

COUNCIL OF ATTORNEYS - GENERAL  
REVIEW OF THE MODEL DEFAMATION AMENDMENT  
PROVISIONS 2020

COMMENT ON RECOMMENDATION 9 AND  
MDAP AMENDMENT TO CLAUSE 26

DEFAMATION ACT 2005 (NSW) :  
CONTEXTUAL TRUTH

1. The writer has no comment on the substance of the draft MDAP to Clause 26 of the MDPs, and its objective of allowing a defendant to plead back as a contextual imputation an imputation of which the plaintiff has complained.
2. However the section as it stands has a more fundamental problem. The opportunity should be taken to correct a drafting error in the current section that, if the section is correctly read, deprives it of sensible operation.
3. For simplicity, the argument that follows will take the case of a matter complained of that conveys only two imputations that are defamatory, the plaintiff suing on one only of those imputations, and the defendant relying on the other imputation as a contextual imputation.
4. To establish the defence, paragraph 26 (a) requires the defendant to prove the contextual imputation to be substantially true. Paragraph 26 (b) then requires that
  - (b) *the defamatory imputation [does] not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputation.*
5. Paragraphs 26 (b) expresses a relationship of cause and effect. The *cause* is, the substantial truth of the *contextual imputation*; that is, the fact that it is true. The *effect* is that the *defamatory imputation* (the imputation of which the plaintiff complains), *does not further harm the reputation of the plaintiff*.

6. The first question that arises is, ' *further* ' than what? The thing, which the paragraph requires that any harm to the reputation of the plaintiff, caused by the defamatory imputation will not be '*further*' than, is not expressed. The cryptic language needs words read in to it. But it is clear what they are. The section is implying a comparison between the extent of harm to reputation that the imputation complained of causes, and the extent of harm that the contextual imputation causes. The meaning can be spelt out without changing it as follows:

*(b) because of the substantial truth of the contextual imputation, the defamatory imputation [does] not cause any further harm to the reputation of the plaintiff than the harm that is caused by the contextual imputation.*

7. If that is the intended meaning, the requirement so imposed cannot be satisfied. That is because the fact that one imputation made by a defamatory matter is true (here, the contextual imputation), is not capable of affecting the extent to which another imputation made by that matter (here, the defamatory imputation complained of by the plaintiff) harms the reputation of the plaintiff. Such a causal relation is not logically possible.

### **Background example under s. 25 (truth defence)**

8. Assume that the plaintiff, many years ago, committed the murder of A. Only the plaintiff knows this fact. The police and the public are aware of the murder but do not know who committed it. Neither the police nor the public have ever suspected that the plaintiff committed it. Assume that for this reason, as well as the many others that operate to produce a person's reputation, the plaintiff has a good reputation.
9. Assume that the defendant newspaper publishes an article that conveys the imputation that the plaintiff murdered A, and no other defamatory imputation. The plaintiff sues, complaining of that imputation and the harm to reputation that its publication has caused. The existence and extent of the harm that has been so caused will be a factor of the gravity of the imputation, the extent of the credence that the readers of the article give to it, and the reputation that the plaintiff already has – the susceptibility of that reputation to be harmed. (There may be other factors).
10. Here the imputation is grave, the readers give credence to it (let it be assumed – the courts so assume if there is no evidence to the contrary),

and the existing reputation is good. The court will infer from these facts that serious harm has been done to the plaintiff's reputation by the publication of the matter conveying the imputation, calling for a substantial award of damages. The plaintiff may call witnesses to reinforce the inference. The defendant may cross-examine them, or call its own witnesses, to rebut the inference. In either case the evidence will be directed to establishing the state of mind of the public as regards the plaintiff, as it now, at the time of trial, exists, as affected by the publication which conveys the defamatory imputation.

