



Defamation reappraised

Report of the 'Private Rights and Constitutional Law: Should Theophanous Be Overturned?' seminar, held in Sydney on 12 March by Freehill Hollingdale & Page, the Communications Law Centre and the Faculty of Law, The University of New South Wales

This seminar attempted to analyse the differing approaches to defamation issues in United States and Australian law and to proffer alternatives open to the High Court in its consideration of the *Levy* and *Lange* cases. The well-attended gathering largely comprised representatives from the wider media and broadcasting industries, the legal profession and academia.

Robert Post, Freehills' Visiting Fellow at the University of NSW's Faculty of Law and Professor of Law at University of California, Berkely, made a number of observations about the apparent 'constitutionalisation' of defamation in Australia since the *Theophanous* and *Stephens* decisions; comparing it to the US experience which commenced with the landmark 1964 judgment in *New York Times v Sullivan*.

In that case, the *Times* published an advertisement denouncing acts of racism and violence committed against blacks in the South, following Martin Luther King's arrest in Alabama on trumped-up charges. The advertisement contained a number of trivial inaccuracies. A political official from Montgomery, Alabama successfully sued for libel at state level. The (federal) Supreme Court, however, found that the First Amendment imposed restrictions on a plaintiff's ability to recover for libel. Justice Brennan ruled that in order for a public official to recover in a libel suit arising out of the official's performance in or fitness for office, the official must prove that a false defamatory statement was published with either knowledge of its falsity or reckless disregard for its truth or falsity. This would provide adequate 'breathing space' for criticism of public offi-

cials, and for the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open'.

In *New York Times v Sullivan*, the US Supreme Court brought defamation within federal jurisdiction by identifying a constitutional element in the common law; and established the 'actual malice' test, whereby media organisations could defend a defamation suit brought by a public figure based on a publication containing incorrect facts, providing that these facts were not made with either knowledge of their falsity or with reckless disregard for their truth or falsity. The court ruled that the absence of an available defence where mistakes had honestly and reasonably been made would have a 'chilling' effect on free speech.

Dynamics in US law

Post identified three crucial dynamics at work in the United States' 'constitutionalisation' of defamation:

- federal/state relations
- judicial versus juridical power
- legislative versus judicial power

Unlike Australia, where the federal High Court is the ultimate court of appeal for all legal issues, the United States has a judicial system of dual sovereignty. State Supreme Courts are the highest courts of appeal on state issues, while the federal Supreme Court is the ultimate authority on federal (including Constitutional) issues. Consequently, the identification of a Constitutional aspect to a state law issue enables it to be brought within federal jurisdiction.

It also results in a displacement from juries to judges of determinations of questions of fact on issues relating

to the norms of a particular community. This displacement, Post felt, has more significance in the United States than in Australia, because of differing notions of judicial perspective. In Australia, a judge, when ruling on matters of community norms, does so as a representative – indeed, a pillar – of that community. A United States judge, when ruling on such norms where they embody Constitutional issues will instead stand for a 'public' interest over and above that of the interests of a particular community, whether state-based or otherwise.

Two critiques are levelled at this development. The first is that of democratic legitimacy, being that the determination of factual issues arising from applied legislation should reside with the polis. The second refers to judicial competency, in that judges may become 'armchair sociologists' though being employed only for their legal expertise.

Of course, the real tension between judicial and legislative power lies not in a simple consideration of the degree of 'judicial activism' engaged in by the bench, but in whether cases are determined on common law or Constitutional grounds. The former can be overruled by legislation, while the latter circumscribes it.

Jurisprudential issues aside, the test had had several unintended consequences. First, it provided a 'win/win' outcome for politicians whereby a public figure could claim a moral victory if a respondent was forced to rely on the 'actual malice' defence (thus accepting factual inaccuracy). The test has tended to switch the focus of a hearing from the plaintiff's reputation to the respondent's behaviour, and has led to heavy damages 'malice' is established. Discov-



ery costs, too, have increased enormously, as the importance of the mental element to a plaintiff's case has stimulated investigative inquiry.

