Judge Judith Gibson, District Court of New South Wales

Recent trends in defamation cases

October 31, 2018

The 91 cases considered in this paper reveal a number of trends:

1. **Who is suing whom**: Contrary to Patrick George's statement that defamation actions are brought by the famous (or infamous) against the media, only a dozen of the 91 judgments related to persons of relative celebrity.[1] As the list of plaintiff's names demonstrates, most actions are brought by ordinary members of the community. Only 33 were brought against media defendants at all.[2] Of particular concern is that 39 of the 91 actions (more than 40%) involved litigants in person – an undesirable percentage for a cause of action where almost no defendants have insurance and where the cost of a trial can be hundreds of thousands of dollars. This percentage may in fact be higher because some of those who *are* represented are represented by pro bono lawyers. Rich or poor, even the famous have trouble affording the legal fees; both Senator

---

[1] While opinions on 'fame' may differ, the persons who have been identified in this study as 'famous' are the distinguished surgeon Professor Al Muderis, actors Rebel Wilson and Craig McLachlan, prominent businessmen Harry Triguboff and Dr Chau Chak Wing (erroneously referred to as 'Dr Wing' in *Wing v Australian Broacasting Corporation* [2018] FCA 1340) and current or former politicians (*Mirabella v Price* [2018] VCC 650; *Palmer v Turnbull* [2018] QSC 112; *Culleton v Kershaw* [2018] WASC 236; *Asmar v Fontana & Anor* [2018] VSC 382; and *Jensen v Nationwide News Pty Ltd (No 3)* [2018] WASC 252, which is a rare instance in which a *Lange* defence was pleaded: see *Jensen v Nationwide News Pty Ltd (No 4)* [2018] WASC 285). Former politicians also figure amongst defendants, such as former Labor leader Mark Latham: *Faruqi v Latham* [2018] FCA 1328. Other plaintiffs included lawyers and members of the medical profession who do not have a public profile. It should also be noted that 3 plaintiffs sought orders suppressing their names: *DOQ17 v Australian Financial Security Authority (No 2)* [2018] FCA 1270; *Doe 1 v Dowling* [2018] NSWSC 1278; *Ex parte K* [2018] WASCA 144. Spiritual healer Serge Benhayon (*Benhayon v Rockett* [2018] NSWSC 932) and Rabbi Feldman (whose defamation trials account for 6 of the 91 judgments listed above) are not widely known outside their followers, although publicity concerning their defamation actions has possibly 'Streisand'd' them (*Trkulja v Google LLC* [2018] HCA 25 [49]).

[2] This reflects the trends shown in the UTS Study, above n 34, as is noted in Professor Derek Wilding, 'Defamation in the digital age has morphed into litigation between private individuals', *The Conversation* (online) 3 April 2018 <https://theconversation.com/defamation-in-the-digital-age-has-morphed-into-litigation-between-private-individuals-93739>. The findings noted that 26% of the cases studied involved media companies as defendants (compared to 31% in 2007).

Hanson-Young and her opponent set up GoFundMe sites when she brought proceedings for defamation.[3]

2. **Percentage of online publications:** While there is some cross-over in terms of actions being brought on both internet and traditional publications, the percentage of actions where the claim is based largely upon electronic publication continues to rise.[4] A total of 64 matters complained of either consist entirely of, or include, website publications; in the case of media defendants, there are invariably actions based on both the print and website versions of the matter complained of. The remainder are actions for letters, emails, slanders or documents such as the restrictions placed on a pharmacist's entitlement to practice. This confirms the trend observed in Professor Wilding's study, namely that the percentage of online publications, which in 2007 was just over 17%, had increased by 2017 to 57%.[5]

3. **Cases finalised**: Contrary to concerns expressed about unnecessary case management, 10 of the 91 judgments represent concluded verdicts for either the plaintiff or defendant and a similar number relate to consequential applications, such as costs (notably security for costs) or other post-judgment orders. There were also 14 appeals.

