and it is likely that this anomaly will be redressed when amendments to the Act are finalised.

Qualified privilege

The government is also committed to examining the provisions relating to the reasonable conduct of the publisher, one element of the defence of qualified privilege as established under the New South Wales Act.

The operation of the defence of qualified privilege has recently received judicial consideration in the New South WalesSupreme Court decision of Morgan v John Fairfax. This matter concerned an editorial written by Mr Paddy Mc Guiness, which strongly criticised a paper written by the plaintiff as being, in effect, unprofessional. The defences of truth and fair comment failed, but the newspaper succeeded with its defence of statutory qualified privilege under s.22 of the Defamation Act. Justice Matthews upheld the s.22 defence on the basis that the publisher's conduct was reasonable in the circumstances. She took into consideration factors such as the editorial writer's expertise and extensive experience, the material on which he was commenting, the grounds for the writer's belief in the logic of his viewpoint, and the reasonableness of that belief given the information which was properly available to the publisher at the time of publication. Another factor influencing the decision appears to have been the very great importance of the subject matter, Aussat Communications.

Justice Matthews further stated that in the circumstances, the newspaper's failure to check every element of the report was not unreasonable. It would be imposing an unfair and unrealistic burden on publishers to suggest that exhaustive inquiries should always be made.

The Morgan decision has naturally been welcomed by the media, and is in line with the government's intention to review s.22 generally to emphasise the need for consideration of all the surrounding circumstances when determining reasonableness of publication. It should be pointed out that the case is still subject to appeal.

Conclusion

I would like to conclude by acknowledging the need for revision of the law of defamation, whilst emphatically denying the need for partial or total abolition. There are no easy solutions.

This article is an edited version of a paper delivered by Mr Dowd to an Australia Press Council Seminar on 27 October 1989.

Lawyers respond to Dowd speech

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Public figure defence

This is well travelled ground. The media in general are supportive of the introduction of such a defence. If one analyses the nature of the majority of defamation claims which reach litigation, one cannot but sympathise with the media's view. The bulk are by people who would clearly pass the United States public figure test and who are often in the position of being able to respond in kind to what has been said about them.

Unfortunately, Mr. Dowd is vague as to how the submission on a public figure defence will be treated by the government, apart from a general statement that he has "considerable reservations" about the proposal. The pros and cons have been amply and publicly debated for many years. What the government must decide now is whether it considers there should be freedom of speech and discussion about persons involved in public life at the expense of those few cases where there should be restrictions on discussion however public the figure is. Unfortunately, it is the politicians who stand to lose most if a public figure defence is introduced. It is those same politicians who will have to take the decision to introduce the defence.

Criminal Defamation

I agree, that if the offence of criminal defamation is to remain, proceedings should require the Attorney General's fiat. However, I am concerned that Mr. Dowd envisages criminal proceedings being commenced where, for instance, civil proceedings would be ineffective against a person of no financial substance or where the defamation has a tendency to destroy confidence in a public office. Thus, defamatory publications would be elevated to criminal offences which would not hitherto have attracted criminal sanction. There is considerable scope for misuse if those are the sorts of factors to be taken into account. Indeed, this could result in a marked increase in the number of cases of criminal defamation coming before the court rather than a decrease.

Limitation period

If a person considers he or she has been defamed, there should be an obligation to sue immediately or not at all. I would welcome a reduction in the limitation period from six years to six months. Too often plaintiffs sue many months or even years after the event when witnesses and vital documents have long disappeared, thus making it impossible to hold a fair trial. Indeed, I believe an even shorter period is warranted - three months at the most.

Truth and public benefit

I agree with the Attorney General that the furthest the legislation should go is to require that the defamatory imputation is true and should relate to a matter of public interest. However, I believe that the truth of the matter complained of should be sufficient to establish a defence for a defendant. The Attorney General refers to the usual arguments for restricting the truth defence. However, I believe the requirements of freedom of speech outweigh the risk of an invasion of privacy in a small number of cases. It cannot be suggested that the press in Victoria, South Australia or the Northern Territory is guilty of more invasion of privacy than the other States because of the availability of the truth alone defence. I am also not sure that the requirement of a public interest element in the defence prevents the ridiculing of "minority groups". The requirement in the defence is for the imputation to "relate" to a matter of public interest not for that imputation to be published "in the public interest".

Damages

I agree with the Attorney General's apparent view that damages awards are out of control. Often there is simply no apparent basis for a jury's award. One suspects that

too much weight is given to a newspaper's circulation at the expense of a reasoned evaluation of actual damage to reputation suffered within the community. The obvious solution is for the jury to make a finding for or against the plaintiff and for the judge to assess damages, as suggested by Mr. Dowd.

Retractions

I agree with Mr. Dowd's reservations in relation to mandatory retractions or apologies except that I believe his hesitancy should be more than "initial". It would be completely impractical for the many reasons enumerated by Mr. Dowd for a judge to decide when a retraction should be published. Very often whether or not a retraction and apology is warranted in particular circumstances requires a subjective decision on the limited facts available at the time. Often a judge would be called upon to make a rapid decision based on incomplete material and information. At present, a newspaper has to make that decision and, if it is the wrong one, no doubt it will suffer in the future in the form of a proper damages award. Certainly, newspapers make serious errors of fact and those errors should be corrected. However, generally speaking a newspaper will be ready to make such a correction and there is no need for judicial intervention.

