

Official investigations and laying charges: what can be reported

Michael Hall examines the nebulous authorities in this important area

Journalists and lawyers alike frequently have difficulty determining what can be said concerning investigations, by the police and other official bodies, or charges arising from them.

It is certainly defamatory to say of someone that they are being investigated for or have been charged with an offence. Even the accusation, however unfounded, conveys some suspicion of improper conduct.

The more authoritative the body allegedly investigating, the more sting the accusation will carry. The most clearly defamatory is also the most common - the suggestion that someone is being investigated by the police.

Unfortunately for reporters, it seems clear that such statements do indeed carry further implied statements capable of being considered defamatory, and in practice more will be required than mere proof that the investigation was proceeding. These further imputations are considered below.

The imputation of guilt

The strongest imputation that can arise from the statement that a person is being investigated, is that the person is guilty of the crime. To justify such an imputation the defendant will be required to prove the person's guilt. This can be a formidable task.

Fortunately for reporters, it is assumed that the ordinary reasonable reader will bear in mind that a person is innocent until proved guilty. In *Lewis v Daily Telegraph* (1964), a decision of the English House of Lords which has been cited with approval by Australian courts, it was held that the headline "Fraud Squad probes firm", and an associated report, were incapable of conveying the imputation that the plaintiff (the chairman of the firm) was guilty of fraud as readers would bring to the article their usual sense of fairness and realise that investigation did not equal guilt. Thus the bare statement that a person has been investigated will not carry the imputation that s/he is guilty.

The same is true of the simple statement that a person has been arrested and charged with a criminal offence. In *Mirror Newspapers Limited v Harrison* (1982), a case in the Australian High Court, it was held that a report that the plaintiff had been arrested in connection with an assault could not give rise to the imputation that he was guilty or proba-

bly guilty of that offence.

While it now seems clearly established that the statement that a person is being investigated or has been charged cannot alone give rise to the imputation of guilt, that imputation can certainly be carried if additional matter in the report supports it. The courts have allowed reasonable latitude to reporters in this department. In the *Harrison* case, for example, the article stated that the arrest followed investigations by detectives who had "worked around the clock to fulfil a directive from the Deputy Premier ... that the culprits be found". Even this was not capable of displacing the presumption of innocence.

Third party opinions

The principal category of cases in which the imputation of guilt is conveyed, and of which writers must be wary, is what are known as the "repetition" cases, in which the report repeats someone else's accusation that the plaintiff is guilty of the offence. There is a difficult dividing line to be drawn because one would normally interpret the laying of a criminal charge as an allegation by the police that the person was guilty, and a report of that charge as being a repetition of that allegation. As *Harrison's* case shows, however, the courts do not treat it in that way. Nonetheless, in *Wake v John Fairfax & Sons* (1973) the New South Wales Court of Appeal held that a report of an accusation made by a race steward against a bookmaker was capable of conveying the imputation that the accusation was true. Similarly in *Parker v John Fairfax* (1980) a report that the plaintiff had been alleged in equity proceedings to have solicited a bribe was capable of conveying the imputation that he had indeed solicited that bribe.

Clearly, it will always be difficult to draw such lines. Nonetheless, the following broad practical guidelines seem to operate:

1. A report that a person is being investigated or has been arrested and charged by the police is not, without more, capable of conveying the imputation that he or she is guilty of the offence being investigated or charged.
2. The reporting of an express allegation by a third party that a person is guilty of an offence is capable of conveying the imputation of guilt.

The imputation of reasonable suspicion

Plaintiffs who are unable to assert that the report of their investigation or charge conveys the imputation that they are guilty, can nonetheless make the task of pleading a defence of justification difficult by claiming that the report conveys the imputation that they were suspected on reasonable grounds of being guilty of the offence. In *Jackson v John Fairfax & Sons Limited* (1981), Justice Hunt of the New South Wales Supreme Court said:

"To state that a man has been charged with a criminal offence suggests, in my view, at the least that he has so conducted his affairs as to give the police (or the Corporate Affairs Commission) reasonable and probable cause (or, perhaps, merely good grounds) so to charge him".

This view was considered by the New South Wales Court of Appeal in *Sergi v Australian Broadcasting Commission* (1983), where Justice Glass appears to confirm that to avoid giving rise to such an imputation it is necessary, by the language in which the report is couched, to disclaim any intention to suggest that the charge is laid on reasonable grounds. He said that "distinctions of exquisite delicacy will have to be made depending on small differences in the language employed," and suggested that a report would have to be "cautiously articulated" to succeed in disassociating the publisher from the suggestion that the police suspicion was reasonably based. A reporter faces obvious difficulties in reporting the fact of an investigation or arrest without giving rise to this suspicion. One can see that to report "the police have arrested and charged Mr. Brown [ed: no relation], but we believe that they have no reasonable grounds for doing so" would be likely to avoid defaming Mr. Brown, but it may defame the police officers concerned.

It is important therefore to always bear in mind when deciding what can be safely reported the question: what would I be required to prove, to establish a defence of justification?

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