High Court Defamation Decision

Fascinating Possibilities

The High Court's latest statements about the Constitution's implied guarantee of freedom of political speech raise some fascinating possibilities, if only litigants, judges and even legislators will bravely explore them.

In two decisions - *Theophanous v. Herald and Weekly Times* and *Stephens v. West Australian Newspapers* - a 4-3 majority ruled that the implied freedom meant the balance in defamation law had to shift towards greater freedom to discuss political matters, and away from strict protection of reputation.

The bare majority built on the landmark 1992 decisions (*Australian Capital Television* and *Nationwide News*), in which the Constitution's explicit system of representative government was found to imply a freedom of political discussion.

Both the defamation cases involved Members of Parliament, and the court made it clear that MPs and candidates for parliamentary office now had less opportunity to sue successfully. The cost and complexity of defamation law, said the majority, had been chilling political speech. The underlying purpose of the implied freedom was to 'ensure the efficacious working of representative democracy.'

False and defamatory political discussion may be successfully defended if the defendant can show lack of awareness of falsity, absence of recklessness, and that publication was reasonable in the circumstances.

The scope of 'political discussion' is wide and includes 'discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. Discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, e.g., trade union leaders, Aboriginal leaders, politicial and economic commentators.'

Cunliffe v Commonwealth (1994) 124 ALR 120 was handed down on the same day and attracted no media coverage, but is undoubtedly part of the 'free speech' picture. Had just one judge thought differently, 'political discussion' might have expanded to include communications with government departments. The communications in *Cunliffe* were representations on behalf of immigration applicants. Legislation requiring registration of immigration agents was held not to offend the implied freedom by a majority of 4-3, with Justice Toohey joining the three *Theophanous* dissenters on the Court.

The widely differing views of the judges show just how unpredictable the development of the new 'free speech' doctrine might be. Justices Brennan and Dawson did not think such representations to government were political discussion at all. But Justice Deane, consistent with his 'radical' stance in *Theophanous*, said communications which constitute immigration assistance or immigration representations are among the most important of all political communications.

Other implications of the latest cases are discussed below.

Pressure on journalists' sources

Will the onus on the defendant to show that publication was reasonable in the circumstances lead to greater pressure for disclosure of journalists' sources? Some media lawyers say it will, and point to the conservative approach taken by the courts to a similar test in the section 22 defence in the NSW Defamation Act.

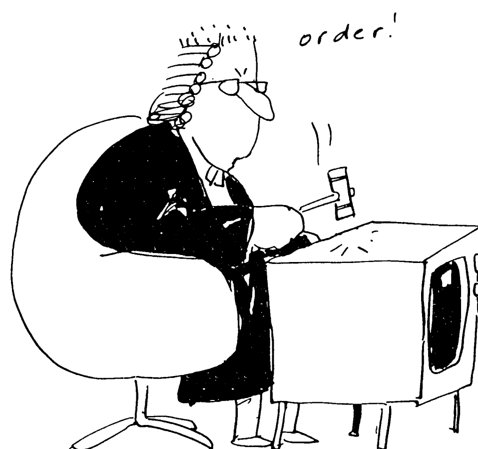
The prospect should give new impetus to the 'shield law' campaign. The Senate committee inquiry into the rights and obligations of the media recommended in October that journalists be given qualified protection through enactment of a structured judicial discretion. The committee acknowledged the importance of source protection to the free flow of information. It suggested that reform should be conditional on steps by the media to improve accountability.

The proponents of shield laws have always emphasised the importance to the democratic process of the free flow of information. Interestingly, similar concerns underpin the High Court's 'free speech' decisions. If the courts were to animate this aspect of the High Court's thinking, pressure for sources might ease, not worsen.

Prospects for greater FOI

Could courts be persuaded to go beyond laws which might chill the expression of political *opinion* (defamation) and invigorate the interpretation of laws designed to liberate the *information* on which those opinions may be based (FOI Acts or even whistleblower protection laws)? Is it not informed opinion which makes democracy work most efficaciously?

Perhaps the implied freedom could constrain attempts by a government to give existing FOI laws damaging surgery, as would the Tasmanian Freedom of Information Amendment Bill 1994 introduced in October to cries of protest.



