Book Review

Do defamation laws make a difference?

Libel and the Media: The Chilling Effect, *Eric Barendt, Laurence Lustgarden, Kenneth Norrie and Hugh Stephenson*, Oxford University Press

The short answer to the question is yes, and no. According to this interesting and relevant study of the impact of U.K. defamation laws on day-to-day decisions of media organisations, the impact of the so called "chilling effect" of defamation laws varies a great deal. Depending on the type of publisher, defamation laws do make a difference to what is published and how complaints and litigation are approached. On the other hand, where something is published seems to make little difference - a comparison between England and Scotland shows that despite apparently lower legal risks for Scottish publishers, the "chill" factor is about the same.

The author's conclusions are fascinating reading for Australian media watchers because of broad similarities in legal principles and media structures.

Coming from the media's (rather than plaintiffs') perspective, the authors look at internal procedures and approaches to defamation problems, before and after publication and in litigation. Based on a mix of interviews with a comprehensive cross section of the U.K. media and empirical data, the statistical and anecdotal come together to give an interesting picture of how laws intrude on media decisions.

The biggest variation in the impact of defamation laws appears between sections of the media. Not surprisingly, national newspapers (for a local comparison, read major metropolitan dailies) put the most effort into dealing with defamation problems, giving blanket access to lawyers (usually inhouse) and working out ways to rewrite stories rather than canning them. Tabloids sometimes take known risks in running stories to match their competitors (in England, there still are competitors in this market) or where "stories are just too good to ignore". Financial considerations come out as less of a factor in decisions by major press to run with a story rather than regional press (an approach perhaps comparable to Australian suburban and rural papers).

Broadcasters fall in the middle of the spectrum, with a commitment to investigative journalism and comprehensive news and an active involvement of internal lawyers in program preparation. Except for satirical or political magazines, U.K. magazine publishers tend to be risk averse: "if in doubt, strike it out". The group apparently most sensitive to defamation laws are book publishers.

Interestingly, the authors find the presence of inhouse lawyers in a media organisation buffers against the "chilling" effect. Anecdotal evidence suggests they share the employer's culture and so are focused on finding ways to get stories out, in contrast with external lawyers, who tend to take a more legalistic approach. Another key difference between organisations is management involvement in editorial decisions, something much less likely in national newspapers than in periodicals and some broadcasters.

With an eye on possible litigation, difficulties of proving truth in court were perceived by some of those interviewed for the study as making the press more "polemical": they saw greater protection in not asserting facts and relying on opinion-based defences to defamation. (Given the problems in establishing the "comment" defence in recent Australian cases, it is interesting to speculate what a local study would reveal).

Australian media lawyers and journalists will find a number of curiosities revealed by the study: the "working precept" that "politicians don't sue", the propensity of police officers to sue and the "hidden" chilling effect of perceived "no-go" areas for journalists, such as deaths in police custody and large companies' exploitative employment practices, which lead to self censorship.

On the post-publication front, the authors find that complaints handling and tactical decisions about litigation are affected by unpredictability in the court system and perceptions about the "lottery" of jury damages.

One telling aspect of the study is the England/Scotland comparison, with the Scottish media serving a much smaller population, English and Scottish media operate under generally similar legal principles but face different practices and procedures. Inhouse lawyers are rare in Scotland and there are no specialist practitioners. More significantly, Scottish damages are low and jury trials extremely rare. A publication's capacity to defame must be proved at a preliminary stage. In England, this issue may not be considered until the trial. Yet, despite apparently lower financial risks, the authors find the Scottish media's day-to-day decisions are made as carefully as their English counterparts. This underscores the key conclusion that the differing impact of defamation laws

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Zealand programs on the same footing where they will be competing on quality not price.

3. First release

The current definition of first release means all back catalogue New Zealand material could count as first release here. The position taken in the submission is that programs which have already been shown in the "common market" of Australia and New Zealand should not qualify as first release.

4. Subsidy levels - series and serials

A major difference between the two countries is that series and serials receive subsidy in New Zealand but don't (except for small amounts of state subsidy) in Australia. To redress the imbalance we propose that series and serials in receipt of certain levels of subsidy should not be eligible for quota.

5. A revised creative elements test

The submission argues for the strengthening of the current creative elements test. Specifically it proposes a new element - that the program must be originated and developed in Australia and that all key creative/managerial decisions including the initiation of the program and the hiring of director/writer/producer must be made by Australians (or New Zealanders). This is necessary for two reasons:

- to ensure that any New Zealand programs that qualify are genuinely New Zealand and not foreign with some local elements;
- given the reduction in Australian programming that will occur, to ensure the integrity of the remaining Australian programming.

6. Removing 10BA as a gateway for quota eligibility

Under the current standard, programs with a 10BA certificate automatically qualify as Australian content . Maintaining this would require providing an equivalent New Zealand film tax gateway. Like 10BA, the New Zealand provisions allow for wide discretion of concern given officials in Wellington would be deciding eligibility for access to the Australian standard. The removal of 10BA would not disqualify Australian programs with a certificate - it would just mean all programs (except official Australian co-productions) would be assessed against the one creative elements test.

7. Official co-productions

The question here is whether official New Zealand/third party co-productions have to be considered eligible. (Currently official Australian/third party co-productions are given full Australian status). The ABA is firmly of the view that this is not required.

Further, we understand the New Zealand government is sympathetic to Australian concerns on this point. But there may still be a need to revisit this issue.

8. How to include New Zealand in the quotas

The submission endorses a single quota satisfied by a separate but parallel creative elements test for New Zealand. The alternative raised by the ABA was separate quota requirements for Australian and New Zealand programs. This is rejected as it would clearly mean conceding "ground" at the outset to a certain proportion of the quota being occupied by New Zealand programs.

Taken together these elements involve wide-ranging changes to the standard and some aspects, for example, the expenditure requirement, will be controversial. But the group is emphatic that modest "tinkering" around the edges will not be sufficient to ensure the current minimum levels of Australian programming are maintained.

The next stage

The ABA has indicated it may release a further paper before moving to a draft standard with the objective of having the revised standard in place from January 1,1999.

The Senate Inquiry process continues, notwithstanding the forthcoming federal election. We understand the committee is intending to start conducting hearings soon after October 3, 1998.

Submissions to the ABA inquiry are available on the ABA website: www.aba.gov.au

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is a function of internal factors in each media organisation.

So what is the point of a book like this? While it doesn't attempt to map out a framework for legislative reform, the authors draw out some helpful perspectives for policy makers, at least from one side of the debate. Despite some obvious shortcomings in the raw data (which the authors point to as a necessary consequence of collecting essentially confidential and strategic information) Libel and the Media gives tangible insights into otherwise speculative perceptions about media behaviour.

In April this year, Australia's Commonwealth Attorney General Darryl Williams signalled that the States had again failed to agree on a path to uniformity of Australian defamation law and called for a "fresh approach," without saying what that might involve. A comparable study of the practical consequences of Australian defamation law may just be a good starting point.

And now for the American perspective: insights on the First Amendment

The Communications Law Centre was fortunate to host a recent discussion forum for Professor Fred Schauer and a group of leading Sydney media law specialists. Prof Schauer is the Frank Stanton Professor of the First Amendment at Harvard and has generated a prolific body of ground-breaking theoretical and empirical work on the First Amendment. He is currently examining the practical impact on media reporting before and after an early U.S. precursor of the New York Times v Sullivan "public figure" case, by comparing media content. Preliminary work suggests the impact of defamation laws on media reporting may not be a simple exercise in cause and effect.

Julie Eisenberg