



New South Wales

Uniform Civil Procedure Rules (Amendment No 5) 2005

under the

Civil Procedure Act 2005

The Uniform Rules Committee made the following rules of court under the *Civil Procedure Act 2005* on 5 December 2005.

Jennifer Atkinson
Secretary of the Uniform Rules Committee

Explanatory note

The object of these Rules is to amend the *Uniform Civil Procedure Rules 2005*:

- (a) to make provision with respect to the practice and procedure for proceedings for defamation (whether under the new *Defamation Act 2005* or the *Defamation Act 1974*), and
- (b) to enable associate Judges of the Supreme Court to exercise certain powers of the Supreme Court in connection with proceedings for defamation.

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1 Name of rules

These rules are the *Uniform Civil Procedure Rules (Amendment No 5) 2005*.

2 Commencement

These rules commence on 1 January 2006.

3 Amendment of Uniform Civil Procedure Rules 2005

The *Uniform Civil Procedure Rules 2005* are amended as set out in Schedule 1.

Schedule 1 Amendments

(Rule 3)

[1] Rule 1.10A

Insert after rule 1.10:

1.10A Powers of associate Judges of the Supreme Court (cf SCR Part 60, rule 1A)

- (1) Subject to subrule (2), an associate Judge of the Supreme Court may exercise any of the powers of the Court under the *Civil Procedure Act 2005*, or under rules of court, in relation to defamation proceedings.
- (2) An associate Judge may not exercise the power conferred by rule 29.15 or 29.16 in relation to any such proceedings.

Note. Section 118 of the *Supreme Court Act 1970* sets out the powers exercisable by an associate Judge. Those powers include powers conferred by rules of court. In addition to the power conferred by this rule, see rule 1A of Part 60 of the *Supreme Court Rules 1970*, together with Schedule D to those rules, for other powers of the Supreme Court that may be exercised by an associate Judge.

[2] Rule 6.3 Where statement of claim required

Insert after rule 6.3 (g):

- (h) proceedings on a claim for relief in relation to the publication of defamatory matter.

[3] Part 14, Division 6

Insert after Division 5:

Division 6 Pleadings concerning defamation

Note. The *Defamation Act 2005* applies to the publication of defamatory matter after the commencement of that Act. The Act commenced on 1 January 2006. However, the *Defamation Act 1974* (as in force before its repeal by the *Defamation Act 2005*) continues to apply to the following causes of action by virtue of clause 2 (Application of this Act) of Schedule 4 (Savings, transitional and other provisions) to the *Defamation Act 2005*:

- (a) a cause of action for defamation that accrued before 1 January 2006,
- (b) a cause of action for defamation that accrued after the commencement of the *Defamation Act 2005*, but only if:
 - (i) the action is raised in proceedings that include other causes of action that accrued before 1 January 2006, and
 - (ii) the action accrued no later than 12 months after the earliest pre-1 January 2006 action accrued, and

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- (iii) each action in the proceedings arose out of the publication of the same, or substantially the same, matter on different occasions.

Clause 2 of Schedule 4 to the *Defamation Act 2005* also ensures that any other law (both legislative and common law) that would have applied to such causes of action but for the enactment of the new Act will continue to apply to such causes of action.

14.30 Allegations in statements of claim generally (cf SCR Part 67, rule 11; DCR Part 49, rule 10)

- (1) A statement of claim seeking relief in relation to the publication of defamatory matter must not include any allegation that the matter or its publication was false, malicious or unlawful.
- (2) Any such statement of claim must:
 - (a) subject to subrule (3), specify each imputation on which the plaintiff relies, and
 - (b) allege that the imputation was defamatory of the plaintiff.
- (3) A plaintiff in proceedings for defamation must not rely on two or more imputations alleged to be made by the defendant by means of the same publication of the same matter unless the imputations differ in substance.