Continued on page 6...

... *Continued from page 5*

Executive - Parliamentary Committee Relations

Spectators to the Conrad Black-Bob Hawke stoush before the Senate committee into foreign ownership may have forgotten one significant sideshow with constitutional implications. The Senate, a committee of which wanted certain information from senior Treasury officials, clashed with the Executive, whose Treasurer, Ralph Willis, instructed the officials not to provide the information. That stand-off is unresolved and the inquiry is still on foot. Meanwhile the High Court has pronounced on the need to ensure the efficacious working of *representative* democracy. So far, the focus has been on the electors in that democracy and their freedom of discussion with government and amongst themselves. But what of the representatives, and the need to ensure that they can work efficaciously?

Hate speech

Now that the Federal Government has introduced in Parliament its Racial Hatred Bill, which punishes racist speech, the question arises as to the extent it was strained through the sieve of the latest High Court decisions.

Commercial speech

Theophanous contains bleak portents for Philip Morris, the tobacco company which is challenging the legislative ban on tobacco ads in part on the grounds that it offends the implied guarantee of freedom of political discussion. The majority note that political discussion ordinarily excludes commercial speech, like advertising aimed at selling goods and services and enhancing profit-making activities. However, the majority note, 'what is ordinarily private speech may develop into speech on a matter of public concern with a change in content, emphasis or context.'

Paul Chadwick and Jenny Mullaly

Plus Ça Change...

While Paul Keating and the Liberals debate Menzies, those interested in media policy might enjoy a short consultation with history too.

Excerpt from *In Search of Keith Murdoch* (Desmond Zwar, Macmillan, 1980, p.89), after a description of Keith Murdoch's involvement in Joe Lyons' political career, first in Lyons winning the leadership of the Nationalist party and then in his defeat of the Scullin Labor Government states:

> *Most of these meetings took place at the [Melbourne] Herald office, at luncheons, to which Lyons went in at the front door in full view. When Lyons announced that he was walking down the steep hill from the Oriental Hotel in Collins Street to the Herald office to see Murdoch, a private secretary asked: 'Why don't you get him to see you here: you are the Prime Minister?' Lyons answered: 'Oh, I like Murdoch. It pleases him to see me in his office, and it does me no harm to go there.'*

Excerpt from 'Inside Keating's Creative Nation' (Michael Gordon, *The Australian* 22-23 October 1994, p 27), after reporting that 'many decisions were driven by the Prime Minister alone' states:

> *Another [example] is the agreement with [Rupert] Murdoch's News Corporation to establish [with public subsidy] a 20th Century Fox movie studio in Australia. Despite suggestions that Keating first put the proposal to [Ken] Cowley, chairman of News Corporation's Australian arm, three months ago, the truth is that it was Cowley who put the idea to Keating and Murdoch independently. Both were attracted to it.*
>
> *In recent weeks, Keating and Cowley discussed many options before the PM met Murdoch for three and a half hours last Thursday week at Murdoch's Canberra home to finalise an agreement. Like so many big decisions during Keating's period as treasurer, knowledge of the discussions was confined to a select few. Apart from discussing the studio idea, Murdoch and Keating canvassed their shared view of the opportunities afforded by the information revolution.*

We wonder what kind of independent advice was sought before a commitment of Government support was made to a capital investment by 20th Century Fox, something more than a struggling home-grown business in search of export markets.

Is history symmetrical, Prime Minister? On 4 January 1939, in a letter to his friend Clive Baillieu, Keith Murdoch mentioned his plans for his prime ministerial caller: 'I do not think it would require a long continued demonstration to convince Lyons that he should get out, but he definitely wants to stay in. He has lost his usefulness...'

On 14 March, Menzies, Lyons' deputy, resigned from the Lyons Cabinet, prompting the *Herald* to declare that Menzies had 'given new and welcome proof of his fitness for leadership in national affairs' (*Menzies - a Life*, vol 1, A.W. Martin, MUP 1993, p 262). On 7 April Lyons died and in the jostling which followed the *Herald* said of Menzies: 'Certain it is that with him in command, Cabinet would function like the very best of business boards...'

By the end of April, Menzies was PM. ❑

Paul Chadwick