Electoral defamation

Bruce Slane examines the implications of a recent New Zealand case for publishers of electoral material

The risks run in publishing lobbying groups' material at election time have been highlighted in a decision of Judge B N Morris in the Auckland District Court convicting a leading New Zealand doctor for publishing defamatory matter during 1990 New Zealand General Election.

Section 128 of the *Electoral Act* 1956 provides:

> *"Every person shall be liable on summary conviction to a fine not exceeding $1,000 or to imprisonment for a term not exceeding three months who at any time between writ day and the close of the poll publishes or exposes or causes to be published or exposed, to public view any document or writing or printed matter containing any untrue statement defamatory of any candidate and calculated to influence the vote of any elector."*

The police brought a prosecution against Dr. R.M. Ridley-Smith, President of a General Practitioners' Association, an unincorporated branch of the New Zealand Medical Association, in respect of five statements made in a pamphlet distributed in the Mt. Albert electorate prior to the General Election in October 1990. At the time the complainant, Hon. Helen Clark was Minister of Health, Minister of Labour and Deputy Prime Minister in the Labour Government. She first became aware of the pamphlet on the Tuesday before the Saturday election.

The five statements were grouped by the Judge in his judgment as follows:

First Group

"1. Helen Clark has given ministerial approval to the closure of St. Helens Maternity Hospital in her own electorate. This is her legacy to the women and parents of Mt. Albert.

4. If you need a cataract operation, or a hip replacement, or a coronary bypass, this is Helen Clark's best offer.

"Join a waiting list with 60,000 people on it. (You might get your operation before you die.")

Second Group

2. The Minister now has a plan to get rid of private medical insurance for GP visits.

3. She has tried to introduce a scheme to put GPs on contract as part of a plan to establish Government control over general practice.

5. The Minister's intentions were revealed by examination of Departmental and Ministerial documents produced in evidence in a recent court case. The documents included a timetable for implementation of the scheme by mid 1992."

A similar provision is contained in section 55 *Local Election & Polls Act* 1976 which the judge held was for all practical purposes the same as section 128 *Electoral Act 1956*.

The relevance of section 55 is that in *Police* v *Starkey* Mr. Justice Barker set out the four elements of the section:

(a) Publication of a document;
(b) Containing any untrue statement;
(c) Defamatory of any candidate;
(d) Calculated to influence the vote of any elector.

An Orwellian Scenario

Senior counsel for the defendant, Mr. H.B. Rennie of Wellington, saw the prosecution as an Orwellian scenario from the novel *1984* — a big brother approach endeavouring to stifle the citizen's right to debate issues, and denied that any of the statements were defamatory.

Mr. Rennie submitted that it had been well established in New Zealand law for many years in accordance with the British tradition of Parliamentary Government, that free and frank expression would be protected by the Courts. He pointed to *Bradney* v *Virtue* where Mr. Justice Edwards noted that "A very considerable latitude must be allowed for words spoken in the heat of an election." Mr. Rennie further argued that the principle of freedom of expression now finds statutory recognition in the New Zealand *Bill of Rights Act* 1990 which at section 14 provides:

> *"Everyone has the right to freedom of expression including the freedom to seek receive and impart information and opinions of any kind in any form."*

Section 6 of that Act provides that whenever an enactment can be given a meaning that is inconsistent with the rights and freedoms contained in the *Bill of Rights Act* that meaning shall be preferred to any other meaning.

In evidence Dr. Ridley-Smith said that the General Practitioner's Society had a basic object: freedom.

The judge found that on the defendant's own evidence the intention of circulating the pamphlet was to influence the votes of electors in the Mt. Albert electorate. The judge also found that the defendant clearly acknowledged being a party to the causing of the pamphlet being published and the taking of necessary steps for it to be distributed in the Mt. Albert electorate. He also found it was published to public view between writ day and the close of the poll.

The remaining issues were whether the statements made were untrue and was defamatory of the candidate. In relation to the second group of statements the judge said he was not satisfied beyond reasonable doubt that the statements complained of were untrue. He held that each statement in that group contained a modicum of truth sufficient to create such a doubt.

Freedom of Speech

The judge said that the funda mental right or freedom put forward by counsel for the defendant must be balanced against the duty imposed on the citizen that in exercising the basic right or freedom, he or she must do so within the boundaries of expression as set out in section 128 of the *Electoral Act* 1956. Judge Morris said this was the approach of Mr. Justice Barker in *Starkey* although the *Bill of Rights* was not applicable in that case before His Honour because of the time at which it was decided. (Judge Morris did not deal otherwise with the *Bill of Rights Act* argument in his judgment which he said had not been developed beyond a "a basic submission").

