

Defamation for authors

Sally Walker of the University of Melbourne argues defamation law has strayed from its objective of protecting individuals from wrongful attacks on their reputations

It is said that the object of the law of defamation is to protect the individual's reputation: a person whose reputation has been wrongfully attached may bring a civil action to clear his or her name. This suggests that, when you are concerned that something you have written may be defamatory, you can apply a simple test - am I wrongfully attacking a person's reputation? Regrettably, the law is not so simple.

The three major characteristics of Australia's defamation laws indicate that defamation law has lost its way; the law is not directed simply at protecting the individual's reputation from wrongful attacks. The importance of these characteristics can be demonstrated in two areas of relevance to authors: fictional works and defamation of the dead.

Characteristics of Australia's defamation law

The first characteristic is that a writer's motive is irrelevant when determining whether his or her material satisfies the definition of "defamatory".

The test of what is defamatory differs from jurisdiction to jurisdiction, but this characteristic is common to the definitions in all Australian jurisdictions. Although Justice Hunt of the New South Wales Supreme Court has argued that it is relevant to consider how the ordinary reader would have understood, from what was published, what the publisher intended to convey, in *Anderson v Mirror Newspapers Ltd (No 1) (1986)*, he conceded that his approach is not in conformity with authority. It follows that, although a writer's improper motive may assume importance in relation to damages and some defences, an honest motive is of no relevance to whether the material is defamatory.

Secondly, defamation is a tort of "strict liability".

This means that, for the purpose of determining whether material is defamatory, the writer's knowledge is irrelevant. Subject to little used New South Wales and Tasmanian legislation regarding the making of an "offer of amends", an author may be liable for publishing defamatory material even though he or she did not know, and could not reasonably have been expected to know, the facts and circumstances which made the material defamatory. Authors may be liable for defaming people whose existence was unknown to them.

Finally, a defamation action is unlikely to result in members of the public knowing whether an attack on the plaintiff's reputation was warranted".

There are various reasons, some practical and others arising from the elements of the action, why defamation cases have little to do with discovering and publicising the truth:

- The mere fact that a statement is false does not necessarily mean that it is defamatory.
- To take advantage of the defence of "justification" or "truth", the defendant publisher or writer bears the burden of establishing the truth of the defamatory material. Indeed, it is even more difficult than this simple statement implies: the defendant must prove the truth of the "imputations" arising out of the publication of the material. An "imputation" is an accusation conveyed by the material. For example, if I said that a person has AIDS this may convey a number of imputations, including that the person is promiscuous and homosexual. To rely on truth as a defence, I would have to prove the truth of these imputations. It is not enough that my statement is literally true; the imputations must be true.
- The defendant, who has the burden of proving truth, may face practical problems: a witness may have changed his or her mind about giving evidence; there may be a desire to protect a writer's sources. Furthermore, the law of evidence limits what evidence may be admitted in court proceedings for the purpose of proving "truth".
- In the case of defamatory comments, inferences or opinion, it is not enough that the defendant truly held the opinion; a comment is "true" only if it is accurate, in the sense of being implicit in the facts which are stated and proved to be true.
- The truth of an allegation may not be investigated because some defence, other than justification, protects the publisher.
- Owing to the fact that it takes months, sometimes years, for an action to reach the courts, a person cannot hope to restore her or his name until long after an allegation has been made. Indeed, only a small proportion of actions reach trial. Even then, there is no guarantee of publicity. In defamation cases, Australian

courts have no power to order a defendant to publish a correction. A wrongly impugned reputation cannot be restored, and the public cannot know the truth, if the proceedings receive no publicity.

Defamation and truth

To the lay person, defamation and truth, or lack of truth, are intertwined: most people would be able to tell you that "truth is a defence" to a defamation action. This involves an obvious fallacy in that in the case of material published in some jurisdictions - New South Wales, Queensland, Tasmania and the Australian Capital Territory - to take advantage of the defence of justification, a publisher must show that the imputation is not only true, but also that it was published for the "public benefit" or, in New South Wales, that it relates to a matter of "public interest". Furthermore, because of the third characteristic of Australia's defamation laws, a defamation action is unlikely to discover "the truth". At the end of the day one is not likely to know whether a person's reputation has been "wrongfully" attacked.

Like many others, I believe that defamation law is in need of reform. In my view it is in the area of "truth" that reforms should be made: to ensure that the law is directed to its objective of protecting the individual's reputation from wrongful attacks, defamation law must ensure that the truth is discovered and publicised.

Practical application

The application of the characteristics of Australia's defamation laws can be illustrated by the Morosi case. At about 7.15 am on 1 August 1975 Ormsby Wilkins made a broadcast over radio station 2GB. He had this to say about Junie Morosi:

"now that she's to have a baby there will be a spate of dirty jokes about her, and a variety of speculations as to who is the father because everyone knows that Junie Morosi is an immoral adventurer ... adventuress ... who has slept with a variety of notable politicians, and most recently has been sleeping with Jim Cairns. In fact, of course, nobody knows any such thing. There is indeed not even the faintest suggestion that she has ever had any such relationship with any of the men she has known ... there is no stain of any kind on her character."

