Telling the truth, laughing

Public humour and its interaction with defamation law were the subject of a speech by acting justice of the NSW Court of Appeal, the Hon. Tony Fitzgerald AC, at the Communication Law Centre's recent 10th anniversary dinner

Three disparate thoughts, all broadly arising from the tedium of recent election campaigns and associated political activity, have coalesced into this speech.

The first concerns the lack of a constitutional bill of rights in this country, especially a constitutionally protected right of free speech.

The second concerns the suitability of the judiciary as an arbiter of social values. I do not propose to direct specific remarks to that issue beyond noting that Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit has observed that the "legal profession's ignorance about the activities that law regulates is one of law's perennial problems". There is a degree of irony in this, in that Judge Posner is Justice Michael Kirby's only serious rival for the title of the English-speaking world's most prolific and published judge.

The third concerns the societal importance of public humour and its interaction with defamation law. The saturation coverage of political activities and disputes would be unendurable if there was nothing to alleviate the hypocrisy and boredom except the gaffes and posturing of politicians and aspirants to that role. Community sanity depends upon the humorous commentators and cartoonists who provide relief from the political morass.

While many take offence at such public humour, comparatively few take defamation proceedings, even in a country as litigious as Australia or a city as litigious as Sydney. There are probably practical as well as legal reasons for this. Apart from additional adverse publicity and the risk of an unfavourable verdict and crippling costs, the institution of an action for defamation often renders the subject of humour even more absurd. On the other hand, a more relaxed self-perspective can undo much of the damage, and even improve one's public image.

The Belgian Noel Godin, otherwise known as Georges le Gloupier, famous for his burlesque terrorist attacks with cream pies upon celebrities, believes that the first few seconds after an attack reveal the true character of the target. The French philosopher Bernard-Henri Levy revealed a less lofty side of his character as he punched and kicked at the *entarteur* and his supporters. Jean-Luc Goddard, on the other hand, is reported to have shown "real stature" - he smiled, pulled off his bespattered jacket, lit up a cigar and said: "It tastes rather good."

However, some who are lampooned do sue.

The Queensland Court of Appeal recently held that Pauline Hanson was defamed on the ABC by Pauline Pantsdown. It was held that Ms Pantsdown's work, "Backdoor Man" published "grossly offensive imputations" relating to Ms Hanson's "sexual orientation and preference ... and her performance". I am unsure what performance was being referred to. Ms Pantsdown might herself have felt aggrieved by the Court's description of her work as "an apparently fairly mindless effort at cheap denigration". But as author Bob Ellis recently found out, one of the disadvantages of publishing defamatory material is that litigation provides ample opportunities for privileged personal attacks on the author. Those who champion free speech can scarcely complain.

I express no view on the merits of the dispute between Ms Hanson and Ms Pantsdown except to note that no one suggests that any imputation which the Court found Ms Pantsdown had published concerning Ms Hanson was true. The significance of the decision is that, despite the context and circumstances of the broadcast, which included a prior statement that it "...was satirical and not to be taken seriously", the Court found that reasonable listeners not only might, *but would*, understand that the publication intended to assert that Ms Hanson was a paedophile and/or "...a homosexual [who] rejoiced in the fact". It was stated that if a jury found otherwise its verdict would be set aside as unreasonable.

The Court's unflattering reference to "Backdoor Man" is interesting. It obviously considered that Ms Pantsdown's work was not funny. What would have been the outcome if the judges had thought the song was side-splittingly hilarious? In the circumstances, that was most unlikely as the target audience of Triple J does not include the judiciary. Could the Court really be satisfied that the likely audience would not treat "Backdoor Man" as a joke to the point of concluding that a jury verdict that the publication was not defamatory would be perverse?

In the circumstances, especially given the sensitivity which many powerful people have to criticism and the desire of some to bolster their superannuation, a reminder of the interaction between public humour and defamation law seems timely.

