Feature

Australian and American libel law reform

Professor David Flint, Chairman, Australian Press Council

Those Australians, who see our defamation law as a significant barrier to the free flow of information, quite often refer with approval to the American model.

For example, Robert Pullan, that energetic champion of free speech, says in *"Guilty Secrets"*, that the "... American system works on the assumption that free speech is the road towards truth and that, where speech is legally inhibited, gagged by cultural institutions or self censored, the lives of the people are not their own. The *First Amendment* to the American Constitution is itself a product of the period when Americans embraced free speech and the free press as a means of asserting the rights of the people against the authority of King George III".

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press ..."

Until the decision in *New York Times -v- Sullivan* in 1964, Australian and US laws of libel were similar. The Supreme Court there ruled that public officials (later public figures) have to show that an allegedly defamatory statement was published with knowledge of its falsity. Alternatively, the plaintiff must show the defendant published the material with a reckless disregard for the truth. A central question in US cases is whether the newspaper or station entertained serious doubts about the truth of the publication. Later the Supreme Court required private plaintiffs (as distinct from public figures) to show the media acted at least negligently when publishing false statements *(Gertz -v- Robert Welch Inc)*. As a result, the media lose few defamation cases in the US. When they do, damages are often reduced on appeal.

Recent Australian cases

In two recent Australian High Court cases *(Stephen & Ors -v- West Australian Newspaper Ltd* and *Theophanous -v- The Herald & Weekly Times Ltd. & Ruxton)*, similar but narrower arguments based on the implied freedom of political communication the Court has identified in our Constitution were put by West Australian Newspapers and the Herald and Weekly Times. In both cases the plaintiffs are politicians.

One case is described in detail in Pullan's book. The West Australian had described a trip by six members of a Legislative Council Committee to inquire into the cost and accountability of government agencies as "a junket of mammoth proportions". According to Pullan, the West's youthful, energetic editor Paul Murray thought of the *Political Advertising* case *(Australian Capital Television Pty Ltd -v- The Commonwealth (No 2))* as "the High Court doing what generations of politicians have failed to do" for free speech. He believed the West, "this little newspaper selling on the wrong side of Australia", was trying to do something for the liberty of the national press.

In the *Political Advertising* case, the High Court found in the *penumbrae* of the Constitution an implied freedom of political communication. The Court, almost twenty years later than the Supreme Court of the United States, but without the advantage of an express guarantee, significantly moved the balance between freedom of and restrictions on speech. In breathing new life into the Constitution, a particularly strong High Court may now be about to do something which legislatures have been unable to do - effect some reform of defamation law.

Problems with convergence

This potential convergence between our two jurisdictions, that the judiciary not the legislature is the only likely source of defamation law reform, points to a fundamental problem. It is not in the interest of many legislators to reform defamation law while it provides an opportunity to stop unfavourable discussion and indeed offer the possibility of substantial damages.

Resort to defamation law may, at the same time, chill legitimate investigative reporting of matters of public interest. Pullan reminds us, for example, that when the Melbourne Herald reported in 1975 that Minerals and Energy Minister R F Connor had continued to negotiate loans with Tirath Khemlani after Connor's authority had been revoked, the Minister issued a writ for libel. Shortly after, he departed from the Ministry for that very fault, Pullan also reminds us of Jana Wendt's interview with Alan Bond where the explanation of a settlement to a defamation action brought by Sir Joh Bjelke-Peterson was: "We would have been liable in any event. ... [T]he Premier made it [clear] that if we were going to continue to do business successfully in Queensland, then he expected that matter to be resolved".

Relevant factors in the US

The present advantage for the media in American substantive and constitutional law, which seems to weigh defamation law against the public figure plaintiff, is, however, balanced by certain ethical and procedural factors which work against the media defendant. These are not restricted to libel law; they apply to all civil litigation in the US.

Walter K Olson argues that the extraordinary level of litigation in the US is the result of certain ethical and procedural changes adopted over the years. The first factor is that in the US costs do not follow the cause. The winner cannot expect to recover costs from the loser.

The second is the triumph of the contingency fee. In almost every other country it is considered unethical (as it is with doctors) for lawyers to be paid more for success in litigation. The system seems to have developed, says Olson, from the first factor - that costs do not follow the cause. Impecunious or unwilling clients have had to have another way of recompensing their lawyers.

While University of Iowa research shows that many libel plaintiffs, at least initially, would have been satisfied with a correction or retraction, the contingency fee system means a legal action is no longer owned only by the plaintiff. He or she takes on his or her lawyer as a partner "maybe a senior partner, to whom words of forgiveness butter no parsnips and gestures of mercy pay for no beachfront condos". Hiring a lawyer by the hour is similar to the control one has over a taxi fare. The contingency fee takes the client along for someone else's ride, aboard a high powered machine typically geared to breaking

altitude records. These two factors - contingency fees and the fact that costs do not follow the cause - mean in effect there is no disincentive to litigation. The way is open for the irresponsible plaintiff.

