**Greg Muller**

Welcome Gertie’s Law. I’m Greg Muller.

Today we’re talking about something which can really spark interest. Often salacious or scandalous, especially when they involve Hollywood Stars or high profile Federal politicians.

It’s about defending one’s honour - and earning capacity. An area of law where a person’s right to protect their reputation rubs up against someone else’s freedom of expression. Defamation.

Defamation comes under the Major Torts List here at the Supreme Court. Torts are a civil wrongs which cause harm, intentionally or otherwise. And a person affected by a tort can claim compensation. There were 67 cases initiated in the major torts list last year. Nineteen of these were for defamation.

Defamation matters are heard in the Common Law division and often in front of Principal Judge of Common Law, Justice John Dixon.

**Justice Dixon**: Defamation cases are unique because the seeking to protect the quality of one’s reputation is quite distinctive compared to all of the other things that get litigated in court.

And also, because the view has traditionally been taken that the best judge of reputation and whether it’s been damaged and how it should be repaired is always thought to be a jury question. One for the community, because it fundamentally reflects the standing of the plaintiff in the community.

**Greg Muller**: Matt Collins QC is a Melbourne Barrister who specialises in defamation and has been involved in some of the biggest cases to come to this court.

**Matt Collins QC**: I became fascinated by defamation law because it is this incredible clash of different fundamental values.

On the one hand you've got a plaintiff, the person suing. In every serious case, serious defamation case the plaintiff has been gravely damaged by something which has been published about them, broadcast or written. So you've got the right to reputation.

On the other side of the bar table, you've got the defendant. And in any serious defamation case, the defendant is arguing that all they were doing was exercising their fundamental right to freedom of expression.

So, defamation cases are the juridical stage on which these incredible battles of fundamental rights and freedoms play out. That's what I find fascinating about it.

**Greg Muller**: But one thing to say up front is that discussing defamation is difficult. That’s because despite there being many fantastic examples which come here every year...

**Justice Dixon**: It’s not appropriate to repeat defamatory imputations that were made against people by telling the stories of the cases unless we go to the old cases where everybody’s dead, because you can’t defame the dead because they no longer have a reputation.

But it is an interesting area of law for lawyers and for judges because of its technicalities of the fact that it’s fought out before juries, that it often involves conflicts of fact and inquiries into the truth, courtroom drama. All of these kinds of features of defamation law make it a very interesting area of practice.

**Greg Muller**: Have you got any examples?

**Judicial Registrar Julie Clayton**: Well, I have lots of examples, Greg.

**Greg Muller**: That you can talk about?

**Judicial Registrar Julie Clayton**: I’m just, I’m really unsure about the ... I’m nervous.

**Greg Muller**: Judicial Registrar in the Common Law division, Julie Clayton. Julie has since been appointed as a judge in the County Court.

**Judicial Registrar Julie Clayton**: One of the great challenges with defamation law is always the risk one doesn't want to fall on the side of re-publishing the defamation, so this presents a particular difficulty for newspapers in terms of they can be held liable if there’s a defamatory statement made and they publish or republish that defamatory statement.

Or podcasts, or any kinds of publications including online reviews and so on. So simply being the conveyor of a defamatory statement by way of forwarding an email doesn’t absolve you of all responsibility. You can’t just say, “Oh I didn’t say those things, I simply passed them around.” You might find yourself somebody who’s also liable.

That makes us all nervous. We don’t want, on podcasts to have inadvertently extended the damage that someone has already suffered by republishing the defamation.

**Matt Collins QC**: Look, I've had the great privilege of being involved in some of the most prominent cases of the last generation or so.

**Greg Muller**: Barrister, Matt Collins QC.

**Matt Collins QC**: The ones that stand out for me are things like former Treasurer Joe Hockey's case against the then Fairfax Media, the Sydney Morning Herald, The Age and The Canberra Times. I acted for Fairfax Media in that case and had an enormous career highlight of being able to cross-examine the sitting Treasurer of Australia for a day and a half.

Interestingly, in that case. I was cross-examining in the course of the afternoon and continuing the following morning. Overnight, people were tweeting ideas about questions I should ask, most of them completely nutty but, you know, it's a sign of just how interested people can be in the running of these cases.

The other case that people associate me with is Rebel Wilson's case where I acted for Rebel Wilson in the Supreme Court of Victoria. I've never seen a media coverage of that intensity of any non-criminal case in my career. I've never seen anything like it. A media scrum outside the court every day, Rebel and me being chased down the road with cameras in our faces. On one day a quiz was being run on FM radio about what was going to happen in court that day. I mean that, that's the courtroom as entertainment and, as the barrister, the challenge is to remain focused on the only thing that matters which is what's happening in the courtroom.

**Greg Muller**: But high-profile cases aside, the majority of matters are things that you wouldn’t expect to see as a defamation claim.

Julie Clayton again.

**Judicial Registrar Julie Clayton**: So, for example, we get claims for defamation that involve disputes within workplace and clubs and voluntary organisations so for example where people might all be members of the same soccer club and someone on the committee has emailed to other members of the committee has taken exception to and considers defamatory and that might end up in the Supreme Court.