14.31 Defamation defences generally (cf SCR Part 67, rules 13 and 19 (1); DCR Part 49, rule 12)

- (1) Subject to rules 14.32–14.40, a defendant in proceedings for defamation must plead any defamation defence specifically.
- (2) If the plaintiff in defamation proceedings complains of two or more imputations, the pleading of any of the following defences must specify to what imputation or imputations the defence is pleaded:
 - (a) a defence under section 15 (2) or 16 (2) of the *Defamation Act 1974*,
 - (b) a defence under section 25 or 26 of the *Defamation Act 2005*,
 - (c) the defence of justification at common law.
- (3) If a plaintiff intends to meet any defamation defence:
 - (a) by alleging that the defendant was actuated by express malice in the publication of the matter complained of, or
 - (b) by relying on any matter which, under the *Defamation Act 1974* or the *Defamation Act 2005*, defeats the defence,then the plaintiff must plead that allegation or matter of defeasance by way of reply.

14.32 Defence of justification generally (cf SCR Part 67, rule 14; DCR Part 49, rule 13)**(1) Defence under Defamation Act 1974**

Subject to rule 14.31 (2), a defence under section 15 (2) of the *Defamation Act 1974* is sufficiently pleaded if it alleges:

- (a) that the imputation in question was a matter of substantial truth, and
- (b) either:
 - (i) that the imputation in question related to a matter of public interest, or
 - (ii) that the imputation in question was published under qualified privilege.

Note. The defence of justification under section 15 (2) of the *Defamation Act 1974* applies to the exclusion of the common law defence of justification. See section 15 (1) of the *Defamation Act 1974*.

(2) Defences under Defamation Act 2005 and at common law

Subject to rule 14.31 (2), a defence of justification under section 25 of the *Defamation Act 2005* or at common law is sufficiently pleaded if it alleges that the imputation in question was substantially true.

Note. The defence of justification under section 25 of the *Defamation Act 2005* is in addition to, and does not vitiate, limit or abrogate, the common law defence of justification. See section 24 (1) of the *Defamation Act 2005*.

14.33 Defence of contextual truth (cf SCR Part 67, rule 15; DCR Part 49, rule 14)**(1) Defence under Defamation Act 1974**

Subject to rule 14.31 (2), a defence under section 16 of the *Defamation Act 1974* is sufficiently pleaded if it:

- (a) alleges either:
 - (i) that the imputation in question related to a matter of public interest, or
 - (ii) that the imputation in question was published under qualified privilege, and
- (b) specifies one or more imputations on which the defendant relies as being contextual to the imputation in question, and

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- (c) as to the contextual imputations on which the defendant relies:
 - (i) alleges either that they related to a matter of public interest or that they were published under qualified privilege, and
 - (ii) alleges that they were matters of substantial truth, and
- (d) alleges that, by reason that the contextual imputations on which the defendant relies are matters of substantial truth, the imputation in question did not further injure the reputation of the plaintiff.

(2) **Defence under Defamation Act 2005**

Subject to rule 14.31 (2), a defence under section 26 of the *Defamation Act 2005* is sufficiently pleaded if it:

- (a) specifies one or more imputations on which the defendant relies as being contextual to the imputation in question, and
- (b) alleges each contextual imputation on which the defendant relies was substantially true, and
- (c) alleges that the imputation in question did not further harm the reputation of the plaintiff because of the contextual imputations on which the defendant relies.

14.34 Defence of absolute privilege

- (1) This rule applies:
 - (a) to a defence of absolute privilege under Division 3 of Part 3 of the *Defamation Act 1974* or under section 27 of the *Defamation Act 2005*, and
 - (b) to the defence of absolute privilege at common law.
- (2) A defence to which this rule applies is sufficiently pleaded if it alleges that the matter complained of was published under absolute privilege.

14.35 Defences for publication of public and official documents**(1) Defence under section 25 of Defamation Act 1974**

A defence under section 25 of the *Defamation Act 1974* is sufficiently pleaded if it alleges that the matter complained of was:

- (a) a document or record specified as a document or record to which that section applies or a copy of such a document or record, or
- (b) a fair summary of, or a fair extract from, such a document or record.