One small point - the Attorney General appears to suggest that an apology cannot be taken into account in calculating damages in New South Wales. That is not so. Apologies are often pleaded in mitigation of damages in New South Wales actions. In other words, the common law on this point applies in New South Wales.

Qualified privilege

The future of the statutory defence of qualified privilege (S. 22 of the Defamation Act NSW) will depend on the final outcome of the Morgan v Fairfax case [ed: this case was reported in the last issue of the CLB and is currently set down for appeal before the Court of Appeal in March 1990]. Section 22, which was initially thought by many to have provided newspapers with a qualified privilege defence for mass publication has been a great disappointment for the media. Judges have always managed to find something wrong with a newspaper's or television station's treatment of a defamatory story instead of considering the matter at a more general level. They have tended to take a very analytical and technical approach which has invariably resulted in a finding against the media defendant. Perhaps the answer is to give the jury the task of deciding if a publication is reasonable in all the circumstances.

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Defamation damages have recently reached new heights both in the amount awarded and the type of article attacked, prompting some of the victims to appeal for a change of rules. John Dowd's proposed reforms offer little hope to publishers echoing only the usual placatory noises made previously for reform in this area. The three significant proposals tilted at by Mr Dowd of a six month limitation period, sealing on damages and a public figure defence have little chance of reaching first base in New South Wales or of being adopted in other states.

Limitation period

A six month limitation period for commencement of actions does have some merit. The main head of damages for a defamatory publication is the hurt to the plaintiff's feelings. If, after six months, the plaintiff is unaware of or unconcerned about a publication s/he realistically cannot complain of such hurt and should not be free to sue at a later date for other financial advantage. A plaintiff who is genuinely unaware of the publication yet feels great hurt and damage to his or her reputation as a result should always be at liberty to apply for an extension of the period under the existing provisions of the Limitation Act.

Ceiling on damages

A ceiling on damages may become a signpost to a jury resulting in most awards at the top of that range. This seems a dangerous departure from the general principles of compensatory damages applicable in tort. Assessment of damages by the trial judge would be preferable. Another option would be to dispense completely with a jury. A quadriplegic and a whip-lash victim should not be subject to the same ceiling on damages neither should a bank manager accused in the national press of involvement in a heroin ring be limited to the same damages as a hairdresser slandered at a Darling Point dinner party.

Public figure defence

The public figure defence is the proposal least likely to fly particularly with politicians at the controls. Many public figures are the creation of the media and intense media interest alone should not amount to a defence. On this proposal Mr Dowd candidly concedes little interest or enthusiasm. While it may have some merit as adopted in other countries, particularly the United States, the media in Australia should still be compelled to make all reasonable attempts for accuracy in reporting on public figures and of course would then have a defence of qualified privilege or at worst substantial truth. If the media properly perform their function a public figure defence should be superfluous to those already available.

Terry Tobin, Q.C., argues that Mr.Dowd's proposals confuse "hurt feelings" with "damaged reputation" and illustrates his point with the recent Lord Aldington case.

The Attorney-General makes two proposals to deal with what he described as recent unjustifiably high awards of damages in defamation trials: impose a limit on the amount which can be awarded for non-economic loss; and take away from juries the function of assessing damages and give it to judges.

The idea of a cap on non-economic loss to reputation and injury to feelings overlooks the central social function of such damages, namely the vindication of the plaintiff's reputation.

This is well-illustrated by the recent action brought by Lord Aldington (the former Brigadier Toby Low) against Count Nikolai Tolstoy over a pamphlet concerning his role in the enforced repatriation of Cossacks and Yugoslavs by the British Army at the end of the European war. The pamphlet was written by the epigonous Count Tolstoy and distributed by Mr. Nigel Watts, a property developer who is said to have harboured a personal grudge against Lord Aldington.

Tolstoy wrote that "the man who issued every order and arranged every detail of the lying and brutality which resulted in these massacres was Brigadier Toby Low". He described the conduct of the then Brigadier Low as comparable to the "worst butchers of Nazi Germany or the Soviet Union". The defendants pleaded justification and conducted the trial as a stage upon which the allegations against the British military in general and Lord Aldington in particular would be paraded and justified. Tolstoy was

joined as a defendant only after he had threatened to issue a summons seeking to be made a defendant. "I remember being puzzled because I had never before heard of anyone volunteering to be a defendant in a libel action", Lord Aldington told the defence counsel, Mr. Richard Rampton Q.C.

During the trial, the defendant's counsel was reported to have clashed many times with the plaintiff during the days of cross-examination.