Since the publication of anything which

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tends to make a person appear ridiculous is actionable, humorous publications can obviously be defamatory. A person who is the butt of a joke will not necessarily be amused, and might be grievously wounded. Humour is probably the most effective method of ridicule. Satirical humour can be devastating.

Defamation by ridicule need not be verbal. It can occur by pictorial representation, even by gestures, intonation and expression. As Dean Swift said, it is possible to "convey a libel in a frown, and wink a reputation down". Even words of praise are actionable if irony is discernible.

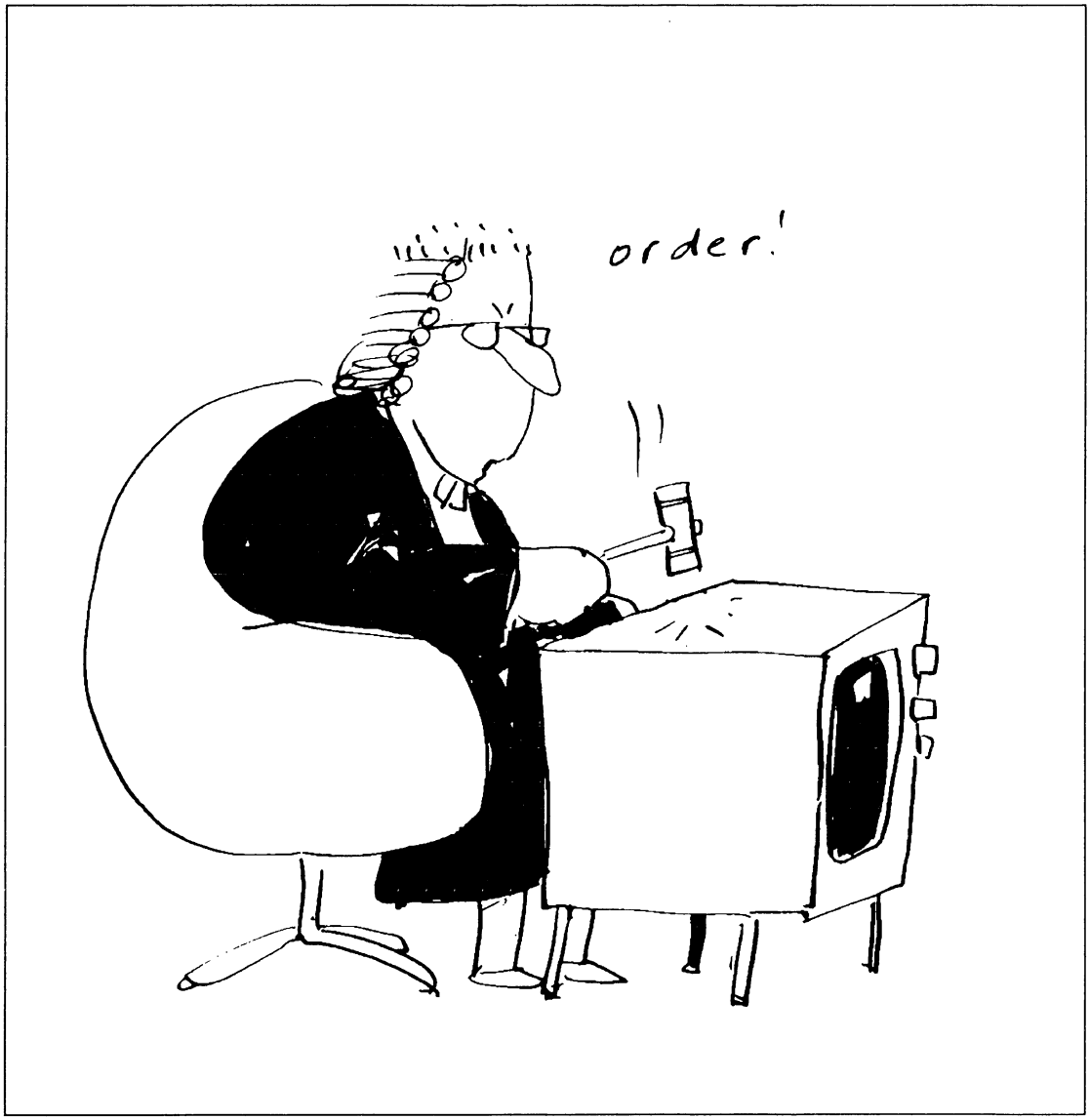
If humorous material is protected, it is because it makes it apparent that the literal meaning is not intended to be taken seriously. Protection is not accorded to a humorous publication merely because it is funny. Nonetheless, a publication which a Court considers funny might more readily be objectively discernible as a joke than one it considers "an apparently fairly mindless effort at cheap denigration".

