Defamation law reform in NSW

The Attorney General, John Dowd, discusses some areas in need of reform

The whole question of reform of defamation law is difficult, because it is not simply abut freedom of speech. Rather, it is about the conflict between the values, both social and democratic, in freedom of speech, and the values reflected in such concerns as the legitimate demands for the respect of individual privacy, freedom of association, careful reporting, encouraging good people into public life, and even the free speech of others. The intemperate or flippant condemnation of a play or film, for example, can have the very real effect of stifling the free speech of those involved in its production and the rights of those who might otherwise have been tempted to see it.

The recent round of high damages awards has sparked renewed calls for revision of defamation laws. There is no doubt in my mind that the very high awards of recent times cannot be justified in the absence of evidence establishing either a malevolent and calculated campaign for boosting the profits of the media organisation concerned, or proof by the plaintiff of a sizeable economic loss.

Some commentators have seen the exaggerated damages awards as an indication of community disenchantment of the more notorious reporting habits of the media in general, and, one suspects some of the journalists in particular. If this is so, one might speculate as to the reasons for this evidence of disenchantment being so uniform in Australia and England. Viewed in that light, the verdicts have come to be defended as part of the general public's revenge against the monopolistic and predatory practices of the media.

It is my contention that such a defence is untenable. No justice system can fairly put a media organisation on trial to answer for the whole of its reporting style, content and coverage in general. I would add that by the same token, no one in public life should be placed in the position of having to defend the whole of his or her private behaviour, no matter how unrelated to matters legitimately in the public domain.

Public figure defence

The adoption of a public figure test is a reform proposal which has been submitted for the government's consideration. The effect of this proposal would be that those in a position of public interest would receive less in damages than private individuals on the grounds that their public activities should be open to comment and criticism. I have considerable reservations about this proposal. I am not persuaded that the conclusions follow from the grounds advanced.

We all know that interest in the life-styles of the rich and famous sells a lot of papers and magazines. We all know, also, that the vigorous public debate upon which democracy depends often requires a canvassing of matters about the chief protagonists in the debate in question which might otherwise have remained private. Having said that, however, it must also be said that in the absence of specific provision to remedy substantial and unwarranted infringements of privacy, defamation law must serve as a passable criterion for distinguishing between the private and public arenas.

A diminution in the ability of public figures to seek redress for defamatory statements carries the very serious risk of adding yet another disincentive to good people becoming involved in public affairs at whatever level. Many people in public life already accept considerable interference with their life and leisure pursuits. However, as was pointed out in the Australian Law Reform Commission Report, there is a point at which any person should be able to seek protection against the retailing of private information which has no bearing on their public affairs. The justifications which have been given for proposing a higher threshold for public figures wanting to sue for defamation are two-fold. First, it is said that a public person has a greater opportunity to counteract false statements. Secondly, it is argued that those in governmental positions or otherwise seeking publicity, voluntarily subject themselves to closer public scrutiny. I do not fully accept these arguments, and am, moreover, of the view that people in public life are entitled to as much protection as any other citizen.

Another concern with the public figure test is the manner in which the public figure is created. One sees too often in journalistic debate the bringing together of public interest and media interest. Given the increasing frequency with which the media first constructs, and then claims to reflect, the public interest, I am naturally suspicious of how it will set about defining a person who is or has become a public figure.

A further concern is the unpredictability and impracticality of the public figure test. In the United States, where the constitutional guarantee of free speech has tipped the balance against the competing interest of individual privacy, the use of the public figure test has often descended to minor government officers, including non-government figures whose prominence may be only transient. The lives of the families of those in high profile positions are also detrimentally affected. While members of Parliament are clearly public figures, one might ask at what stage the definition ceases to apply to members of their family. Who and what will become fair game?

Criminal defamation

The government has already repealed that part of the statute law allowing privately instituted proceedings for criminal defamation.

Section 50 of the NSW Defamation Act provides that it is an offence to publish defamatory material without lawful excuse. The offence is not committed unless the publisher intended to cause serious harm to a person or knew that it was probable that serious harm would be caused. Some have suggested that a criminal defamation offence is unnecessary. However, the view of my government has been that the law of criminal defamation should be retained, but with the requirement that the Attorney General's consent be obtained prior to the commencement of proceedings.

In practice, this prosecutorial discretion is exercised by the Director of Public Prosecutions on my behalf. This delegation of authority imposes a very necessary controlling factor which will prevent the abuse of this type of prosecution. Limitation on free speech by way of criminal prosecution can be justified only if invoked for the protection of the community as a whole, and not for reasons of personal or political interest in suppressing criticism or dissent. While I expect that these provisions will be used only rarely, there will be circumstances where a prosecution may be appropriate. These include cases where there is a tendency to create a breach of the peace; where unfounded abuse is repeated by a person of no financial substance against whom civil proceedings would be ineffective; or where the defamation has the tendency to destroy confidence in a public office.