4. **Cases disposed of summarily**: One of the most significant results arising from this study is the high number of summary dismissal applications brought, a high proportion of which were granted.[6] In

---

[3] James Elton-Pym, 'Hanson-Young, Leyonhjelm both crowdfund sexist slur legal fight', *SBS News* (online) 10 July 2018 <https://www.sbs.com.au/news/hanson-young-leyonhjelm-both-crowdfund-sexist-slur-legal-fight>.

[4] The increasing number of defamation actions on social media was known even at the time of the s 49 Review in 2011; see Patrick George "Super Media: Rise of Social Media: the view from Australia, *Inforrm*, 6 October 2012, https://inforrm.org/2012/10/06/super-media-rise-of-social-media-the-view-from-australia-patrick-george/.

[5] Wilding, above n 51.

[6] The most common grounds for summary dismissal are absolute privilege (*Kostov v State of NSW* [2018] NSWSC 1252; *Chen v Premier Motor Services Pty Ltd t/as Premier Illawarra* [2018] NSWCATAP 142) and hopeless pleadings (*Culleton v Kershaw* [2018] WASC 236; *Morris v IMF Bentham Ltd* [2018] FCA 1009). Other grounds include lack of identification of the plaintiff (*Triguboff v Fairfax Media Publications Pty Ltd* [2018] FCA 845); no defamatory imputations (*Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858; note that absence of 'serious harm' constituted the alternate grounds for dismissal) and suing the wrong defendant (*Alfaro t/as Palfaro Cleaning Services ABN: 57 267 431 409 v Taylor* [2018] NSWDC 134 (no cause of action against Facebook Australia Pty Ltd)). Compare this figure to the number of proceedings dismissed as vexatious in Hilary Young's 2017 survey of Canadian judgments, where 8% (28) of the 346 judgments over the period 2003 – 2013 were dismissed on such a basis.

all but one of the successful cases, the plaintiff was a litigant in person. The total of cases summarily dismissed (11) outnumbers judgments.

5. **Interlocutory applications**: The great majority of interlocutory arguments arose from the pleading and particularisation of the defence of justification, which accounted for 14[7] of the 91 judgments. This tends to support the observation that defences such as qualified privilege play an increasingly smaller role in an online world, and that plaintiffs are seeking to move the goalposts in relation to the defence of justification.[8] Despite criticisms levelled at specialist courts for meretricious imputation arguments, only 3 judgments[9] related to rulings on plaintiffs' imputations. The real battleground is justification; qualified privilege and opinion are raised only in a handful of cases and the *Lange* defence continues to languish in obscurity.

6. **Feral litigation**: The most disturbing statistic is that 9 out of the 91 cases related to contempt of court[10] and several also included

---

[7] *Al Sesalim v The Herald and Weekly Times Pty Ltd & Anor* [2018] VSC 264; *Eustice v Channel Seven Adelaide* [2018] SASC 73; *Faruqi v Latham* [2018] FCA 1328 (although the whole of the defence was in fact struck out); *Fenn v Australian Broadcasting Corporation* [2018] VSCA 166; *Fenn v Australian Broadcasting Corporation* [2018] VSC 449; *Gair v Greenwood (No 2)* [2018] NSWSC 947; *Granitto v Gostelow* [2018] WASC 242; *Knell v Harris* [2018] WADC 85; *McLachlan v Browne and Fairfax Media Publications Pty Ltd; McLachlan v Browne and Australian Broadcasting Corp (No 2)* [2018] NSWSC 829; *McLachlan v Browne and Fairfax Media Publications Pty Ltd; McLachlan v Browne and Australian Broadcasting Corp (No 3)* [2018] NSWSC 830; *McLachlan v Browne and Fairfax Media Publications Pty Ltd; McLachlan v Browne and Australian Broadcasting Corp (No 4)* [2018] NSWSC 940; *Sheppard v Nine Network Australia Pty Ltd* [2018] QDC 158; *Wing v Australian Broadcasting Corporation* [2018] FCA 1340; *Wraydeh v New South Wales* [2018] NSWDC 138.

[8] Judith C Gibson DCJ, 'Adapting defamation law reform to online defamation' (2018) 22 *Media & Arts Law Review* 119, 139-140, 146.