In determining meaning, regard must be had to the context and circumstances of publication. With a radio broadcast, for example, the nature of the program and, perhaps, the typical role of the station are material.

The whole publication must be considered to discern whether it provides both "the bane and the antidote". A recent English decision, *Charleston v News Group Newspapers Ltd* [1195] 2AC 65, illustrates this.

The plaintiffs were actors who played the married and altogether respectable suburbanites "Harold" and "Madge" in soap opera "Neighbours". The offending story, headed "Strewth! What's Harold up to with our Madge?" contained explicit photographs of a near naked man and woman apparently engaged in intercourse or sodomy. The plaintiff's faces were superimposed onto other bodies, without the plaintiffs' knowledge.

The fakery was not concealed. On



the contrary, the text was devoted to how the composite image originated in a computer game. Under the photograph was the caption: "Soap studs: Harold and Madge's faces are added to porn actors' bodies in a scene from the game". The article's tone expressed disapproval, albeit in a hypocritical way.

The House of Lords held the article was not defamatory of the plaintiffs. Although readers who only took in the headline and photographs might have believed the imputation that the plaintiffs were willing participants in the production of a pornographic photograph and computer game, the text and the disclaimer saved the publication.

These superficially simple aspects of defamation law involve considerable complexity and subtlety when applied to satire, which is the most important form of public humour. Government and politicians, the legal system, lawyers, religion, the powerful, wealthy and pretentious, have all been satirised and hopefully will continue to be so. Historically, satirists have been punished by more than defamation law for their disrespect toward the established order. Voltaire attracted the enmity of both Church and State by his satires directed at authoritarian rule and was imprisoned, beaten and ultimately exiled. Many of today's right-wing reactionaries probably dwell nostalgically upon such effective methods of dissuasion in their yearnings for the recent past as they imagine it existed.

To those slightly more liberal (and intelligent), the importance of satirical commentary which causes a society to examine itself critically and confront its deficiencies is self-evident.

Although not essential, humour is a common component of satire. For present purposes, I adopt Horace's statement that the satirist wishes to tell the truth, laughing.

As Dr Johnson observed: "Abuse is not so dangerous when there is no vehicle of wit..." The reason is plain. Ridicule provokes amusement which emphasises the underlying message.

Satirical humour uniquely combines laughter with information and criticism, enlightens facts and ideas and encourages iconoclasm in preference to reverence and acquiescence. In this country, humour has exploited the larrikinism in the national character to release us from rigidity and to push the boundaries of tolerance. As humour's edge has sharpened, language and content once thought outrageous are now commonplace. Even a lawyer has to admit that the Australian media has largely avoided self-censorship and that media humour contributes enormously to a better informed, more diverse and accepting society.

Public humorists have naturally fared well in the U.S. where the First Amendment gives freedom of speech a stature broadly equivalent to that of the Ten Commandments in Christian religions. *Hustler* magazine's parody of a Campari advertisement depicted the Reverend Jerry Falwell as a drunk who indulged in sexual relations with his mother in an outhouse. Falwell's action against the magazine failed. One appeal judge, Judge Wilkinson, spoke of his repugnance for the "utterly unwarranted and offensive personal attack" but said that the "most precious privilege" of a democracy was "open political debate" and that:

"Satire is particularly well suited for social criticism because it tears down facades, deflates stuffed shirts and unmasks hypocrisy by cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air...Nothing is more thoroughly democratic than to have the high and mighty lampooned and spoofed".