Sometimes it’s workplace disputes where people who work together say something to other people in the workplace about the performance of their colleague. That one seems to be a little more popular among medical professionals than other areas that I’ve seen.

We’ve had a few claims that have involved medical professionals who have felt that they’ve had aspersions cast on their competence or their ability to practice medicine to their colleagues and then they decide to bring a claim in the Supreme Court.

You do occasionally sometimes wonder why this has exercised someone to the extent that they’re gone to the expense, the trouble and time and no doubt the stress involved in litigating in the Supreme Court.

I suppose what that demonstrates is that to people their reputation, their standing in the eyes of their peers, even if that peer group is a volunteer group or a local sports club or whatever is really, really important to them.

They value it really highly. They value it to the extent that they are prepared to take the risk that coming to the Supreme court and getting publicity about it will in fact make it much more widely known than it otherwise would have been.

**Greg Muller**: By far the majority of matters initiated in the Supreme Court settle before a verdict by a judge. And there’s a good reason for this.

Our courts are open courts, which means journalists can generally report what’s being said.  So if you're upset because your reputation has been harmed, an open court with a free press might not always be the best forum to settle the score. Sometimes trying to hide something makes it more conspicuous.

Common Law judge, Justice Richards.

**Justice Richards**: One reality of defamation litigation is the defamatory matter is repeated, more than once in a forum where absolute privilege applies.

A judgement which sets out what was said can then be reported on with impunity. So, it doesn’t put anything, it keeps it alive, and it can with a particularly notorious case or a well reported case it can exacerbate the damage.

There’s actually a word for it. A term for it. It’s called being Streisanded.

**Greg Muller**: In 2003, American entertainer Barbara Streisand tried to sue a photographer for violation of privacy. The photographer, Kenneth Alderman, took thousands of aerial photos of California’s coastline for an online research project.

However, in doing so he also snapped a picture of Streisand’s Malibu mansion, a huge oceanfront estate with an impressive pool nestled between the house and the sea cliff. I know that because I went looking for the picture which can now be easily found.

Streisand’s attempt to suppress the picture backfired spectacularly, so much so it became a term in itself. In the month Streisand filed the $10 million lawsuit against Alderman, more than 420 thousand people visited the site. Before taking this issue to court the picture is estimated to have been downloaded six times. You see the problem.

In the end, Streisand lost and had to pay the photographer’s legal fees, more than 150 thousand dollars.

**Justice Richards**: If you sue on a defamatory publication and that results in republication of the hurtful material. It can be a bit of an own goal.

**Greg Muller**: Justice Dixon.

**Justice Dixon**: That's often a problem, and it’s surprising that the litigants don’t see it and the defamation is published for example in the paper and that's read and it’s topical for a short period of time, increasingly in modern society that’s a very short period of time with the news cycle turning over very quickly.

The Law turns over not as quickly as that so it’s sometime later that the matter comes up in court, when it’s all gone through again and of course you can publish what is said in court with impunity because you have an absolute privilege to publish what is said in open court, because anybody can go into court and sit there and listen to it.

So, the plaintiff runs the risk that everything gets repeated, and everyone has forgotten about that and then they say, “Oh yeah, I remember when they said that about him.”

And then of course if you lose your case, it’s pretty bad. If you win your case of course people are reminded of why you sued, of what was said about you and there’s the emphatic rejection of that because it’s found to be defamatory and damages are awarded.

It’s a double whammy if you lose.

**Greg Muller**: Judicial Registrar, Julie Clayton

**Judicial Registrar Julie Clayton**: That’s exactly the case that whenever something is said, I imagine you have to weigh up the impact that’s had on you personally within your own community against the impact that it might have if it’s splashed across the newspapers, that it’s available every time somebody does a Google search on your name, that it’s going to be the subject of a reported decision most likely if it runs all the way to trial. And that it will be associated with you in people’s mind far longer than perhaps the original publication might otherwise have been.

That’s an assessment that people make all the time and obviously in cases like Rebel Wilson and Geoffrey Rush in the New South Wales Supreme Court, it was an assessment that they made, that they decided that it was worth that risk that people who otherwise wouldn’t have heard those allegations would hear of those allegations, make their own assessment about them. In both those cases the particular plaintiffs involved were vindicated.

You’d have to ask them as to whether it was worth it in the end.

**Greg Muller**: Current defamation laws are largely based on long held legal principles. Principles which are still used to determine matters that could not have possibly been conceived of, when the laws were established. There’s been updates and the last one in 2005, when Australia’s laws were nationalised.

Prior to this you could say something on Collins Street in Melbourne that you might not get away with on Pitt street in Sydney. And at a time when people who read The Age would rarely see anything in the Sydney Morning Herald, that may have been appropriate.

But in 2005 this clearly needed to be updated, but things have again changed a lot. Fifteen years ago, Facebook had about 1 million users. It now has 2.6 billion. Twitter started in 2006 and the first smartphone came a year later.

So, another review is currently taking place with changes expected in the near future. But keeping up with the latest technology is not a recent problem.

In 1932, Defamation laws had to contend with what was then the latest thing in publishing.

