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Question Time – Judith Gibson

Judith Gibson's recent departure as Defamation List Judge at the NSW District Court took everyone by surprise – and caused some speculation about the future of juries in defamation trials. Her Honour agreed to talk to the *Gazette* about this, and other media law issues

GLJ: Judge Gibson, first the question on everyone's lips – why did you resign from the position of Defamation List Judge?

Gibson J: I did not resign – and it was not my decision. I cannot appoint myself to any position; such appointments are matter for the Chief Judge.

GLJ: The talk around town is that juries are being phased out of defamation trials at the District Court. What's your view on the role of the jury in defamation hearings?

Gibson J: The role of the jury was a central part of the new *Defamation Act*. It was extensively discussed at the SCAG meetings and the role of the jury is the pivot on which the Act turns.

Judges can only dispense with the jury at the request of a party if there is a specific problem – as set out in section 21, sub-section 3 – and the Court of Appeal has repeatedly said in *Mallon v Silvas* and *Hanrahan v Ainsworth* that the role of the jury must be energetically defended as it's of very great benefit.

There are a number of decisions in the Supreme Court to the same effect, like Justice McCallum's judgment in *Mallick v McGeown*.

The High Court has said the same thing in *Gerlach v Clifton Bricks*. Justices Kirby and Callinan both said that a plaintiff who has lawfully requisitioned a jury does not have to justify retention of the jury and that before dispensing with the jury something more than the general evils of jury-trial problems in other cases has to be shown.

And I think this is because juries are such an important public barometer on many issues particularly where there is a media defendant – where

there's a controversy about defamatory meaning or contextual truth, a defence of implied right of freedom of speech under the constitution, a plaintiff who is a politician – these are important reasons for retaining juries.

I know that jury trials are complex and expensive, but we have them in crime all the time – our court is the biggest jury court in Australia.

If we have a problem with jury trial resources in civil cases, I think that's probably a question of allocation of resources.

My view is that if there isn't going to be some attempt to limit the jury's role by, for example, not having the jury in the District Court – the jury should determine all issues, not just liability.

I think that if there is a cap on damages you don't need to worry about the jury going berserk. What I would like, also to see, is a cap at the bottom like you have in personal injury, as well as at the top.

If the role of the jury is taken out – for some reason – then there have to be suitable checks and balances, particularly in relation to limited publications, to have restrictions on damages and legal costs.

I am particularly aware of some of the suggestions that have come out of Lord Lester's Defamation Bill in England, about limitations to be put on very restricted publications where they have had these enormous problems with colossal legal costs.

For example, you could have a cap at the bottom; you could have a compulsory requirement in very limited publications for an apology and mediation and some kind of review of excessive contingency, legal fees and charges.

The thing is, that if you do take the jury out, that arguably may lower the barriers to entry and cause a rise in contingency fee defamation of the kind that we saw that led to the *Civil Liability Act* in the Keddies saga to a major review of costs in personal injury litigation.

The big problem in defamation is that, quite apart from the very lucrative costs structures for lawyers, just about all defendants are all uninsured and you have an awful lot of ordinary little people who are in the local football club and the like and these people, if they are met with a defamation action – that can wipe them out, and that has a chilling effect,

not only on freedom of speech with the media but also for private speech as well. So that's my concern.

GLJ: You've managed the Defamation List for nine years. What's the most interesting case over which you presided?

Gibson J: Well, I think each case when I hear it is the most interesting case at the time and I regard all my cases as interesting, not just my defamation cases – all cases. I don't know that I have a favourite case but I am a bit fond of the first case I ever did which was *Duncan v Nationwide News*.

GLJ: Why is that?

Gibson J: It was interesting, it was a wonderful case – there was some fantastic expert evidence on handwriting, and it was just a great case.

Another one I do have some fondness for was the *Nagle v John Fairfax* judgment which was a difficult judgment to write because there was so much factual detail but I had some very good submissions which came not only from the plaintiff's lawyers, but also I suspect the plaintiff, Mr Nagle.

GLJ: You've been talking to practitioners about a re-draft of the defamation practice note. What's happening there?

Gibson J: I've wanted to have a new practice note for some time – this is not only because of the new Act, but to avoid some common practice problems like late notification of objections to imputation.

So earlier this year when we were talking about some of these problems in the List, Sue Chrysanthou, who is one of the regular practitioners, suggested that she could prepare a draft practice note and circulate it for comment.

