Republication of Defamation

Moira Saville examines a recent decision where the New South Wales Supreme Court decided that a newspaper reviewer, whose remarks were read out and commented upon in a radio broadcast, could be sued in defamation for the repetition

Williams v *John Fairfax Group Pty Ltd,* was heard on 20 November 1991. It concerned one of Leo Schofield's restaurant reviews in the "Good Living" section of *The Sydney Morning Herald.* John Fairfax, the publishers and Mr Schofield were sued for defamation by the owner of a cafe and two members of his staff.

The "sting" of the allegedly defamatory review had been read out and commented upon by David Dale on 2BL later on the day of publication. Dale called the review one of Schofield's "famous (or shall we say, notorious) dump jobs on a restaurant". The issue was whether this was a republication for which the defendants could also be sued.

The decision

Justice Hunt decided that a right to claim damages for republication exists in New South Wales, even though section 9 of the *Defamation Act* 1974 (NSW), which deals with causes of action for defamation, does not refer to republication. He decided that section 9 did not exclude the common law.

He held that there was an arguable case that the defendants were liable for the republication. The jury was to determine whether the publication and the republication were defamatory and whether the defendants were liable for the republication, as questions of fact in the circumstances of the case.

Circumstances of liability for republication

The only way a defendant can have a claim for damages for republication struck out before the trial is by proving that it is "so obviously untenable that it cannot possibly succeed, or manifestly unarguable." This is a very heavy onus. Justice Hunt said that the authorities identify four classes where a defendant will be responsible for republication:

1. where the defendant authorised the republication;
2. where the defendant intended the republication;
3. where there was a moral obligation upon the person to whom the original publication was made to repeat it;
4. where the republication was the natural and probable consequence of the defendant's original publication.

To satisfy the last class, it is not necessary to show that a defendant authorised, intended or even was aware of the alleged republication. Justice Hunt relied on *Speight* v *Gosnay* as authority. That case concerned a defendant who had in fact intended the alleged republication, but the four classes were approved by the NSW Supreme Court of Appeal in *Dempster* v *Coates* in April, 1990 and by the House of Lords in *Slipper* v *BBC* .

"Natural and probable consequence"

Justice Hunt held that the plaintiff had an arguable case that the radio show included a republication of the allegedly defamatory newspaper review. It was arguably a "natural and probable consequence" of the original publication by the defendants. It did not matter that the defendants did not authorise or intend the broadcast, even if the republication was in breach of copyright.

Justice Hunt took account of the High Court's decision in *March* v *E & MH Stramare Pty Ltd,* which redefined the principles of causation in tort. The established test was that damage is caused by a tortious act if it would not have occurred but for that act. The High Court decided that the "but for" test should no longer be definitive; there now should be a greater emphasis on common sense and experience, applied to the facts of the particular case.

A defendant will be responsible for the consequences of an act if the act was "the very kind of thing which was likely to happen" as a result of the defendant's original tortious act or if the defendant's act had "generated the very risk that, in the ordinary course of things, a third party would act in the way which caused the plaintiff further injury".

Justice Hunt suggested that the plaintiffs should remodel their statement of claim in these terms. He also treated the "natural and probable" test as coterminous with foreseeability. The House of Lords in *Slipper* v *BBC* supported the view that no special rules apply to causation or remoteness of damage in defamation cases. General tort principles apply. The case concerned the republication of allegedly defamatory parts of a BBC television production in newspaper reviews.

Justice Hunt felt that to apply these principles to the facts would not give a different result. Dale's programme was not a "novus actus interveniens" — a new intervening act. He said that it was foreseeable that Schofield's criticisms would be repeated by those that read the review. It was a "matter of common sense or experience". This was not true, however, of everything in a newspaper:

"The report of the usually fatuous remarks made by a visiting US TV 'celebrity' would in most cases be unlikely to be repeated",

in comparison to the repetition of the "sting" of a published expose.

He said that the very purpose of a restaurant review was that it should be repeated:

"if one person suggests to another that they attend the plaintiff's restaurant, it is obviously foreseeable that the second will refer to and repeat the sting of the newspaper review as a consideration...".

Justice Hunt also seemed to suggest that the republication was Schofield's fault anyway, because his reviews had become

"something which he has placed before the public for their attention" (citing Goldsborough v Fairfax , and Chappell v TCN 9).

They had become

"a matter of public interest since the extraordinary publicity given to the result of the defamation action based upon one of his reviews, the so-called 'lobster case', even if they were not already".

Moira Saville is a student at the University of Sydney Law School and law clerk with Malleson Stephen Jaques.