11. The existence and extent of harm to the plaintiff's reputation caused by the defendant's imputation, that the plaintiff murdered A, cannot depend on the *truth* of the imputation. This is not because the readers of the newspaper, having no relevant pre-publication knowledge of facts that implicate the plaintiff, do not *know* it to be true. It is because reputation is a state of mind. Here it is the state of mind of the readers in regard to the plaintiff. Before publication, that state of mind is favourable, and the plaintiff's reputation is good. The publication, by conveying the imputation, induces in the readers an adverse state of mind, that is, a belief in, or suspicion of, the plaintiff's guilt of murder (depending on the reaction of each reader), so that the plaintiff's reputation, it may be inferred, is harmed; it is now no longer good; it is bad. The publication, by its conveyance to the public of the imputation that the plaintiff murdered A, harms the plaintiff's reputation. Because the imputation is true, the belief is well-founded and the suspicion is justified. But the harm that the imputation has done to A's reputation is made no worse by that fact. The harm would exist, and exist to the same extent, if the imputation were in fact untrue.
  
12. Assume that the defendant pleads a defence of truth under s. 25 of the UDA, and proves that the imputation, the plaintiff murdered A, is true. The plaintiff's action will fail. No damages for harm to reputation will be awarded; but this is not because no harm to reputation has occurred, nor because the extent of it is small. Harm to reputation has occurred and it is serious in extent, but the law withholds damages because, the imputation being true, the plaintiff does not deserve damages.

### Example under s. 26

13. Now assume that the newspaper article conveys two imputations that are defamatory of the plaintiff. The first is that the plaintiff murdered A. The second is that the plaintiff stole B's car. The plaintiff sues, complaining only of the second imputation. The first imputation is true and the defendant can prove it to be true. But assume the second imputation is false.
14. It must be remembered that the plaintiff's reputation, for the purposes of defamation law, is not the same thing as the plaintiff's disposition. The plaintiff's reputation at any relevant time, before or after the publication of the matter complained of, is the opinion that people generally (or some relevant group of people) actually have of the plaintiff, based on their state of knowledge or belief as to the plaintiff's nature or character, which in the nature of things is judged by what people observe or are told of the plaintiff's words and deeds. The plaintiff's reputation is not the opinion that people *would have* of the plaintiff if they had perfect, knowledge of the plaintiff's nature, character, words and deeds, or better knowledge than they have in fact.
15. Returning to the example, assume again that the readers of the article have, before reading it, no beliefs or suspicions about who murdered A or who stole B's car; and that the plaintiff's reputation among those readers is good. To the extent that the readers give credence to the imputations about the plaintiff now conveyed to them, the plaintiff's reputation among them will be harmed. If one asks the question, by the publication of which of the imputations was the harm caused, the answer may well be, by the first imputation, that the plaintiff murdered A, and by that alone; or by that imputation to an extent enormously greater than the extent to which the second imputation, that the plaintiff stole B's car, caused harm. That will be because an imputation of murder is more serious than an imputation of stealing a car, and when a single defamatory matter conveys both imputations, it may be inferred that such harm to reputation as is done is wholly or mainly done by the murder imputation. To put it another way, that the stealing imputation does not cause any further harm to reputation than the murder imputation causes. It will *not* be because, as a matter of fact, the plaintiff did commit the murder, but the plaintiff did not steal the car.
16. However if the defendant newspaper pleads a defence under s. 26 relying on the first imputation, that the plaintiff murdered A, as a contextual imputation, and satisfies paragraph 26 (a) by proving that the

plaintiff did murder A, paragraph 26 (b) will require that *the fact that the plaintiff murdered A* should be *the cause* of the failure of the imputation of which the plaintiff complains, that the plaintiff stole B's car, to harm the plaintiff's reputation to any further extent than the imputation that the plaintiff committed murder has harmed it. That is impossible.