Morosi instituted defamation proceedings against the broadcaster. The New South Wales Court of Appeal dismissed an appeal against a jury's award of \$10,000 in Morosi's favour.

This case illustrates the first characteristic of the law: what the broadcaster intended his words to convey was irrelevant; his motive was irrelevant. It also illustrates the operation of the third characteristic. To take advantage of the defence of justification, the defendant would have to establish the truth of the defamatory imputations. So far as the "speculations" and "rumours" referred to in the broadcast were concerned, the defendant would have to prove the truth of the defamatory imputations arising from the speculations and rumours; it would not be sufficient to show that there had in fact been speculation or that the rumours were in fact circulating.

Fictional works

To succeed in a defamation action the plaintiff must prove that the material complained of was published "of and concerning" the plaintiff. The law is concerned with whether the material would lead persons acquainted with the plaintiff to believe that he or she was the person referred to. It follows that a work of fiction may defame a person if it could reasonably be understood to refer to that person.

In one case, a newspaper published what was intended to be an amusing article about a person described as "Artemus Jones". Unknown to the author and the editor there was a person of that name. Jones' friends gave evidence that they believed the article referred to him. The House of Lords held that the trial judge had correctly directed the jury that they must apply a two stage test. Firstly they must determine whether sensible and reasonable people reading the article would think it referred to an imaginary person or to a real person; if people supposed it to refer to a real person, the second question for the jury was whether people who knew the plaintiff would understand that he was the person referred to in the article.

Similar principles are applied where material describes fictitious events. A magazine published a story dealing with fictitious incidents involving the hijacking of an aeroplane. The aeroplane was, however, described as one belonging to that airline and its insignia. The airline commenced proceedings. It was held that it should be left to the jury to determine whether a reasonable reader would conclude from the story that there were dangers inherent in travelling in the plaintiff's aeroplanes.

These cases illustrate the second characteristic of Australia's defamation laws: the writers' knowledge regarding the existence of Artemus Jones and the airline was irrelevant. Furthermore, the writers' intentions were in accordance with the first characteristic, irrelevant.

Defamation of the dead

In Australia there is no liability for defaming a person who is dead. Thus, this provides another illustration of the third characteristic of the law.

A statement regarding a dead person may, however, form the basis of an action by a living person. For example, if you were to say that a dead person was illegitimate, the person's living parents might bring an action alleging that this defamed them. An imputation concerned the family, whether living or dead, of a living person may defame that living person. It is not sufficient that a deceased person's reputation has been injured. An imputation about a deceased person is defamatory only if the conditions for defamation are fulfilled in relation to a living person.

Some law reform bodies have suggested that there should be a limited right of action in respect of defamatory imputations regarding a deceased person, even if the imputation does not defame a living person. If the law is to find the truth, that is, to determine whether an attack on a person's reputation is "wrongful", regardless of whether the person happens to be alive or dead, these proposals should be implemented.

Conclusion

Most people judge the "wrongness" of a statement made by one person about another by reference to its veracity; they would probably also have regard to the mental state of the "wrongdoer" including his or her motive and state of knowledge. Australia's defamation laws pay insufficient regard to motive, knowledge and truth. In formulating proposals to amend the law, regard should be had to what the law aims to achieve.

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Pont Data Australia v. Asx

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not matter in that the relevant conduct was to deter or prevent competitive conduct.

Section 49

Section 49 prohibits a Corporation from engaging in price discrimination in relation to the supply of goods. Pont Data contended that, by the terms of the agreements it was obliged to sign with subscribers, the ASX discriminated between purchasers of "goods of like grade and quality" in relation to price. As Justice Wilcox found that the data feed constituted "goods", he was satisfied that the ASX did discriminate, as between its subscribers in relation to the price charged for the C signal, because:

- the monthly fees varied according to the number of terminals which took the information;
- the fee varied as between subscribers for the same number of terminals, as to how many customers those subscribers had;
- the fees varied by reference to dynamic supply and non-dynamic supply of data to end-users; and
- the fees varied in relation to subscribers who pay for the right to store information and those who did not.

Justice Wilcox found that the differences were of a kind to which the various exempting provisions of s.49 had no application and that the breach of s.49 was therefore established

Clarification of issues

The judgment of Justice Wilcox will affect the business of data supply in Australia in a number of respects, aside from its impact on distribution of data by the ASX.

It was unnecessary for Justice Wilcox to determine whether copyright subsisted in either a data stream or its format, because of the admissions made by the ASX that legal advice had indicated the ASX did not own copyright in the data itself. However, the judgment seems to proceed on the basis that copyright in the data or format was not a relevant issue, because the exemption from the Act for conditions imposed in a copyright licence was not considered.

By finding that the data stream constituted "goods" for the purposes of the Act, Justice Wilcox was able to apply s.49 to the conduct of the ASX. However, the same conclusion may affect other conduct of data supply, including arrangements for resale price maintenance. Previously, a data or information service had been regarded as a "service" for the purposes of the Act.