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Limitation period

The government is also assessing the need for a six-year limitation period in bringing proceedings for defamation. Where a person's reputation has been impugned, it could be expected that the maligned person would wish to clear his or her reputation at the earliest possible opportunity. The government is considering reducing the six-year period, possibly to as little as six months. This would mean that people wishing to sue for defamation would be required to commence proceedings within the six month period after learning of the publication.

Truth and public benefit

Some commentators have urged the adoption of truth being a defence in itself. Four jurisdictions in Australia currently provide a defence of truth and public benefit. In Victoria, South Australia and the Northern Territory, no statutory provisions apply, and accordingly the common law applies. In New South Wales there is a defence when an imputation is a matter of substantial truth and the imputation either relates to a matter of continuing public interest, or is published under qualified privilege. The New South Wales statute also provides that it is for the court to determine what constitutes a matter of public interest.

I am opposed to the idea of introducing any stricter test to the definition of public interest than those currently applying. But the government has yet to be convinced that the community will be better served by abolishing the requirement that the defence of truth also include an element of public benefit. In saying this, I am not repudiating the fundamental importance of free spe[illegible] in a democratic society. It is simply that to make truth an ultimate value in preference to an individual's privacy and reputation, without any requirement that it be in the public interest, is to tip the balance unfairly.

The common law rule, which applies in some jurisdictions, is that it is defamatory to publish material which exposes a person to hatred, ridicule or contempt, or which will cause him or her to be shunned or avoided by others. Where truth alone is a defence, material which leads to such a result can be published without adverse legal consequences. Statements which are true, but unnecessary and cruel, have exposed to ridicule people such as the intellectually an physical disabled, people of non-English speaking backgrounds, and other minority groups. Society's respect for the truth is an insufficient justification for publication of purely private matters of no real public interest, but of gratuitous cruelty, which are not and should not be the subject of publicity without consent.

The amount of damages

Recent record verdicts, both in New South Wales and elsewhere, have drawn much criticism regarding the availability of monetary damages. There are several issues involved here.

One option which is worth considering is the legislative establishment of deductibles and caps for damages for non-economic loss. Proven financial loss which can be quantified should always be recoverable. But damages for wounded feelings are qualitatively different, and it may be that we should set a limit on them.

I am of the view that victims who have suffered unwarranted damage to their reputations should be entitled to financial compensation, even though they may be unable to prove economic loss. An individual's reputation is extremely important to his or her self perception and social standing. As a civilised community, we must maintain our commitment to the protection of an individual's sense of dignity and self esteem, and also to the recognition of the importance to individuals of their ability to socialise.

There might, however, be a case for setting a threshold requirement before damages for non-economic loss can be awarded. The very real, but temporary, hurt of no lasting consequence might have to be regarded as being out balanced by other, more pressing, claims upon court time.

There has also been considerable criticism of late of spectacularly high verdicts for non-economic loss, where the implication seems to be that injury to reputation can fetch more in damages than very significant bodily injury as a result of a motor accident. Just as in motor accidents, my government has set a ceiling or cap on damages for non-economic loss, it might be worth considering setting a cap upon damages for non-economic loss in defamation actions. If this were done, it might be quantified as a percentage of the cap for non-pecuniary loss for physical injury thus establishing an order of priority between the physical and the reputation injuries.

Judge and jury

The defamation jury is extremely important. But some of the criticisms of recent awards have focussed on the wide variations which can be expected in the size of an award as computed by a jury. There might be a case for redefining the relationship between the judge and the jury with a view to bringing a greater sense of predictability in defamation awards.

In criminal matters, the jury determines liability while the judge determines the sentence. It might be appropriate, particularly in these days of increasingly disproportionate verdicts, to give the judge the task of assessing damages in defamation cases. The only guidelines that juries have when assessing these damages are the well publicised reports of large verdicts in previous cases. Such reports must naturally have an inflationary impact upon the general level of defamation damages, as juries will tend to consider the larger and therefore reported, verdicts as the norm.

Judges are in a far better position to assess where a particular case falls within the whole spectrum of civil damages cases, and also to be aware of the other end of the defamation scale, at which most cases settle for an apology and little more than costs. Judges are also better placed to take account of mitigating factors and the relevance of costs.

To move responsibility for the assessment of damages to the judge should lead to greater consistency and thus predictability in defamation awards. This in turn should encourage more out of court settlements. It may also reduce the incidence of appeals in these matters. The appeal mechanism is a less cost-effective way of controlling flagrantly inappropriate damages assessments.

Retractions

The case for a mandatory retraction or apology in lieu of a damages award has been much pressed of late. While it is an option worth considering, I must confess to some initial hesitancy on how it might work. How, for example, would an order for cost operate where a retraction order is the only remedy granted? How would one distinguish, in costs terms, between the derisory and the compensatory award? The costs consequences of a verdict for one cent are obvious. Not so the costs implications of a verdict requiring a retraction. And where would the retraction be placed? On page 1, or page 27? Would it be given a prominence equal to that of the defamatory article? Even if there were to be a legislative requirement of equal prominence, would that be effective to eradicate or negate the original defamation? How, for example, does one withdraw an imputation that a minister is a child molester? With a front page disclaimer?

