Qualified privilege and the media

... paper examines the background to this defence in Australia and finds the defence of limited application to the media

Qualified privilege covers two subject headings: first, for 'fair' reports of ... ary debates, court ... meetings and public ... could loosely be ... secondly, protection ... version of facts or the ... nor's opinion, or a ... in most cases could ... as 'commentary'. ... for fair reports of ... gs is covered in each ... law and the same ... court proceedings, but ... in the case of extra- ... which cannot be ... sed but which should ... er is concerned with ... ory of privilege,

... commentary

... the other two classic ... s, namely truth and ... ment, are not avail- ... statement may yet be ... is made in "the ... gal, moral or social ... ving a corresponding ... ive it" (*Adam* v *Ward*

... were formulated, it was ... they would apply to the ... en more obvious when ... test for the existence ... social duty' from the ... ngstone* (1930):

... ss of right minded men ... fendant have considered ... circumstances, to make

... Zealand case of *Truth* ... was observed that the ... st relationship could ... relation to the mass ... ients' were the public

... ulty in understanding ... distinct from agreeing ... word 'interest' is not ... se of 'public interest' ... sity. The old cases ... matters as reporting ... nours and writing ... ing employees, in the ... ur on some innocent character was mistakenly, but honestly, placed. The 'duty' was to make the report, something which is viewed by modern standards as less of an obligation. The 'interest' was the rightful concern of the person, group of organisation receiving the report in what the report contained, eg a concern to shun unreliable employees or prosecute felons. Applying this rule to publishers and broadcasters aiming at an audience of millions, requires a giant step across an unbridgeable gap.

'any degree of uniformity and predictability is an advance on the present situation'

A good example of the difficulty in applying the test to media publications was supplied by a 1932 English case, *Chapman* v *Ellesmere*, where it was held that *The Times* was not protected by privilege when it published a decision of the stewards of the Jockey Club - only a section of readers had an interest in racing. But a publication of the same decision in the *Racing Calendar* was protected, because it was presumed that all its readers were interested in racing.

In Australia, *Morosi* v *Mirror Newspaper* (1977), seems to have settled that, for the press, any common law defence of qualified privilege is an illusion. *Blackshaw* v *Lord* (1983) was a recent English case where the question of qualified privilege for a newspaper was raised squarely. A public servant had been employed in a department which had been found responsible, by a House of Commons committee, for wasting large sums of money in a North Sea Oil development. The public servant had not been named, but a journalist discovered his name and published a report suggesting that his resignation from the public service had been connected with this irregularity. The plaintiff sued and was awarded $45,000 for the libel. The Court of Appeal held that for a newspaper report to be protected by qualified privilege at common law, it was not enough that the report was of general interest to the public. The public at large had to have a legitimate interest in receiving the information contained in the report and the publisher had to have a corresponding duty to publish the report to the public at large. At the time the article was written, the allegation of incompetence against the plaintiff had not been established, so the public at large could not be said to have had a legitimate interest in reading the defendant's inference or speculation that he had been dismissed for incompetence and the question was a mere rumour.

Loveday v *Sun Newspapers* (1937) illustrates an exception to the rule. In this case the plaintiff had attacked the Town Clerk in a newspaper, and the Town Clerk had used the same medium for a response, which contained the words complained of. The High Court held that the Town Clerk and the newspaper were justified in writing and publishing the counter-attack. This must be seen as a special and unusual case well outside the ordinary realm of mass-media publication.

Qualified privilege by statute

For Victoria this subject is no longer academic because of the likelihood that Victoria will become a 'Code State', at least in part, following an accord with New South Wales and Queensland.

Unlike the common law which requires a 'corresponding interest or duty' between the communicants, this kind of 'reciprocity' is not required under the Codes.

In Queensland (section 379) and Tasmania (section 20), the defence of qualified privilege operates in a wide range of circumstances including publications in the media on subjects of public interest:

- protecting the interests of the person making the publication, or some other person, or for the public good
- for the purpose of giving information to the person to whom it is made with respect to some subject on which the person has, or is believed, on reasonable grounds, to have, such an interest in knowing the truth as to make the publication reasonable under the circumstances.

The first test goes beyond the common law in sanctioning a publication made for the protection of the interests of some person other than the defendant without stipulating a corresponding duty in the recipient to protect the interest mentioned. The term 'public good' is unclear, although *Calwell* v *Ipec* (1975) suggests it correlates with a liberally

defined 'public interest'.

Unlike the restricted meaning of 'interest' at common law, the Codes construe the term broadly so that it includes information on any matter of genuine interest to readers of a general newspaper as long as reasonable care has been taken to check the facts.

New South Wales

In this State the rule that the receiver of the defamatory statement must have an interest or duty is modified by Section 21 of the *Defamation Act* to the extent that if the publisher of the statement believes on reasonable grounds that the recipient has an interest or duty, the defence will succeed.