(2) Defence under section 27 of Defamation Act 1974

A defence under section 27 of the *Defamation Act 1974* is sufficiently pleaded if it alleges that the matter complained of was a notice published in accordance with the direction of a court.

(3) Defence under section 28 of Defamation Act 2005

A defence under section 28 of the *Defamation Act 2005* is sufficiently pleaded if it alleges that the matter complained of was contained in:

- (a) a public document or a fair copy of a public document, or
- (b) a fair summary of, or a fair extract from, a public document.

14.36 Defences of fair report of proceedings of public concern**(1) Defences under Defamation Act 1974**

A defence under section 24 of the *Defamation Act 1974* is sufficiently pleaded if it alleges that:

- (a) the matter complained of was a fair protected report, or
- (b) the matter complained of was a later publication by the defendant of:
 - (i) a protected report or a copy of the protected report, or a fair extract or fair abstract from, or fair summary of, a protected report that was previously published by another person, or
 - (ii) material purporting to be a protected report or a copy of a protected report, or of a fair extract or fair abstract from, or fair summary of, material purporting to be a protected report that was previously published by another person,

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and the defendant did not have knowledge that should have made the defendant aware that the protected report is not fair or the material purporting to be a protected report was not a protected report or is not fair.

(2) **Defences under Defamation Act 2005**

A defence under section 29 of the *Defamation Act 2005* is sufficiently pleaded if it alleges that:

- (a) the matter complained of was, or was contained in, a fair report of any proceedings of public concern, or
- (b) the matter complained of:
 - (i) was, or was contained in, an earlier published report of proceedings of public concern, and
 - (ii) was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report,

and the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.

14.37 Defence of qualified privilege (cf SCR Part 67, rule 16; DCR Part 49, rule 15)

- (1) This rule applies:
 - (a) to a defence under Division 4 of Part 3 of the *Defamation Act 1974* or section 30 of the *Defamation Act 2005*, and
 - (b) to any other defence of qualified privilege other than any of the following:
 - (i) a defence under Division 5, 6 or 7 of Part 3 of the *Defamation Act 1974*,
 - (ii) a defence under section 28, 29 or 31 of the *Defamation Act 2005*,
 - (iii) the defence of fair comment at common law.
- (2) A defence to which this rule applies is sufficiently pleaded if it alleges that the matter complained of was published under qualified privilege.

14.38 Defences of comment or honest opinion (cf SCR Part 67, rule 17 (1) and (2); DCR Part 49, rule 16 (1) and (2))

(1) **Defences under Defamation Act 1974**

A defence under Division 7 of Part 3 of the *Defamation Act 1974* is sufficiently pleaded if, as to the matter it alleges was comment, it:

- (a) either:
 - (i) alleges that the comment was comment based on proper material for comment and on no other material, or
 - (ii) alleges that the comment was comment based to some extent on proper material for comment and represented an opinion that might reasonably be based on that material to the extent to which it was proper material for comment, and
- (b) alleges that the comment related to a matter of public interest, and
- (c) either:
 - (i) alleges that the comment was the comment of the defendant, or
 - (ii) alleges that the comment was the comment of a servant or agent of the defendant, or
 - (iii) alleges that the comment was not, and in its context and in the circumstances of the publication complained of did not purport to be, the comment of the defendant or of any servant or agent of the defendant.

Note. A defence of fair comment under Division 7 of Part 3 of the *Defamation Act 1974* applies to the exclusion of the common law defence of fair comment. See section 29 of the *Defamation Act 1974*.

