Lange v ABC: defamation reappraised

The High Court has delivered its first major response to ***Theophanous***

With its decision in *Lange v ABC*, the High Court has dispelled the aura of uncertainty surrounding the law of defamation post *Theophanous*, but its solution is not to the liking of all. Some commentators prognosticated gloomily the demise of an unparalleled golden age of freedom of speech. Conversely, the judgment elicited praise and admiration from others, including Professor Sally Walker and prominent media lawyers. It seems that the balancing of the interests of speech and reputation via the law of defamation can only ever produce polarised responses.

Background

David Lange, former NZ Prime Minister, sued the ABC for defamation in relation to a 1990 Four Corners program. The ABC's defence invoked both limbs of the High Court's 1994 *Theophanous* decision - the new 'political discussion' defence and modified common law qualified privilege. Lange argued that *Theophanous* and its companion decision, *Stephens*, were wrongly decided (the decisions were under concurrent attack in the case of *Levy v State of Victoria*, in which Dawson J suggested that they might not enjoy the support of the currently constituted High Court).

In *Lange*, the High Court produced a strong joint judgment intended to settle matters of constitutional interpretation and common law defences to defamation. It dispensed with the *Theophanous* defence and expanded qualified privilege to the publication of government or political matter to a large audience. It did so without overruling expressly the 1994 decisions, saying that they did not contain any binding statement of principle and that the joint judgment of Mason CJ, Toohey and Gaudron JJ, absent the direct support of Deane J, lacked authoritative status.

The Court confirmed that the system of representative and responsible government established by the Constitution requires freedom of communication on government and political matters. This constitutional requirement creates an area of immunity from the exercise of legislative or executive power. Laws burdening freedom of communication that are not reasonably appropriate and adopted to the achievement of a legitimate end compatible with the maintenance of representative government are invalid.

Principle issue

The principal issue addressed by the Court was whether the common law of defamation is reasonably appropriate and adapted to the protection of reputation. Consideration of the balance struck must take into account modern developments in mass communications, especially the electronic media.

The defences to defamation, which create immunity from liability, are the critical gauge of the extent of defamation's impact upon free speech. The Court considered that without a defence for the mistaken but honest publication of defamatory material about government or political matters, defamation places an undue burden on freedom of communication. It referred in particular to the failure of common law qualified privilege to extend its protection beyond limited communications, due to the requirement of reciprocal interest and duty.

Qualified privilege extended

The Court's response was to develop and extend the common law defence of qualified privilege. It declared that 'each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia'. The categories of qualified privilege must now be recognised as protecting a communication made to the public on a government or political matter. The Court suggested that this expanded defence could go beyond what is required by the Constitution. It could protect discussion of government or politics at state, territory and local government level, and even matters concerning the United Nations or other countries, notwithstanding the absence of a connection with federal matters.

Having opened the defence of qualified privilege to widespread publication relating to government or political matters, the Court addressed the conditions attaching to the defence. In view of the greater damage caused by the publication of defamatory material to a large audience, the defendant should be required, in such circumstances, to demonstrate that its conduct was reasonable. The Court said that this requirement, also found in the NSW statutory form of qualified privilege (s 22 *Defamation Act*), is consistent with the constitutional requirement. Reasonableness depends on the circumstances of each case, but includes whether there were reasonable grounds for believing that the defamatory imputation was true, the steps taken to verify the accuracy of the material, absence of belief that the imputations were untrue and whether a response was sought and published.

The extended defence of qualified privilege can be defeated if the plaintiff demonstrates that the publication was actuated by malice, that is, it was made for some improper purpose. Here, the Court set a high threshold: the motive of causing political damage to the plaintiff or his or her party, the vigour of an attack or the pungency of a defamatory statement do not amount to malice.

The Court concluded that the *Theophanous* defence was bad in law, because the Constitutional requirement of freedom of communication only defines an area of immunity and confers no private right of defence. However, it would be possible for the ABC to seek to rely on the expanded defence of qualified privilege, because the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia.

Implications

Are defamation defendants worse off as a result of the *Lange* decision? The defences are fewer in number, but the real issue is whether the practical effect of the newly expanded defence of qualified privilege takes away more than it gives. Critics argue that the removal of the *Theophanous* defence and the introduction of the requirement of reasonableness for qualified privilege reduce the overall protection for publishers. Such criticisms tend to conflate the political discussion and qualified privilege elements of *Theophanous*. Reasonableness was also an element of the *Theophanous* defence and attracted similar criticism and pessimism. Indeed, some commentators suggested that the real significance of *Theophanous* was not the political discussion defence, but its modification of qualified privilege, which presented clear tactical advantages. Defendants had only to establish that the material constituted political discussion, whereas the new defence required proof of three elements. Complaints about the reduction of protection under *Lange* appear to relate more to the imposition of a requirement of reasonableness for the defence of qualified privilege, than to the loss of the *Theophanous* defence.

In principle, it is not unreasonable to require reasonable conduct on the part of a publisher in order to enjoy protection from liability in defamation. Factors such as checking accuracy and seeking a response reflect good journalistic practice. But much depends on how the courts interpret this requirement, and in New South Wales s 22 has been unimpressive in this regard. There are concerns that judicial scrutiny of the conduct of journalists, with the benefit of hindsight and without an understanding of the journalistic context and its attendant pressures, will create an unrealistically high standard of conduct that journalists will rarely meet, particularly where they seek to maintain the confidentiality of their sources. Such concerns are valid, but were equally relevant to the *Theophanous* defence. It is possible that the High Court's manifest intention to extend the defences to facilitate the freedom of communication may result in a more liberal interpretation of reasonableness by lower courts.

Right of reply

An interesting aspect of the High Court's decision is the prominence given to right of reply. The Court said that a defendant's conduct will not be reasonable unless it sought and published a response from the person defamed, unless it was not practicable or necessary to do so. The Centre has argued previously that a right of reply adds to, rather than detracts from free speech. A person who has been given an opportunity to respond to allegations may be less likely to commence defamation proceedings.

One area of concern is that it may be more difficult for media organisations to defend the publication of the statements of others under *Lange* than under *Theophanous*. The first limb of *Theophanous* (lack of unawareness of the falsity of the material published) was interpreted by Allen J in *Hartley* as requiring media organisations simply to report accurately such statements, rather than to form an opinion about their truth. However, in *Lange* the Court said that reasonableness requires a defendant to have reasonable grounds for believing that the imputation was true. The ability of media organisations to act as a conduit for political discussion by publishing the statements of others will be reduced if they must form an opinion as to the truth, not only of the statements themselves, but of the imputations that flow from them.❑

Jenny Mullaly