At common law, the making of an apology by a defendant in the defamation action can be taken into account in calculating the extent of liability for damages. There has been statutory recognition of this fact in all Australian jurisdictions except New South Wales,

and it is likely that this anomaly will be redressed when amendments to the Act are finalised.

Qualified privilege

The government is also committed to examining the provisions relating to the reasonable conduct of the publisher, one element of the defence of qualified privilege as established under the New South Wales Act.

The operation of the defence of qualified privilege has recently received judicial consideration in the New South WalesSupreme Court decision of Morgan v John Fairfax. This matter concerned an editorial written by Mr Paddy Mc Guiness, which strongly criticised a paper written by the plaintiff as being, in effect, unprofessional. The defences of truth and fair comment failed, but the newspaper succeeded with its defence of statutory qualified privilege under s.22 of the Defamation Act. Justice Matthews upheld the s.22 defence on the basis that the publisher's conduct was reasonable in the circumstances. She took into consideration factors such as the editorial writer's expertise and extensive experience, the material on which he was commenting, the grounds for the writer's belief in the logic of his viewpoint, and the reasonableness of that belief given the information which was properly available to the publisher at the time of publication. Another factor influencing the decision appears to have been the very great importance of the subject matter, Aussat Communications.

Justice Matthews further stated that in the circumstances, the newspaper's failure to check every element of the report was not unreasonable. It would be imposing an unfair and unrealistic burden on publishers to suggest that exhaustive inquiries should always be made.

The Morgan decision has naturally been welcomed by the media, and is in line with the government's intention to review s.22 generally to emphasise the need for consideration of all the surrounding circumstances when determining reasonableness of publication. It should be pointed out that the case is still subject to appeal.

Conclusion

I would like to conclude by acknowledging the need for revision of the law of defamation, whilst emphatically denying the need for partial or total abolition. There are no easy solutions.

This article is an edited version of a paper delivered by Mr Dowd to an Australia Press Council Seminar on 27 October 1989.

Lawyers respond to Dowd speech

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Public figure defence

This is well travelled ground. The media in general are supportive of the introduction of such a defence. If one analyses the nature of the majority of defamation claims which reach litigation, one cannot but sympathise with the media's view. The bulk are by people who would clearly pass the United States public figure test and who are often in the position of being able to respond in kind to what has been said about them.

Unfortunately, Mr. Dowd is vague as to how the submission on a public figure defence will be treated by the government, apart from a general statement that he has "considerable reservations" about the proposal. The pros and cons have been amply and publicly debated for many years. What the government must decide now is whether it considers there should be freedom of speech and discussion about persons involved in public life at the expense of those few cases where there should be restrictions on discussion however public the figure is. Unfortunately, it is the politicians who stand to lose most if a public figure defence is introduced. It is those same politicians who will have to take the decision to introduce the defence.

Criminal Defamation

I agree, that if the offence of criminal defamation is to remain, proceedings should require the Attorney General's fiat. However, I am concerned that Mr. Dowd envisages criminal proceedings being commenced where, for instance, civil proceedings would be ineffective against a person of no financial substance or where the defamation has a tendency to destroy confidence in a public office. Thus, defamatory publications would be elevated to criminal offences which would not hitherto have attracted criminal sanction. There is considerable scope for misuse if those are the sorts of factors to be taken into account. Indeed, this could result in a marked increase in the number of cases of criminal defamation coming before the court rather than a decrease.

Limitation period

If a person considers he or she has been defamed, there should be an obligation to sue immediately or not at all. I would welcome a reduction in the limitation period from six years to six months. Too often plaintiffs sue many months or even years after the event when witnesses and vital documents have long disappeared, thus making it impossible to hold a fair trial. Indeed, I believe an even shorter period is warranted - three months at the most.

Truth and public benefit

I agree with the Attorney General that the furthest the legislation should go is to require that the defamatory imputation is true and should relate to a matter of public interest. However, I believe that the truth of the matter complained of should be sufficient to establish a defence for a defendant. The Attorney General refers to the usual arguments for restricting the truth defence. However, I believe the requirements of freedom of speech outweigh the risk of an invasion of privacy in a small number of cases. It cannot be suggested that the press in Victoria, South Australia or the Northern Territory is guilty of more invasion of privacy than the other States because of the availability of the truth alone defence. I am also not sure that the requirement of a public interest element in the defence prevents the ridiculing of "minority groups". The requirement in the defence is for the imputation to "relate" to a matter of public interest not for that imputation to be published "in the public interest".

Damages

I agree with the Attorney General's apparent view that damages awards are out of control. Often there is simply no apparent basis for a jury's award. One suspects that