(2) **Defences under Defamation Act 2005**

A defence under section 31 of the *Defamation Act 2005* is sufficiently pleaded if, as to the matter it alleges was opinion, it:

- (a) either:
 - (i) alleges that the opinion was based on proper material and on no other material, or
 - (ii) alleges that the opinion was an opinion based to some extent on proper material and represented an opinion that might reasonably be based on that material to the extent to which it was proper material, and

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- (b) alleges that the opinion was an opinion related to a matter of public interest, and
- (c) either:
 - (i) alleges that the opinion was an expression of opinion of the defendant, or
 - (ii) alleges that the opinion was an expression of opinion of an employee or agent of the defendant, or
 - (iii) alleges that the opinion was an expression of opinion of a person other than the defendant or an employee or agent of the defendant.

Note. A defence of honest opinion under section 31 of the *Defamation Act 2005* is in addition to, and does not vitiate, limit or abrogate, the common law defence of fair comment. See section 24 (1) of the *Defamation Act 2005*.

(3) Defence of fair comment at common law

A defence of fair comment at common law is sufficiently pleaded if, as to the matter it alleges was comment, it:

- (a) alleges that the comment was comment based on true facts or material that was published under privilege, and
- (b) alleges that the comment related to a matter of public interest, and
- (c) alleges that the comment was made honestly by the defendant.

Note. See the note to subrule (2).

14.39 Defence of innocent dissemination

A defence under section 32 of the *Defamation Act 2005* is sufficiently pleaded if it alleges that:

- (a) the defendant published the matter complained of merely in the capacity, or as an employee or agent, of a subordinate distributor, and
- (b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and
- (c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

14.40 Defence of triviality

- (1) This rule applies to:
 - (a) a defence under section 13 of the *Defamation Act 1974*, and

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- (b) a defence under section 33 of the *Defamation Act 2005*.
 - (2) A defence to which this rule applies is sufficiently pleaded if it alleges that the circumstances of publication of the matter complained of were such that the plaintiff was unlikely to sustain any harm.

[4] Part 15, Division 4

Insert after Division 3:

Division 4 Defamation

Note. The *Defamation Act 2005* applies to the publication of defamatory matter after the commencement of that Act. The Act commenced on 1 January 2006. However, the *Defamation Act 1974* (as in force before its repeal by the *Defamation Act 2005*) continues to apply to the following causes of action by virtue of clause 2 (Application of this Act) of Schedule 4 (Savings, transitional and other provisions) to the *Defamation Act 2005*:

- (a) a cause of action for defamation that accrued before 1 January 2006,
- (b) a cause of action for defamation that accrued after the commencement of the *Defamation Act 2005*, but only if:
 - (i) the action is raised in proceedings that include other causes of action that accrued before 1 January 2006, and
 - (ii) the action accrued no later than 12 months after the earliest pre-1 January 2006 action accrued, and
 - (iii) each action in the proceedings arose out of the publication of the same, or substantially the same, matter on different occasions.

Clause 2 of Schedule 4 to the *Defamation Act 2005* also ensures that any other law (both legislative and common law) that would have applied to such causes of action but for the enactment of the new Act will continue to apply to such causes of action.

15.19 Particulars in relation to statements of claim for defamation (cf SCR Part 67, rule 12; DCR Part 49, rule 11)

- (1) The particulars required by rule 15.1 in relation to a statement of claim seeking relief in relation to the publication of defamatory matter must include the following:
 - (a) particulars of any publication on which the plaintiff relies to establish the cause of action, sufficient to enable the publication to be identified,
 - (b) particulars of any publication, circulation or distribution of the matter complained of or copy of the matter complained of on which the plaintiff relies on the question of damages, sufficient to enable the publication, circulation or distribution to be identified,