The judge quoted Mr. Justice Barker's judgment:

> *"Section 55 is aimed at prohibiting the publication of untrue defamatory material at election time. There is obviously a strong public interest in ensuring free and fair elections and non-interference with the democratic process. Section 55 involves balancing a number of rights including the rights to free speech, the rights of candidates for election to be defamed or have untrue statements made about them,*

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the right of electors to vote in a fair election untrammelled by false statements. The protection of these rights is all the more crucial when the section specifies that the offence may be committed after public notice has been given but before closing of the voting. Within this time frame candidates may have no opportunity to correct untrue statements or to clear their names before the election. The public interest therefore clearly requires that every effort be made to ensure that any information published about candidates at such a time is accurate. It will be seen that the object of this section squarely involves the public welfare."

And later:

"Whether or not a statement is defamatory is a question for objective determination on the ordinary meaning of the word. In both these two latter cases (Re Waimairi County Election Petitions, Re The Election of the Mayor of Cambridge) the meaning of 'defamatory' adopted was the ordinary civil meaning, that is an imputation which would tend to lower the plaintiff in the estimation of right thinking members of society generally. It is equally clear however, that the civil test is only relevant to the definition of the word 'defamatory' — the civil defences are irrelevant to a charge brought under the section (Krafter v Webster and Guscott (No. 2))."

Mr. Rennie had submitted that for a statement to be defamatory it would necessarily have to be made in relation to the "personal character or conduct of a candidate" but in addition to affecting reputation in that way, it must meet the normal test for a defamatory statement. His submission was that issues of personal political policy do not meet that test.

However, Judge Morris adopted the test formulated by Mr. Justice Barker.

Findings

Turning to the first group, the judge found that both statements 1 and 4 were untrue. The first statement connotes a positive act by the complainant which was untrue, he said. (The closing of the hospital was apparently a decision of the Auckland Area Health Board).

The defendant had the right to show that on the balance of probabilities reasonable care was taken to ensure the truth of the statements published. Insofar as the closing of St. Helens was concerned, the judge's view was that the defendant took "no care at all in regard to this statement, and with regard to the waiting list, he dismisses the item in the pamphlet as rhetoric in his statement to the police." The judge found on the basis of the appropriate test the defendant had not made out a defence to statements 1 and 4 and he was convicted in respect of those statements.

As to whether the statements were defamatory, the judge found that the first one held the Minister as responsible for an act she had not performed and that she did not have the welfare of women and parents in her electorate at heart and was an unfit person to represent the electorate.

As far as statement 4 was concerned, the complainant saw this as a portrayal that she had suggested to people that they should sit at the end of the waiting list until they died. This portrayal of her was of an entirely heartless person, a callous person who had no concern for the welfare of her people regarding surgery.

A fine was imposed.

Implications for Publishers

In the normal course of election reporting there are probably many statements published by the media in respect of which prosecutions for offences under the *Electoral Act* could be brought.

Mr. Justice Barker addressed this problem in *Starkey* where he had ruled:

"Strict liability attaches to the phrase 'containing any untrue statement'; the defendant may exculpate himself by proving on the balance of probabilities that he took reasonable care to ensure that what was published was true."

Mr. Justice Barker had rejected absolute liability on the one hand and proof of mens rea on the other.

Absolute liability would unduly deter publishers from printing relevant material about election candidates which they reasonably believed to be true. The public had an interest in knowing the background and reputations of candidates for election, Mr. Justice Barker said.

No publisher could guarantee the absolute truth of what was printed — all he or she could do was to make all reasonable enquiries. The imposition of absolute liability would defeat the public right to know about the election candidates; categorising the section as a full mens rea offence would defeat the public right to full and fair elections.

"Only strict liability with respect to the truth of the statements, will strike a balance between the competing rights, by requiring a publisher to prove that reasonable care has been taken to ensure the truth of statements published."

In the absence of any other civil defence The greatest care has to be taken by publishers at election time to ensure that reasonable enquiries are made in respect of potentially defamatory statements about a candidate's personal character and conduct.

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allows real jobs, real dollars and real services to be threatened, the BTCE should be required to produce some very convincing quantitative assessments which demonstrate that the potential rewards of the proposed change far outweigh the potential risks. Hard statistical evidence relating to the financial impact of new commercial competition is emerging from both local and overseas markets and the BTCE should be required to objectively analyse such data.

Conclusion

The BSB, and any other future legislation which affects the commercial broadcasting industry, must continue to take into the account the financial health of the industry as a whole, and not be allowed to focus on a single objective such as maximising the quantity of available services.

If the Government wants to continue to foster the growth and development of the commercial broadcasting sector, then commercial sensibility rather than radical theoretical purity needs to be the predominant feature of any future broadcasting regulations.

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