**Justice McArthur (actor)**: By his statement of claim the plaintiff alleged that the defendant by its agent or servant falsely and maliciously wrote a script containing defamatory words, and read out the words into a broadcasting apparatus, and by means of the said apparatus published them throughout Victoria and other States of the Commonwealth.

**Greg Muller**: The two times Archibald Prize winning artist Max Meldrum was a controversial figure, and a leader of the Tonalist Movement. He sued the ABC in the Victorian Supreme Court for £3,000 for alleged injury to his reputation. In a broadcast, an ABC presenter - reading from a script - labelled him an “Iconoclast.”

Here’s an actor reading from Justice McArthur’s decision.

**Justice McArthur (actor)**: The defendant is a company incorporated under the Companies Act, for the time being of the State of Victoria. It has its registered office at 140 Russell Street, Melbourne, and there carries on its business of wireless broadcasting.

**Greg Muller**: The case found slander is oral defamation and libel is defamation in a written or permanent form.

At the very beginning of radio broadcasting - when reading aloud from a written script - a new definition needed to be established.

**Justice McArthur (actor)**: The statement of claim in this case is not in the form usually adopted in actions of libel or slander - that "the defendant wrote and published," in the case of libel, or "spoke and published," in the case of slander, of and concerning the plaintiff the words complained of - but it alleges that "the defendant by its agent wrote a script" containing the words complained of, and read out the said words into a broadcasting apparatus.

This leaves the defendant in doubt as to whether he has to meet a claim for libel or a claim for slander.

**Greg Muller**: And it’s worth noting, this was 1932, the same year the ABC began broadcasting, and less than a decade after the first radio station began operating in Australia.

**Justice McArthur (actor)**: And, lastly, the circumstances which gave rise to the question raised by this appeal, being the result of very recent developments in physical science, could not possibly have been foreseen when the Common Law Courts were working out the essentials of the respective causes of action for libel and slander.

**Greg Muller**: This court’s determination was that radio defamation was slander rather than libel, even though read from a script, since it reached the public through spoken words.

Like the invention of radio, the internet gave rise to a whole new range of issues for defamation. It's now possible for anyone to publish anything, anywhere in the world - whether that be a comment on social media or a personal blog or an article from an established media organisation.

One of the first issues to consider is who’s responsible for publishing? The person who wrote the comment? The social media platform it was read on? Or, the search engine which helped you find the defamatory material in the first place.Currently, a case 90 years ago is still setting a precedent for this.

**Justice Richards**: The primary authority in Australia on publication is still a 1928 High Court decision ...

**Greg Muller**: Justice Richards explains.

**Justice Richards**: ...Webb and Bloch which involved a circular printed by a solicitor by a Victorian wheat committee that said some things that turned out to be defamatory of a person, and the question in there was to what extent various people were involved in circulating that material were liable for its publication.

**Greg Muller**: Basically, the case revolved around an action for damages for libel which was brought by Thomas Henry Webb, the chairman of the South Australian Wheat Compensation Committee, against Mark Bloch, from the Victorian Committee. They were both representing wheat growers from their respective states and were attempting to gain compensation from the South Australian Government on behalf of the growers.

The Victorian’s wrote a circular - a letter - which was sent to growers, but the circular contained untrue defamatory statements concerning the plaintiff.

**Justice Richards**: And the principles that were expounded in that decision are the ones that are applied now in working out whether internet search engine providers or anyone is a publisher for the purpose of defamation.

**Greg Muller**: What this judgement established was that every participant in the publication shared liability.

Justice Isaacs of the High Court found:

**Justice Isaacs (actor)**: If he has intentionally lent his assistance to its existence for the purposes of being published, his instrumentality is evidence to show a publication by him.

**Greg Muller**: So, not only those who wrote the offending material, but everyone concerned in the distribution. And...

**Justice Isaacs (actor)**: ..”the responsibility; here it is joint and several”

**Greg Muller**: In 1928 that might have meant putting a notice up on a notice board or, on instruction from someone else, sending out a circular to a particular group.

Now, almost a century later, it can mean a re-tweet or a sharing of a Facebook post. But Facebook Co-founder Mark Zuckerberg insists his company is not a news publisher.

Zuckerberg fronted the US’s Senate's Commerce and Judiciary committee in April this year and was asked whether Facebook was a tech company or the world’s biggest publisher.

**US Senator Dan Sullivan**: I think about 140 million Americans get their news from Facebook.

**Greg Muller**: US Senator Dan Sullivan

**US Senator Dan Sullivan**: So which are you, are you a tech company or are you the world's largest publisher?

**Greg Muller**: Mark Zuckerberg.

**Mark Zuckerberg**: Senator, this is a - I view us as a tech company, because the primary thing that we do is build technology and products.

**Greg Muller**: The issue here is that of secondary publishers. These might not be newspapers or magazines, but they may have knowledge, and importantly, control of the material they are helping to disseminate. Like we saw in Webb and Bloch, liability for publishing is shared, it is “joint and several”. This then implicates web hosts, online bulletin boards, and indeed search engines.

Justice John Dixon again.