17. It may be suggested against this argument that, when the court comes to decide whether paragraph 26 (b) is satisfied, having decided that paragraph (a) is satisfied – that is, having decided that the contextual imputation is conveyed and that it is substantially true – the plaintiff's reputation will not be good, or will no longer be good, because paragraph (a) has been satisfied.
18. How can a person who has committed murder have good reputation? Easily, if the public does not yet know, believe or suspect that the plaintiff has done so. In the example, when the defamatory matter complained of was published, the public state of mind was that it had no such knowledge, belief or suspicion. By the time that the court decides that the plaintiff has committed murder, the public mind may or may not still be the same. It will depend for on, among other things, the extent of publicity given to the trial. The trial may cause no change in the plaintiff's reputation. The court's pronouncing a decision that the plaintiff has committed murder may cause no change either. So it cannot be assumed that any such change would exist and be available to be treated as a factor in deciding whether paragraph (b) is satisfied.
19. If there had been a change due to either event, and if it were legally relevant, it would be incumbent on the defendant to prove it by evidence. The defendant would need to call witnesses to say that either, or both, the evidence given of, and the court's finding of the truth of, the imputation that the plaintiff committed murder, has harmed the plaintiff's reputation, has changed it from good to bad.
20. But even assuming that any such change in the state of the plaintiff's reputation could be proved at a trial, the change would be irrelevant to the application of paragraph 26 (b). For such a change in reputation to be relevant, paragraph 26 (b) would have to be read as if it meant something like this:

*' the defamatory imputations do not further harm the reputation that the plaintiff deserves to have, having regard to the substantial truth of the contextual imputations '*

OR

*‘ the defamatory imputations do not further harm the reputation that the plaintiff would have if the persons to whom the defamatory matter has been published believed (as is the fact) that the contextual imputations were substantially true ‘ .*

21. Ordinary canons of construction do not permit such a rewriting of the statute.

### **1974 NSW Act section 16**

22. The model on which s 26 was based, section 16 of the NSW Defamation Act 1974, suffers from the same defect. The offending words are in paragraph 26 (2) (c):

*(c) by reason that those contextual imputations are matters of substantial truth, the imputation complained of does not further injure the reputation of the plaintiff.*

23. There is the same posited but impossible relationship of cause – the fact that the contextual imputation(s) are true – and effect – failure of the imputation complained of to injure the plaintiff’s reputation any further than the contextual imputation does so.

24. Section 16 of the NSW Act originated from the draft Defamation Bill annexed to in the *Report on Defamation* by the NSW Law Reform Commission in 1971 (NSW LRC No. 11). It was clause 16 of that draft Bill. But the corresponding clause 16 in the Bill for what became the NSW Act, as introduced into Parliament and passed unamended, was substantially different. Subsection (1) and paragraphs (a) and (b) of subsection (2) are identical in the Commission’s draft clause 16 and in the Bill as enacted. But paragraph (2) (c) of the Commission’s draft Bill read as follows (emphasis added):

*(c) having regard to the publication of those contextual imputations, the imputation complained of does not further injure the reputation of the plaintiff.*

25. Had this version been enacted, the defence could work. At the final stage of considering whether harm (or ‘injury’) to the plaintiff’s reputation has occurred, there would be a cause, and an effect. The cause would not be *the fact of the truth* of the contextual imputations, but merely *the fact that they had been published*. Having regard to the gravity of the contextual imputations, which is their only quality relevant to the extent that their publication could harm the plaintiff’s reputation, it would be possible for the court to conclude that the imputation complained of causes no harm to reputation further than the harm that the contextual imputations have caused. The stated cause would be capable of having the stated effect.
26. The Commission said (at paragraph 24 and Appendix D, paragraphs 73 and 74 of their Report) that they intended clause 16 to achieve the same object as, but more effectively than, s. 5 of the English *Defamation Act 1952*. Section 5 had been adopted by s. 18 of the *Defamation Act 1957* of Tasmania, but not by any other Australian jurisdiction. Section 18 provided:
18. *In an action for defamation in respect of words containing two or more distinct charges against the plaintiff, a defence of justification does not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the reputation of the plaintiff, having regard to the truth of the remaining charges.*
27. The Commission observed that this section was not always effective to enable a defendant, faced with a plaintiff attempting to claim damages for the making, in one published defamatory matter, of one (untrue), but not claiming damages for the making in the same matter of another (true), defamatory charge, to use the truth of the latter true defamatory charge as an element in a defence to the claim on the former untrue charge. This was because the plaintiff could often readily frame the action as one that was not brought ‘*in respect of [the] words containing*’ the untrue defamatory charge, alone, and not also in respect of the words containing the true defamatory charge, and such an action lay outside the section. The Commission’s clause 16, by defining a ‘contextual imputation’, in relation to any imputation that the plaintiff complains of, as meaning any other imputation that is conveyed by any part of the whole published matter, regardless of whether the plaintiff has complained of the whole matter or not, overcame this problem.

