Uniform defamation laws - the final chapter

Victoria's Attorney-General, Jim Kennan, outlines the reforms proposed by the Attorneys-General of the eastern States

Agreement between the Victorian, New South Wales & Queensland Attorneys-General should lead to uniform defamation Bills being introduced in these states later this year.

There are currently eight different defamation laws which operate throughout Australia, one for each of the States and Territories. Such lack of uniformity has two particular adverse effects: firstly, people defamed by the mass media shop around for the most favourable jurisdiction in which to sue; and secondly, juries are often obliged to apply up to eight different laws in reaching their verdicts.

In 1984, 'Uniform Defamation Laws' was an agenda item at the Standing Committee of Attorneys-General (SCAG). Discussions among the States broke down, particularly after agreement could not be reached on truth alone as a defence to defamation.

Defamation was put back on the SCAG Agenda in March 1990. After several meetings and discussions, myself and the Attorneys-General of Queensland and New South Wales agreed to work towards uniform defamation laws in those three jurisdictions.

Two discussion papers were released by the Queensland, New South Wales and Victorian Attorneys-General. Discussion Paper No. 1 was released in August 1990; Discussion Paper No. 2 was released in January of this year. Many submissions were received in response to the discussion papers.

A series of further meetings between the three Attorneys-General was held to discuss the outstanding areas of disagreement. Finally, in April, 1991, consensus was reached between myself and my counterparts and the matters below agreed as forming the basis of uniform defamation laws for Victoria, Queensland and New South Wales. We had reached historic agreement on all substantial issues.

Justification

In Victoria, a defamatory statement is justified if the defendant establishes its truth; in New South Wales, the defendant must prove that the statement is true and that it relates to a matter of public interest or it is published under qualified privilege; in Queensland, the defence of justification consists of truth plus public benefit.

In a major breakthrough in the push for uniformity, we have agreed that justification will be made out if the defendant establishes that the statement is substantially true and that it is not an unwarranted invasion of privacy. The law of defamation must seek to balance these three objectives simultaneously.

At common law, if the defendant pleads justification, every defamatory imputation pleaded by the plaintiff must be justified. This rule operates unfairly where one imputation that is not proven to be true is minor and does not further injure the reputation of the plaintiff in the light of the imputations that are proven.

Section 16 of the *Defamation Act* 1974 (NSW) provides in effect that partial justification is a complete defence where the truth of any imputation not justified does not further injure the plaintiff in the light of the imputations that are proven to be true.

We considered that a defence of contextual truth based on the New South Wales formulation should apply in all three jurisdictions.

Qualified privilege

In Victoria, the defence of qualified privilege is of limited scope: the defendant must show that he or she had a duty or interest in making the statement, and that the person who received the statement had a reciprocal duty or interest to receive it. Similarly, the New South Wales statutory defence of qualified privilege is of narrow application: section 22 of the *Defamation Act* 1974 (NSW) requires that defendant to act carefully, honestly and reasonably.

As a consequence, qualified privilege is rarely available to the media in New South Wales and Victoria. In Queensland, qualified privilege is afforded to publications that fall within certain categories specified in section 377 of its Criminal Code. The Queensland provision is used by the media.

We have agreed to open up the defence of qualified privilege to the media, but with strict conditions. The Bill will allow a defence of qualified privilege where the publication was made in good faith in the public interest and reasonable enquiries were made.

'Good faith' will include a willingness to allow a right of reply; the making of reasonable enquiries will extend to whether, in appropriate circumstances, the matter was put to the person allegedly defamed to confirm or deny its truth prior to publication; and, finally, if qualified privilege is successfully pleaded and it is apparent that the statement is false, the court will have a discretion to order a right of reply.

These conditions should promote responsible journalism, and avoid reckless, baseless or sensational statements that are injurious to reputation.

Correction statements

Unprecedented damages awards in some jurisdictions over recent years have called into question the relevance of monetary damages to compensate for injury to reputation. Damage to reputation is much less tangible than physical injury or property damage. Often all a plaintiff seeks is a retraction or correction. Given that correction statements may be effective in fully or partially restoring injured reputations, the Attorneys propose to introduce a system of court-recommended correction statements.

A plaintiff will be able to apply to the court for a mediator to be appointed to determine the form and content of a correction statement. It will not be mandatory for the defendant to publicise the correction statement; but in assessing damages, the court may take into account whether or not a correction statement was sought or published.

This procedure will establish a 'fast track' remedy for a plaintiff seeking a retraction rather than monetary damages. It will also encourage early settlement of actions, and prevent 'gold-digging' plaintiffs seeking large damages awards.

New South Wales and Victoria rely principally on the common law as the source of their defamation laws; although the Defamation Act 1974 modified the common law position in New South Wales. Queensland is a code State: its defamation law derives mainly from its Criminal Code.

We have agreed that the Bill will not operate as a code; rather it will modify the common law with respect to the matters agreed.

In Queensland, New South Wales and Victoria, defamation proceedings must be brought within six years of publication of the

alleged defamatory statement. In its report *Unfair Publication: Defamation and Privacy*, the Australian Law Reform Commission proposed that defamation actions be subject to a special limitation period in order to achieve speedy trials and timely corrections of false statements.

