Injunctions in defamation actions

Frank O'Donnell discusses recent cases which have challenged the courts' reluctance to grant injunctions and finds injunctions are still difficult to obtain

Traditionally, courts have been reticent in granting injunctive relief. This reticence is because defamation actions, unlike other areas of the law, require special consideration of the right to freedom of speech and the public's right to engage in open and fully informed debate.

One hundred years ago in the celebrated case of *Bonnard* v *Perryman* the English Court of Appeal handed down a decision which set out the test for the granting of interlocutory relief for the publication of defamatory material.

After an interlocutory injunction restraining the publication of the alleged libel was granted, the defendant publisher appealed. The Court of Appeal in overruling the lower Court said:

"it is obvious that the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction... The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done, and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

Recent Developments

The inflexible policy of refusing interlocutury injunctions in defamation actions was confronted two years ago in *National Mutual Life Association* v. *GTV Corporation* (1989).

This case concerned an application by National Mutual to restrain General Television Corporation Pty Ltd, Jana Wendt, Martin King and TransMedia Productions Pty Ltd from broadcasting on Channel Nine's program *A Current Affair*, the second segment of a two-part program dealing with certain sickness and disability insurance policies of the plaintiff and the manner in which they were sold to the public. The National Mutual had already commenced proceedings against the defendants claiming that it was defamed by the broadcasting of the first segment and associated promotional material when it sought the injunction.

The plaintiff's application for an interlocutory injunction was based on restraining the defendants from:

- broadcasting defamatory material; and
- committing a conspiracy to injure the plaintiff by misleading the public.

Broadcasting Defamatory material

In essence, Justice Ormiston (the judge at first instance in the *National Mutual* case), had to consider two substantive issues. First, whether the plaintiff had established a prima facie case. Secondly, whether it was 'just and convenient' to grant an injunction.

Justice Ormiston resolved the first issue by asking the question formulated by the High Court in *Murphy* v. *Lush* (1986) of whether there is:

"a serious question.....to be determined which, if determined in favour of the plaintiff, would require the grant of an injunction in one form or another."

It was held there was a serious question to be determined because "whether looked at independently or in conjunction with the first program and the promotional material the segment would be defamatory if broadcast".

In relation to the second issue Justice Ormiston held that the test of what is 'just and convenient' had to be determined after considering 'the balance of convenience and hardship'. The defendants argued that the balance of convenience and hardship was in their favour because there was sufficient evidentiary material on affidavit before the Court to justify the right of freedom of speech to prevail over any injury which the plaintiff might have incurred from the broadcasting of the defamatory material.

In rejecting the defendants' argument, Justice Ormiston held that while recognising that the courts have given higher priority to freedom of speech over a potentially aggrieved individual (particularly where damages would be a sufficient remedy), merely asserting the defence of justification with the aim of proving the truth of the allegations at trial was not sufficient for the defendant to succeed. Although it was not necessary for the defendant to precisely identify the source of information and to give detailed reasons as to why it believed its allegations to be true, some 'reliability' had to be attached to the statement. In this case, there was doubt over the reliability of statements and "sufficient evidence of a real risk of loss of goodwill by the plaintiff, to require the defendants to go further".

However, the court held that it could not ignore the public interest in the free dissemination of news, ideas and opinion. Public policy had to be weighed against the Court's power to grant equitable relief. Here, it was deemed in the public interest that a major insurance company be open to scrutiny and criticism.

The Court held that the conspiracy to injure claim was founded on a:

"fundamental misconception. It assumed that the court should grant interlocutory relief because an allegation of conspiracy was added to an allegation of libel. The conspiracy was to commit the very same libel that is the principal ground for relief...."

However, His Honour noted that had the plaintiff been able to show a predominant intention to injure, as in the English case of *Gulf Oil* v. *Page* (1987), then the outcome in this case may have been different.

Although the plaintiff was unsuccessful in this action, the case does demonstrate a shift in the law's attitude towards interlocutory injunctions restraining publication. It would appear that the courts are more willing to balance the injury to a plaintiff against the defendant's right to freedom of speech and the public's right to engage in open and fully informed debate. Indeed, as the Full Court noted when the case went unsuccessfully on appeal:

"It has been felt, we think, that it is usually better that some plaintiffs should suffer some untrue libels for which damages will be paid than that members of the community generally, including the so-called news media, should suffer restraint of free speech."

In the NSW Supreme Court decision of *Chappell* v. *TCN Channel Nine* (1988). Justice Hunt granted an interlocutory injunction. Interestingly, this case also involved the program *A Current Affair*,

which proposed to telecast a segment raising questions of adultery and the participation in unusual sexual activities concerning the plaintiff, a well known Australian cricketer.

