Defamation Law Reform

Professor Flint discusses the latest stage in the process of developing uniform defamation laws

In their Discussion Paper No. 2, the three eastern Attorneys General continue their quest for uniformity in defamation law. In this they have the support of at least another of their colleagues, Attorney General Sumner of South Australia. The Attorneys do not envisage that uniformity will be achieved by a uniform bill, but rather through complementary legislation based on an agreement as to what constitutes the fundamental elements of defamation law.

The major issues now are qualified privilege, court recommended corrections and justification. A number of other matters are raised and there is agreement on several of these. The limitation period will be reduced. Actions will be required to be brought within six months with an absolute limitation of three years. Criminal defamation will be retained, but subject to the discretion of the Director of Public Prosecutions or similar officials.

The review of contempt laws will be the subject of separate reference. The Attorneys accept that there is a problem for the media and others concerning knowledge of pending cases. They cite the experience of the Minister for Justice, Senator Tate, who issued a press release regarding an alleged drug smuggler when, unknown to the Minister, the person was on trial. The trial had to be aborted.

Privilege

The Attorneys also raise issues of parliamentary privilege and protected reports. They pose a number of interesting questions.

Should privilege be extended to other bodies performing a similar function to parliament? Should proceedings in parliament be defined? Should the categories of documents that attract privilege be extended? Should privilege be extended to public meetings?

New South Wales and Victoria have agreed that the judges should have the responsibility for determining the quantum of damages, juries having the power to determine whether damages should be nominal or actual. Caps on damages will not now be introduced. In Victoria, the jury will still determine damages, but the judge will be permitted to give guidelines on the range of damages.

The Attorneys are also attracted by Division 8 of the New South Wales *Defamation Act* in relation to innocent publication. The situation in the case of Artemus Jones (*Hutton* v *Jones* (1910)) is cited as an example of one form of innocent publication. The more frequent problem of innocent distribution, meaning innocent dissemination by booksellers, libraries, etc. is considered without coming to any final decisions. The Attorneys are not inclined to support submissions to modify the common law so that the distributor is not liable where he or she did not know the publication contained defamatory material, even if the publication was likely to contain such. They are also disinclined to give absolute privilege to the proceedings of certain church tribunals or structures.

The Attorneys are receptive to procedural reforms allowing for speedier trials, oversight of the conduct of the parties and the striking out of frivolous actions at an early stage. A writ which is dormant and inactive for a period of twelve months will be struck out for want of prosecution. Although defamation lists are not deemed justified in Queensland and Victoria, they think general case management systems should be beneficial. One of the difficulties for the parties in defamation cases is the complex and expensive procedures involved. The Attorneys note that an application to strike out on the grounds of the action being frivolous or vexatious is difficult to obtain as the claim must be almost hopeless, and will discuss ways proposed to alleviate this with members of the judiciary.

Public figure defence

The Attorneys have firmly dismissed any question of introducing a public figure defence. They again point to difficulties in applying this aspect of constitutional law in the United States. They refer to research which concludes that the proposition that politicians benefit from defamation actions is misconceived, and that politicians do significantly worse than other classes of plaintiffs. After media organisations, they are the largest group of defendants. Rather than introducing a public figure test, the Attorneys argue that increased freedom of speech and expression would flow from a workable, uniform qualified privilege which the media could rely on when publishing information on matters of public interest. The difficulty, of course, will be in finding a form of qualified privilege which is 'workable'.

Qualified privilege

Appropriately, much of the paper deals with the issue of qualified privilege. Statutory qualified privilege extending the common law principle of protective communications in New South Wales and Queensland is accepted as an improvement. The new uniform defence will apply, in addition to and not in substitution for, these existing positions. However, amendments or even a partial restatement of those provisions are not ruled out.

The proposed new defence would require a responsible standard of journalism. It should not protect the publication of reckless, baseless or sensational statements which are injurious to reputation. It should be sufficiently flexible so as to enable a court to consider, in each particular set of circumstances, whether the public interest in receiving the information outweighs the private injury which may result. The Attorneys say that the defence should not operate where the manner or extent of publication is excessive, or where a publisher is activated by ill will or improper motive.

Reasonableness

However, the Victorian Attorney has strong reservations about the proposed new defence. The pleading by defendants of qualified privilege could, he says, become the rule rather than the exception. He is concerned about cases where the law would have to choose between two relatively innocent parties, that is where a person is defamed but the media has exercised reasonable care. The statement would nevertheless still be false and defamatory. He believes that in such a case the media should bear the loss. However, in the interests of uniformity, Victoria is considering a defence similar to section 22 of the New South Wales Act. Such a defence might still mean that the plaintiff could recover economic damages.