[9] *Asmar v Fontana & Anor* [2018] VSC 382 and *Spedding v Nationwide News Pty Ltd* [2018] NSWSC 844 were traditional challenges to the plaintiff's imputations. Nationwide News Pty Ltd brought an imputations argument in the alternative to a summary dismissal application on the basis of no defamatory imputations being capable of arising in *Khalil v Nationwide News Pty Ltd (No 2)* [2018] NSWDC 126, an application Nationwide News Pty Ltd successfully made in *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858.

[10] These 9 cases are summarized below, under the heading "Contempt of Court".

applications for vexatious litigant orders.[11] A particularly significant issue in this context is online technology, as there is no effective way to remove an online publication on a permanent basis where the defendant refuses to do so.

7. **Forum issues and abuse of process**: The single most important takeaway from this study is the degree to which abuse of process complaints are before the court in one form or another but the courts are unable to formulate solutions. First, there is the impact of unrepresented litigants on one or both sides of the bar table (in just over 40% of the cases) which has led to an increase in hopeless or mischievous claims resulting in summary dismissal (11 of the 91 cases), which in turn exacerbate case management problems for courts, especially magistrates' courts and tribunals where such actions until recently were rare. Second, there is the increase of conduct asserted to be contempt of court (9 of the 91 cases) and/or vexatious litigation[12] as well as the risk of accidental contempt caused by the increasing number of suppression orders being made. Third, plaintiff forum-shopping to avoid jury trials and specialist lists has failed to reduce the technicality of claims but has clearly contributed to the steep rise in number of actions over the past year. Fourth, the high cost of defamation (evidenced by figures for the costs of trials in security for costs applications) and the problems of enforcement of orders (particularly online removal) can

---

[11] The only declaration in relation to vexatious litigation made during the period under study was made in relation to Mr Mowen's conduct of a number of actions, of which defamation was only one: *Mowen v Rockhampton Regional Council* [2018] QSC 192 (see the orders made in related litigation, in *Mowen v State of Queensland* [2018] QSC 183); an application for the plaintiff to be declared a vexatious litigant in *Craven v Globe Valley Pty Ltd & Ors* [2018] QDC 155 failed, although the court later struck out his claim against 3 of the defendants after he failed to comply with a security for costs order: *Craven v Globe Valley Pty Ltd* [2018] QDC 198. The extreme nature of a declaration of being deemed a vexatious litigant makes it a largely unworkable remedy; courts are reluctant to interfere with the perceived right of a litigant in person to bring proceedings even where there is a long history of vexatious claims (such as the concerns expressed in *Nyoni v Hee* [2014] WASCA 84 [27], which are noted in *Nyoni v Pharmacy Board of Australia* [2018] FCA 1313). Courts have sought to impose requirements of a different nature; for example, an application to have Dr Ghosh declared a vexatious litigant failed at first instance, although an order requiring her to conduct her litigation through legal representatives has now been made on appeal: *Ghosh v Miller (No 2)* [2018] NSWCA 212. An application to have Mr Mohareb declared a vexatious litigant failed: *Attorney-General (New South Wales) v Mohareb* [2016] MSWSC 1823. A particularly effective method for clear cases of abuse is that used by the Western Australia Supreme Court in *Ex parte K* [2018] WASCA 144, where the plaintiff was refused leave to file the claim and the question of the adequacy of the claim was resolved ex parte, rather than imposing the burden on defendants who may not have the skills or finances to combat such a claim.

[12] Ibid.

render success pyrrhic, as the difficulties faced by the plaintiff in *Al Muderis v Duncan (No 4)*[13] starkly demonstrate.

Problem areas in relation to the statutory review's proposed reforms

In addition to the trends laid out above, it is also clear that the law reform issues that these cases reveal paint a starkly different picture to the current defamation law reform climate and, specifically, the Review.

