

A matter of aggravation: recent developments in damages awards in defamation

By Lyndelle Barnett

As three recent high profile proceedings demonstrate, the construction now placed upon section 35 of the Defamation Act, which imposes a maximum amount, or cap, on damages for non-economic loss in defamation proceedings has led to an increased focus on demonstrating that the circumstances justify an award of aggravated damages.

When national uniform defamation legislation was introduced in 2005 (*being the Defamation Act 2005* (NSW) in New South Wales) it provided for a maximum damages amount for non-economic loss that may be awarded in defamation proceedings. The rationale for the maximum damages amount was explained in the Second Reading Speech for the *Defamation Bill 2005* (NSW) as follows:

Recent changes to New South Wales civil liability law have imposed both thresholds and caps on awards of general damages in personal injury cases. In order to be eligible for the maximum award of damages for non-economic loss, which currently stands at \$400,000, it is likely that a plaintiff would need to show that they have been rendered quadriplegic or severely brain damaged and will be highly dependent on the care of others for the rest of their life. By way of contrast, in the recent case of *Sleeman v Nationwide News Ltd*, 2004 NSWSC 954, a journalist from the *Sydney Morning Herald* was awarded \$400,000 in damages basically because an article in *The Australian* conveyed the impression that he was a dishonest journalist.

While I have no doubt that false and defamatory statements are harmful, the fact is that reputations may be restored and injured feelings may pass after a time. The pain and suffering associated with an affliction like quadriplegia, on the other hand, will last a lifetime. The bill ensures that this glaring discrepancy in the way damages are awarded is addressed.

The operative provision of the Defamation Act, section 35, relevantly provides as follows:

- (1) Unless the court orders otherwise under subsection (2), the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is \$250,000 or any other amount adjusted in accordance with this section from time to time (the maximum damages amount) that is applicable at the time damages are awarded.
- (2) A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages.

The maximum damages amount is currently \$398,500.

General damages exceeding the maximum damages amount have been awarded in three recent cases discussed in this article: *Wilson v Bauer Media Pty Ltd*, *Rayney v The State of Western Australia* and *Wagner & Ors v Harbour Radio Pty Limited & Ors*.

Wilson v Bauer Media Pty Ltd

The actress Rebel Wilson brought proceedings against Bauer Media in relation to the publication of an article in *Woman's Day* magazine and seven articles published on websites controlled by Bauer Media. The articles were found to have conveyed defamatory meanings to the effect that Ms Wilson was a serial liar, had lied about many aspects of her private life and was so untrustworthy that one could not rely upon what she said about herself without corroboration. All defences relied upon by Bauer Media failed.

At first instance (*Wilson v Bauer Media Pty Ltd* [2017] VSC 521), Dixon J construed section 35 of the *Defamation Act 2005* (Vic) to the effect that the maximum damages

amount for non-economic loss had no application in cases where the court found that the circumstances of the publication were such as to warrant an award of aggravated damages. His Honour awarded Ms Wilson \$650,000 for non-economic loss (as well as \$3,917,474 for special damages and \$182,448.61 in interest).

The Victorian Court of Appeal, constituted by Tate, Beach and Ashley JJA (*Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154), agreed with Dixon J's construction of section 35.

The court began its analysis of section 35 by considering whether section 35(1) fixed the top end of a range, or rather whether damages were to be assessed at large with section 35(1) applying a cap ([182]-[215]). Bauer Media had contended that the maximum damages amount fixed the upper limit of a range or scale reflecting the most serious cases, with less serious cases taking their place within the scale. Bauer submitted that this construction would operate to ensure consistency of awards in defamation proceedings across jurisdictions. Support for Bauer Media's construction was found in a number of first instance decisions of the New South Wales Supreme Court commencing with *Attrill v Christie* [2007] NSWSC 1386 per Bell J.