28. But there was another defect in the English section 5 and the Tasmanian section 18 that was not commented on by the Commission. If one reads *'the words not proved to be true'* in each section as meaning, *'the distinct charge, conveyed by certain words in the matter complained of, which charge is not proved to be true'*, as presumably was the intention, the section proceeds on the same cause and effect basis as do sections 16 (of the 1974 NSW Act) and 26 (of the UDA). The *cause* is the truth of the *'remaining charge'* (that is, the truth of the words in the matter complained of that convey that charge), and the *effect* of that cause is the failure of another charge (that is, the failure of the other *'words not proved to be true'*) to injure materially the plaintiff's reputation. As *the fact of the truth* of one published charge or imputation is incapable of having an effect on the extent to which another published charge or imputation injures the plaintiff's reputation, these sections, in assuming that it is so capable, and requiring it to have this effect, imposed a test that could not be satisfied.
29. The drafter of the Commission's clause 16 appears to have realised this, because, see above, paragraph (c) of that clause avoided the fatal reference in sections 5 and 18 to *the fact of the truth of the charge (imputation)*, which charge (imputation) the defendant wishes to rely on. But clause 16 of the Bill for the 1974 Act repeated that reference, and clause 16 in that Bill was enacted as section 16 of the Act.
30. Why the Commission's draft was changed is not explained in the Parliamentary debates or elsewhere. The change may have resulted from a misconception as to why truth was a defence at common law and was, with the added elements (relates to a matter of public interest, or published under qualified privilege), to be a defence under the 1974 NSW Act. Namely, that when the plaintiff complains of a defamatory imputation and the defendant proves that it is true, the law withholds damages from the plaintiff because it judges the plaintiff's reputation not actually to have been injured by the publication of that imputation. In fact the law does not deny that the publication of a true imputation can harm the reputation of its subject. The law denies damages for the harm because, if the defence of truth is made out, the plaintiff does not deserve to receive compensation for that harm.



## Defamation Act 2013 (Eng), section 2

31. The defect in s. 5 of the English Act has been overcome in England by its replacement in the new *Defamation Act 2013*, section 2:

2. (1) *It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.*

(2) *Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.*

(3) *If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the plaintiff's reputation.*

32. In this new section, the *cause* is simply the imputation(s) on which the defendant, having proved them true, relies in defence. It is their existence, not the fact that they are true. The court is to have regard to the imputation(s) themselves, that is, the relevant quality of them, their gravity as imputations, and then (this is implicit), to the degree of harm that their publication does to the plaintiff's reputation, compared with the degree of harm that the imputation that is not proved true does to the plaintiff's reputation. This is a workable procedure.

### Judicial authority

33. The above argument about UDA section 26 and its predecessors has not been considered in any reported or unreported decision that the writer has found. The courts have proceeded on the assumption that paragraph 26 (b) of the UDA, and its predecessor paragraph 16 (2) (c) of the NSW Act, permit and require a weighing of the effect on the plaintiff's reputation of the imputation(s) on which the plaintiff sues, on one hand, and the contextual imputation(s), on the other. They have further assumed that in this process, the fact of the proved truth of the contextual imputation(s) is an element that weighs in the balance.

34. How this can be reconciled with the terms of the sections, and how *the*

