

Response from Dr Matt Collins QC:

Is it fair to conclude that a journalist/publisher should not rely on historical documents, like the findings of a Royal Commission, as established facts in a defamation case?

Royal Commissions make factual findings in a peculiar context, involving the exercise of executive, as opposed to judicial, power. As Rares J put it in the Full Court judgment at [182], “the function and purpose of a Royal Commission, unlikely a judicial proceeding, is not to resolve a controversy, but to exercise the power of the executive branch of government to inquire into and report on a subject. However distinguished a Royal Commission may be, experience has shown that clear or conclusive findings that one makes often are not vindicated in subsequent judicial proceedings, whether criminal or civil.”

Royal Commission findings cannot be relied upon in a defamation case as a shorthand means of establishing relevant facts - facts have to be proved in the ordinary way through admissible evidence adduced from witnesses and by the tendering of admissible documents. Defamation trials also have safeguards inherent in the adversarial process that are not hallmarks of Royal Commissions—including the law of evidence and the ability of an opposing party to cross-examine witnesses at large.

It does not follow, however, that publishers cannot report or comment on Royal Commission findings. There is, for example, a defence for fair summaries of Royal Commission findings (section 28). There is also no reason in principle why the section 30 defence for publications that are reasonable in all the circumstances could not succeed in relation to works that comment on Royal Commission findings (although the Full Court rejected that defence on the facts in the *Herron and Gill* case).

Is it fair to conclude that a journalist/publisher should not rely on expert evidence to similar such hearings if those experts are now deceased?

The Full Court found that the trial judge erred in admitting the reports of the deceased experts, essentially because (a) the reports, which were not prepared for the purposes of the proceedings, did not comply with the requirements in the law of evidence for the admissibility of expert reports in judicial proceedings; and (b) further and in any event, they should have been excluded as a matter of discretion because the deaths of the experts meant that the plaintiffs were unable to challenge the reliability of the reports, which meant that they were unfairly prejudiced.

It is possible to conceive of cases where expert evidence by a deceased witness could be relied upon in a defamation case—where, for example, the report complied with the requirements in the law of evidence for admissibility, and the probative weight of the report outweighed any prejudice to the opposing party, or the opposing party had otherwise had the opportunity to challenge the reliability of the report. But I think that will be very much the exception rather than the rule.

What weight does the full federal court judgment (and its finding that the seven imputations were carried) have on a new trial?

The Full Court judgment is binding in a number of important respects on a retrial. The seven disputed imputations, for example, have been found by the Full Court to be carried. It would not be open to the judge on a retrial to conclude otherwise. In so far as the Full Court has ruled that evidence is inadmissible, such as the reports of the deceased experts, those findings would bind the judge on any retrial. And the section 30 defence has been thrown out. The retrial would therefore essentially be confined to the publishers' justification defences in respect of a number of the imputations, to be determined by reference to the admissible evidence, which would be quite different from, and likely significantly narrower than, that in the first trial.

Will a new trial have to rule independently on the admissibility of the RC documents and facts? And if so, will Cannane/ Harper Collins need to reprove many of these facts? 50 years on?

Yes. An important aspect of any retrial would involve assessing the admissibility of documents that were before the Royal Commission, particularly by reference to whether allowing the publishers to rely on them would unfairly prejudice Dr Gill. The publishers will not necessarily be precluded from relying on evidence at the retrial that goes beyond that tendered at the first trial but their ability to do so will, obviously, be complicated by the time that elapsed since the relevant events