**Justice Dixon**: Yes, that’s right because the law in relation to publication is that if you are in any way involved or complicit in the act of publication then you are guilty of the tort of defamation. And in the old-fashioned forms of publication that would extend beyond the newspaper proprietor and the journalist who wrote the article and include the local newsagent for example because you got your copy of the paper by buying it from the newsagent, and the newsagent would have it in display.

And there are also the banners that are put out about what the key article is in the particular newspaper. In fact, it was the very brief description of an article that appeared in a banner that caused The Age some difficulty in a case bought only a few years ago by a Federal Treasurer, but the point is that if anybody contributes to the publication coming to the attention of the plaintiff or to the attention to members of the community who less of the plaintiff, then they have participated in the publication and can be found liable in defamation.

And of course, that’s what search engines do, they find these articles and give them up to the person conducting the search who then becomes aware of - they look a at the material and say, “Oh look at that, that’s saying very nasty things about my friend Mr X I think he’s been defamed. 

**Greg Muller**: The old-fashioned version of this would be a librarian getting a book off a shelf in response to a customer query.

**Justice Dixon:** Well, yes you could even have the situation where you can go to a library saying I am doing research about Mr X and the librarian gives you a book about Mr X which presents the defamatory material about Mr X and so the librarian has drawn it to your attention and is part of the chain of publication.

The law’s always recognised a defence though of innocent dissemination, and if you are just an innocent actor in this then you’ve got a good defence and you’re not liable. So, the newsagent, the librarian, people whose involvement is of that sort generally don't know about the defamatory content and don’t intend to communicate it and to publish it so they’re acting innocently and they are excused from liability.

If on the other hand they know, the librarian knows full well that you are looking for nasty material on Mr X and said, “Oh I know where you can find that, look at this,” then they wouldn’t have a defence of innocent dissemination.

**Greg Muller**: So, it’s the intent?

**Justice Dixon**: Yeah.

**Greg Muller**: But search engines are largely automated unlike the librarian example, so is there liability in an algorithm? Well, that depends.

Matt Collins QC.

**Matt Collins QC**: Those kinds of things go global, instantaneously, to an audience which cannot be identified and once the genie is out of the bottle, it can't be put back in. Now, we see that all the time in defamation cases in the modern era. People complaining that their reputations have been destroyed in a second by an ill thought through Tweet or a Facebook post or Instagram photo.

**Greg Muller**: Maybe this is the hard question then, who's liable? The person who's put the post that may well be anonymous, the publishers based overseas, if it's Facebook.

**Matt Collins QC**: Yes, it's a really difficult question and different countries have reached different views about it.

In the United States, the home of free speech, the platforms whether it be Google or Instagram or Facebook or Twitter are not liable for anything which has been put up by a third party. In Australia, the trend in the authorities is that they can be liable if they don't remove material which is defamatory upon having it brought to their attention.

In the United Kingdom, there's a third route which is there's a presumption that the platforms, Facebook, Instagram, Twitter and so on, there's a presumption that they are not liable, unless it's not practical for the plaintiff to sue the person who wrote the tweet or the post or put up the photo.

So, another example of there just being no international consensus about how to resolve these problems.

**Greg Muller**: As well as the difficulty with who is liable, the next question is where are they liable. Online publication can occur anywhere in the world and be read anywhere in the world, and each country will have different laws.

Justice Dixon.

**Justice Dixon**: Well, yes, the attraction of those massive damages awards that those American juries hand out might be attractive but the problem in America is the first amendment to the constitution guarantees the right to free speech which means that in many cases the publisher is able to say that I was exercising my constitutional right and I don’t have to pay you damages.

So, it’s a lot harder in America to enforce rights to protect reputation than it is in some other places because of the first amendment.

**Greg Muller**: One of the first cases in the world to grapple with this issue was heard in the Victorian Supreme Court in 2000. It then went onto the High Court which handed down its decision in December 2002. This case attracted global attention and highlighted the problem between social and technological change and the development of the law.

It was Dow Jones and Company versus Gutnick. Dow Jones was the publisher of the Wall Street Journal and Barron’s Magazine. Their offices were in New York and importantly, the company’s servers were in New Jersey.

Melbourne businessman Joe Gutnick alleged he was defamed in an article called, “Unholy Gains’, published in Barron’s Online and Barron’s print magazine. And he sued in the jurisdiction where he lived, Victoria.

Only five copies of the magazine had been sold in newsstands in Victoria, but the online version of the magazine had half a million subscribers worldwide and notably, about 1700 of these were paid for with Australian credit cards. It was a massive case. The whole world was watching.

Matt Collins.

**Matt Collins QC**: Yes, so Diamond Joe Gutnick was an Internet pioneer. That was the first time that the ultimate appellate court of a country, in our case the High Court, had heard a case about the Internet.

And the court held in Gutnick, that Mr Gutnick could sue in Melbourne even though what had been written about him, had been written in the United States and even though most people who had read the Dow Jones article were located in the United States.

**Greg Muller**: When the proceedings began, Dow Jones immediately applied for a stay of the proceedings, arguing that publication occurred when the article was uploaded in New Jersey, and therefore it was New Jersey where legal action should be taken.

Justice Hedigan of the Victorian Supreme Court refused the stay application and held that publication had occurred where the article could be downloaded and therefore Victoria was an appropriate jurisdiction to pursue a defamation case.