The Attorneys canvass the various submissions made to them on the standard of behaviour expected by those who would raise this defence. A concept of reasonableness based on standards of care would bring the tort of defamation closer to negligence. Appropriate journalistic standards would be considered and there would be no need to examine the state of mind of the defendant. One problem in any examination of whether conduct has been reasonable might involve a journalist being required to reveal his or her sources. As we know, this is the great stumbling block. Journalists and newspapers consider it unethical to reveal their sources where a condition of confidentiality applies. To justify his or her conduct the journalist will say he or she relied on a source of impeccable standing; however, to justify this, he or she cannot, because of ethics, tell the court who that source was. This apparent riddle is answered in some United States jurisdictions, and in other countries, by laws shielding journalists from answering in such a case, either absolutely or in certain cases. For the defence to be workable it may need to be accompanied by some shielding provision.

Another submission was that the publication of the defence be made conditional upon the publication, by request, of a reasonable statement by way of explanation or contradiction. This would impose difficulties on editors of deciding what is reasonable, what is defamatory, etc. It might be possible to resolve such issues speedily by a reference to a third party, for example, the Press Council, to rule on this question.

Another area of difficulty is statements made by a third party. One suggestion is that there be a defence of attributed statement which could require, among others, that the publisher not have adopted the report and that there be a right of reply.

Another suggestion canvassed is an amendment to section 22 of the New South Wales Act, providing that the defence is not defeated by the plaintiff being able to show the matter complained of is untrue, or that the defendant or its agent did not believe in the truth of the matter. This would change the current requirement that the defendant publisher have an honest belief in the truth of the matter.

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Court recommended correction statements

The Attorneys have decided to establish a system of court recommended, rather than court ordered, correction statements. They recognise the right not to publish is as important as the right to publish. It is imperative, they believe, that this be by way of a fast track procedure. After a writ of defamation is issued, any party could apply for a court recommended correction statement, supported by affidavit. Damages would not be awarded at this stage. Any implication that the acceptance of a recommended correction could be an admission of guilt for the purposes of later proceedings would be expressly excluded. The Attorneys acknowledge that a jury could still make such an inference. This possibility could be a matter relevant to the exercise of the judge's discretion whether to make a recommendation, particularly where the plaintiff is well-known or the matter has received extensive publicity.

It is disappointing that the Attorneys reject the proposition that the publication of a retraction statement should thereafter limit a plaintiff only to recovering no more than proven economic loss. Whether or not a jury should be made aware of the proceedings for a court recommended retraction is not decided. There would be arguments to make the failure to publish inadmissible - the spirit behind the proposal is to encourage the use of this proceeding.

The Attorneys acknowledge that it may be inappropriate to require a judge to determine the precise contents of the retraction statement. Ideally, this could be a matter appropriate for resolution by an outside mediation process. One option suggested is through the Press Council, because that organisation is one which consists in part of persons with expert knowledge of the technical aspects of media distribution. The Attorneys see two difficulties with this. First, the Council normally requires a complainant to enter into a waiver from taking out a defamation action. The Council has replied that a derogation from its practice would be granted in cases such as this. The other problem is that different sections of the media have expressed varying degrees of support for the Council. The views of the Press Council and media organisations have been sought on this.

Another important issue raised in the Discussion Paper is the question of justification. The Attorneys have decided that the defence of justification will consist of truth alone, except where the publication is an invasion of privacy. In this case the publication will only be justified if it is in the public interest. They believe that privacy and reputation are inextricably linked. This approach may well have certain advantages. The possibility of a defendant being liable in separate actions for defamation and privacy is not attractive; it would be better if, where a plaintiff felt wronged, considerations of defamation and privacy were considered in the one action. The precise form of what constitutes private matters will be given further careful consideration.

The Attorneys have made progress in some areas where there is agreement. The rejection of a public figure defence will be disappointing to many, but is not unexpected. The decision to incorporate a privacy aspect in the defence of justification would seek a reasonable compromise, subject of course, to a reading of the fine print when the draft section is completed. What will be important is that the Attorneys succeed in their aim of finding a workable defence of qualified privilege. This search is laudable, and it is to be hoped that the Attorneys are successful in this venture.

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