Problems with *Theophanous*

Leanne Norman, a Freehills partner currently representing the Fairfax group in the *Levy* case, outlined the development of the Constitutional aspects of Australian defamation law and flagged areas of uncertainty in the practical application of the *Theophanous* defence. As presently construed, the elements of the *Theophanous* defence are that:

- the publisher was unaware at the time of the falsity of the matter
- the publisher did not publish the matter recklessly
- publication was 'reasonable' in the circumstances
- it concerned a matter of 'political discussion'
- the publisher was not actuated by malice

Problems arise with respect to the 'reasonableness' requirement, the precise ambit of 'political discussion', as well as with issues relating to qualified privilege (an aspect Ms Norman anticipated the following speaker would address).

The majority of the court in *Theophanous* indicated that reasonableness required either that adequate steps were taken to check the accuracy of material or other reason existed as to why accuracy was not checked prior to publication. It is also possible that cases interpreting section 22 of the NSW Defamation Act, which embodies the qualified privilege and contains a similar requirement of reasonableness, may be relevant.

The ambit of political discussion is particularly relevant in the *Lange* case, where the former Prime Minister of New Zealand sued the ABC over a *Four Corners* piece on political donations. Amongst other things, Lange is arguing that this should only cover discussion of Australian politi-

cal issues. During the hearing of the matter, Norman reported, several judges questioned whether this would remove discussion of European Community and United Nations matters from the ambit of the *Theophanous* defence, and Justice McHugh suggested whether the proper cast should be the wider question as to whether a matter was relevant to Australian political discussion and debate.

Other ways ahead?

Michael Chesterman, Professor of Law UNSW, addressed the assumption - inherent in much of the present speculation about the reconsideration of the *Theophanous* principle - that any overruling of the principle may constitute a form of 'judicial infanticide'. Leaving the court with no other avenue for the liberalisation of free speech. He observed that in Australian law, the common law test of 'malice' - that the defendant either did not believe in the truth of an assertion or published it with ill-will towards the plaintiff - had more in common with the *New York Times v Sullivan* 'actual malice' test for public figures than either of them had with the *Theophanous* test. He suggested that we may be moving towards a variant of the 'actual malice' test, similar to other, lesser conceptions of malice which appear in other United States common law jurisdictions.

Chesterman suggested that the minority judgment of Brennan CJ and McHugh J in *Stephens* may provide for an expanded notion of the defence of qualified privilege. These judges referred to statements about public officials or institutions made by persons with 'special knowledge'. It is this latter phrase that constitutes the Pandora's Box. Would the narrow, elitist conception of 'special knowledge' - requiring, for instance, orthodox accreditation - prevail, or would, as Justice McHugh suggested, a broader version emerge which included investigative journalists and whistleblowers? In any case, this test

is not problem-free. What level of knowledge would be required before it was considered 'special'? Institutions could, for instance, attempt to insulate themselves from defensible defamatory remarks by seeking to withhold information that would enable a critic to assert a sufficient level of knowledge to claim qualified privilege. Also, publishers defending information confidentially obtained might be unable to plead this defence without disclosing their sources.

Failing an expanded notion of qualified privilege, the court could always fall back to an expanded version of the fair comment defence, available even when the factual basis for a defamatory opinion is untrue, providing the defendant honestly believed it to be true.

Constitutional lawyer **Professor Cheryl Saunders** from the University of Melbourne, observed that attempts to overrule *Theophanous* were being made on three grounds: the substantive aspect, issues of precedent (whether a change in composition of the court is a legitimate reason to revisit an issue), and the legitimacy of the implied Constitutional rights finding. In relation to the second issue, Saunders noted that, the history of section 92 cases (concerning freedom of interstate trade) revealed that courts have looked to the extent to which government decisions have been based on existing principles. As to whether the 'implied rights' principle is retained, Saunders remarked that, at the very least, *Theophanous* has contributed much to the prevailing debate about free speech, has stimulated consideration of what 'representative government' and 'representative democracy' actually means, and has focussed attention on the degree of protection of the concepts offered by the Constitution. □

For background information on the Levy case and its possible reconsideration of Theophanous principles, see 'Freedom of Speech and the High Court' by Chris Warren, CU 127 (November 1996) pp 2-3.