

# Why publications get sued so often

**Brian Gallagher explains why, despite mooted defamation reform, the welter of defamation litigation will continue**

Journalists are sitting on a mountain of defamation writs which is unlikely to diminish in the future even with liberalization of Australia's defamation laws. That is because the main source of writs is not based on deficiencies in the law which are likely to be reformed, but on factors to which the Attorney's General have paid scant regard.

A lot of copy submitted for publication in metropolitan daily newspapers and magazines has to be amended, or occasionally spiked, if the publications are not to be sued.

If defamation suits instituted against the media generally and litigated or settled in favour of the plaintiff were to be analysed the same following factors would be found to be the cause in many of them. In the absence of any fundamental reform of defamation law, journalists and editors must continue to guard against the pitfalls discussed below.

## Misunderstanding the law

**Repetition:** Repeating a third party's defamatory statement, in the belief that liability for defamation can thereby be avoided, is one common pitfall likely to lead to a defamation action. An example of the kind of statement one should be careful about repeating in print is:

*"People have been making money out of the Squire family for years. The Squires, who run a small security business in the Sydney suburb of Croydon, are politely asking the giant Mazda Corp. of Japan to pay some royalties on a patent which they allege has been flagrantly infringed."*

**Comment:** The mistaken assumption that a defence of comment can be established to an expression of opinion although the facts on which it is based are not indicated. Here is an example where the facts on which the opinion is based are set out, but the kind of editing which can lead to a defamation action is also indicated by underlining:

*"By failing to do this (engage in cost cutting measures and negotiate a quick settlement with the bondholders), Fairfax was being presented as a company with deteriorating earnings, no attempt at cost control and major litigation between the bondholders, the company and the banks. 'Talk about the lunatics being in charge of the asylum', Mr Turnbull said."*

**Ineffective Denial:** While the disparaging meaning conveyed in one part of an article can sometimes be removed by a complete rebuttal of that meaning in another part of the article might found a defence to a defamation action (the 'bane and antidote') a simple denial will seldom offset a defamatory imputation. For instance:

*"Late last year he was the victim of malicious and untrue rumours that his ministerial income was augmented by gifts from the beneficiaries of his zoning decisions."*

**Ineffective Qualifications:** The belief that defamatory imputations in a poster or headline can be qualified by material in the story to which it refers or other inconspicuous material in the poster itself has proved another fertile basis for many suits.

**Smith guilty**

**QC claims**

## Failure to detect defamatory imputations

**Implicit in the words:** One feature of defamation law which many fail to understand is that liability in defamation crystallises not around statements, as such, but rather around the imputations conveyed by those statements. To say, for instance, 'that Tom Smith has AIDS', is not only capable of being defamatory at its literal level, but may also be said to convey the defamatory imputations that Tom Smith is gay or uses intravenous drugs or that he is promiscuous. Care must be taken to read between lines to detect implicit meanings. Another example would be the imputation conveyed by irony in the following statement that another TV presenter had appeared drunk:

*"I am Hinch and I am sober."*

**Implicit from the layout or pictures:** Another fertile ground for writs arises from layout of headings, pull-out-quotes, articles and pictures. Here is an obvious example:

|  |   |
|--|---|
| <b>MINISTER CALLS FOR HANGING FOR CHILD MOLESTERS</b>      |   |
| Story about Ministers' call for hanging of child molesters | Picture of Rugby League star                          |
|  | Story about Rugby League star's resignation from club |

### **Failure to perceive that persons defamed have been identified**

The identification of the plaintiff may be linked to a defamatory imputation by facts known to the public at large or some members of it, even though no explicit identification is made in the copy. Here are two examples:

Poster

*"Which bank stole my farm"* (reference to Westpac intended)



**Photo courtesy of Mirror Australian Telegraph Publications**

*"I am Hinch and I am sober"* (reference to Willessee intended)

Inadvertent reference to all members of a small, identifiable class when reference to only one member of that class is intended is another potential pitfall. For instance by stating "I am Hinch and I am sober", Hinch was referring to the fact that a well known TV compere had appeared on air the previous evening apparently drunk. This is arguably a reference to each member of a small group of TV comperes, not just Willessee.

### **Optimism**

Publication in the hope or belief that the truth of a matter will be readily made out in court but when establishing the truth of a particular imputation may depend on:

- essential witnesses who are not likely to give evidence in court because they fear losing their jobs or their lives, or are dead, or out of the country
- documents which are likely to be destroyed by the time the matter gets to court or which may be fake
- reliance on the journalist's simple 'gut feeling' that he or she 'knows it's true' can prove lethal.

### **Factual errors**

Factual errors are a common reason for the bringing of defamation actions. Journalists should be cautious about relying on sources such as:

- cuttings from other newspapers;
- sources who were not direct witnesses but got their story from someone else; and
- sources who are biased (or even malicious) such as police or the parties' legal representatives.

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