Furthermore, in NSW, section 22 of the Act provides that if the recipient has an interest or an apparent interest in some subject and the matter is published to him in the course of giving him information and the publisher's conduct is reasonable, then the defence of qualified privilege exists. The recipient has an apparent interest if, but only if, at the time of the publication the publisher believes on reasonable grounds that he has an interest.

However, as was stated in the *Morosi* case, section 22 gives no carte blanche to newspapers to publish defamatory matter merely because the public has an interest in receiving information on the relevant subject. What the section does is to substitute reasonableness in the circumstances for the duty or interest which the common law principles require to be established.

Section 20(3) also provides that in a multiple publication where some but not all of the recipients are such that qualified privilege would exist and the extent of the publication is reasonable, "having regard to the matter published and to the occasion of qualified privilege", the defence exists as regards all recipients.

Where the privilege is lost

Unlike the common law which says that qualified privilege is lost if the publication was actuated by malice, the codes in Queensland and Tasmania impose a test of good faith.

That means that the material published must be:

(a) relevant to the matters the existence of which may excuse the publication of the defamatory material;

(b) that the manner and extent of publication do not exceed what is reasonably sufficient for the occasion; and

(c) that the publisher is not actuated by ill-will or improper motive and does not believe the defamatory material to be untrue.

In most respects, the codes reflect the common law test of malice which applies to "material published for the information of he public". Sections 14 and 15 of the *Defamation Act* in New South Wales make it clear that qualified privilege is not defeated by malice if the imputation was true and the manner of the publication is reasonable having regard to the imputation and the occasion of qualified privilege.

However, for publication of fair reports or extracts, the test of good faith applies. In the *Waterhouse* case, Justice Hunt said that in the NSW legislation absence of good faith was not the same as the common law concept of malice.

Reasonableness

Section 22 of the *Defamation Act* (NSW) makes it clear that a publisher must establish that the publication of the defamatory imputation was reasonable.

The policy consideration underlying the 'reasonableness' requirement was stated by the Privy Council in *Austin* v *Mirror Newspapers* (1986) to be the interests of society in ensuring that a journalist has the facts right, otherwise it would condone carelessness by newspapers in their reporting.

Deciding whether the publication of material is reasonable was held in the *Austin* case to involve considering "all the circumstances leading up to and surrounding the publication".

Until the *Morgan* v *John Fairfax* (1990) case, it was generally accepted that the court's view of what is 'reasonable' had hampered the potential of the section 22 defence in New South Wales. The article in the *Australian Financial Review* at the centre of this case was a survey of arguments relating to the Aussat satellite and included the words:

"Not surprisingly, the arguments of the Telecom unions have had a strong influence in the councils of the Government. They have been willing to produce totally phony estimates of costs and usage of the new saiellite, employing supposedly reputable and independent commentators".

The plaintiff, though not named, was identifiable as one of those 'commentators'.

At the trial, the jury rejected defences of truth and fair comment and found for the plaintiff, awarding $150,000 damages. But the defendant moved for judgment on the ground of 'reasonableness' under section 22(1)(c) of the Act.

Justice Matthews said that the article of the defendant was 'reasonably' published for a number of reasons including: another person highly qualified had reached similar conclusions to that of the defendant; it was reasonable for the defendant to take the view that there was no possible explanation for the defects in the plaintiff's study; all the circumstances of the case will determine whether a defendant must make further enquiry before defaming a person upon the basis solely of that person's written output; and ample material was possessed by the defendant for it to have reasonably published the matter being judged by the objective standards.

Unhappily, although the reasonableness/privilege defence is a matter for the Judge under Section 23, the questions of the fact that establish that defence are for the jury, in the absence of consent. The jury had been unable to agree on various questions submitted to them, so had brought in a general verdict for the plaintiff thus ensuring no precise answer by the jury to the vital question of whether the author genuinely believed to be true the imputations alleging dishonesty, bias and other defects which the jury's verdict showed the passage to have conveyed concerning the plaintiff, and to have been in fact untrue. The Court of Appeal directed a new trial, with expressions of regret befitting a Greek tragedy - especially as the new trial was to be not the second, but the third, a prior trial having been unaccountably mistried.

Future directions

Remarkable as it may seem, the Attorneys-General of Queensland, New South Wales and Victoria have reached broad agreement about uniform defamation laws, including qualified privilege extending to the media. Disagreements in the latest *Discussion Paper* (January 1991) have evidently been overcome and the Bills should be ready for submission to the respective parliaments later this year. It is devoutly to be wished that the Bills will actually be debated in parliament, as well as in the public forums, but, equally, that they will not founder because of bickering amongst pressure groups.

I understand it is proposed that qualified privilege will apply where the publication was made in good faith, in the public interest and 'reasonable enquiries' were made - presumably, enquiries as to the existence of facts, but possibly extending to 'adequate homework' so as to justify an expressed opinion, as in the *Morgan* case.

Even when the text of the new law is known, it will be as hard to predict how it will work in practice, as it was in the case of the NSW 1974 Act. What is certain is that any degree of uniformity and predictability is an advance on the present situation. If achieved, will it be followed in the other states? Wait and see.

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