More defamation claims, more litigants in person and more potential for abuse of process

Essentially, what these cases demonstrate is that the potential for abuse of process warned of by Deane J in *Theophanous* is already flourishing. All of the Review's targeted areas of reform will be threatened by the excessive (in comparison with other common law jurisdictions) proliferation of defamation actions in courts without the resources to manage them, or where the court's case management procedure is unsuitable.

The principal challenges in relation to abuse of process are the increasing number of litigants in person, the increasing number of courts in which these applications are being brought, the costs problems faced by defendants and the bringing of trivial or oppressive actions.

As to the first of these, the rapid growth of litigants in person is not a new problem, nor is it restricted to Australia.[14] Academics have noted the failure of legislators and courts to address this; for example, one commentator in 2016 noted that there was a 'disappointing lack of empirical evidence indicating self-represented litigant numbers, characteristics, success rates, claim types and motivations' in terms of court or legislative inquiries and research.[15] Judges have noted what

---

[13] [2018] NSWSC 925. A/Prof Munjed Al Muderis's long struggle to protect his reputation is detailed in the AMA's online journal ('The Cost of a Good Reputation', https://www.amansw.com.au/the-cost-of-a-good-reputation/). The publications attacking him are still online.

[14] In her annual review of media law in New Zealand ((2013) 15 *Media & Arts Law Review* 242), Ursula Cheer noted that 'It has been a year of the defamation litigant in person'. In Canada, Martin J set out a series of case management procedures (*Slipetz v Trudeau* [2013] MBQB 111) for dealing with a litigant in person in defamation proceedings.

[15] This quote is taken from Louise Gray, *Not for the Faint of heart: The Right to Self-representation in New Zealand* (Research Paper, Victoria University of Wellington, 2016).

appears to be an irreversible rise in unrepresented litigants in Australia,[16] as well as in New Zealand,[17] and the resulting 'efficiency deficit' for a legal system which is not designed to support them.[18] What is new, however, is the opportunity for ordinary members of the public to be exposed to the risks of defamation law, whether as a plaintiff or defendant, without insurance, journalistic training or skilled legal advice, in a legal system where costs are increasingly rising.[19]

The second complicating factor is the increasing number of cases being brought in jurisdictions where there is no case management beyond setting the case down for trial. As cases such as *Small v Small*[20] and *Walden v Danieletto*[21] demonstrate, defamation cases are being brought with increasing regularity in magistrates courts (apart from New South Wales, where the jurisdiction of the magistrates court does not extend to defamation). Other recent decisions confirm this trend: *Sangare v Northern Territory of* Australia[22] started in the local court in the Northern Territory, and *Ferguson v South Australia*[23] and *Berge v Thanarattanabodee*[24] were appeals from magistrates courts in South

---

[16] Justice Geoffrey Nettle, 'Technology and the Law' (Paper presented at the Bar Association of Queensland Annual Conference, Brisbane, 27 February 2016) notes at 8 that 'technology is likely to increase the incidence of self-represented litigants' and, at 9, that the role of lawyers and judges would decrease as technology advanced.

[17] Justice Helen Winkelman, 'Access to justice: Who needs lawyers?' (Paper presented at Ethel Benjamin Address, 7 November 2014).

[18] Adrian Zuckerman, 'No Justice without Lawyers – the myth of an inquisitorial solution' (2014) 33 *Civil Justice Quarterly* 355, 355.

[19] Michaela Whitbourn, 'NSW chief justice Tom Bathurst warns of "worrying" costs in NSW defamation cases', *Sydney Morning Herald* (online) 2 July 2017 <https://www.smh.com.au/national/nsw/nsw-chief-justice-tom-bathurst-warns-of-worrying-costs-in-defamation-cases-20170630-gx1z4d.html>. The high cost of defamation actions in the common law system was demonstrated in a 2008 study which found that the cost of defamation actions in the United Kingdom was 140 times greater than civil law systems in Europe: Norma Patterson, *A comparative Study of Defamation Costs Across Europe* (University of Oxford, Centre for Socio-Legal Studies, 2008) <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf>. The main contributing factor to these costs is the conditional fee agreement: Ben Dowell, 'High cost of libel studies shackling newspapers, says study', *The Guardian* (online) 19 February 2009 <https://www.theguardian.com/media/2009/feb/19/no-win-no-fee-lawyers-shackling-newspapers>.

