The hidden impact of the law on reporting

Julianne Schultz argues that not only the defamation laws but the legal system and commercial considerations constrain investigative journalism

It is important that by welcoming the reforms to the law of defamation that the Attorneys-General of the eastern States have put, we do not give the impression that the press will be much freer as a result of those changes. As well as defamation and contempt laws, political and economic pressures have a very significant impact on what the media publishes and broadcasts.

The legal playing field is not an even one. It may seem trite to point out that the way media law operates reflects the political and economic relationships of the individuals and institutions involved — but there has been almost nothing written analysing the media law from this point of view.

What price are we paying for Australia's restrictive defamation laws — restrictions in loss of information and freedom of expression? How much of that price is due to timid publishers and the high general costs of litigation and how much to the law itself? How often do important stories remain in the notebooks of journalists?

The law itself, except in a few cases, has not prevented the publication or broadcast of whole articles or programmes. But when you examine the whole of the legal process, defamation law affects the form and content of stories told.

As Armstrong, Blakeney and Watterson acknowledge in their manual *Media Law in Australia*, "no satisfactory empirical studies about the practical effect of defamation law have been carried out". It is not surprising then that the proposals for reform contained in the recent discussion paper issued by the Attorneys-General have been framed with more understanding of the problems the law presents for lawyers, than of its practical impact on the day to day workings of the media in general and journalists in particular.

The study

The approach adopted in a research project being undertaken by me and Wendy Bacon is to examine what is lost from stories before publication and the role of threats of legal action and apologies and closed door negotiations which have little to do with the defamation writs as such.

Our project involves a detailed study of the impact of the law on twenty-five investigative articles and programmes. The stories have been chosen randomly although we have attempted to spread between different states and media, and have included many of the best known stories of the 1980s. The study also includes interviews with a number of journalists and lawyers about their views and impressions of the impact of the law on journalism.

The Moonlight State

Without Chris Masters' report on Four Corners, *The Moonlight State*, there probably would have been no Fitzgerald inquiry. That program got to air, but sections of it were line-ball. A less courageous executive producer and legal adviser might have been prepared to expose illegal gambling and prostitution rackets, but not to raise serious questions about the police commissioner. But without its political dimension, the program would not have had the same impact.

At the time the program was broadcast, there was no evidence which could have been produced in court of actual corruption directly involving ex-Police Commissioner Terry Lewis. And yet he had presided over a police force which was corrupt. There was no assertion in the program that he was corrupt, but would his very presence impute corruption as well as incompetence? This is the sort of fine distinction that the defamation advice turned on. In the case of Lewis, ABC lawyer Bruce Donald, advised in favour of publication. Even so journalists involved were disappointed that ex-Premier Joh Bjelke Peterson had to be suitably distanced from the action disclosed, and felt that the program may have lost impact as a result.

Would any other broadcaster than the ABC, with its public service charter, have broadcast this story? The answer to this question is almost certainly no. This is an important distinction, because it was the commitment to a public debate that informed the legal advice. Such a commitment is often excluded by those seeking to interpret the law more strictly.

Legal vetting

Most investigative stories are legally vetted as a matter of course before publication. Certainly lawyers went over most of the stories we are examining with a fine-tooth comb. In a number of cases, the legal advice given to editors and producers was equivocal: for instance, "there are dangers but it is up to you".

In many cases, sections were omitted and words fine-tuned, with an ear to legal imputations, before publication, sometimes in a way journalists believed weakened the impact or obscured the meaning. Only one story was not published at all (ostensibly) for legal reasons.

Of the twenty-five stories, twelve actually attracted at least one writ after publication. There were attempts to injunct four other stories before publication, for reasons other than defamation such as secrecy laws. Most of these defamation writs have not gone beyond the statement of claim stage.

Five of the writs have been resolved in favour of the plaintiff. But since this might give the impression that, at least in these cases, innocent victims of the media have been deservedly compensated, it is worth looking more carefully at these results.

In the one case which went to trial, a jury found that two policemen, who claimed associates could identify them from an article about police corruption, had been defamed but awarded only nominal damages. In another case, in a confidential settlement, ex-NSW policeman Roger Rogerson was paid a sum of money by Channel 9 for a program which dealt with his role in the shooting of heroin trafficker Warren Lanfranchi.

The other three cases involved well-known public figures. In each case, management became directly involved in negotiations with a representative of the plaintiff while the journalists and editors were kept in the dark until after negotiations had been completed. In each of these cases, there is a strong possibility that political or commercial, rather than simply legal considerations, were involved in these negotiations.

Who negotiates?