The third factor which facilitates litigation are the rules of civil procedure which from 1938 simplified pleading to such an extent that from *Dioguardi -v- Durning* plaintiffs were no longer required to allege facts sufficient to constitute a cause of action. After that it was very hard to get pleadings thrown out on technicalities. And they can be varied without great difficulty. The previous prescription, the need to set out a plausible case against a defendant when beginning litigation, is no longer necessary.

In addition, with the adoption of generous rules allowing discovery and the taking of oral depositions, which are not restricted against "fishing expeditions", American litigation now has a "sue first and verify later spirit".

Discovery is now not even limited to each side taking turns - the process can be a free for all with simultaneous motions and notices. Inevitably, says Olson, pretrial litigation has become a much bigger source of legal business than trials themselves!

It is understandable, given the nature of the *Sullivan* test which puts in issue the mind of the journalist, there is a need for reasonably generous discovery rules. But it seems that in the US discovery is used more to intimidate, to harass and to burden the opposition with enormous legal costs. The procedures can be protracted, and often attract media attention. Nor is the trial made cheaper, a result one would at least have expected from these changes. Since marginal issues and evidence are admitted, the trial in fact usually takes longer than before.

Thus while American substantive law seems to favour the media, American trial procedures, long, complicated and extremely expensive, ensure that litigation costs are often prohibitive. In one notorious case, discovery, and discovery related litigation, continued for thirteen years! The deposition of a TV producer filled twenty-six volumes, totalling 3,000 pages and 240 exhibits - all about the state of mind of the editor and journalists on whether they seriously doubted the truth of the publication.

The effectiveness of their defamation law therefore concerns American as the Australian law concerns our reformers, but for different reasons. Randall P Bezanson, Dean of the Washington and Lee University Law School, says American defamation law is fundamentally "broken and dysfunctional". Complexities and costs are such that only those *desperately* interested in protecting their reputations or positions sue. With noted US defamation law reformer, Professor John Soloski, he has made a major study on defamation law reform. They found that plaintiffs often have motivations other than damages in suing for libel.

The 1991 US draft model: Uniform Defamation Act

It is the fear of the cost of a libel suit itself which discourages US media publishing or pursuing controversial stories of public importance. To overcome this, US law reformers produced draft legislation in 1991, the model *Uniform Defamation Act*. (The Press Council has proposed adoption of similar procedures in Australia). The key to the model was to be a new "vindication action". Plaintiffs could sue for a court declaration establishing the truth or falsity of a story. Defendants would thus lose their constitutional defences because the reason for them – the chilling effect on newspapers of the prospect of heavy damages – would disappear. The action was to be simple, and was not to be clogged by procedural issues. Plaintiffs would be attracted by its speed and the lower costs involved.

The model Act provided that if at any time before 90 days after service of process the defendant agreed to publish a sufficient retraction, the court was to dismiss the action. Defendants would not have been obliged to concede falsity, something defendants are rarely willing to do. They would have been required to stipulate that they do not assert the truth of the publication or do not intend asserting its truth.

If the plaintiff were successful, the defendant would have been ordered to publish the written findings of fact which would be required to be included in the judgment. Alternatively, at the option of the defendant, he or she would have been ordered to pay to the plaintiff the cost of publishing those written findings of fact. In certain cases costs could have been awarded. Damages would only have been awarded where the *New York Times v. Sullivan* rule was satisfied.

There was, however, little support for the 1991 model Act from any sector and, indeed, rigorous opposition from media groups. The Act was doomed. With little hope of being adopted, it was eventually withdrawn.

The 1993 US draft model: Uniform Correction or Clarification of Defamation Act – Central features

The largely unnoticed retraction provisions were, however, revived in another draft model, the *Uniform Correction or Clarification of Defamation Act (1993)*. This model has attracted wide support and was approved by the uniform state law commissioners this year.

Central to the 1993 model Act is section 5 which provides:

"If a timely and sufficient correction or clarification is made, a person may recover only provable economic loss, as mitigated by the correction or clarification."

According to the framers, the section is designed to encourage a publisher to grant a request for correction or clarification by providing that a requesting party may seek only damages for provable economic loss in the event of the timely publication of a sufficient correction or clarification. To be "timely" and "sufficient", the correction or clarification must meet the requirements of section 6 (*Ed - see boxed section*).

In limiting recovery of damages to provable economic loss as mitigated by the correction or clarification, the Act anticipates that any loss caused by the publication can be significantly reduced by publication of the correction or clarification.

Under section 6 and subject to possible extension under section 4(c), a "timely" correction or clarification must be published before or within 45 days of a request for correction or clarification.