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- (c) if the plaintiff alleges that the matter complained of had a defamatory meaning other than its ordinary meaning—particulars of the facts and matters on which the plaintiff relies to establish that defamatory meaning, including:
 - (i) full and complete particulars of the facts and matters relied on to establish a true innuendo, and
 - (ii) by reference to name or class, the identity of those to whom those facts and matters were known,
 - (d) if the plaintiff is not named in the matter complained of—particulars of identification of the plaintiff together with the identity, by reference to names and addresses or class of persons, of those to whom any such particulars were known, and
 - (e) particulars of the part or parts of the matter complained of relied on by the plaintiff in support of each pleaded imputation.
- (2) Such of the following as is applicable must be filed and served with a statement of claim seeking relief in relation to the publication of defamatory matter (or any amended statement of claim) and be referred to in the statement of claim or amended statement of claim:
- (a) a legible photocopy of the original publication or, in the case of an internet, e-mail or other computer displayed publication, a printed copy,
 - (b) a typescript, with numbered lines, of:
 - (i) if the original publication is in English—the text of the original publication, or
 - (ii) otherwise—a translation of the text of the original publication.
- (3) Subrule (2) (b) must be complied with in respect of radio and television publications.

15.20 Particulars in relation to statements of claim by corporations

The particulars required by rule 15.1 in relation to a statement of claim seeking relief in relation to the publication of defamatory matter about a corporation must include particulars of the facts, matters and circumstances on which the plaintiff relies to establish that the corporation is not precluded from asserting a cause of action for defamation.

Note. Subject to limited exceptions, corporations are precluded from bringing defamation proceedings:

- (a) in relation to causes of action to which the *Defamation Act 1974* applies, by section 8A of that Act, and
- (b) in relation to causes of action to which the *Defamation Act 2005* applies, by section 9 of that Act.

15.21 Particulars of defamation defences generally (cf SCR Part 67, rule 18; DCR Part 49, rule 17)

- (1) The particulars of a defamation defence required by rule 15.1 must, unless the court orders otherwise, include particulars of the facts, matters and circumstances on which the defendant relies to establish:
 - (a) that any imputation, notice, report, comment or other material was or related to a matter of public interest,
 - (b) that any imputation was published under qualified privilege,
 - (c) that any imputation or contextual imputation was true or was a matter of substantial truth,
 - (d) that any material being proper material for comment was a matter of substantial truth.
- (2) If a defendant in proceedings for defamation intends to make a case in mitigation of damages by reference to:
 - (a) the circumstances in which the publication complained of was made, or
 - (b) the reputation of the plaintiff, or
 - (c) any apology for, or explanation or correction or retraction of, any imputation complained of, or
 - (d) any recovery, proceedings, receipt or agreement to which section 48 of the *Defamation Act 1974* or section 38 (1) (c), (d) or (e) of the *Defamation Act 2005* applies,the defendant must give particulars of the facts, matters and circumstances on which the defendant relies to make that case.
- (3) If a defendant in proceedings for defamation intends to show, in mitigation of damages, that any imputation complained of was true or was a matter of substantial truth, the defendant must give particulars identifying the imputation, stating that intention, and of the facts, matters and circumstances the defendant relies on to establish that the imputation was true or was a matter of substantial truth.

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- (4) The particulars required by subrules (2) and (3) must be set out in the defence, or, if that is inconvenient, may be set out in a separate document, referred to in the defence and that document must be filed and served with the defence.

15.22 Particulars in relation to defence of justification

(1) Defence under section 15 of Defamation Act 1974

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence under section 15 (2) of the *Defamation Act 1974* must (unless the court orders otherwise) include particulars of the facts, matters and circumstances on which the defendant relies to establish:

- (a) that the imputation in question was a matter of substantial truth, and
- (b) either:
 - (i) that the imputation in question related to a matter of public interest, or
 - (ii) that the imputation in question was published under qualified privilege.

Note. The defence of justification under section 15 (2) of the *Defamation Act 1974* applies to the exclusion of the common law defence of justification. See section 15 (1) of the *Defamation Act 1974*.

(2) Defences under section 25 of Defamation Act 2005 and at common law

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence of justification under section 25 of the *Defamation Act 2005* or at common law must (unless the court orders otherwise) include particulars of the facts, matters and circumstances on which the defendant relies to establish that the imputation in question was substantially true.

Note. The defence of justification under section 25 of the *Defamation Act 2005* is in addition to, and does not vitiate, limit or abrogate, the common law defence of justification. See section 24 (1) of the *Defamation Act 2005*.

