Conference report

Media Law: Leo Cussen Institute, 26 March 1996

Interesting times for qualified privilege

The post-*Theophanous* defence of qualified privilege may become more significant than the constitutional defence based on the implied freedom of political communication, said Mark Dreyfus, of the Victorian Bar, at a defamation seminar hosted by the Leo Cussen Institute in Melbourne on 26 March 1996.

Prior to *Theophanous*, attempts by the media to rely on the defence of qualified privilege foundered because of inability to prove that publication to the general public met the requirement of reciprocal interest and duty. Theophanous held that political discussion can give rise to an occasion of qualified privilege, consequently opening up the defence to media defendants. The defence presents clear tactical, forensic and practical advantages for media defendants when compared with the political discussion defence, which requires proof of honesty, absence of recklessness, and reasonableness. Hopefully, future decisions will elucidate the relationship between the two defences.

Dreyfus also discussed the potential development of the concept of political discussion, an essential element of both the constitutional defence and post-*Theophanous* qualified privilege. *Theophanous* and Stephens clearly involved political discussion - the conduct of members of parliament - albeit at a 'low level'. Political discussion has since been held to exist in relation to debate about gun control (*Sporting Shooters*) and the conduct of an alderman and immigration agent (*Hartley*). Cases at the margins will require judicial pronouncement, particularly the circumstances in which the private life of a public figure constitutes political discussion. Dreyfus said that it is misconceived to describe the constitutional defence as a 'public figure' test, as the *Theophanous* majority rejected explicitly this option and defined political discussion broadly.

Peter Bartlett, partner at Minter Ellison and solicitor to *The Age*, prefaced his discussion of the New South Wales Law Reform Commission's defamation reform proposals by noting that the delivery by a NSW jury, the day before, of a $600,000 verdict (see Gazette of Law and Journalism, April 1996, page 2) highlighted the need for reform in that State. Bartlett described the report as disappointing.

Chief among his criticisms were the NSW focus of the report, which diminishes the prospects of achieving uniformity. Bartlett was doubtful that the proposed remedy of declaration of falsity could be delivered speedily, predicting that cases would get bogged down by discovery and interrogatories. The remedy would disadvantage defendants, because the plaintiff's burden of proving falsity is not significant - achievable merely by denying the truth of the material - and defendants are precluded from relying on important defences. The requirement that media defendants publish declarations of falsity authored by judges raises questions of editorial freedom and constitutionality. Claims against the media may increase as a result of the new remedy.

Bartlett also suggested the scenario that plaintiffs might seek a declaration of falsity in NSW, then sue for damages in other jurisdictions. In relation to proposals for corrections, he suggested that it should be a defence if the defendant publishes a reasonable apology, because plaintiffs usually want more substantial corrections than media defendants are willing to provide. In Bartlett's experience, most plaintiffs want damages and are unlikely to be satisfied by a correction alone.

Andrew Kenyon, of the Law School at the University of Melbourne, discussed Australian and overseas developments in relation to the assessment of damages. The prospect of large damages awards is a major element of defamation's 'chilling effect'. In recent years, awards have been criticised as excessive, particularly when compared with the general damages awarded in personal injury cases. Another view holds that such comparison is arbitrary and impractical. The trio of cases of *Coyne v Citizen Finance* (minority judgment), *Carson v John Fairfax* and *ACP v Ettingshausen* establish that Australian courts are prepared to limit damages awards in defamation actions to ensure that there is a 'rational relationship' with personal injuries awards.

Kenyon raised the possibility of challenging high damages awards on the basis of Australia's international human rights obligations. In *Tolstoy Miloslavsky v United Kingdom* (1955), the European Court of Human Rights held that English defamation law, in permitting damages awards disproportionate to the harm suffered (in this case, a jury verdict of £1.3m), restricted freedom of speech in contravention of Article 10 of the European Convention on Human Rights. Kenyon suggested that the International Covenant on Civil and Political Rights, to which Australia is a signatory, may afford Australians a similar avenue of appeal. ❑

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