In the accompanying commentary, the authors of the draft explain that the characteristics of a "sufficient" correction or clarification will vary depending upon the frequency and nature of the original publication and upon the timing and nature of the correcting or clarifying publication. The general focus of "sufficiency" under s.6 is to seek to assure that the correcting or clarifying publication is "reasonably likely to reach substantially the same audience" as the challenged publication. The Act thus uses a functional standard aimed at effective vindication of reputation rather than one focussing mechanistically on particular location, identity of medium, specific size of audience, or the like. In attempting to effectuate the goal of reaching substantially the same audience as the challenged publication, the 1993 model Act requires that the correction or clarification also be judged in terms of its prominence and the manner and medium of its publication. These criteria require that a judgment be made in each particular case with respect to the sufficiency of the particular publication.

The authors point out that newspapers and other frequent publications have been the principal subjects of correction or clarification statutes in the United States. At times the corrections or clarifications have been required to be placed in similar if not identical locations to those in which the original story occurred, although even this

Section 6 provides:

(a) A correction or clarification is timely if it is published before, or within 45 days after, receipt of a request for correction or clarification, unless the period is extended under Section 4(c).

(b) A correction or clarification is sufficient if it:

(1) is published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of;

(2) refers to the statement being corrected or clarified and:

(i) corrects the statement;

(ii) in the case of defamatory meaning arising from other than the express language of the publication, disclaims an intent to communicate that meaning or to assert its truth; or

(iii) in the case of a statement attributed to another person, identifies the person and disclaims an intent to assert the truth of the statement; and

(3) is communicated to the person who has made a request for correction or clarification.

(c) A correction or clarification is published in a medium reasonably likely to reach substantially the same audience as the publication complained of if it is published in a later issue, edition, or broadcast of the original publication.

(d) If a later issue, edition, or broadcast of the original publication will not be published within the time limits established for a timely correction or clarification, a correction or clarification is published in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of if:

(1) it is timely published in a reasonably prominent manner:

(i) in another medium likely to reach an audience reasonably equivalent to the original publication; or

(ii) if the parties cannot agree on another medium, in the newspaper with the largest general circulation in the region in which the original publication was distributed;

(2) reasonable steps are taken to correct undistributed copies of the original publication, if any; and

(3) it is published in the next practicable issue, edition, or broadcast, if any, of the original publication.

(e) A correction or clarification is timely and sufficient if the parties agree in writing that it is timely and sufficient.

rule has been dependent upon a number of factors, including the nature and scope of the original story as well as the newspaper's practices concerning reserved space for corrections.

"Under the Act such alternatives, as well as others presented in different types of media must be judged in each case in terms of the requirement that the correction or clarification, in its location and prominence, should be reasonably calculated to reach substantially the same audience as the original publication. Thus, in the case of an alleged newspaper defamation occurring in a smaller story appearing on an inside page, use of a regularly published corrections column at a fixed location, e.g. at the front or back of a news section or opposite an editorial page, may often suffice. Use of such a regularly placed column may or may not suffice for a publication appearing on the front page or in a specialised section of the paper."

- Other aspects of the 1993 model Act

The 1993 model Act is published with a detailed commentary, and the following paragraphs are based on that.

The authors explain that in the case of an alleged ***radio or television broadcast or cablecast defamation,*** publication of a correction or clarification in a subsequent broadcast or cablecast of the same program (e.g. during a succeeding daily news program, or weekly newsmagazine program, in the same time period) would ordinarily suffice. Where the original broadcast or cablecast had been on a non-recurring program, however, publication of the correction or clarification on the same station or network or cable system during the same time of day would likely constitute a reasonable alternative in most instances.

There are other contexts. The authors say, for example, that correction or clarification of a ***defamatory employee reference or evaluation*** may require no more than contacting those persons or firms to whom the defamatory statement was communicated. If the statement had made its way into permanent files or had reached broader audiences, however, reasonable efforts to have the material removed from such files or to communicate the correction or clarification to identifiable members of the broader audience might be required. In the case of an oral defamation to friends or colleagues, a letter to those persons correcting or clarifying the defamation might suffice, on the assumption that word of the correction or clarification would spread as rapidly in the channels of gossip as did the original defamation.

For a book currently being sold, where a subsequent printing or edition will not be timely published, reasonable efforts to correct or clarify are set out in subsection (d) and involve the following measures: timely publication in an alternative medium; appropriate corrections in any future editions; and reasonable steps to correct undistributed copies (by "undistributed" is meant books not yet shipped by the publisher to its customers). Suitable alternative media and reasonable steps to correct undistributed copies should be left, in the first instance, to the parties, and, if necessary, to the courts to evolve over time. Where the parties cannot agree on an alternative medium and the original distribution was national in scope, use of a publication likely to reach a substantially equivalent audience should ordinarily suffice.