15.23 Particulars in relation to the defence of contextual truth

(1) Defence under section 16 of Defamation Act 1974

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence under section 16 of the *Defamation Act 1974* must include particulars of the facts, matters and circumstances on which the defendant relies to establish:

- (a) that the imputation in question related to a matter of public interest or was published under qualified privilege, and
- (b) that the contextual imputations on which the defendant relies:
 - (i) related to a matter of public interest or that they were published under qualified privilege, and
 - (ii) are matters of substantial truth.

(2) **Defence under section 26 of Defamation Act 2005**

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence of contextual truth under section 26 of the *Defamation Act 2005* must include particulars of the facts, matters and circumstances on which the defendant relies to establish that the contextual imputations on which the defendant relies are substantially true.

15.24 Particulars in relation to defence of absolute privilege

- (1) This rule applies:
 - (a) to a defence of absolute privilege under Division 3 of Part 3 of the *Defamation Act 1974* or under section 27 of the *Defamation Act 2005*, and
 - (b) to the defence of absolute privilege at common law.
- (2) Without limiting rule 15.21, the particulars required by rule 15.1 for a defence of absolute privilege to which this rule applies must include particulars of the facts, matters and circumstances on which the defendant relies to establish that the imputation or matter complained of was published under absolute privilege.

15.25 Particulars in relation to defences for publication of public and official documents

(1) **Defence under section 25 of Defamation Act 1974**

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence under section 25 of the *Defamation Act 1974* must include particulars of the facts, matters and circumstances on which the defendant relies to establish that the matter complained of was:

- (a) a document or record specified as a document or record to which that section applies or a copy of such a document or record, or
- (b) a fair extract or fair abstract from, or a fair summary of, such a document or record.

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(2) **Defence under section 27 of Defamation Act 1974**

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence under section 27 of the *Defamation Act 1974* must include particulars of the facts, matters and circumstances on which the defendant relies to establish that the matter complained of was a notice published in accordance with the direction of a court.

(3) **Defence under section 28 of Defamation Act 2005**

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence under section 28 of the *Defamation Act 2005* must include particulars of the facts, matters and circumstances on which the defendant relies to establish that the matter complained of was contained in:

- (a) a public document or a fair copy of a public document, or
- (b) a fair summary of, or a fair extract from, a public document.

15.26 Particulars in relation to defences of fair report of proceedings of public concern

(1) **Defences under section 24 of Defamation Act 1974**

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence under section 24 of the *Defamation Act 1974* must include particulars of the facts, matters and circumstances on which the defendant relies to establish that:

- (a) the matter complained of was a fair protected report, or
- (b) the matter complained of was a later publication by the defendant of:
 - (i) a protected report or a copy of the protected report, or a fair extract or fair abstract from, or fair summary of, a protected report that was previously published by another person, or
 - (ii) material purporting to be a protected report or a copy of the protected report, or of a fair extract or fair abstract from, or fair summary of, material purporting to be a protected report that was previously published by another person,

and the defendant did not have knowledge that should have made the defendant aware that the protected report is not fair or the material purporting to be a protected report was not a protected report or is not fair.

(2) **Defences under section 29 of Defamation Act 2005**

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence under section 29 of the *Defamation Act 2005* must include particulars of the facts, matters and circumstances on which the defendant relies to establish that:

- (a) the matter complained of was, or was contained in, a fair report of any proceedings of public concern, or
- (b) the matter complained of:
 - (i) was, or was contained in, an earlier published report of proceedings of public concern, and
 - (ii) was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report,

and the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.