[20] [2018] ACTSC 231.

[21] [2018] QMC 10.

[22] [2018] NTCA10.

[23] [2018] SASC 90.

[24] [2018] QDC 121.

Australia and Queensland. The Victorian Magistrates Courts have been hearing defamation actions for some time (see, for example, *Yuanjun Holdings Pty Ltd v Min Luo,*[25] where the plaintiff was ordered to pay sums totalling $3,500 to three plaintiffs for an online review of their dentistry practices). A recent attempt by a litigant in person to commence proceedings in the Queensland Administrative Tribunal was unsuccessful,[26] but the ACT Administrative and Appeals Court is hearing an increasing number of cases.[27] The increasing workload of lower courts is well documented[28] and the added burden of self-represented litigants makes that workload even more of a burden, as both these appeal decisions demonstrate.

The growth of cases in the Federal Court demonstrates a different challenge. The Federal Court's preference for the docket system of trial-oriented case management is shown at its highest level in *Herron v HarperCollins Publishers Pty Ltd*.[29] Jagot J dismissed the issue of proportionality as being, at best, a trial issue, without any consideration of the issues raised in *Farrow v Nationwide News Pty Ltd*[30] and *Toben v*

---

[25] [2018] VMA 7.

[26] *Singh & Anor v AusHomes Pty Ltd* [2018] QCAT 312 [4]. This was put by way of counter-claim to a claim for damages for defective building which failed on its merits.

[27] In *GP v Mackenzie & Ors (Appeal)* [2018] ACAT 96, Presidential Member E Symons describes the 'long history' of a defamation case arising from the placing of a table on public land which 'has taken up an extraordinary amount of time in the tribunal due to the sheer volume of applications for interim or other orders since the filing of the application commencing this action': [3]. As well as dealing with defamation proceedings, these administrative tribunals also have to deal with allegations of perjury (*Toogood v Cassowary* [2018] QCAT 319; *More atf Cleopatra Skin Discretionary Trust v/ats Ford* [2018] QCAT 19), referral to the Director of Public Prosecutions (*Payne v APN News & Media* [2016] QCATA 140) and complaints of bias by Tribunal members (*Chen v Premier Motor Services Pty Ltd t/as Premier Illawarra* [2018] NSWCATAP 142).

[28] On 18 August 2018, the President of the Law Society of New South Wales wrote to the Premier and to the Attorney General of New South Wales setting out statistics concerning the increase of criminal work: Letter from Doug Humphreys OAM to the Hon Gladys Berejiklian MP and the Hon Mark Speakman SC MP, 14 August 2018 <http://static1.1.sqspcdn.com/static/f/556710/27980779/1536046997203/LawSoc_court_delays.pdf?token=27U0a3OCca/ica/PevE2Jn1Ilak%3D>. There are likely to be similar increases in other states and territories. While legislation has always prevented the bringing of defamation actions in New South Wales (*Local Courts Act 2007* (NSW) s 33), there is no cognate provision in other states and territories. That has not, however, stopped litigants in person from attempting to commence proceedings at the Local Court level; Dr Ghosh commenced her proceedings in the Local Court at Newcastle: *Ghosh v Miller* [2013] NSWDC 194.

[29] [2018] FCA 1495.

[30] [2017] NSWCA 246.

Nationwide News Pty Ltd ,[31] although the plaintiffs had pleaded imputations relating to their conduct which had been the subject of disciplinary and Royal Commission findings and where (in the case of Dr Gill) defamation proceedings had been dismissed for want of prosecution 20 years beforehand.[32] It is easy to see, from this decision, that the landmark reform proposed by the Review – the introduction of a serious harm threshold – would simply be sidelined to becoming, at best, a minor trial issue, unless there is a recognised procedure for summary dismissal of cases where abuse of process is claimed.