I thought that was a terrific idea because cooperation between the bench and the profession is really the best way to achieve change and also because I thought changes that come from the practitioners might get a sympathetic hearing by those who are responsible for managing this court.

Sue Chrysanthou has consulted with the other regulars – if I can call them that – and she's sent me a revised practice note – she did that on June 10 – and I sent that draft on June 11 to all the judges in our court, not just the new Defamation List judges for their comments.

I also sent a copy to Justice McClellan because I wondered if there might be some benefit in having consistent practice notes in both courts.

But I've been reading what's been said in the *Gazette* and if defamation actions are going to be run without juries and motions put on general lists then I have a bad feeling – a lot of this excellent draft practice is going to end up in the dustbin.

GLJ: What are the main features of the draft practice note?

Gibson J: It's a document that speaks for itself, but what's really terrific about it is that it was drafted by the practitioners and it contains things that worry them.

I think a properly drafted practice note and careful case management are as essential to defamation as they are to other cases, in fact more so.

Defendants in many actions in this court are often ordinary members of the community who don't have funds to defend an action – they may even end up acting for themselves and this is going to be a problem if the judge hearing the case is unfamiliar with defamation law.

So good case management and a good practice note prevent adjournments and appeals.

GLJ: You've presided over two different forms of the *Defamation Act*, and the new Act is not without controversy. What do you see as the strengths and weaknesses of the 2005 Act?

Gibson J: Well the strengths of the 2005 Act are the removal of the imputation as the cause of action, a cap on damages, the abolition of section 7A, the introduction of a defence of triviality in all jurisdictions and, my favourite amendment, the section 40 costs provision.

GLJ: Why is that your favourite?

Gibson J: I think that the Member for Manly and his fight for the introduction of brakes on costs is really one of the unsung heroes of defamation law.

I think we have a lot to be grateful for because where you have David and Goliath type struggles, where you have a big media organisation or a very rich plaintiff, there's a lot to be said for the court having this brake to ensure there is proportionality between the cause of action and how it's run.

GLJ: What about the removal of the public interest aspect of the truth defence?

Gibson J: I think that's a very good step, but in practical terms just about everything is a matter of public interest so I don't know that it really was such a significant problem.

The other time I can recall public interest being of any significance was in the *Bellino v ABC* trial and I could never work out what it was about public interest that the High Court was so worried about – they ended up not following through in any event.

So I don't think that made terribly much difference, but I do think that it should not be necessary to go through the formality, especially in the modern age, where really there are very few matters that are not public interest and generally when they are, they are protected by the legislation, such as the *Family Law Act* ...

GLJ: Isn't there a difference between the things that the public are interested in, and things of genuine public interest?

Gibson J: Yes, that's true but a lot of that goes down to good journalistic practice and I think we have a very high standard of journalism in Australia and we ought to be able, in a developed country like ours, where you have a journalist's code of ethics, to trust our journalists to know where to draw the line.

GLJ: A recent example of journalists not knowing where to draw the line might be the unfortunate case of David Campbell – which brings me to the whole area of the law of privacy.

Gibson J: That is truly a journalists' ethics question and I'm not sure that legislation is appropriate.

The thing is, that even on a public interest basis, there's a lot of argument – there's an arguable case that a person whose sexual proclivities may lay them open to potential blackmail as was asserted to be the case with the late Justice Yeldham – that that person should be open about their sexual orientation.

GLJ: But sexual orientation doesn't determine the capacity for someone to be blackmailed?

Gibson J: I know, but I had a lot of trouble, for example, in *Chappell* with the idea of his having a girlfriend or his having his private sex life being

something that it wasn't – as the basis of an appeal that would prevent the publication of an article.

I really think that these are appropriate matters very often for damages. So I'm not a big fan of public interest being a requirement.

GLJ: On with privacy law – do we really need a law of privacy and when do you think we might get one?

Gibson J: I was one of the counsel on the *Lenah Game Meats* case, which was the case, which everyone claims re-opened this issue.

And what *Lenah Game Meats* wanted to keep private was the fact that they were slaughtering these cute little furry animals – because it might put people off buying their product.

I don't think, first of all, it is appropriate for such a cause of action to be created by judges. I think it has to be done by way of legislation, it would have to be uniform legislation around Australia and given the opposition by the media and other organisations of influence, I don't think this is likely to happen.

In the meantime, I think the best way to protect privacy is to have specific case-by-case situations, e.g. protection laws for private information like health records, protection of publication concerning marital breakdown, protection of children and identification in Children's Court proceedings and so on.