15.27 Particulars in relation to defence of qualified privilege

- (1) This rule applies:
 - (a) to a defence under Division 4 of Part 3 of the *Defamation Act 1974* or section 30 of the *Defamation Act 2005*, and
 - (b) to any other defence of qualified privilege other than any of the following:
 - (i) a defence under Division 5, 6 or 7 of Part 3 of the *Defamation Act 1974*,
 - (ii) a defence under section 28, 29 or 31 of the *Defamation Act 2005*,
 - (iii) the defence of fair comment at common law.
- (2) Without limiting rule 15.21, the particulars required by rule 15.1 for a defence of qualified privilege to which this rule applies must include particulars of the facts, matters and circumstances on which the defendant relies to establish that the imputation or matter complained of was published under qualified privilege.

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15.28 Particulars in relation to defences of comment and honest opinion

(cf SCR Part 67, rule 17 (3)–(6); DCR Part 49, rule 16 (3)–(6))

(1) Defences under Division 7 of Part 3 of Defamation Act 1974

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence of comment under Division 7 of Part 3 of the *Defamation Act 1974* must include:

- (a) particulars identifying the material on which it is alleged that the matter alleged to be comment was comment and identifying to what extent that material is alleged to be proper material for comment, and
- (b) as to material alleged to be proper material for comment, particulars of the facts, matters and circumstances on which the defendant relies to establish that allegation.
- (c) if the defendant relies on a defence under section 33 of that Act—particulars identifying the servant or agent of the defendant whose comment it is alleged to be.

Note. A defence of fair comment under Division 7 of Part 3 of the *Defamation Act 1974* applies to the exclusion of the common law defence of fair comment. See section 29 of the *Defamation Act 1974*.

(2) Defences under section 31 of Defamation Act 2005

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence of honest opinion under section 31 of the *Defamation Act 2005* must include:

- (a) particulars identifying the material on which it is alleged that the matter alleged to be an opinion was an opinion and identifying to what extent that material is alleged to be proper material, and
- (b) as to material alleged to be proper material, particulars of the facts, matters and circumstances on which the defendant relies to establish that allegation, and
- (c) if the defendant relies on a defence under section 31 (2) of that Act—particulars identifying the employee or agent of the defendant whose opinion it is alleged to be, and
- (d) if the defendant relies on a defence under section 31 (3) of that Act—particulars identifying the commentator whose opinion it is alleged to be.

Note. A defence of honest opinion under section 31 of the *Defamation Act 2005* is in addition to, and does not vitiate, limit or abrogate, the common law defence of fair comment. See section 24 (1) of the *Defamation Act 2005*.

(3) **Defence of fair comment at common law**

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence of fair comment at common law must include:

- (a) particulars identifying the material on which it is alleged that the matter alleged to be comment was comment and identifying to what extent that material is alleged to be based on true facts or material that was published under privilege, and
- (b) as to material alleged to be true facts or material that was published under privilege, particulars of the facts, matters and circumstances on which the defendant relies to establish that allegation.

Note. See note to subrule (2).

15.29 Particulars in relation to defence of innocent dissemination

Without limiting rule 15.21, the particulars required by rule 15.1 for a defence under section 32 of the *Defamation Act 2005* must include particulars of the facts, matters and circumstances on which the defendant relies to establish that:

- (a) the defendant published the matter complained of merely in the capacity, or as an employee or agent, of a subordinate distributor, and
- (b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and
- (c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

15.30 Particulars in relation to defence of triviality

- (1) This rule applies to:
 - (a) a defence under section 13 of the *Defamation Act 1974*, and
 - (b) a defence under section 33 of the *Defamation Act 2005*.
- (2) Without limiting rule 15.21, the particulars required by rule 15.1 for a defence to which this rule applies must include particulars of the facts, matters and circumstances on which the defendant relies to establish that the circumstances of publication of the matter complained of were such that the plaintiff was unlikely to sustain any harm.