To spell out the significance of what happened in these cases one needs to remember the procedures which are *usually* followed at settlement of legal cases. Settlement is negotiated between lawyers in consultation with clients. In the case of an alleged defamatory story, journalists and editors and executive producers, and lawyers representing the organisation will be involved in consultations leading up to settlement. Journalists will not necessarily be informed of the actual terms of confidential settlements.

You might expect the senior management of the media organisation to become involved when decisions are being made about spending money but not to the exclusion of editors and certainly not to the exclusion of the lawyers acting for them.

In these cases, media management became directly involved in negotiations with representatives of the plaintiff to settle the cases while journalists and editors were kept in the dark until after negotiations had been completed. In one case, even the Fairfax lawyers were unclear about the reasons for a settlement with Alan Bond.

These cases occurred in the mid eighties. Each involved an extremely powerful plaintiff. Unfortunately, space dictates that only one case be discussed.

Bond case

This case involved an article in the *Sydney Morning Herald* alleging that directors of Bond Corporation had taken advantage of the public shareholders to the tune of millions of dollars. One needs to remember that this was the mid eighties and this was only the second critical article to appear in the otherwise laudatory press enjoyed by Bond. Martin Saxon, who co-authored the *Sydney Morning Herald* article with Colleen Ryan, had originally prepared the article for publication in the Robert Holmes A'Court owned *Western Mail*. Despite the piece being legally approved, the paper refused to publish the story and Saxon resigned. There was much agonising at the *Herald* before publication, however, the article was passed by a QC and the decision to go ahead was finally given. Bond not only sued but withdrew all the Tooheys beer advertising from John Fairfax and Sons.

While the writ was pending, another smaller *Times on Sunday* article dealing With Bond's affairs was stopped at a managerial level although it had been approved both legally and by the editor. There is still confusion amongst editorial staff about the terms of settlement with Bond which came unexpectedly. Despite legal advice that the company could defend the action, Bond was given a large advertisement in which to state his case against the article in the *Herald*.

Self-censorship

Do journalists have a lot of stories which they feel should be published but cannot be because of the defamation laws? This question is difficult to answer because experienced journalists may adapt so well to the law that they do not attempt to write stories which they know will not reach the standard of evidence that lawyers require. For example, one journalist interviewed several independent, but confidential, sources who supplied information about the corrupt practices of a leading Australian businessman. She was personally convinced of the veracity of the story, but knew it was no use writing it except anonymously in the context of a more general piece about business corruption. Another journalist believed material he had gathered in taped interviews should have been published but was convinced that it would not be legally approved, so did not attempt to write it up until after the NSW illegal tapes story was published. He blamed this cautious approach on his previous experience with the particular lawyers and publishers involved, rather than on the law itself.

Nevertheless, it is significant that some of these experienced journalists could not name a story they had been unable to publish at all because of the law and were even sceptical of journalists who blamed the law for their own inadequacies. One even said that stories which were completely knocked back by lawyers were not up to scratch anyway. These journalists have learnt the standards of proof required by lawyers and several commented that they thought they had become better, more careful and imaginative reporters as a result.

Yet most investigative journalists are still very critical of the way the defamation laws work. Some of their reasons are:

- To meet the standards required by our restrictive defamation laws, stories can become more obscure and writing more clumsy. For example citing court reports and Parliamentary proceedings because they are privileged. Since these reports have to be identified, a story can develop an awkward and distracting chronology.
- Journalists are tempted to adopt a bargaining attitude, eliminating or weakening some points in their dealings with lawyers in order to get a story published.
- Defamation laws use up valuable time and resources. Journalists spend days preparing material for lawyers in cases in which the plaintiff never intends to proceed. Small publishers may scarcely even be able to afford to file a defence in an action, let alone defend it in court.
- Publishers often become more cautious if there is a risk of exacerbating damages following the commencement of proceedings ('stop writs') or if a public figure is known to be litigious.
- Journalists often use confidential sources. Because a journalist who will not name a source, he or she can be charged with contempt and lawyers will not consider calling him or her as witness in a defamation trial. As a result, settlements are reached in cases where the publisher believes in the truth of the story.
- Journalists are frustrated by having to prove not only the truth of each separate assertion and the inferences they intend to draw from these but also meanings they never intended in the first place.

Conclusion

Journalism plays a crucial watchdog role in the effective functioning of a democratic state. For journalism to serve this function effectively journalists need to be able to publish or broadcast matters of public importance in a way which is less fettered than the current law permits. But they should also not shirk from doing the hard work of proving the allegations they wish to raise as conclusively as possible.

Some have argued that the defamation law itself is not the problem, but merely the cautiousness of journalists and lawyers. The two cannot be easily separated. That cautiousness is itself a reflection of the uncertainty, fine distinctions in the law and the threat of damages which, in the leaner 90's, few can afford to run the risk of having to pay.

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