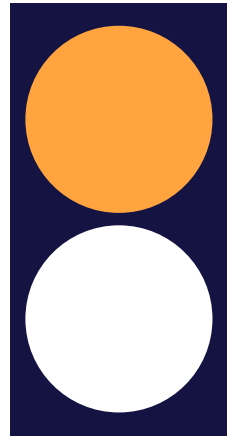


DISPUTE RESOLUTION



ARTICLE: THE STATUTORY DEFENCE OF CONTEXTUAL TRUTH

SEPTEMBER 2023

Overview

What is the statutory defence of contextual truth?

To establish a defamation, an Applicant must prove that the Respondent published defamatory material concerning the Applicant to another person.

The test for whether a publication is defamatory is: Does the publication harm the Applicant's reputation, hold the Applicant up to ridicule or lead others to shun and avoid the Applicant judged from the perspective of ordinary reasonable people in the community in general and considering contemporary standards.

There are several defences which the Applicant may seek to establish in order to avoid a negative finding being made. Such defences include (a) that the publication was issued on an occasion of qualified or absolute privilege (Sections 25 and 28 Defamation Act 2005 (SA) (Act) (e.g. complaints made to the Police or matters raised in an Australian Parliament, respectively); (b) that the publication presents a "fair" or "honest opinion" on the basis of proper material and on a matter of "public interest" (Section 29) e.g. Arts reviews; (c) fair reporting by journalists of proceedings of public concern (Section 27).

Section 23 provides that if a Respondent can prove the "substantial truth" of an imputation, that constitutes a complete defence to an established defamatory statement. Whilst truth is a defence to a claim of defamation, the onus is on the Respondent to establish that truth, an exercise which, as may be seen from the long and costly proceedings brought by Ben Roberts-Smith in the Federal Court of Australia (**Roberts-Smith v Fairfax Media Publications Pty Limited (No 41) [2023] FCA 555**) is not a task assumed lightly by a publisher even for a media organisation with deep pockets.



Ben Roberts-Smith defamation case

Imputations and Contextual Truth

Importantly, it is ultimately for the Applicant to determine which imputations to raise by way of complaint.

Accordingly, for example, a scenario may be imagined where a publication is issued which imputes that the Applicant has received a number of speeding tickets; and, in addition, is a murderer (obviously the latter being the more defamatory imputation).

The Applicant, anticipating that the Respondent is likely to be able to prove the truth of the more defamatory imputation but is unlikely to be able to prove the truth of the less defamatory imputation, a savvy Applicant might only complain of the less defamatory imputation.

One can easily perceive the potential for unjust results because the Respondent could become liable notwithstanding the Applicant's reputation would not be further harmed by the less defamatory imputation in view of the (truthful) more defamatory imputation.

Accordingly, Section 24 provides for a defence of contextual truth which entitles a Respondent to plead that other truthful imputations were also conveyed by the matter, and which would, if proven, mean the Respondent would escape liability if the less defamatory imputation caused no further harm to the Applicant's reputation given the truth of the more defamatory imputation.

It should be noted that the first iteration of the defence appearing as part of the newly "codified" national legislation in 2005 caused some confusion in that certain jurisdictions interpreted the wording to effectively prohibit a Respondent from pleading in its Defence, any imputation that had been pleaded by the Applicant in the statement of claim (a practice referred to as 'pleading back').

Needless to say, such a construction caused some concern among practitioners and led to the amendments of the section in 2020 to add:

(2) The contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

Roberts-Smith and the Federal Court

The majority will be aware from the saturation media reporting, that Mr Roberts-Smith complained of a myriad of imputations arising from numerous articles published by Fairfax-Media, ranging from the murder and cover up of Afghani citizens whilst he was deployed as a member of the SAS in Afghanistan in the course of that conflict, bullying and assault during that deployment to allegations of domestic violence perpetrated against a woman with whom he had a relationship.