The defendant argued that the rule in *Bonnard* v. *Perryman* supported its application to prevent publication because it could justify the defamatory allegations at trial. However, Justice Hunt found that there was no real ground for supposing that the defendant might succeed on the defence of justification, as the imputations could not be seen as being related to a matter of public interest — a necessary requirement for success in a defence of justification under section 15 of the *Defamation Act* 1974 (NSW).

In granting an interlocutory injunction, Justice Hunt referred to Justice Ormiston in the *National Mutual* case with approval and made it clear that the rigidity of the *Bonnard* v. *Perryman* test was not applicable.

Animal Liberation Case

The most recent decision concerning interlocutory relief is the Victorian Full Court decision of *Animal Liberation* v. *Gasser* (1991). This case concerned a vigorous campaign by the defendants to persuade members of the public not to attend circuses. The defendants sought to deter persons from attending the circus by subjecting the persons present, including elderly people escorting young children, to intimidation constituted by accusations (some by placard and some shouted). These accusations carried the implications that the persons attending the circus should be ashamed of themselves for attending, and for escorting children to the circus. They were calculated to put the children and their escorts in fear.

The plaintiffs commenced proceedings for causes of action in defamation, malicious falsehood and nuisance. They also sought interlocutory injunctions restraining the appellants from further publishing the words complained of and from obstructing and interfering with the patrons or prospective patrons of the circus.

The defendants pleaded the *Bonnard* v. *Perryman* defence swearing on affidavit that they believed the words complained of were true and that they intended to plead justification. In an unreported judgment of 12 January, 1989, Justice Beach ordered an interlocutory injunction against publication of the words complained of. He also ordered that the appellants be restrained from "conducting any demonstrations" on or adjoining the respondents' premises during the performances of the plaintiffs' circus or one hour before and after such performances.

In dealing with the application to restrain publication, Justice Beach referred to the *National Mutual* decision, and said:

"as to what had been called in New South Wales the 'special exception' in favour of a defendant in a defamation action, there is no such special exception where a plaintiff's cause of action is based on injurious falsehood."

The Full Court however, held that Justice Beach had been led into error on this point of law. They noted:

"the mere fact that a plaintiff pleads injurious falsehood, in addition to defamation, is not sufficient of itself to relieve the court from having to be satisfied that there is a very clear case for an injunction before restraining the repetition of defamatory words which the defendants propose to justify and which they have some real and not illusory prospect of justifying."

'a plaintiff will not obtain better entitlement to an injunction by simply "tacking on" other causes of action'

In other words, the Full Court basically confirmed the ruling in *National Mutual*; that is, a plaintiff will not obtain better entitlement to an injunction by simply 'tacking on' other causes of action to an application for injunctive relief in a defamation action without being able to justify that those grounds do in fact exist.

Stop Writs

In addition to the above a plaintiff can also issue a 'stop' or 'frightening' writ. They are commonly seen as an alternative to injunctive proceedings. The aim of a 'stop' writ is to stop the defendant from publishing or republishing defamatory matter, rather than to proceed to trial on the issue.

Unlike an injunction, which is a legal remedy to prevent the publication of defamatory matter, the stop writ works by intimidating the defendant into silence.

There is a mystique to 'stop' writs. There should not be. They are not a particular type of writ with a particular legal remedy. They are initiated with the intention of intimidation. Their motive is to stop the further publication of the allegedly objectional material whether it is defamatory or not. The rationale is that should further publications ensue and subsequently be found to be libellous and to have exacerbated the initial libel, this exacerbation is likely to be reflected in an increased award of damages. However, by intimidating the defendant into not proceeding to trial the plaintiff may be accused of abusing the processes of the court to achieve what he may not have been able to achieve in court. In the English case of *Re Majory* (1955) the Master of the Rolls, Evershed, stated that court proceedings could not be used in this way and that persons using or threatening proceedings to obtain a collateral benefit could be guilty of an abuse of the process of the court.

The collateral benefit need not only be the suppression of the defamatory matter. For example, in another English case, *Goldsmith* v. *Sperrings* (1977), the plaintiff began actions for libel against the defendant newspaper distributor and 36 secondary distributors of the satirical magazine *Private Eye*. Some of the secondary distributors agreed not to handle the magazine in future, at which point actions against them were agreed to be dropped.

Conclusion

Nevertheless, if one wishes to pursue injunctive relief for suppression of defamatory material, one should think twice. Although the Courts may have indicated an easing of the once rigid *Bonnard* v. *Perryman* rule, the reality is that it is only in the most extraordinary of cases that one will succeed. Freedom of speech will generally outweigh private interests and any injury to the plaintiff which can be remedied by damages. One will only succeed:—

- Where there is a prima facie defamation which is so clear that a jury's finding of no defamation would be set aside as unreasonable.
- Where there is no room to debate any of the defences such as a qualified privilege, justification or public benefit.
- Where there is a substantive question to consider at trial and justice demands the restraint of the publication.

However, if interlocutory relief is not available but one believes there has been a defamation then one has every right to issue a writ, no matter how dubious the alleged defamation.

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