The English Court of Appeal took a less enlightened approach in the recent *Berkoff v Burchill* case ([1996] 4 All ER 1008). Actor, director and writer Stephen Berkoff sued over a review of his film which described a character known as "The Creature" as "scarred and primeval...a lot like Stephen Berkoff, only marginally better looking".

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The majority stolidly held that the question of whether the publication was defamatory was for decision by a jury. The more interesting dissenting judgment of Millet LJ considered the proceedings as frivolous as the article, remarking:

"It is a common experience that ugly people have satisfactory social lives - Boris Karloff is not known to have been a recluse - and it is a popular belief for the truth of which I am unable to vouch that ugly men are particularly attractive to women".

I will have to leave it to each man present to consider whether his personal experience supports that "popular belief".

Conclusion

It is time to return to the Pauline Hanson case. What has not yet been said is that the ABC also sought to raise a defence of qualified privilege: for present purposes, a right to discuss matters of public interest or public affairs. The prospect of that defence was rejected because the publication was put forward as merely humorous by the publisher.

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The defence was irrelevant to the sexual imputations but was potentially material to the publication's other, satirical message. The judgment noted Ms Hanson "had become well-known nationally for her political views, and...was a controversial figure". The public affairs defence required consideration of the underlying critical message about Ms Hanson's politics and public pronouncements. That did not occur. Ms Hanson made no complaint of those underlying criticisms. The Court did not expressly consider the possibility that those criticisms were "Backdoor Man's" real message and protected under the public affairs defence, and that the audience would accordingly understand that the literal sexual imputations were unintended.

I will conclude with a rhetorical question. Defamation law in Australia is in a mess. In some parts of the country it is codified, in some parts it is an amalgam of statute and common law, and in other parts common law alone is applicable. For at least the past 20 years, there have been unsuccessful attempts to amend and unify defamation laws. For a period, it seemed that there would be a relatively broad protection of free discussion of public affairs based on implications derived from the Constitution but that has now been diminished to the point where the protection has considerably less practical significance.

There is no positive constitutional right to free speech, even in respect of political communication and discussion, a subject which is recognised by Article 19 of the International Covenant on Civil and Political Rights. The implied constitutional freedom in Australia merely operates as a restraint on the exercise of legislative and executive power. That restraint permits any laws which are reasonably appropriate and adapted to serve a legitimate end which is compatible with the exercise of free and informed choice by voters in Commonwealth and Territory elections. (The State and local authority election position appears to depend on each State constitution). Many laws which inhibit free speech would easily pass that test and be constitutionally valid. Defamation law is consistent with the Constitution even if it restricts discussion of public affairs with requirements that the conduct of the publisher be reasonable and not malicious. We also know it is permissible to limit free speech in the interests of safe duck shooting (as in the *Levy v Victoria* case) and presumably permissible, for example, to limit free speech in the interests of the safe and smooth passage of traffic. Queenslanders, at least, have in the past experienced such laws, with prohibitions on public demonstrations without police permission.

While there are advantages in the Australian approach, it is fundamentally timid. The degree of permissible freedom of speech is a fundamental indicator of a society's preference for freedom over regulation.

As a lawyer, I am intuitively opposed to abuse of power. The ordinary citizen's right of free speech is a source of great power which is susceptible to abuse by those with access to the public through the media. The continued trend toward the concentration of media ownership/control in a small group of wealthy, influential people is obviously undesirable. Nonetheless, we should be slow to accept any limits on freedom of speech which are not absolutely essential. As Ronald Dworkin said: "freedom of speech...is the core of the choice modern democracies have made". Australia has not yet made that choice.