In line with these recommendations, we have determined that defamation actions must be brought within six months of the date the plaintiff first became aware of the publication or three years from the date of the publication, whichever is the earlier.

Privilege & innocent publication

Anything said in Parliament by a member of Parliament in his or her capacity as a member is protected by absolute privilege. Qualified privilege attaches to fair and accurate reports of 'parliamentary proceedings', and will deal with a number of ancillary matters, such as preparation of papers intended for tabling.

At common law, a statement is defamatory if the reasonable recipient of the statement would regard it as defamatory. It does not matter whether the published intended the statement to be defamatory, or knew it contained defamatory matter.

These principles operate unfairly against the maker of a statement who is unaware that the statement is defamatory. Division 8 of the New South Wales *Defamation Act* alleviates a number of difficulties in this area by permitting a defendant to make an 'offer of amends'. We have agreed that provisions similar to those in New South Wales be adopted in all three jurisdictions.

Damages

It is the responsibility of juries to assess the quantum of plaintiffs' damages. Due principally to large damages awards in their jurisdictions, New South Wales and Queensland intend to give judges the task of assessing damages. In Victoria, where large damages awards are a rarity and the jury system works well in this area, assessment of damages will remain the function of the jury.

Libel is actionable without proof of damage: to succeed in an action for slander, the plaintiff must as a general rule show that he or she has suffered some damage.

Victoria retains the distinction between libel and slander. The distinction is described variously as the difference between defamatory statements in permanent (libel) or transient (slander) form; or alternatively, as the difference between defamatory statements addressed to the sense of sight (libel) or communicated to the ear (slander).

The distinction between libel and slander is based on the old forms of actions, is archaic and no longer serves any useful purpose. It has been abolished in New South Wales and Queensland. It will also be abolished in Victoria.

The above matters form the basis for the uniform defamation laws. It is proposed that amendments will be introduced in the Spring session of the respective parliaments later this year.

I would now hope that other States will re-examine their laws to provide us with truly national defamation laws.

Book reviews

Peter Bartlett reviews 'Australian Defamation Law and Practice'

For many years media lawyers have had to rely upon United Kingdom publications such as *Gatley on Libel and Slander*. There were very few Australian texts that covered this area. *Fleming on Torts* contained a very good chapter on defamation. However it was not comprehensive enough for such a complicated area of law. At the time when Sydney was already known as the defamation capital of Australia and Justice Hunt and the New South Wales Court of Appeal was bringing down so many important decisions, we had no Australian textbooks. In 1983 Mark Armstrong, Michael Blakeney and Ray Watterson published a book entitled *Media Law in Australia* (Second Edition 1988) and in 1989 Sally Walker's excellent book *The Law of Journalism in Australia* was published. Both these books were for journalists, broadcasts and lawyers.

Australian Defamation Law and Practice is aimed directly at lawyers. It has many admirable features, the first and probably the most important being that it is a loose leaf service. Most practitioners would regard the ability to include statutory amendments, judicial interpretation and up-to-date case analysis as paramount. Another admirable feature is that it covers all Australian jurisdictions. It therefore brings together in a comprehensive fashion the legislation covering all the States and Territories. This allows a practitioner easy access to legislation from the other States, and hopefully access to the most recent amendments.

With a draft Bill to reform the law of defamation in Victoria, New South Wales and Queensland now nearing completion, this book may be the first to reach us with a detailed analysis.

When considering the book I compared its treatment of various limited sections, with that of Gatley and Walker.

One topical area is the media's attempts to rely on statutory and common law qualified privilege. None of the books of course refer to Justice Matthew's welcome judgement in *Morgan* v *John Fairfax* (1990).

However, Tobin and Sexton, Gatley and Walker confirm that only in extremely limited circumstances would the media succeed. This book gives a fuller coverage to the topic and quotes from the more encouraging judgement of Justice Smithers in *Australian Broadcasting Corporation* v *Comalco Limited* (1986).

In the last few years we have had some interesting cases where a party has attempted to introduce into evidence parliamentary records, documents or Hansard. These include *R* v *Murphy* (1986), *R* v *Jackson* (1987) and *Wright and Advertiser Newspapers Limited* v. *Lewis* (1990). The *Westpac letters* case earlier this year could also have invoked this complex area of law.

Tobin and Sexton's treatment of this area also compares very well with Walker and Gatley. To be fair of course it must be pointed our that Walker's book covers areas far wider than those limited to defamation.

Later updates to the book will enable the authors to include more obscure statutory provisions covering the issue of defamation. For example, there is no reference to Section 5A of the *Victorian Wrongs Act* (which provides qualified privilege in limited circumstances for publications made at the request of the Police Force) or Section 62 of the *Victorian Freedom of Information Act* (protection against actions for defamation).

A visit to the defamation list in Sydney is a unique experience, in particular for an interstate practitioner. The ability of barristers to quote from endless unreported decisions is astounding. The difficulty, of course, is to gain access to these unreported decisions. This book contains a tab for unreported