Is this Australia’s defining moment for defamation law?

Reform The challenge is to keep pace with the digital age.

Michael Pelly

I ne proem wii Austraian aeraama-
tion laws, says leading barrister Mat-
thew Collins QC, is that there has been no “key moment” that has backed free-
dom of speech.

In the United States, it was the 1964 decision in New York Times v Sullivan at the height of the civil rights debate. The Supreme Court declared a public figure had to prove the publisher acted with malice in false reporting.

“The New York Times case was the key moment in defamation law when the Supreme Court of the United States grappled squarely with why freedom of speech and freedom of the press really mattered,” says Collins.

“An equivalent moment has happened in almost every other Western democracy, but not Australia.”

With state and federal attorneys-general having now agreed on a timetable that could lead to new defamation laws within 18 months, Collins – like many others – is hoping that moment has arrived.

The move follows a string of high-profile defamation cases in 2018.

Rebel Wilson won an Australian record payout of $4.7 million from Woman’s Day. That was reduced to $600,000 on appeal because of insufficient proof of lost earnings.

Alan Jones – and radio stations 2GB and 4BC – were left with the record created a statutory power for courts to order material be taken down from the internet.

Actor Geoffrey Rush then sued The Daily Telegraph over articles alleging he behaved inappropriately towards co-star Erin-Jean Norvill and sought $20 million. A judgment is expected soon.

Collins, the president of the Victorian Bar, represented Wilson but primarily acts for media companies.

He says a central problem is that the law focuses on what plaintiffs say the article means – the imputations – rather than leaving it to a judge or jury. This, he adds, awards tactical game-playing, encourages costly inter-

locutory disputation and distracts attention from the real issues.

He notes the system allows people to sue for hurt feelings and get more damages that someone who lost a leg.

The law has also failed to keep up with the digital age, a point made by NSW Attorney-General Mark Speak-
man when he released details of the reform process on Thursday. A first step is a discussion paper to be released in February, with drafting to begin in September. The aim is to have final agreement by June 2020.

Collins points out that before the pro-
feration of the internet, the media worked on a fixed cycle of newspapers in the morning and then nightly news at the same time.

“News is no longer static in that way. A mistake can be made at one moment in time and be corrected in the next moment, having no real consequences.

“Yet our law treats every moment in time as if it is the 7 o’clock news bulletin or the daily newspaper.”

Professor David Rolph of the Uni-
versity of Sydney says it’s time to “go back to the drawing board”.

He wants the review to examine the balance between freedom of speech and protection of reputation “in a fundamental way”.

Part of that, he suggests, should be looking at effective remedies and the right forum for disputes.

“Litigating in a court for reputational damage is for most people not the best way to deal with it.”

He says there needs to be more cre-
ative remedies and suggests “apologies, retractions and effective take-down mechanisms”.

Rolph notes that UK reforms in 2013 created a statutory power for courts to order material be taken down from online forums.

“That’s often what people are con-
terned about: is it still out there? It can be an effective remedy.”

Mills Oakley partner Stuart Gibson, who primarily acts for plaintiffs, agrees the discussion paper needs to address the issue of ongoing publication on the internet.

“It so often gives rise to significant further damage by way of the grape-
vine effect, where users can so easily forward to large online communities.”

Gibson says the liability of internet service providers, moderators and search engine operators should also be examined.

Rolph suggests many of the smaller claims between individuals – which have surged with the advent of social media – could be shifted to low-cost for-
ums such as tribunals and local courts.

The ACT has gone down this road.

Collins agrees: “The law does not provide an effective remedy for those whose lives are genuinely destroyed in a heartbeat by conduct which cannot be justified because our system is too slow, too expensive and too con-
ved.”

A good example is the use of imputa-
tions and the resulting complexity for a jury – or judge.

At the end of a defamation case in Britain a jury is usually asked only two questions – Do you find for the plaintiff or the defendant? And, what damages would you award?”

“In Australia,” says Collins, “jurocrs are given an exam paper. In the Rebel Wilson case, they had to answer 47 questions. It should not be that complicated.”

Collins is also puzzled by the rela-
relationships between defamation and seri-
ous personal injury cases.

“Why would a reputation loss in terms of general damages – leaving aside financial loss – be greater than permanent brain damage or the loss of a limb?”

He reckons there are lots of problems “that could be fixed with tinkering”.

“But nothing will get around the structural problem in our defamation law short of a watershed moment.”

The closest Australia came was Lange v ABC in 1997. In that case the High Court recognised an implied right to free speech on political issues found in the election provisions – sections 7 and 24 – of the Constitution had impli-
cations for defamation law.

It tried to lower the hurdle for media with a “reasonable inquiry test”, but Collins points out that in the following two decades it has never been success-
ful in a case involving the mainstream media.

“I do not believe that that can be explained away with platitudes about the irresponsibility of the Australian media. That the defence has proved to be a dead letter reinforces the need for reform.”
Rebel Wilson with barrister Matthew Collins QC during her defamation battle with Woman's Day. Her record payout was reduced on appeal. PHOTO: PENNY STEPHENS