Social freedoms cannot be regarded lightly or taken for granted. Salman Rushdie has pointed out that a lack of public debate can "deaden the imagination of the people", and that freedom of expression ceases to exist "[w]ithout the freedom to offend" and "the freedom to challenge, even to satirise all orthodoxies". Satirical humour is extremely vulnerable and involves a degree of legal risk, using distorted fact as a facade for criticism intended to cause discomfort to the target. The law needs to develop sophisticated responses which do not unduly inhibit the true message which readers, listeners and viewers have the wit to comprehend.

Australians tend to compare themselves with other western democracies such as the U.S., Canada, the U.K., New Zealand and those in Europe. But Australia has a strange reluctance to participate in the great international movement to protect individuals and minorities from government interference. Politicians and bureaucrats will never lead us along a path towards greater personal freedom, with correlative restrictions on their power and authority.

My question then is this. With all the capacity which the media has to influence public opinion, why is there no concerted, persistent effort by journalists and lawyers to bring the discussion of a bill of rights for Australia to the forefront of public discourse and debate? Undoubtedly, lawyers and journalists will continue to find fault with each other. But perhaps we could also act in conjunction to advocate entrenched constitutional freedoms which are beyond the reach of all arms of government.

Tony Fitzgerald

The TIO

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function of referring cases or issues to these bodies for investigation to playing an active part in the development and monitoring of industry-wide practices and codes.

The consumer codes currently being developed through ACIF will be a vital underpinning to the self-regulatory regime and will provide minimum standards for the delivery of telecommunications products and services.

The major challenges ahead for the telecommunications industry are the completion and industry-wide acceptance and implementation of self-regulating codes. In particular, codes are urgently needed to address emerging and existing consumer issues such as billing delays, unauthorised customer transfers between service providers, and the terms and conditions of service contracts.

The 1997 Act gives the TIO the power to investigate breaches of these new codes where a company is a signatory to the code, irrespective of whether the signatory is a member of the TIO.

The introduction of the ACA-administered Customer Service Guarantee (CSG) in January 1998 has given the TIO a new role in ensuring that the guarantee is properly applied in individual cases of delays in telephone service connections and fault rectification. In its collection of statistics about CSG-related complaints the TIO also has an important role to play in monitoring the operation of the CSG at an industry-wide level.

The experience of the TIO to date is that there are a number of definitional and operational problems with the CSG as it is currently specified, including the meaning and extent of exemptions from the guarantee, and the calculation of compensation payable. These concerns have been included in the TIO's submission to the ACA's review of the guarantee.

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Although significant progress has been made in the development of these codes, the industry had underestimated the resources needed to accomplish this task and the speed with which it could be completed. The year ahead will be a telling time in terms of the industry's ability to put its self-regulatory mechanisms into practice.

As it is a much younger section of the industry, it is not surprising that ISPs have further to go than the telephony service providers in order to improve some fundamental areas of their customer service.

The quality and cost of services vary widely from one ISP to another, and the TIO's experience in its first 12 months of jurisdiction over Internet access complaints indicates that there is a real need for some industry standards in areas such as the quality and speed of access, technical support, and billing and payment arrangements.

The TIO has recognised that changes in its membership and functions are necessitating some changes to the TIO scheme itself. An ISP representative has already been appointed to the TIO board, and a review of the board and council structures is being undertaken to ensure fair representation for new members. At the same time, a review of the TIO's funding arrangements is being carried out, examining the standard costs to members for complaints, and the definition of what constitutes a complaint, rather than merely an enquiry. It should be mentioned that members do not pay to join the TIO, but fund it on the basis of the number and proportion of cases received against them.

Despite its expanded role since July 1,1997, the principal focus of the TIO's work continues to be the investigation and resolution of individual consumer complaints. By providing an impartial avenue for dispute resolution, and by reporting to the industry and the public at large on the level and nature of consumer complaints about telecommunications services, the TIO is performing a crucial service in the increasingly competitive telecommunications industry.

John Pinnock has been Telecommunications Industry Ombudsman since 1995. Complaints are handled from residential and small business users of telecommunications and Internet access services. The TIO is an office of last resort, only taking up complaints if consumers have first attempted to resolve their problem with their service provider. The TIO currently receives some 1,200 cases a week