The Victorian Court of Appeal refused leave to appeal on the basis there was insufficient doubt about the correctness of the decision.

Dow Jones was then granted special leave to appeal to the High Court. It was up to the High Court to determine where the defamation took place, and not the merits of the defamation itself.

Head of the Common Law division, Justice Dixon.

**Justice Dixon**: So, the question was a policy choice. Is the offending material published at the time that it’s uploaded onto the internet where it may sit for some time without anybody knowing it's there and without anybody reading it, or is it published when it’s downloaded by someone and actually read?

The policy decision that was made by the High Court in the Gutnik case was that publication occurred on download. The article had been downloaded and read in Victoria. Gutnick, being Australian and being Victorian, considered he had a bigger reputation to protect here locally than he did in the US, and he also didn’t want to have to confront the First Amendment defence of the publisher’s right to free speech.

That would have been, I presume his reasons for wanting to argue that but the High Court supported the position and said it’s not published until it’s downloaded.

**Greg Muller**: The court reasoned that the plaintiff, Joseph Gutnick, had a reputation to protect based on where the article was read, not where it was published.

This decision raised the spectre of ‘Global Liability’. This meant an internet publisher would be subject to the defamation laws of every county where it’s material could be downloaded, anywhere that’s connected to the internet. So, anywhere. And it follows then that someone could sue in the jurisdiction where they had the best chance of winning, and when you think about it, that may well be the country with most restrictions on free speech. But the High Court rejected this concern by arguing people would only take action in the jurisdiction where they have a reputation to protect.

But, what if you’re a celebrity or an international businessperson with an international reputation. At the time, some commentators were saying this decision could break the internet.

**Matt Collins QC**: The day after the High Court delivered its judgement, the New York Times wrote a thundering editorial, where they said this was a severe blow to freedom of speech and that this was a disastrous result. It was going to lead to the death of the Internet, I'm exaggerating slightly, but they were wrong about that obviously.

Laws adjust, commerce adjusts to the law and with the Internet, I don't think anyone can argue that the Internet is less vibrant today than it was in 2000 when that case was decided.

**Greg Muller**: The internet didn’t break, but this case was a pivotal moment in the world coming to grips with this new form of publishing. The High Court stated:

**Actor**: “It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principle focus of defamation, not any quality of the defendant’s conduct.”

**Greg Muller**: And therefore, in a unanimous decision, The High Court dismissed Dow Jones’ appeal. This paved the way for Mr Gutnick’s action to proceed in the Victorian Supreme Court. Dow Jones then settled.

So, based on what happened in the Gutnick case, did this decision mean someone could ‘shop around’ for the jurisdiction where a win was most likely?

**Matt Collins QC**: So yes, in fact in England, in the early part of the last decade, lots of Russian oligarchs used to sue for defamation in England and they used to say that they were suing in England because they were more likely to win in England but also because the result was more likely to be respected in Russia. So, the Russian oligarchs chose not to sue in Russia because they were too likely to win there as well, but the result was going to be less neutral and less respected than a decision of an English court.

Now, these are very complicated questions of law but courts determine whether they have jurisdiction to hear a case, to simplify it a little bit, based upon the degree of connection between the facts and the jurisdiction. So, a Russian oligarch couldn't come to Australia to sue over something which had been overwhelmingly published in Britain but an Australian can, and that's why Joe Gutnick who was a Victorian resident was able to sue in the Supreme Court of Victoria even though the defendant was Dow Jones, a big American publisher with no presence in this state.

**Greg Muller**: The journalist who wrote the original article, Bill Alpert, then filed a plea - which was ultimately unsuccessful - with the UN Human Rights Commission alleging that the Australian High Court decision restricted his freedom of speech.

Another issue highlighted by the change in publication from hard copy to online is the concept of Single Publication. It used to be the case that a story in a newspaper would become fish and chip wrap the next day. The article would no longer be read and more importantly, would no longer be on the newsstands to buy.

But now, something written ten or 20 years ago is accessible with one online search. The story lives on well past its original publication date.

And as we saw in the Gutnick example, if publication occurs when something is downloaded, this means it’s republished every time someone finds the story online.

**Matt Collins QC**: Yes, that’s right. So, with the internet, I call it indefinitely accessible publications which means, once something is put up on the internet, it is a permanent record which is available indefinitely and even if you wanted to pull it down as a publisher, often you can't do so effectively because it's been cached or stored on third party sites and so on. And that has one really significant consequence under our current law, unlike most countries, there's a one-year period within which you have to sue for defamation.

But the one year runs from the date on which material is published and with the internet, material is published every time it is accessed by somebody. So if you take an old printed edition of the newspaper, the newspaper's published this morning on paper, a year from now, the time has essentially expired.

But the same article which is put up on the website of the newspaper, a year from now, will still be accessible and if people are still reading it a year from now, time has not run out for the bringing of a course of action for defamation. So, it means that there is the spectre of indefinite liability for those who put material up on the Internet.