Many of these protections already exist, but I would prefer to do it on a case-by-case basis rather than having a general protection of privacy.

GLJ: What about the internet – doesn't it make privacy protection rather hopeless?

Gibson J: I agree with Lord Lester who spoke to his Defamation Bill in England early this month that defamation law has failed to adapt to the changed role of electronic communication and the chilling effect of the litigation costs -both of which not only affect the mass media, but ordinary people.

I think that Lord Lester's ideas about reviews of what amounts to publication and liability for publication in the electronic age are exciting and innovative and that they deserve careful consideration.

Defamation needs to take a great leap forward into the 21st century and we need to look at ways to redefine publication and liability for publication in the electronic world.

The most significant area of law reform at the moment that is being discussed, both in England and also in the United States, is this question of libel tourism.

What concerns me is that investigative journalism in the future may end up behind pay walls.

I read a very interesting article about this in *The Observer* – for once *The Observer* and Rupert Murdoch were agreed – that pay walls are a good idea.

A good example of investigative journalism behind the safety net of a pay wall coming out when the evidence became overwhelming was the *Bettencourt* case. Because there were proceedings in court, it was able to come out in court and then be reported.

That's a good example of investigative journalism being safe behind the pay wall. But the real problem is where you've got these very, very limited publications of the *Jameel* variety, where you've got libel tourism as it's called, people shopping, foreign shopping for the jurisdiction where there's one publication.

I think the current Act is an important step in achieving a better balance between protection of reputation and freedom of speech, but I think we need to keep going.

GLJ: What do you see as the main challenge facing media defendants?

Gibson J: For media defendants, I think freedom of speech issues in a world where it's going to be more and more difficult and where the protections of the *Defamation Act* and the procedure that underpins it can potentially be undermined.

I don't want to see investigative journalism end up behind a pay wall.

When you look at the ABC and SBS – they have a fantastic success rate in defamation proceedings – you can see that they have got, not only good journalists, but also a good environment for journalism, and I would hope that media organisations can concentrate on giving journalists the resources, and the time, to write the good articles that they need.

I think that media defendants, if they don't have the protections of the *Defamation Act* and the continuing law reform process and the guarantees of procedural protection, are going to be very unhappy – and they may well be very unhappy in this court if those rights are undermined.

After all, it is defendants that benefit most from case management.

GLJ: What then are the challenges facing plaintiffs?

Gibson J: I think that for the plaintiff the challenge will be to think about alternatives to defamation law because I'd like to see an environment where plaintiffs just didn't have to sue.

I think that a lot of plaintiffs would really be happy with an apology if one was offered. And one of the problems with some of the newspapers was that they wouldn't apologise and in fact one of the most important reforms was to permit the giving of an apology without it being, without it ruining your qualified privilege defence.

I would like to see plaintiffs looking at some alternatives.

GLJ: Speaking of alternatives – what's next for Judge Gibson?

Gibson J: Well, I can tell you what I'm doing on Saturday. I am flying to Washington because I am one of the contributors to the Legal Culture and Legal Transplants session of the 18th International Congress of Comparative Law.

I've been working on a French government committee on this kind of issue for the last six years and I am participating in this Congress with some of my colleagues. They invited me to give a paper from the point of view of Australia.

I have a long standing interest in Chinese law reform issues and I've been to a number of conferences in China such as the first Sino-Australian Law Deans conference in Beijing in 2006 – Phillip Ruddock came to that – and the China Law Society's Legal Writing Association conference in 2007. They've asked me back again in August.

I've also been involved in organising conferences, most about Chinese law for the Centre of Asia-Pacific Law at the University of Sydney.

For example we had a conference on law reform and economic efficiency in 2007 – which was opened by, yes, Phillip Ruddock again – and I did have a

chat to him about defamation in between meeting all the Chinese speakers.

We've had a very busy year this year because there's been an intellectual property lawyer out from China in May and we currently have a professor of sport & gaming law out here doing research.

Although I am no longer the Defamation List Judge, defamation law is the field I have worked in since I was a solicitor at Allens in 1981 and I will always remain interested in it.

I still have to read all the cases because I am going to go on being the bulletin editor of *Australian Defamation Law & Practice*, which I have been doing for 16 years.

I do hope that from time to time to be allocated a defamation trial, but I may not be allocated any sittings in Sydney – in the Sydney registry – for some time, so I really don't know.

GLJ: Thank you, Judge Gibson.