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15.31 Particulars concerning grounds that defeat defamation defences

(cf SCR Part 67, rule 19 (1); DCR Part 49, rule 18)

- (1) If a plaintiff intends to meet any defamation defence:
 - (a) by alleging that the defendant was actuated by express malice in the publication of the matter complained of, or
 - (b) by relying on any matter which, under the *Defamation Act 1974* or the *Defamation Act 2005*, defeats the defence,then the particulars required by rule 15.1 in relation to the reply must include particulars of the facts, matters and circumstances on which the plaintiff relies to establish that allegation or matter of defeasance.
- (2) The particulars required by subrule (1) must be set out in the reply, or, if that is inconvenient, may be set out in a separate document, referred to in the reply, and that document must be filed and served with the reply.

15.32 Particulars concerning damages (cf SCR Part 67, rule 19 (2) and (3); DCR Part 49, rule 18)

The plaintiff must give:

- (a) particulars of facts, matters and circumstances on which the plaintiff will rely in support of a claim for aggravated damages, and
- (b) particulars of any claim the plaintiff makes by way of:
 - (i) special damages, or
 - (ii) any claim for general loss of business or custom.

[5] Rule 29.2

Omit the rule. Insert instead:

29.2 Applications, elections and requisitions for jury (cf SCR Part 34, rule 3; DCR Part 12, rule 5)

- (1) **Applications generally**

Except as provided by subrule (3), an application for proceedings to be tried by jury must be made by notice of motion.
- (2) **Filing of requisitions for juries**

For the purposes of section 85 of the *Supreme Court Act 1970* and section 76A of the *District Court Act 1973*, a requisition for a jury must be filed at the same time as the notice of motion referred to in subrule (1) is filed.

(3) **Elections under section 21 of Defamation Act 2005**

A party who intends to make an election under section 21 of the *Defamation Act 2005* to have proceedings for defamation tried by jury (an *election for trial by jury*) must file a notice of intention to do so.

(4) Unless the court otherwise orders, an election for trial by jury must be made, by means of an announcement in open court before a judicial officer, at the first hearing that takes place more than 3 days after service on the active parties of the notice of intention to make the election.

(5) At a hearing referred to in subrule (4), any party may, without notice of motion having been filed or served, apply to the court for an order under section 21 (3) of the *Defamation Act 2005* that the trial not be by jury and, if such an application is made, the court may determine the application on the day it is made or on any later day fixed by the court.

(6) **Time for filing notice of motion or intention**

Unless the court otherwise orders, a notice of motion under subrule (1) or notice of intention under subrule (3) must be filed:

- (a) if the notice is filed by the plaintiff:
 - (i) within 56 days after service on the defendant of the statement of claim, or
 - (ii) if a defence is served on the plaintiff within that period, within 28 days after service of the defence on the plaintiff, or
- (b) if the notice is filed by the defendant:
 - (i) within 28 days after service on the defendant of the statement of claim, or
 - (ii) if, pursuant to rule 14.3, the court directs some other date for the filing of a defence, within 28 days after the date fixed by the court's direction.

[6] Rules 29.15 and 29.16

Insert after rule 29.14:

29.15 Statement in open court about settled defamation proceedings (cf SCR Part 67, rule 21; DCR Part 49, rule 19)

With the leave of the court, a party to proceedings for defamation that have been settled may make in open court such statement about the proceedings as has been approved by the court in private.

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**29.16 Offers to make amends for defamatory publications:
determination of questions** (cf SCR Part 67, rule 22; DCR Part 49, rule 20)

The court may hear an application and determine any question under section 9F (2) of the *Defamation Act 1974* or section 15 (3) of the *Defamation Act 2005* in the absence of the public.

[7] Schedule 2 Local rules that prevail over these rules

Omit the matter relating to Part 67 (Defamation) of the *Supreme Court Rules 1970*.

[8] Dictionary

Insert in alphabetical order:

defamation defence means:

- (a) any defence to the publication of defamatory matter under the *Defamation Act 1974* or the *Defamation Act 2005*, or
- (b) any other defence or exclusion of liability available to a defendant apart from those Acts for the publication of defamatory matter (whether at common law or under any other legislation).

imputation in question, in relation to any defamation defence, means the imputation to which the defence is pleaded.

BY AUTHORITY