**Justice Dixon**: So the upload onto their website at the same time they publish it in paper form is not relevant. Years later by doing a search the article is discovered, it’s then downloaded and so that download becomes a fresh act publication and the limitation period of 12 months runs from the time of the download, So there’s a new opportunity to sue for an old article.

**Greg Muller**: But this may soon change. Justice Richards.

**Justice Richards**: There’s a law reform exercise being led by the NSW Department of Justice which has come up with a bunch of recommendations and a discussion draft of an amending bill, and one of the proposals is that there be a single publication rule which they currently have in the United Kingdom.

Which is that the limitation period runs from the date of first publication and so you wouldn’t be able to continue to sue on repeated publication on the internet for years and years. Sometimes decades after the first publication. So that’s not something that we can fix as judges, we apply the law as it stands.

It is something which needs attention from the various parliaments that enact the various Defamation Acts across the country.

**Greg Muller**: Matt Collins.

**Matt Collins QC**: I should say that there is a law reform proposal which I'm hopeful will pass which will reverse that position by the introduction of what's called a single publication rule which will equate online publications to those print analogues.

**Greg Muller**: So that would mean the date of publication is when it's uploaded rather than downloaded?

**Matt Collins QC**: That's right. There'll be some exceptions but as a general proposition, yes, the time will start to run from the moment the material first becomes accessible and will expire one year after that point.

**Greg Muller**

So, you’re looking to buy a new car, or stay in a hotel, travel or try out a new restaurant. One of the first things many of us do is go online to check the reviews. It’s not surprising then, online reviews are increasingly coming to court as defamation matters.

Judicial Registrar, Julie Clayton.

**Judicial Registrar Julie Clayton**: We see a lot of claims where people have left poor reviews on a google or other website about someone's product, services or business and the person about whom the reviews being left takes exception and wants to sue the party that has left that review.

We’ve seen more of those types of cases than we previously would and that’s to be expected I suppose as our lives turn more and more online and as we look to those types of reviews to get guidance. So, people are at least able to argue a claim that the review has caused them an actual loss.

One thing that I didn’t understand before starting to hear some of these cases in terms of the case management of them is that if you ever get a one-star review, you can never have a five star rating on some of these review sites, or some of these platforms.

And so, even if you’ve got five million perfect reviews, if there’s ever one that’s bad then it has a disproportionate effect. So that’s why I think people want to really take steps about them and they obviously feel that it does impact them in their workplace and their hip pocket.

**Greg Muller**: And again, there’s the problem of who to sue. The person writing the review? Well, that could be difficult because often these reviews are anonymous - or the publisher, or indeed the tech company who’s site you read it on.

**Judicial Registrar Julie Clayton**: Well, that’s a really interesting question and there’s often a bit of litigation about that itself.

There have been people who have sued Google and the online publisher and I think Australia is at the forefront of the world in terms of some of the decisions that have been handed down by our courts, saying that Google and other platforms may in fact be liable but I think that what we probably see more often is that there will be an application brought for pre-trial discovery against Google to disclose the identity of the party that’s made the defamatory or the allegedly defamatory statement.

They’re not particularly uncommon. Google usually doesn’t take a position so; Google won’t fight it or argue against it in the cases that I’ve seen but what they’ll say is they won’t disclose without a court order.

So, you come along and make your application and you say you want google to tell us who User *123* is and Google says, ‘well, we don’t oppose the order but we’re not going to provide that information without a court order”.

They get the court order. Presumably, they provide that information and then the aggrieved person makes the decision as to whether they actually want to go down the track and issue defamation proceedings.

**Greg Muller**: But, enforcing Australian court orders in other jurisdictions is not always that easy. Matt Collins.

**Matt Collins QC**: It's particularly difficult to enforce an order of an Australian court, in a defamation case, in the United States because American courts don't recognise Australian defamation law.

They say it is antithetical to the protections afforded to freedom of speech by the First Amendment in that country.

So, an order was made by a court in Victoria requiring Google to identify one or the person standing behind, allegedly, a fake review that was put up on a website. It remains to be seen whether Google will honour that order or not. As a matter of strict law, possibly doesn't have to. As a matter of being a good corporate citizen, it should.

**Greg Muller**: There’s a number of defences for defamation and this podcast is by no means an exhaustive list, but we will go through some of the main ones.

Matt Collins.

**Matt Collins QC**: Yeah, so in most defamation cases, the plaintiff will pretty easily establish the elements of the cause of action for defamation.

So a plaintiff has to establish only three things. That something's been published, that means written or broadcast about them or said about them. They have to prove that it was defamatory, that means that it was something which had a tendency to undermine their reputation and they have to prove that it was about them, that they were either named or otherwise pointed to by what was said.

In most serious defamation cases, those are very low hurdles for the plaintiff to overcome.

Having established those hurdles, it's then for the defendant to seek to establish a defence and the defences tend to be very complicated, very technical and there are lots of rules around the way in which defendants can run their defences.

But the main defences are the defence of truth. So, most people will have heard the expression, truth is a complete defence, that comes from defamation law.

**Justice Dixon**: You cannot damage a person's reputation by truthfully describing them. It may be that they have a higher reputation than they deserve because people do not understand the truth about them, and then if the truth is revealed, that doesn’t damage a person’s reputation, it simply settles it at the proper level.