Making it easier for plaintiffs to sue, seen as a desirable step in terms of simplifying the technicalities of defamation law, has led to a blow-out in the number of cases, particularly where the absence of juries and specialist lists means that no specialist skills are required. The difficulty is, however, that as the percentage of media defendants continues to drop, ordinary members of the public are increasingly taking their place. Lacking insurance and the significant sums necessary to defend these cases, defendants who are self-represented, poorly represented or (for the lucky few) aided by pro bono lawyers, are increasingly a matter for concern.

Weaponised[33] litigation and the unrepresented defendant

While the proposed serious harm reform and traditional summary dismissal applications are likely to be successful in many cases, bringing such an application still places a heavy burden on the defendant,

---

[31] [2016] NSWCA 296. Nor was there any reference to the landmark decision of *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858, where McCallum J made alternate findings to the effect that the imputations pleaded by the plaintiff, if conveyed, would not have been sufficient to establish serious harm, a principle of law which her Honour held was currently in existence in Australian common law.

[32] *Gill v Eatts & Anor; Gill v ABC & 2 Ors* [1999] NSWSC 1056; this judgment is not referred to, and all that is noted is that defamation actions commenced by Dr Gill and Dr Herron 'went nowhere' ([4]). Jagot J's approach to abuse of process may be at variance with the approach taken by the High Court of Australia in *USB AG v Tyne* [2018] HCA 45, a decision handed down shortly after *Herron v HarperCollins Publishing Pty Ltd*, where the High Court stated (at [38]) that 'the timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute' in relation to abuse of process. This comes close to adopting proportionality as an issue, in that issues such as delay in commencing or conducting proceedings expeditiously may be a relevant factor (*Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 240 [153] – [154]).

[33] The term 'weaponised' began to enjoy increased use in relation to politically-related court proceedings (see for example Erwin Chemerinsky, 'Fake News and Weaponized Defamation and the First Amendment' (2018) 47 *Southwestern Law Review* 291, but has now come to be employed to describe a wide range of litigation previously described as 'SLAPP suits' or vexatious. The purpose of a weaponized defamation action is to annoy or cause financial harm to an opponent rather than to vindicate reputation: David Acheson and Ansgar Wohlschlegel, 'The Economics of Weaponized Defamation Lawsuits' (2018) 47 *Southwestern Law Review* 335.

especially where that defendant is unrepresented. While a self-represented plaintiff can generally be case-managed, self-represented defendants present real difficulties. Defendants were unrepresented in 16 of the 39 cases and, as social media/website posting actions increase, this number will likely continue to rise. Defamation insurance is rarely available and the cost of defamation trials is, as is demonstrated by the estimates given in security for costs applications, generally around a quarter of a million dollars.

Courts are increasingly being called upon to find ways to ensure litigation of a vexatious nature can be managed by the court.[34] Studies of vexatious litigants have noted that litigants in person can, and do, network with each other;[35] in a few cases, there have even been reports of funding from organisations such as Judicial Watch.[36]

The cases in this study make sombre reading in terms of the absence of schemes of assistance afforded to litigants faced with complex and expensive litigation. The Court of Appeal was critical of the conduct of the represented defendants in their application for security for costs in the saga of litigation commenced by a self-represented plaintiff in *Ghosh v Miller*[37]although the complexity and cost of those proceedings is self-evident; Dr Ghosh's difficulties later led the Court of Appeal to impose a requirement that she could continue this action only if represented.[38] Similarly, there was a lengthy prior history of unpaid costs orders in *Craven v Globe Valley Pty Ltd & Ors*.[39] The bankrupt defendant in the

---

[34] See above n 60.

[35] This was observed well before social media, as can be seen from the report Victoria, *Inquiry into Vexatious Litigants*, Parl Paper No 162 (2008) 9.4.3. See also Recommendation 23, proposing that such communications should be the subject of restriction. Forum-shopping by vexatious litigants is also noted: 9.4.4. Websites for litigants in person now offer a range of services including draft pleadings and legal advice. Many also attack the courts and judges, which may lead to applications for the publisher to be dealt with for contempt of court. Sites in New Zealand are particularly numerous: Law Commission of New Zealand, *Contempt in modern New Zealand* (IP136, 2014) Ch 6; see Rachael Schmidt, 'Mental Health Issues and the Administration of Justice: The Court's Approach to the Vexatious Litigant – Time for a Rethink?' (Paper, AIJA, 2017) <https://aija.org.au/wp-content/uploads/2017/08/Schmidt1.pdf>.

