

Response from Marlia Saunders, media lawyer:

What does this judgment mean for journalists and publishers who rely on historical documents, like findings of a Royal Commission?

The judgment shows that historical Royal Commission findings need to be treated with care and not taken as gospel - unless the publication is a fair and accurate report of the Royal Commission proceedings, or the findings have been upheld in subsequent criminal prosecutions.

The appeal judgment doesn't rule out being able to rely on Royal Commission evidence in defamation proceedings - it just makes it more difficult. The issue is that the NSW legislation provides that compelled evidence given at a Royal Commission is generally inadmissible in any civil or criminal proceedings unless certain exceptions apply. The trial judge held that this restriction only applies to prevent evidence being used to establish civil liability or criminal responsibility against a witness, not where the evidence is used to defend defamation proceedings. The appeal judges rejected this approach, but found the evidence can still be admitted so long as judge has first to considered whether the "probative value" of the evidence would be outweighed by the danger that it may be "unfairly prejudicial" to a party - since the trial judge did not do this, the appeal judges found that a retrial is required.

Is there anything that can tilt the law back in favour for the media when using findings like a Royal Commission as 'established facts'?

The new public interest defence to a defamation action, which was introduced a year ago, can now be used in cases where a publisher reasonably believes that the material being published is in the public interest. This is an important development in tilting the law back in favour of the media in relation to cases which concern Royal Commission findings, which are very clearly in the public interest.

There are other steps that the media can take when using Royal Commission findings in their reporting to reduce the legal risk, such as by including relevant context - in this case, that would include the fact that there had not subsequently been a successful prosecution or disciplinary proceedings in relation to the allegations made during the Royal Commission and the fact that the doctors denied wrongdoing. Most importantly, the appeal judges in this case were critical of the fact that the doctors had not been approached for comment prior to publication of the book, and found that the publisher's conduct was not reasonable as a result.

One appeal judge said the processes of discovery or subpoenas could be used in the defamation proceedings to compel production of the same documents that were produced under compulsion to the Royal Commission in order to avoid the admissibility issue. However, this is completely unrealistic in circumstances where the Royal Commission was conducted in 1988 and related to events that occurred between 1963 and 1979. Ironically, in the late 1980s and early 1990s, a criminal prosecution against one doctor had been dismissed, and disciplinary proceedings had been permanently stayed, because the delay in bringing them was found to

cause substantial prejudice to the doctors' ability to defend them. Yet Harper Collins has been expected to incur millions of dollars defending defamation proceedings brought more than 50 years after the events in question, in circumstances where many of the people who could have given evidence or provided documents are now deceased.

Given this judgment, could media be exposed to defamation action if they were to quote damning findings about one's character from a Royal Commission?

Unfortunately, the media can be exposed to defamation actions where they rely on damning findings by a Royal Commission in relation to a person's conduct or character. The laws limiting the admissibility of evidence given to a Royal Commission are designed to encourage witnesses to give candid evidence without fear of it later being used against them. This is problematic where, over time, a Royal Commission's findings become notorious but the evidence to prove them true becomes more difficult to find as memories fade and documents are misplaced.