In defence of the 'public figure' defence

Peter Cole-Adams examines the US public figure defence and argues that such a test should be introduced to local defamation laws

I seek to champion the introduction of some sort of public figure test into Australian defamation law. Let me concede immediately that there was a time when not even journalists imagined such a thing might be necessary. Back in the 19th Century my newspaper, *The Age*, used to say the most appalling things about public figures without, apparently, giving a thought to the legal consequences.

In the age of the $100,000 lobster, we, the media, treat those who govern us with a gentle respect born of a keen sense of financial survival. This is a very bad thing.

Naturally, the politicians want to keep it that way. If there is one point on which the Attorneys-General of NSW, Queensland and Victoria agreed in their recent discussions on defamation law reform, it is that they will not touch a public figure defence with a barge pole.

The US experience

The so-called public figure defence is an American invention of recent origin. This in itself makes the doctrine suspect in the eyes of many members of the Australian legal establishment who have long felt an aversion for the enthusiasm with which the Americans, from Thomas Jefferson on, have embraced the need to maintain maximum freedom of the press.

In March 1960, a full-page advertisement was placed, by a group called 'The Committee to Defend Martin Luther King and the Struggle for Freedom in the South', in the *New York Times*. It alleged violations of black civil rights in Montgomery County, Alabama. Although he was not named in the advertisement, the local police superintendent, a man named Sullivan, sued for defamation and was subsequently awarded $500,000 by a local jury. The award was upheld by the Alabama Supreme Court. Some of the statements complained of in the advertisement were inaccurate.

The *New York Times* appealed to the US Supreme Court. In 1964, the court upheld the appeal in an historic judgment which, for the first time, drew a distinction between the defamation of public officials and other citizens.

It found that the constitutional guarantees of freedom of speech and of the press required a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice', that is with knowledge that it was false or with reckless disregard of whether it was false or not.

In explaining its decision, the court declared that "debate on public issues should be uninhibited, robust and wide open" and recognised that some erroneous statements are inevitable in such a free debate. In the absence of actual malice, even such erroneous statements needed to be protected to avoid a chilling effect of free speech and self-censorship by critics of official conduct.

You will note that the *Sullivan* judgment referred to 'public officials'. In 1967, the Supreme Court extended the "actual malice" requirement to 'public figures'. The plaintiff involved, a Mr Butts, was a football coach who was alleged to have 'fixed' a game. The court held that he was a public figure and defined this term as meaning persons who are "ultimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large".

In another case in the same year, the Supreme Court held that the 'actual malice' requirement might apply even to private citizens who involuntarily found themselves in the limelight - if the issue was one of legitimate public concern.

However, in 1974, in *Gertz* v *Robert Welch* the Supreme Court refined this broad concept, ruling that a private plaintiff can recover damages for actual injuries merely by showing negligence but that, where the defamation relates to a matter of public concern, even a private plaintiff cannot recover presumed or punitive damages without showing actual malice.

The *Gertz* judgment was also interesting in that it provided a further definition of 'public figures' as governmental officers or "those who, by reason of the notoriety of their achievements or the vigour and success with which they seek the public attention", should properly be classified as such. The court argued, first, that 'public figures' usually enjoy greater access to channels of effective communication, and are therefore better placed to counteract false statements and, second, that they have voluntarily exposed themselves to closer public scrutiny and increased risk of being defamed.

An assessment of the US experience

There are three other points about the American experience which should be noted. First, the US courts have had some problems in deciding just who is or is not a public figure; second, the courts in recent years have tended, as I understand it, to take a much more restricted view of the public figure concept; and, third, the existence of the test does not seem to have discouraged public figures from suing or prevented many of them from winning enormous damages awards.

A recent report by the US Libel Defence Resource Centre, found that 55 per cent of the defamation trials concluded against media defendants during the period 1982-84 were instituted by public officials or public figures and of those, the plaintiffs won more than 50 per cent. About a third of these plaintiffs recovered compensatory damages of more than $US1 million and punitive damages of the same magnitude. In short, American experience suggests that the notion that a public figure test is tantamount to declaring an open season for the media to impugn the reputations of those who enjoy power or fame is simply nonsense.

Defining 'public figure'

Let me turn to the two specific objections cited by the Australian Law Reform Commission (ALRC), and gratefully endorsed by the three Attorneys-General, in deciding that the 'public figure' concept would not be appropriate to Australia.

The ALRC stated that "there is no satisfactory way of specifying what persons fall within, or without, the 'public figure' category". I concede immediately that the American courts, particularly in the first decade after *Sullivan*, had problems with the question of definition. May I submit that this is not an argument for learning from American mistakes in the drafting of Australian legislation. Precisely because we

do not have a constitutional guarantee of free speech, we are not bound by the US precedents. We can define the term 'public figure' as broadly or as narrowly as we please. We would obviously be foolish not to take account of the American experience, but we would be equally foolish to follow it slavishly.