He told Lord Aldington when he began his cross-examination that although they were likely to agree on little, they could agree that the allegations against Lord Aldington were "as brutal as character-assassination as you are likely to see". He accused him of lying on oath about the date he gave of his return from the war zone to England - which, if accepted by the jury, meant he could not have written crucial military orders for repatriation: "You have deliberately given the jury false evidence." He suggested that the plaintiff could fairly be described as a war criminal were he proved to have forcibly repatriated 70,000 Cossack and Yugoslav prisoners, knowing he was sending them to their deaths.

The trial itself was described as Britain's first War Crimes Trial and the defence was conducted on the basis that the allegations were true.

In the end, after some two months in court, the jury returned a verdict the sterling equivalent of A$3 million for the plaintiff.

In a case where the defendant sets out to prove that a leading public figure is a war criminal, and fails, it is difficult to see why a jury verdict of this size should not stand. Of course, if limited to injury to feelings alone, a libel verdict could never exceed the highest awards for personal injuries. As for damage to reputation however, there must be circumstances where vindication of the plaintiff requires enormous damages. Aldington's was a case where the defence itself described the charges as character assassination in the first degree, accepted the challenge of proving the plaintiff was a war criminal, compared him to a Nazi butcher and failed to obtain a verdict from the jury.

It will be difficult to find informed press comment on this case which does not reflect the journalist's special vulnerability to and abhorrence of such verdicts. Moreover, it is not possible here to do justice to the wider debate about the role of juries other than to assert that the "solution" of abolishing the jury's role should be resisted. While the outcome of their deliberations may not be predictable - as to who wins or by how much - there is such general agreement among lawyers as to the innate sense of justice in most jury verdicts that the task of vindication of the plaintiff in libel actions should remain with the jury.

The "Bond amendments"

Paul Marx explains the Broadcasting Amendments Bill 1989

The Broadcasting Amendment Bill 1989 ("the Bill"), which amends the Broadcasting Act 1942 ("the Act") was introduced into the House of Representatives on 1 November 1989. In his Second Reading Speech the Minister for Transport and Communications, the Hon. Ralph Willis MP, observed that the Act "has rightly been described as a complex, unwieldy piece of legislation". The amendments proposed by the Bill, however, make the Act more complex.

The Bill seeks to amend the ownership and control provisions of the Act so as to overcome problems with the current legislation perceived by some in the course of recent inquiries by the Australian Broadcasting Tribunal, most notably its inquiry into matters concerning licensee companies controlled by Mr Alan Bond. These problems were described as follows by the Minster in his Second Reading Speech:

"At present, the Tribunal would be faced with extremely limited options if, after conducting an inquiry that it was required to hold, it were to find that a commercial licensee was no longer 'fit and proper', or no longer had the financial, technical or management capacity to provide an adequate and comprehensive service. It presently may only impose licence conditions or suspend, revoke or not renew the licence. But if the licensee's unsuitability was due to the conduct or character of a person in a position to control the licensee company or its operations, licence conditions may not be an effective remedy. This is because the conditions may not be capable of affecting the influence of the relevant person on the licensee company. The only other remedies available - suspension, revocation or refusal to renew the licence - would put the service off the air."

Supplementary and public licences

In addition to the significant changes to the ownership and control provisions, the Bill also contains amendments relating to the grant of licences for supplementary radio services in regional areas and to the nature of material which may be broadcast by the holders of public licences. In summary, those amendments:

(a) clarify the Minster's power to initiate joint inquiries into the grant of a licence for a supplementary or a so-called "independent" commercial FM radio service in a regional area. The amendments also confirm the procedures to be adopted by the Tribunal when holding such a joint inquiry;
(b) permit aspiring public broadcasters to transmit sponsorship announcements when conducting test transmissions; and
(c) permit public licensees to broadcast community promotional material.

The amendments relating to the grant of supplementary/independent commercial FM licences are as a consequence of the changed approach to the planning of such services announced by the then Minister of Communications, Michael Duffy, on 24 February 1987. Under that approach to planning, the Minister forms a prima facie view as to whether an area or market is able to support a new, competing service. Where the Minister is in doubt as to the viability of a new "independent" service the Tribunal considers simultaneously relevant supplementary licence applications and applications lodged with the Tribunal for the grant of a new licence. The original provisions of the Principal Act containing criteria for the grant of supplementary licences were drafted at a time when it was contemplated that supplementary licence applications would be considered by the Tribunal prior to a determination of any relevant "independent" licence applications. In amending the Act to reflect such changed planning procedures the Bill provides that the amendments are not to be taken to imply either that a power conferred on the Minister or the Tribunal by the amendments was not previously possessed by the Minister or the Tribunal.

Suitability requirements

Central to the amendments to the ownership and control provisions is a definition of the term "suitability requirements" which is inserted in s.4 of the Act. The holder of a commercial licence fails to meet the suitability requirements that apply to a licence if the licensee is no longer a fit and proper person to hold the licence or no longer has the financial, technical and management capabilities necessary to provide an adequate and comprehensive service pursuant to the licence. Similar "suitability requirements" apply in respect of applications for approval of relevant share transactions involving licensee companies.

Renewal of commercial licences

The nature and extent of the new powers conferred on the Tribunal by the Bill can be