So, it’s always a good thing to do to speak the truth if you’re going to say something which carries a defamatory imputation.

**Matt Collins QC**: Another of the major defences is an opinion defence. So, if you express an honestly-held opinion, in general, you're not liable for defamation. And then there are defences around special circumstances when the law recognises that there is some freedom to get things a bit wrong. For example, when I go into a courtroom and I address the court, I can't be sued for defamation for anything I say in the courtroom. And why is that? Because, I defame people every day in the courtroom. We all do. That's the nature of it.

In a case, a plaintiff is making accusations against the defendant, always that the defendant has done something wrong which ought to give rise to a right to compensation.

And the defendant is defending the case by saying, well the plaintiff has got all the facts wrong. Invariably, the barristers at the bar table are defaming the other side's clients. So, our whole system would break down if you could sue for defamation over things said in the courtroom.

A bit more contentiously, you can't sue politicians for anything said in the House of Parliament.

**Greg Muller**: Then there’s a more subtle version of this. It’s called qualified privilege.

**Justice Dixon**: Qualified privilege is a defence that focuses on the occasion in which publication occurs. So, if that occasion is such that the publication of the material is said to be justified, or appropriate, or reasonable then it’s described as an occasion of Qualified Privilege. And there are a variety of examples about this. For example, a company might seek a credit reference from a bank or an employer might seek a personal reference for a prospective job applicant from a former employer and in that context, it is said to be reasonable for the request to be made for information and reasonable for the person with that knowledge to respond to it. So that’s said to be an occasion whereupon the parties are acting reasonably, and it’s an occasion which the law describes as one of qualified privilege.

And that can extend out to more interesting areas like investigative journalism where the occasion on the one hand the public’s right to know things generally which might be for example their right to know about things happening publicly concerning politicians so they can properly and appropriately exercise their right to vote, and so then the journalists say well, we have a corresponding duty to make the investigation and provide material and it’s the law of Qualified Privilege looks essentially at whether the publisher - in my example, that’s the journalist - acted reasonably in what they did.

And you often see for example on the television and in the newspaper the comment that when they’ve spoken about Mr X. They say Mr X was invited to come onto the program, or was invited to express their views but declined or was unable to respond by the time of publication, because their trying to make the point that we’ve done what we could to try and get their version of the story and to give them the opportunity to put their side therefore we acted reasonably.

**Greg Muller**: And if we did get something wrong, you weren’t there to rebut it so we’re covered by qualified privilege?

**Justice Dixon**: Yeah, we acted reasonably. It might be wrong, it's not necessarily “truth” defence, it’s saying we acted reasonably and it was appropriate to publish because of the relationship of the subject of discussion with people’s right to know and the right of the journalist to inform them about it.

Public interest investigative journalism is one of the cutting-edge areas where I think it’s commonly thought the law doesn’t quite get it right. It’s a complicated area.

**Greg Muller**: It's often said that journalism is the story that someone somewhere doesn't want told. Do our defamation laws protect that?

**Matt Collins QC**: So, our defamation laws are, I think, notoriously more plaintiff friendly, that is, they favour the person suing, than defamation laws in comparable democracies.

**Greg Muller**: Matt Collins QC again.

**Matt Collins QC**

Now people will argue that it's not such a bad thing if journalists - remember Julia Gillard once said, you know, what was her advice to journalists? She said, "Don't," can I swear? “Don't write shit”, she said. And a lot of people have a lot of sympathy for that view.

If journalists make mistakes or people make mistakes in things they write, why shouldn't they be held liable? There is another side to the argument though and that is a vibrant western democracy depends upon exposing misconduct where it occurs and some of the greatest journalistic exploits of all time have involved those kinds of stories. You think about Watergate in the United States. You think about The Moonlight State, the uncovering of the corruption in Queensland that led to the Fitzgerald Inquiry.

Journalists, I would argue, have to be given the freedom to make mistakes in order to disclose those kinds of stories of fundamental importance.

There's another reason why it's such a fascinating area because different members of the community will come to different views about where the balance should be struck.

**Greg Muller**: So, let’s say that someone has been defamed. It’s the judge’s job now to decide what the damages should be. That’s not easy, and is often contentious. Remember, a few years ago, Rebel Wilson was initially awarded 4.56 million dollars after Baur Media were found to have defamed her. On appeal this amount was reduced to $600,000. So how do you come up with the correct amount? How much is a reputation worth?

Justice Dixon.

**Justice Dixon**: The damages. The law of defamation basically recognises that somebody who was defamed sufferers hurt and humiliation. So, there’s an injury to feelings type response to which they are entitled to damages and that their reputation can be lost and can be damaged by what’s been said because everybody thinks the less of them.

So, they need some form of vindication so that their reputation is effectively restored because they can say, “Yes I know that was said about me but the court said that was defamatory and gave me $100,000”.

As to how it’s actually assessed, it’s a common problem for the law to have to apply a monetary value to things that are simply not measurable in monetary terms. Reputation is one of them. But again, the law has to fix a figure to adequately compensate the person in those circumstances and it has to fix a figure that adequately compensates for injury to feelings and damage to reputation and vindicating reputation.

