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The Responsible Reporter

Press Council member CHRIS McLEOD looks at the legal concept of 'reasonableness', its application to defamation law and how it is affecting journalists' defences.

Journalists are being painted into a corner by defamation law reform. The corner is that of reasonableness.

The press can never expect to be able to publish whatever it likes with immunity. Though there are laws that specifically restrict aspects of publishing, the press itself recognises that it must behave responsibly. That's why the Australian Press Council exists. The press pushes its case for press freedom with vigour, but it recognises that to balance those rights, it has responsibilities.

The Press Council provides a mechanism for those with grievances against the press to air them. Most would say that this is reasonable.

Every person has some concept of what's reasonable behaviour – it's what stops society falling into anarchy and the law of the jungle.

So it should be no surprise that 'reasonableness' is emerging as an important concept in defamation.

It isn't a new concept but it is a significant one in the reform proposals that are emerging from state and territory moves on uniform defamation law.

Reasonableness came to prominence as a defamation defence in two High Court cases, first in *Theophanous v The Herald and Weekly Times* (1994) and the subsequent modification in *Lange v The ABC* (1997).

The High Court, basically, found that certain defamatory material could be published, even if wrong, as long as publication was ***reasonable in the circumstances***.

The material said to be eligible for such protection was discussion of government and political matter, based on an implied right in the Commonwealth Constitution to a free political system, unfettered by law.

What evolved from that is the defence known as "extended qualified privilege", with an emphasis on reasonableness.

Lower courts in Australia have taken mixed approaches to the application of the defence and considerable uncertainty has surrounded its effectiveness.

Reasonableness isn't a new idea.

Queensland's defamation code, in force since 1889, provides a qualified protection defence (Section 16[e]) that says it's a lawful excuse to publish defamatory material

> if the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make the person's conduct in making the publication *reasonable under the circumstances*...

While the legalese may be difficult to decipher, it is clear that reasonable conduct is essential.

According to the High Court decisions, reasonableness requires that:

- The publisher had reasonable grounds for believing the matter published was true;
- The publisher took proper steps, so far as reasonably open, to verify the accuracy of the material;
- The publisher did not believe that the matter published was untrue;
- The publisher sought a response from the person defamed and published the response (if any) except in cases where it was not practicable, or it was unnecessary, to give the defamed person a chance to respond.

In NSW, the concept was picked up in s22 of the *Defamation Act*, (1974, as amended):

> Where, in respect of matter published to any person:
>
> (a) the recipient has an interest or apparent interest in having information on some subject,
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
>
> (c) the conduct of the publisher in publishing that matter is *reasonable in the circumstances*,
>
> there is a defence of qualified privilege for that publication.

The protection has qualifications, of course, largely based on what the High Court had said.

Unfortunately, the defence has enjoyed little success, due either to judges interpreting many of the High Court's propositions as being absolute (reasonable in ***all*** the circumstances) or defendants not being able to convince courts they did enough investigation or inquiry before publication.

In one of the first cases where the extended qualified privilege defence made available by the *Theophanous* and *Lange* cases was tested (*Craigie v Nornews Pty Ltd*, 1999), a newspaper argued in the NSW Supreme Court that its conduct in reporting allegations of improper spending of an association's funds was reasonable – it had reported accurately criticisms made by one person of another. The newspaper lost.

Justice Ireland said, in part:

> In my view the defendant fell far short of what was reasonable in the circumstances. In particular the evidence does not establish that the defendant believed in the truth of the imputation, or that reasonable care was exercised to make inquiries or check the accuracy of the source material relied upon.

The judge said the effort made by the reporter to contact the plaintiff was just one unsuccessful phone call to the plaintiff's home.

In a Victorian case (*Popovic v The Herald And Weekly Times*, 2002), a jury found a columnist's statements and conduct to be reasonable but the decision, controversially, was taken away by the judge. The Court of Appeal upheld the judge's action, finding that the journalist acted unreasonably by including only part of an exchange from a court transcript to underline criticism of a deputy chief magistrate.

In a NSW s22 case (*O'Shane v John Fairfax & Sons Ltd*, 2004), a court found the newspaper did not act reasonably because the imputations drawn did not follow logically from information obtained by the newspaper.

Both these cases involved members of the judiciary and their fitness for office, raising the question of what constitutes discussion of government and political matter. But reasonableness was a turning point in both and the courts applied tough tests.

The theory of extended qualified privilege also has developed in the United Kingdom.

In a 1998 case (*Reynolds v Times Newspapers*), the courts for the first time recognised a right-to-know principle and a duty and interest relationship between the public and the press. The Court of Appeal's decision that such a relationship existed was upheld in 1999 by the Law Lords.

The Lords set out a list of circumstances under which the media would have such a defence. In short, these are the issues to be addressed:

- The seriousness of the allegation;
- The nature of the information and whether it is of public concern;
- The reliability of source of the information;
- Steps taken to verify the information;
- The status or currency of the allegation;
- The urgency of the matter;
- Whether comment was sought from those affected;
- Whether the article contained the comments of those affected;
- Whether comments and allegations were adopted as statements of fact;
- The circumstances, including timing, of the publication.

