press, with the people through their surrogate the jury determining how much could be said.<sup>3</sup> Notwithstanding changes in political climate, the Parliament of New South Wales apparently continues to perceive advantages in having certain aspects of defamation actions determined by a cross-section of the community rather than by judges alone.<sup>4</sup> For, unless the parties otherwise agree<sup>5</sup> or unless the Court otherwise dispenses with the jury because the case requires a "prolonged examination of documents or scientific or local investigation" which "cannot conveniently be made with a jury",<sup>6</sup> specific issues in defamation actions must, in the Supreme Court, be tried with a jury.<sup>7</sup>

3.3 It is, however, misleading to regard a defamation action in New South Wales as a "trial by jury". First, juries are relevant in defamation actions only where damages are claimed.<sup>8</sup> A jury would not be sworn, for example, in an application for an interlocutory injunction. The Commission does not propose that the role of the jury be expanded beyond actions for damages. In particular, we see no role for a jury if a plaintiff chooses to seek a declaration of falsity, the new remedy which we develop in Chapter 6. In our view, the urgency associated with that remedy outweighs any concerns about removing community input from those actions. Further, we believe that it would be inappropriate and inefficient for the judge to have to formulate the terms of the declaration in conjunction with a jury.

3.4 Secondly, in actions for damages, s 7A of the *Defamation Act 1974* (NSW) (which was inserted by the *Defamation (Amendment) Act 1994*), severely restricts the role of the jury in defamation cases. That section provides that the judge decides whether the matter complained of is capable of carrying the imputation pleaded by the plaintiff, and, if it is, whether the imputation is capable of bearing a defamatory meaning ("the capacity of the imputations").<sup>9</sup> If the judge determines these issues in the negative, a verdict is entered for the defendant in relation to the imputation pleaded.<sup>10</sup> If the judge determines in the affirmative, the jury then decides whether the matter complained of does in fact carry the pleaded imputation and, if it does, whether the imputation is defamatory ("the imputations stage").<sup>11</sup> Having made these findings, and having decided that the defendant published the matter complained of,<sup>12</sup> the function of the jury comes to an end. In particular, the judge decides all matters relating to defences<sup>13</sup> and damages.<sup>14</sup>

3.5 The specific allocation of tasks to the jury in defamation actions made by the 1994 amendments to the *Defamation Act* is not mirrored in the law of other Australian jurisdictions. In South Australia juries are not used at all in civil actions.<sup>15</sup> In other jurisdictions, legislative provisions tend to allow the plaintiff or defendant to opt for, or to request the court to exercise a discretion to allow, trial by jury.<sup>16</sup> In practice, juries are not normally used in the Northern Territory,<sup>17</sup> nor in the Australian Capital Territory. But in Victoria<sup>18</sup> and, to a lesser extent in Queensland,<sup>19</sup> where jury trial can be requested by either party subject to the discretion of the court, juries are commonly used.

#### EVALUATING THE ROLE OF THE JURY

3.6 DP 32 canvassed three options aimed at improving procedure in defamation trials:

conducting defamation trials before judges alone;

## NSW Law Reform Commission: REPORT 75 (1995) - DEFAMATION

retaining juries only to decide whether the imputations are conveyed and are defamatory; and

retaining juries in their present role but implementing other reforms such as imposing a cap on damages or allowing judges to give increased guidance on quantum.<sup>20</sup>

Since the publication of DP 32, the 1994 amendments to the *Defamation Act 1974* (NSW) have effectively adopted the second option as the law of New South Wales. Generally, the Commission endorses this position.

3.7 No submission received in response to DP 32 advocated the abolition of the jury completely. Rather, submissions indicated continued community support for a jury role in defamation actions, but division over the nature of such a role.<sup>21</sup> Community support tends to be founded on the view that, by drawing on its combined knowledge of how matters are regarded in the community at large, a jury is capable of providing a superior result, as compared with a judge who only deploys his or her own knowledge. This view is underpinned by an assumption that a jury, composed of persons with diverse backgrounds, has a wider experience of life than a single judge.<sup>22</sup> In considering the appropriate role for juries in defamation actions, the Commission has considered this view against the background of the declining use of jury trials in civil actions in Australia as well as of the complex realities of defamation litigation.

3.8 First, while the Commission accepts that, at least where the composition of the jury is sufficiently diverse,<sup>23</sup> four persons are more likely to reflect community values, perceptions and expectations than one, it regards as too broadly drawn the argument that juries are, overall, more likely to arrive at a larger measure of social justice in defamation cases than judges. Many issues arise in a defamation trial. Not every one of those issues requires such a sensitivity to community values that it can be resolved only by a decision of a cross-section of the community. In short, it is the nature of the issue, rather than a general theoretical postulate, which determines the appropriate mode of trial for that particular issue.

3.9 Secondly, the Commission is conscious of the general decline in the use of juries in civil actions in Australia.<sup>24</sup> A major reason for that decline is the realisation that judges are often simply much better and more efficient at resolving disputed issues of fact than juries. The role of the jury has, of course, always been limited to the resolution of disputed issues of fact, the judge deciding all issues of law. But, in the context of modern civil litigation, where the facts are often specialised or complex and the borderline between issues of fact and issues of law is blurred, the resolution of disputed facts and issues of credibility is often best left to judges whose training, experience and tradition of detachment better equips them to deal with these issues than a jury.<sup>25</sup>

3.10 Thirdly, the costs and delays associated with jury trials in defamation can be removed, or at least reduced, by confining the functions of the jury to the resolution of those issues in which community input is desirable. We note that giving instructions to the jury can be extremely complex and time consuming, particularly where the boundaries of the functions between judge and jury are finely drawn and need to be carefully spelled out, as where defences such as qualified privilege<sup>26</sup> or the new constitutional defence are in issue.<sup>27</sup> Evidence before the Legislation Committee indicated that explanations to the jury double the time that the matter would take before a judge.<sup>28</sup> This is hardly surprising as the judge must deal with every issue in the summing up even though it may turn out to be unnecessary because of the conclusions reached by the jury. But it does result in increased costs for all parties. It also creates the risk of appeal points directed principally at the proper distribution of functions between judge and jury.

3.11 In seeking to define the role of the jury in defamation cases in such a way so as to achieve as many advantages as possible in saved time and expenditure, the Commission's approach has been to consider individually the principal issues which arise in a defamation case to determine where community involvement is essential and where it is unnecessary. We have, throughout, been mindful of possible limitations which procedural considerations could place upon the recommendations we make. We address these in paras 3.30-3.33.

### THE ISSUES IN AN ACTION FOR DAMAGES