Ultimately the Federal Court found most imputations pleaded had indeed been carried by the articles in question, but that in respect of the most serious of allegations the in particular concerning the murder and assault of Afghani citizens, the Respondents were able to prove the substantial truth of the imputations. In relation to the charges of domestic violence, in his judgment His Honour, Justice Besanko, sets down in an extremely detailed manner the events the subject of the allegations and his conclusions are telling as against Mr Roberts-Smith:

I have difficulty accepting [Roberts-Smith] evidence on any disputed issue. (@2220)

However, without criticism of the woman the subject of the allegations, His Honour ultimately concluded that given the nature of the imputations arising from the articles and the obligation to assess whether criminal conduct alleged had occurred, he was not satisfied that the evidence was sufficiently reliable to form the basis of a finding that the assault had occurred and that the imputations arising from the allegations were substantially true.

So, having established the substantial truth of the “most serious” of the imputations (noting of course that a comparison of the seriousness between murder and domestic violence is ultimately is likely only an academic one), the question arose as to whether the imputations which were not justified - specifically the domestic violence charges (because the Respondents had been unable to prove the substantial truth of those allegations) did not harm the Applicant’s reputation because the substantial truth of the contextual imputations.

Roberts-Smith contended that it “cannot be shown that those imputations do no further harm to his reputation because of the substantial truth of the contextual imputations”.

He relied on a line of authority supporting the proposition that a person has a reputation, or may have a reputation, which has different sectors – e.g., a professional or “work” reputation and a private/social reputation.

He referred to the decision of the New South Wales Court of Appeal in O’Brien v Australian Broadcasting Corporation [2017] NSWCA 338; (2017) 97 NSWLR 1 where Macfarlane JA (with whom Leeming JA agreed) said (at [224]–[225]):

224 In my view this distinction between the imputations is significant. It leads me to differ from the primary judge’s conclusion concerning the s 26 defence. Whilst the appellant’s reputation

would have been substantially damaged by contextual imputation A, her honesty would not have been impugned by it. As the plaintiff's imputation (a) did impugn her honesty, I consider that that imputation further harmed her reputation beyond that caused by the substantially true contextual imputation.

225 The distinction to which I have referred is one between different "sectors" of the appellant's reputation, a distinction well-recognised in other aspects of defamation law: see Australian Broadcasting Corporation v McBride (2001) 53 NSWLR 430; [2001] NSWCA 322 at [16]–[23]; Channel Seven Sydney Pty Ltd v Mahommed (2010) 278 ALR 232; [2010] NSWCA 335 at [162]–[186]; Holt v TCN Channel Nine Pty Ltd (2014) 86 NSWLR 96; [2014] NSWCA 90 at [29]. Whilst the level of generality at which sectors of reputation should be identified will in some cases be in doubt (see Mahommed at [182]), it is sufficient to say in the present case that the appellant's honesty and competence constitute different sectors of her reputation. Even a severe blow to the latter will not necessarily, and in my view in this case did not, affect the former. The trickery imputation did however affect the former.

The Respondents rejected the "different sector" approach in this case if the imputations relating to, amongst other imputations, domestic violence are not shown to be substantially true, but the allegations of unlawful killings in Afghanistan are proved.

They submitted that the reputation enjoyed by Roberts-Smith was based on and intrinsically linked with his military service and reputation. It was not a reputation that stood alone - that every aspect of his reputation is in some way linked to his military service. Further, although the imputations of domestic violence and hypocrisy related to his domestic conduct in the sense of his conduct in a private relationship and in Australia:

the two sets of conduct bear what the respondents described as an "uncanny similarity" in that both related to violent conduct towards a vulnerable person to whom the applicant had a duty, legal and moral, to refrain from assaulting. Both forms of conduct involved an attempted cover up. The only difference is that one assault was committed against his girlfriend, whereas the other conduct was committed against Afghan persons under confinement. I agree with this second submission. Once the conduct is clearly and fully described (and that is the appropriate basis upon which to proceed), then there is sufficient similarity in the conduct to preclude an approach based on different sectors of reputation. [@2606]

His Honour accepted these submissions – to a point.

However, ultimately, His Honour chose a different approach, with the same consequence.

He considered that the imputations found to be substantially true were so serious that the Applicant had no reputation capable of being further harmed and considered that this was an appropriate case to take such an approach.

The Appeal

I note at the time of writing Roberts-Smith is seriously considering an appeal from this judgment.

The prospect for that appeal is speculative. Respectfully, His Honour's judgment is extraordinarily detailed and thorough. However, the cost consequences for a negative finding are so serious that Roberts-Smith

may feel he has nothing to lose, given that he continues to enjoy the largesse of his previous employer in funding the litigation.

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