More recent judgments in Victoria (*Cripps v Vakras* [2014] VSC 279 and *Sheales v The Age Co Pty Ltd* [2017] VSC 380), New South Wales (*Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091), South Australia (*Lesses v Maras (No 2)* [2017] SASCF 137) and Western Australian (*Rayney v Western Australia (No 9)* [2017] WASC 367) had held that the maximum damages amount did not fix the upper limit of a range or scale but rather operated as a cap. The Victorian Court of Appeal agreed, stating at [209]:

In our view, the combination of s 34 and s 35(1) does not create a range or scale with respect to the quantum of damages to be awarded for non-economic loss. In this respect, it is significant, as the

plaintiff submitted, that s 35(1) specifies the maximum damages amount for individual defamation ‘proceedings’ rather than for individual defamatory matter, or for individual imputations, or for separate causes of action. If s 34 and s 35(1) create a range to govern the award of damages for non-economic loss it would be necessary for comparisons to be confidently drawn between defamation proceedings to identify where one proceeding sat relative to another with respect to the seriousness of the imputations and the level of harm suffered. However, the Legislature’s choice of ‘proceedings’ as the reference point rather than imputations or causes of action has the consequence that the ability to draw comparisons is significantly impaired.

The court also considered (at [212]) that treating section 35(1) as fixing the upper limit of a range may artificially deflate awards made for non-economic loss at the lower end of seriousness of defamation with the consequence that a principal purpose of such damages, namely, vindication of reputation, would not be met.

The consequence of the court’s rejection of Bauer Media’s contention that section 35(1) fixed the upper limit of the range was that the court was satisfied that damages for non-economic loss were to be assessed at large. By application of section 35(2), if the court was not satisfied that the circumstances of publication warranted an award of aggravated damages, damages for non-economic loss would be capped at the maximum damages amount (assuming they were assessed to exceed the amount), but if it was so satisfied, damages would be awarded in the full amount assessed. The court concluded at [249] as follows:

We accept that when a court is satisfied that an award of aggravated damages is appropriate the court is entitled to make an order for damages for non-economic loss that exceeds the statutory cap in

respect of both pure compensatory damages and aggravated compensatory damages. In other words, the statutory cap does not then constrain the court’s assessment of damages for non-economic loss; when an award of aggravated damages is warranted, the statutory cap is inapplicable.

The court agreed with the decision of Dixon J that the circumstances of publication in that case warranted an award of aggravated damages, but re-assessed the damages award and reduced it to \$600,000 for non-economic loss, and set aside the award of special damages.

Rayney v The State of Western Australia

Rayney v Western Australia (No 9) [2017] WASC 367 concerned a claim by Lloyd Rayney, a barrister who had previously held senior positions in the Office of the Australian Government Solicitor and the Office of the Director of Public Prosecutions for Western Australia. Mr Rayney sued the State of Western Australia over four press conferences conducted by Detective Senior Sergeant Jack Lee during the course of an investigation into the murder of Mr Rayney’s wife. Chaney J found that the last of the press conferences conveyed an imputation that the plaintiff murdered his wife, that the defence of qualified privilege failed and that the circumstances of publication were such as to warrant an award of aggravated damages.

Rayney was decided after Dixon J’s judgment in *Wilson*, but before the decision of the Victorian Court of Appeal. Chaney J followed Dixon J in *Wilson* and held that the maximum damages amount was inapplicable. Mr Rayney was awarded \$600,000 for non-economic loss.

Wagner & Ors v Harbour Radio Pty Limited & Ors

Denis Wagner, John Wagner, Neill Wagner and Joe Wagner are brothers who have built a highly successful business. They each brought proceedings against Harbour Radio Pty

Limited, Alan Jones, Radio 4BC Brisbane Pty Limited and Nick Cater in relation to the publication of 32 publications alleged to be defamatory of them. In his judgment (*Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201) Flanagan J found that 29 of the matters complained of conveyed 80 imputations defamatory of them including imputations to the effect that each of the plaintiffs caused the deaths of ten adults and two children in the Grantham floods by the manner in which they constructed their quarry, and then covered up their involvement. All defences relied upon failed.

The Victorian Court of Appeal’s decision in *Wilson* was handed down on the final day of the trial. Flanagan J followed *Wilson* in relation to the construction of section 35, and having found that the circumstances of publication warranted an award of aggravated damages, awarded each plaintiff \$850,000 in damages for non-economic loss, plus interest.

The damages awards granted in the three decisions discussed in this article represent a significant increase in the awards granted in earlier cases decided under the Defamation Act. In light of the construction of section 35 adopted in the decisions discussed in this article it is likely that there will now be an increased focus in defamation litigation on matters giving rise to a claim for aggravated damages.