For example, the Law Institute of Victoria, in its submission to the three Attorneys-General on defamation law reform suggests that, at least for the time being, the term 'public figure' should apply only to Federal and State parliamentarians.

The Institute points out that elected politicians are not only undeniably and voluntarily public figures, with ultimate responsibility to the electorate and with excellent access to the media if they wish to counter attacks on their credibility, but they are also uniquely privileged in having the right to say to Parliament whatever they like about whomever they don't like with absolute immunity. They cannot be sued and they do not even have to believe in the truth of what they are saying.

Obviously, most people in the media would prefer a broader definition, one that took in not only elected politicians (including those in local government) but also leading figures in the bureaucracy, business, culture and sport. I think most of us agree that the definition should be limited to those who choose to be in positions that give them real power to influence public affairs, or who successfully pursue fame or notoriety. The web should not extend to minor officials or involuntary celebrities who happen to be close relatives of a public figure or who, through no wish of their own, become accidental and temporary objects of media interest.

It should be also possible to so frame the law that the public figure test would apply only where the issue is one of genuine public concern, with the private affairs of public figures specifically excluded except insofar as their private activities can be shown to compromise their ability to carry out their public responsibilities.

The ALRC's second general objection to the public figure concept is that it is "wrong in principle to deny legal protection to persons who are prominent in public affairs simply because of that fact". While agreeing that persons in public life necessarily expose themselves to public criticism, the ALRC said "there is a point at which any person, however prominent in public affairs, is entitled to protection against defamatory statements and the retailing of private information which has no relationship with those public affairs".

I think most thoughtful people in the Australian media would agree with the latter point. But, then, so does the American law. The original Sullivan rule was specifically restricted to a defamatory falsehood relating to a public official's official conduct. And, as I understand it, even when the concept was broadened to include public figures, as opposed to officials, it was specified that the matter complained of had to relate to issues and events of public concern.

Nor is the ALRC right in suggesting that public figures are denied protection under American law. Where they can show actual malice, as may have been able to do in recent years, they can recover huge damages.

It is true, as the Attorneys-General say in their discussion paper, that it is not always easy, in practice, to make the distinction between matters of public concern and matters of purely private concern. But our courts are often asked to make such subjective judgments, and do not flinch from the task.

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Is a public figure test discriminatory?

But the more fundamental objection raised by critics of the public figure concept is their contention that it is wrong to apply a special discriminatory rule against a particular class of people, in this case public figures. As Tom Hughes QC put it in a paper to the 23rd Australian Legal Convention: "There should not be one law for the governed and another for those who govern."

Now there is, of course, another way of looking at this. Far from creating an inequality between different classes of people the purpose of the public figure test is to lessen an existing inequality that operates in favour of those who occupy positions of persuasive power or influence or who have voluntarily thrust themselves to the forefront of public controversy. Such people not only have greater access than private individuals to put their case to the media, they also have chosen to seek the limelight and should thus accept the consequences, which include the risk of public scrutiny and criticism. Of no people is this more true than it is of parliamentarians.

Reforming qualified privilege

A more subtle, though in my view equally fallacious, argument against introducing the public figure concept in Australia rests on the proposition that we do not need such a thing in Australia because the free flow of information on matters of public concern is already adequately catered for, at least in New South Wales where, in theory, the media has resort to section 22 of the 1974 *Defamation Act*. This provides a defence of qualified privilege for untrue statements where the public has a legitimate interest in being informed on an issue and the publisher's conduct in providing that information is 'reasonable under the circumstances'.

Australian publishers have so far been remarkably unsuccessful in exploiting this provision. Their latest attempt to do so collapsed recently when the NSW Court of Appeal overturned the judgment for the defendant in *Morgan* v *Fairfax*.

It is true that the Attorneys-General have suggested some change to section 22, and that it might then be adopted by other States. My newspaper, in its submission to the Attorneys-General, has argued that the present 'reasonableness' test should be replaced by a test of the publisher's belief, at the time of publication, in the truth of the matter published. We argued that a court should simply decide whether or not the publisher believed, and had good grounds for believing, in the truth of the published matter, not in the imputations, sometimes unintended, that might be held to arise from that matter.

I will concede that an improved, and uniform, section 22 defence might assist the cause of more vigorous debate on issues of public interest. But I do not accept that it would invalidate the case for a public figure defence.

A public figure defence in this country, particularly if introduced as part of a wider package of reforms, would reduce litigation of the sort that has a 'chilling' effect on public debate of matters of legitimate public interest without in any way compromising the ordinary citizen's right to legal protection of reputation.

This is an edited version of an address Peter Cole-Adams, Deputy Editor of the Age, gave to the BLEC forum on Defamation Law Reform in Sydney on 31 October 1990