

## Pre-publication & Defamation Alert

### June 2008

# The Mercedes Corby decision - the impact of increased jury involvement in NSW defamation hearings

“As a result of the Corby decision, producers and editors of media organisations should be more cautious about publishing material that could be considered to be defamatory.”

The widely publicised defamation case involving Mercedes Corby is the first case where the decision has been handed down by a jury instead of a judge, as per the new hearing procedures prescribed by the *Defamation Act 2005* (NSW) (**the 2005 Act**).

### What are the implications?

Under the old Defamation Act 1974 (**the 1974 Act**), the judge played a much more significant role in deciding whether or not a plaintiff had been defamed.

Now, under the 2005 Act, most of this power has been given to the jury. Consequently, the defendant in defamation proceedings is essentially now much more “*at the mercy*” of the public.

It is possible that the changes brought about by the 2005 Act may have the effect of producing more verdicts in

favour of the plaintiff, as a jury may not be as concerned with technical interpretation and legal precedent as a judge.

Section 22 of the 2005 Act simply prescribes that a jury is to determine whether the defendant has published a defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.

If the jury is satisfied that the defendant has defamed the plaintiff, the court’s role is simply to determine the amount of damages (if any) to be awarded to the plaintiff.

As a result of the Corby decision and the procedures under the 2005 Act, producers and editors of media organisations should be more cautious about publishing material that may arguably contain defamatory content.

### The facts of the Mercedes Corby case

Corby commenced proceedings in the Supreme Court of NSW in 2007 in relation to three separate *Today Tonight* programs and a news report aired in February 2007 (**the programs**). The defendants in this case were:

- > the Seven Network;
- > the producers of Sky News;
- > Anna Coren (the presenter of Seven’s *Today Tonight*);

- > Brian Seymour (a *Today Tonight* reporter); and
- > Ms Jodie Power.

Corby alleged that the programs contained 29 defamatory accusations, including that Corby:

- > had been knowingly involved in Schapelle Corby’s importation of marijuana to Indonesia;
- > had denied Schapelle Corby’s Indonesian lawyers a chance to prove her innocence;
- > had Power import drugs to Indonesia;
- > confessed to Power that Corby had previously imported marijuana;
- > had cultivated, sold, supplied and possessed marijuana;
- > had lied to the public regarding the Corby family’s involvement in drugs;
- > was a threat to Power’s safety;
- > was guilty of the crime of taking illicit drugs; and
- > was guilty of the crime of possessing illicit drugs.

On 29 May 2008 a jury of four found that Corby had been defamed in respect of 28 of the 29 alleged defamatory accusations.

A judgment on damages was due to be delivered by Justice Simpson this week, but the parties instead agreed to settlement of the claim for a confidential sum of money.



## What are the significant changes under the 2005 Act?

The most significant change under the new legislation is that the role of the judge in defamation proceedings has been significantly reduced, and that of the jury has significantly increased.

The increased role of the jury was a deliberate inclusion in the 2005 Act. A report generated from the NSW Attorney General's Department in 2004 noted that:

*"... the main arguments in favour of juries are that judges are assumed to lose touch with the feelings and*

*language of the ordinary person and that a jury selected from a cross-section of the community is more likely to arrive at a true appreciation of the facts in a defamation action."*

Whilst this argument may be sound, it is possible that the changes under the 2005 Act may have the effect of producing more verdicts in favour of the plaintiff, because a jury may not be as concerned with technical interpretation and legal precedent as a judge.

At the very least, the extended powers granted to a jury are likely to result in inconsistent decisions.

For more information on how the new legislation and the outcome of this case may affect your organisation, please contact a member of our pre-publication and defamation team below.

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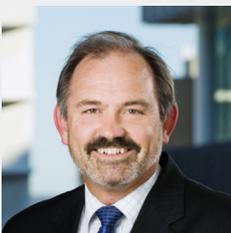
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