[36] 'In contempt', above n 49.

[37] [2018] NSWCA 138.

[38] *Ghosh v Miller (No 2)* [2018] NSWCA 212.

[39] [2018] QDC 155.

Behayon v Rockett proceedings was fortunate to obtain pro bono assistance and to win a lengthy and difficult jury trial.[40]

The trial-oriented docket system in the Federal Court and magistrates courts could add to the burden of defending the case for the ordinary members of the public who increasingly are finding themselves the defendants in online defamation actions. The docket system may be appropriate where defendants are insurers, corporations engaged in trade or commerce and/or government bodies, but ordinary working families cannot afford to pay what can amount to hundreds of thousands of dollars to defend disputes about website posts, social media 'pub talk'[41] and the like. The degree to which actions of this kind will fall by the wayside if a serious harm test is included is, however, uncertain, particularly if the docket system of referring such matters to trial (in the manner currently used for the defence of triviality) is employed.

Failure of the defences

Of the 91 cases considered in this study, 64 involved online publications, which by reason of the extent of publication meant that the qualified privilege and triviality defences were likely to fail. The success of the defence of honest opinion in *v Polaris Media Pty Ltd as trustee of The Polaris Media Trust trading as The Australian Jewish News (No 3)*[42] is a tribute to good journalism, but of little assistance for the kind of pungent publications found on social media. The increasing rise of the truth defence is matched by the increasing ferocity with which it is challenged, as the 14 judgments on truth and contextual truth demonstrate.[43]

The failure of the *Lange* defence has long been acknowledged; the cases in this study demonstrate that politicians (especially former politicians) are bringing or defending defamation actions relating to their activities in 5 cases where the defence does not appear to have any significance. As is noted in Appendix A, the defence failed on the only occasion where it was

---

[40] Michaela Whitbourn, 'Self-styled leader healer Serge Benhayon leads 'socially harmful' cult: jury', *Sydney Morning Herald* (online) 15 October 2018 <https://www.smh.com.au/national/nsw/self-styled-healer-serge-benhayon-leads-socially-harmful-cult-jury-20181010-p508ux.html>.

[41] Brian Christopher Jones, 'The Online/Offline Cognitive Divide: Implications for the Law' (2016) 13(1) *SCRIPTed* 83, 83.

[42] [2018] NSWSC 1201.

[43] See the list of 14 judgments where challenges to the defences of justification and contextual justification above, n 56.

brought (*Jones v Aldridge*); the defence is not referred to in any of the other judgments in this study.

Balance may only be restored, in relation to workable defences, by consideration of more radical changes such as consideration of a *Durie v Gardiner* "public interest" defence[44], declarations of falsity and/or the reversal of the onus on falsity (proposals put forward by Dr Matt Collins QC, a stronger summary dismissal procedure than serious harm and/or a public figure test.[45] No such proposals were considered in the Review, which restricted consideration to the existing defences."

---

[44] The decision of *Durie v Gardiner* [2018] NZCA 278 has excited interest in common law countries all over the world: see, for example, John Kamau, 'Media gets protection in defamation cases', *The East African*, 13 September 2018 http://www.theeastafrican.co.ke/news/ea/Media-gets-protection-in-defamation-cases/4552908-4757400-ok2jcg/index.html; David Rolph, 'Australia: the public interest backwater', *Inforrm*, 5 September 2013, https://inforrm.org/2018/09/05/australia-the-public-interest-backwater-david-rolph/. One of the features of online judgment publication has been increasing judicial awareness of overseas judgments, which may impact on the standing of that country as one where the rule of law prevails; loss of judicial reputation is one of the dangers of a generally perceived insufficient protection of freedom of speech.

[45] Above, n 12.