Since the *Reynolds* decision, the principles of qualified privilege have been made clearer. (In *Reynolds* the court found against *The Sunday Times* - noting the reporter believed Reynolds didn't have a defence to the allegations it aired so didn't contact him and had not taken any notes during his inquiries.)

In a 2001 case (*Loutchansky v Times Newspaper, second action*) the Appeal Court considered the qualified privilege defence of *Reynolds* and accepted that it was available, but noted that no privilege existed unless the journalist acted responsibly.

Lord Phillips said setting the standard of journalistic responsibility too low would inevitably encourage too great a readiness to publish defamatory matter. Journalists ought to be rigorous, not lax, he said.

We see from all of this that the so-called reasonableness test is more of a "responsible journalist" test.

This is the likely way forward.

The Australian state and territory Attorneys-General have developed a model for uniform defamation law. Legislation has been introduced in every state jurisdiction (under the threat of a national defamation law being imposed by the Commonwealth) and the territories are also moving to introduce similar legislation by the start of 2006.

While hardly any of the concepts in the model law are new, there is a heavy emphasis on reasonable conduct – by publishers and journalists.

There's an offer of amends process designed to head off legal action. It requires reasonable offers.

There will be a defence of qualified privilege if "the conduct of the defendant in publishing that matter is ***reasonable in the circumstances***".

And in determining questions of reasonableness, the model Act says:

> Whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account
>
> (a) the extent to which the matter published is of public interest; and
>
> (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
>
> (c) the seriousness of any defamatory imputation carried by the matter published; and

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costs more than $25,000, but the same matter costs just over $5,000 in Queensland.' The complainant argues that this assertion is 'plainly misleading' and that the error could have been avoided had the court been given the opportunity to comment. The complainant points out that more than 85 per cent of the criminal workload in the NSW Supreme Court consists of long and complex murder and manslaughter trials, compared with only 10-50 per cent in the nation's other supreme courts. He also states that the Queensland Supreme Court tries a high proportion of relatively minor drugs charges, which are dealt with by lower courts in NSW. The complaint on this issue is upheld.

The Press Council emphasises that it is the right of any newspaper to subject any institution to vigorous scrutiny. It must also be pointed out that the complainant does not challenge this right. Given that the courts are central to the administration of justice, subjecting them to the glare of publicity will ensure transparency and accountability in relation to their operation. Equally, the Press Council draws the attention of newspapers to the need to maintain confidence in the courts and the rule of law in their presentation of court-related matters. The exercise of the newspaper's right to scrutinise does not give it *carte blanche* to report on the activities of a court in any manner it likes. Like any other entity in society, the courts are entitled to be reported in a fair and balanced manner, and in a manner that accords with the Statement of Principles of the Press Council.

Adjudication No. 1301

The Australian Press Council has dismissed a complaint from Marian McDuie about an article, *Land war surrender*, published in the Sunday Mail, Adelaide, on 23 January 2005. The article was largely an update on the progress of the housing development at Aldinga on the Fleurieu Peninsula, south of Adelaide, giving details of the style, number and cost of houses likely to be completed by the end of the year.

Ms McDuie, a member of the Southern Eco Alliance, a community group that protested about the development, complained she was misquoted in the story. However the newspaper believes the quotation attributed to her was a fair and accurate reflection of what she said, and provided a copy of the reporter's notes in support.

The Australian Press Council is unable to determine that Ms McDuie was misquoted and therefore is unable to find that any of its principles have been breached.

Adjudication No. 1302

The Australian Press Council has upheld in part complaints against the Fraser Coast Chronicle over reports involving long-standing differences between a local organisation known as the Access for All Alliance and the Hervey Bay City Council.

The differences concern facilities for the disabled, apparently mainly wheelchair users, at bus stops, on beaches, and in toilets. In addition, the nature of various court actions is also in question.

The details cover such things as the number of seats in a bus shelter compared with the spaces provided for wheelchairs; the percentage of tables in a park allowing wheelchair access; the paths to shelters and beaches.

In a Page 1 report the paper claimed that $60,000 would be needed to modify the bus shelters, alone, to fit the set standards, and further reports on inside pages cited other costs incurred and foreseen.

The paper quoted the Alliance as saying that it has warned the Hervey Bay Council of the standards and the need to meet them ... "We're just pointing out what is correct".

The complainants, Bob and Glenise Staff, both members of the Alliance, also say that of two letters sent to the paper only one was published, and then cut by more than 50 per cent.

In reply the paper says it published information provided by Hervey Bay Council, it did not "deliberately print untrue, misleading or distorted information". The Alliance, it says, "has a confrontational rather than a conciliatory style", and only one letter was received and published.

The Press Council upholds in part because there were inaccuracies and some failure of attribution in the reports. With regard to the published letter, the Alliance's concerns with the newspaper's reporting were preserved in the letter even if it was cut in the editorial process. This part of the complaint is dismissed.

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(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and

(f) the nature of the business environment in which the defendant operates; and

(g) the sources of the information in the matter published and the integrity of those sources; and

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

To some the bar may seem to be set far too high. And questions will remain about the approach courts will take.

For journalists, they'll need to be extremely thorough.

To the consumer, that's probably quite reasonable.

Chris McLeod