There are some interesting things which come into that because the law says, ‘you never know where the defamation lurks, and where it’s likely to suddenly rise up and injure the plaintiff again’. This is called the grapevine effect, where the words that are said or spoken about the plaintiff travel along the grapevine and pop up in all kinds of unexpected places.

This is a recognition of the fact that, and people will know from their life’s experience that when I say something to you, I don’t know who you are going to repeat it to, neither of us knows who’s listening to this podcast, who they’re going to repeat it to, so if there was a defamatory comment made, where’s it going to pop up, and, the extent to which publication has occurred is an important consideration in determining the amount of damages.

If something is said to three people, you’re going to get - generally speaking - you’re going to get less money than if it’s published to three and a half million people.

**Greg Muller**: It’s hard to determine now though if you see a comment in the comment section on a Facebook post?

**Justice Dixon**: Well, there are ways of determining the extent to which people have looked at a Facebook post, the statistics can be gathered, and that kind of evidence is often put before the court.

This is a small Facebook group, it’s only got ten members, we can see from the comments and likes that another 15 people have looked at it. Generally, the circulation when a newspaper - a national daily newspaper is sued, the circulation figures come in and the circulation figure for the, whatever newspaper it was might be three and a half million on that particular day and it’s not assumed that every one of those people read that particular article but it gives a feel for the extent of the publication which would be one of the things which would be taken into account.

**Greg Muller**: Although juries decide whether or not something is defamatory, they no longer have a role determining damages.

**Justice Dixon**: And one of the problems that developed was that the courts - particularly juries - focussed on what was seen as bad behaviour by the publisher. The publishers were trying to sell newspapers and individuals were being harassed with publication of defamatory material so the juries would in effect try punish them by giving a big award of damages to the plaintiff.

So, the situation came about where plaintiffs in defamation cases were getting a lot more money than people who had suffered a serious injury through the negligence of a driver of another vehicle and were left in permanent pain for the rest of their lives and it was thought there’s got to be proportionality between these types of issues and that resulted in the assessment of damages being taken away from juries by the law reform that happened in the early 2000s.

And also, there are caps on damages for personal injury and caps on damages for defamation that maintain a proportionality in the kinds of awards that can be handed out by the courts.

**Greg Muller**: Assessing damage to reputation is not always straightforward. Damages for a ruined reputation assumes there was an intact reputation to start with.

**Justice Dixon**: Plaintiffs will give evidence of how they felt. Some people are more robust than others of course. Other people give evidence about what they thought. They come along and they say, “I was really shocked to hear what was said about ‘X’ because I’ve known him for a very long time and to suddenly hear that - I thought it was true - I thought the newspaper was saying that he’d stolen all this money and I was really quite shocked to hear it”. So, that kind of evidence indicates that the person’s reputation has taken a significant hit.

As opposed to other evidence, “Oh I heard that and just know that wasn’t true - that couldn’t possibly be true - he wouldn’t have done that.” So, you have to weigh all this up.

**Judicial Registrar Julie Clayton**: That would be the argument. This is not a person of good reputation. So, if in fact we have made the alleged statements and if in fact they are defamatory.

**Greg Muller**: I asked Julie Clayton for examples. She could think of quite a few, straight off the top of her head.

**Judicial Registrar Julie Clayton**: So, for example. If, well there was the claim between <BEEEP> and the <BEEP> where he says there were allegations made about him that were defamatory …

**Greg Muller**: But not one we could talk about.

**Judicial Registrar Julie Clayton**:... it could be argued that he was not a person of good … let’s not go there.

**Greg Muller**: So, she made one up.

**Judicial Registrar Julie Clayton**: So, if I say, “Greg Muller is a standover man and goes around to workplaces and threatens employers,” then that's clearly a defamatory statement if that’s not true. And if there is no evidence that you have done it then it’s not true.

But if you are in fact, you are a notorious criminal, even though that’s not the particular crime that you practice, you are a notorious criminal. You are hated by everybody in the community because you, sort of go and kill small kittens, or something like that, then you’ve got no, you’ve got no reputation to damage is the argument so what loss have you suffered?

**Judicial Registrar Julie Clayton**: The other thing is, I suppose also that yes alright you’ve got a good reputation and it’s defamatory and the rest of it, but you haven’t suffered any damage or loss.

That is impacted by the extent to which there’s been broadcast of the defamatory things so if it’s just been … we’ve got one in the court at the moment where a person was running a business and…(fade)

**Greg Muller**: I wonder if I could sue Julie Clayton for saying that, then again, it’s on a podcast which I was involved in publishing, so would I be partly liable?

And then the media attention around a case where someone at the Supreme Court is killing kittens could attract more attention than, well, the number of people listening to this, and that could just make it worse.

Probably just leave it then…

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I’m Greg Muller. Thanks for listening.

Ends.

**Links to matters discussed in this episode**

[**Webb & Bloch**](https://jade.io/article/63395)

https://jade.io/article/63395

[**Dow Jones and Company Inc v Gutnick**](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2002/56.html)

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2002/56.html

[**Meldrum v Australian Broadcasting Co Ltd**](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VicLawRp/1932/46.html)

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