obtaining a damages verdict for $30,000 (which would, judging on the experience of judge - awarded damages verdicts in the ACT, be a pretty good result). If both A and B incurred $80,000 in legal costs (easily done if a senior QC and senior junior are briefed to appear at the trial, along with a senior solicitor), then in all likelihood A will come out ahead in financial terms (assuming that B recovers less than $50,000 in legal costs on a taxation and A recovers all his/her costs).

The Commission anticipates that declarations of falsity will operate as a fast track method for plaintiffs to vindicate their reputation and at the same time will remove the "chilling effect" which the prospect of large damages verdicts is said to have on the media in reporting controversial stories. Given the financial considerations referred to above however, the question needs to be asked whether the declaration of falsity procedure will have a similarly chilling effect on the media.

Declarations of Falsity and the Contextual Truth Defence

The Commission has recommended that the current contextual truth defence cannot be pleaded to an application for a declaration of falsity. This will be relevant where, for example, the publication in question alleges that the plaintiff is a murderer and a thief, in circumstances where the plaintiff can prove he is not a thief but is unable to prove he is not a murderer. Under the current law, such a plaintiff would be ill-advised to sue for general damages on the imputation that he is a thief, given that the defendant could plead contextual truth on the basis that the imputation of murder "swamps" the imputation of theft. I suggest that a plaintiff in this situation would be similarly ill-advised to seek a declaration of falsity (if the Commission's recommendations are eventually adopted), even though the defendant could not plead contextual truth. If indeed the plaintiff did succeed in obtaining an order requiring the defendant to publish a declaration that the plaintiff is not a thief, there would be nothing to stop the defendant at the same time as it publishes this declaration also republishing the allegation that the plaintiff is a murderer. The plaintiff would thus have gained nothing by suing for the declaration.

Conclusion

The media will no doubt applaud the Commission for urging that plaintiffs must prove falsity and for seeking to move the focus of defamation actions away from large general damages payouts to clarification of the issue of truth or falsity. As noted above however, there is plenty room for questioning whether the prospect of paying indemnity costs for a plaintiff's QC, junior counsel, solicitors and expert witnesses will operate to muzzle the media and act as a powerful financial incentive for plaintiffs to commence proceedings.

Kendall Odgers is a solicitor with Gilbert & Tobin.

DEFAMATION - MEETING OF MINDS

Patrick George outlines the innovative procedure of 'Early Neutral Evaluation' in defamation cases.

Defamation cases turn on the meaning of the publication. Journalists often complain that they did not mean to say what the plaintiff alleges the publication means.

The law is clear nevertheless that the journalist's intention is irrelevant to what the words mean. Accidental defamations such as this cause stress to both parties, particularly when the plaintiff is being told by his/her friends what the words mean to them and the defendant refuses to apologise for a meaning he/she believes is far-fetched.

The litigation process can take 2-3 years for a determination of who is right and wrong at great cost to both parties.

Separate Trial

In New South Wales, a practice has developed by way of separate trial to allow either party to have the court determine whether the meaning (ie the imputations) is capable of being conveyed from the publication. The benefit of the process is that it can provide some definition to the issues at an early stage in the proceedings; but it does not provide a final determination because the jury continues to have the role of deciding what the words actually mean. Concern has also grown about the technical arguments that often arise on the formulation of imputations and about the utility of the process when the imputations complained of are struck out with leave to amend to plead other imputations.

Mediation

Parties have begun to explore the resolution of these cases through mediation. However without a determination of what the words mean, negotiations often become focused upon how much money the defendant is prepared to pay. In accidental defamation cases, this is very hard for a defendant to swallow. Without the benefit of some other means of resolving or determining the issue, the defendant is advised to 'look at the big picture'. This means that litigation costs money and at the end of the day having had a trial of some weeks with publicity and time away from work, a defendant will find the negotiated payment relatively painless.

Declarations

The NSW Law Reform Commission has proposed declarations of defamation and falsity as a fast track solution. There is debate about whether this procedure will be fast or practical. At this stage it is not being used although it is technically possible to seek a declaration that the plaintiff was defamed.

Early Neutral Evaluation

Recently however, I had the opportunity to use another procedure known as 'Early Neutral Evaluation'. This process is without prejudice to the rights of the parties and confidential. It requires an evaluator to consider the issues in dispute which by agreement are put before him/her to enable the evaluator to express a view as to the likely outcome of the dispute. The evaluation is not binding on the parties and the manner in which it is conducted is entirely within the agreement of the parties.

The evaluation can be arranged through the National Dispute Centre which provides a draft agreement and the names of a number of possible evaluators who, in this instance, were experienced defamation practitioners. The issue was limited to the evaluation of the degree of probability of the claimant succeeding on the alleged defamatory meaning of the words complained of. It was not limited to a determination of whether the meaning complained of was capable of being conveyed. At the end of the process, the parties had an opinion from a neutral Queen's Counsel as to whether the meanings were in fact conveyed.

Once the evaluation had been made, the parties were able to negotiate a mutually satisfactory settlement.

The benefit in this process was a considered opinion at an early stage of the dispute on which the parties could objectively base their settlement negotiations.

Further details of the process can be obtained from:

National Dispute Centre
233 Macquarie Street
SYDNEY NSW 2000
Telephone: (02) 223 1044

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The Law of Hate Speech

The difficult balance between protecting freedom of speech and regulating 'hate speech' is the subject of this talk by Melvin Urofsky.

One of the questions which American courts are now considering is one that is loosely labelled hate speech, the use of language to demean, insult and injure others. We are not talking about traditional notions of libel and slander, but epithets aimed at a group, the purpose of which is, in the words of one university's speech code, to intentionally demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of the individual or individuals.

One would think that in a civilised society, one would have no need for such regulations, that common courtesy would prevent one from uttering such crude insults. Alas, civilized society is not what we live in today, and not only in the United States. There appears to be rising tensions between ethnic and religious groups all over the world, of which the fighting in Bosnia is only the most visible and the most bloody manifestation.

The rise in tensions in the United States is a result, I believe, of the great social changes of the last thirty years which include civil rights for people of color, the women's movement, the gay rights movement, advocacy for people with disabilities, in short, the various movements that have attempted to bring people who were excluded from mainstream society into a full and equal citizenship.

This has, in turn, created a backlash, in which some people blame today's social problems on these groups. "If only blacks had stayed segregated, if only gays had stayed in the closet, if only women had stayed at home, if only people with disabilities had stayed in institutions, then we would not have problems with drugs, crime, abortion, affirmative action, irreligiosity" - the list goes on and on.

But these groups are not going back into the closet, kitchen, institution or rooms marked "colored only". They are fighting to preserve the gains they made and that is the context in which the current drive to secure so-called hate speech regulations must be viewed.

Under the United States Constitution, the First Amendment declares that "Congress shall make no law...abridging the freedom of speech, or of the press," and the Supreme Court has ruled that this prohibition applies against the states as well as against the national government.

The late Justice Hugo L. Black argued that the Framers of the First Amendment meant exactly what they said - no law means no law, of any sort. But the Supreme Court has never adopted that view, and over the last sixty years or so has erected a jurisprudence of free speech that gives great protection to expression, both oral and written, but also includes a balancing of interests.

The key - indeed the crucial - value of the First Amendment is its protection of political speech, and that is a principle accepted by both conservatives and liberals. No democratic society can hope to survive and prosper unless its citizens are free to speak their minds about public affairs. The greatest expression of this view is Mr. Justice Brandeis's concurrence in the 1927 case of *Whitney v. California.*

Brandeis wrote:

'Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliverative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the spread of noxious doctrine...Fear of serious injury