Finally, the requirement of making ***reasonable efforts to reach substantially the same audience*** should be equitably construed, the authors say, so as to achieve the over-riding purpose of the Act to give incentives for the publication of reasonably effective corrections or clarifications. To this end, the section is not intended to guarantee that in all cases a correction or clarification will reach the very same audience, nor does it require that a publisher achieve the impossible in attempting to reach a substantially equivalent audience.

Subsection (b)(2) states the general rule that a ***"sufficient"*** correction or clarification must correct the original communication. An equivocal correction or clarification will not satisfy this requirement.

An interesting provision is that used when an ***innuendo*** is published. Where the alleged defamation was the result of a meaning arising from other than the express language of the publication or a statement attributed in the publication to another person, a sufficient correction or clarification need only contain a statement that the party making the communication did not intend the non-expressed meaning and disclaims it, or that in publishing the attributed statement of another person the publisher disclaims any intent to attest to the truth of the facts contained therein. This will allow the publisher to disavow the alleged meaning and yet stand behind the

"facts" of the story.

Subsection (b)(2)(iii) provides a mechanism for a defendant who ***repeats a defamation from another source*** to "correct" or "clarify" by indicating that the defendant did not intend to assert the truth of the statement but merely reported what another had said. This form of "correction" does not, however, vindicate the plaintiff's reputation because it does not necessarily indicate that the statement is false, only that the particular defendant does not assert that it is true. A defendant relieved of liability for all but provable economic loss by such a correction should be required to identify the person asserting the truth of the statement even if the original publication did not do so. This provides the plaintiff the opportunity to seek vindication from the source.

Nothing in this section, however, requires the news media or others to disclose *the identity of confidential sources.* Thus, if there is a confidential source, the media defendant would have three alternative courses of action: (1) limit liability by issuing a correction under this section and identifying its source; (2) issue a correction under subsection (b)(2)(i) or (ii) without identifying the source but fully vindicating the plaintiff's reputation; or (3) defend the defamation action.

The 1993 model Act would apply to all claims for damages arising out of harm to personal reputation caused by the publication of falsehoods. Thus, certain *actions for emotional stress* and *breach of privacy* could be covered, although not defamation as such.

- Responses

This model Act has attracted significant media support. It does not seek, of course, to cure the inadequacies of US litigation at large - that would mean taking on too many vested interests.

However, Henry Kaufman, general counsel of the New York based Libel Defence Resource Center, which represents media defendants, is cautious about the 1993 model Act. He says:

"It is possible to envision that more potential claims will be resolved without litigation and that what litigation does go forward - despite publication of a correction or clarification - will be less costly and less extended. It is even possible ultimately to envision that, with the fear of costly and extended litigation lessened, both the accuracy of journalism and the protection of reputation will be enhanced."

The unacceptability to the media of the earlier proposal for a "vindication action" and the lack of support from other quarters for the *Uniform Defamation* Act demonstrate the difficulties for defamation law reform whether here or in the US. The latest American proposal does seem to have the advantage of stressing the vindication of reputation as the primary justification for defamation law - a point made by the NSW Law Reform Commission.

The *quid pro quo* in the correction procedure of limiting damages to economic loss would, if approved here, have a bigger impact because plaintiffs have a more successful record. If this is to be coupled with a change in the substantive law making it more difficult for public figures to sue, it would be more attractive to plaintiffs.

The great advantage of such a change in the defamation law would be the pursuit, and the early publication by the media, of matters of public interest. If, for example, the Australian public had earlier notice of some of the major financial debacles of the 1980s, it is possible that the losses could have been lower. The beauty of the current US proposal is not that the media's power would be unlimited - it would still be liable for losses - but that plaintiffs would have to prove loss. This is food for thought for reformers here.

Development

There is potential for some convergence between the US and Australian substantive libel law being modified by constitutional considerations. The present High Court has already demonstrated a remarkable ability to lead the development of the law in a number of significant areas. The context of litigation in the US has opened up libel law to the impecunious and even unwilling libel plaintiff which because of the procedural complexities impose considerable unrecoverable costs which only the richest media organisation can contemplate. In Australia, only the rich and powerful normally have access to the courts for defamation. However, Australians do have access to an established system of alternate dispute resolution through the Press Council. While the way American litigation is conducted calls out for reform, the suggested solution, for practical purposes, seeks to side-step and cut short those complexities.

Its success depends on the proposition, supported by research, that many if not most American litigants, at least initially, are more interested in vindication than damages. But how does one persuade the plaintiff's lawyers to follow this course?

An alternative to this approach might be for the American media to endorse the concept of media accountability through press or news councils. Professor Louise W Hermanson's work in this area, including her major survey of news council complaints, suggests that alternative dispute resolution through such bodies, supported by the media, may well provide the remedy which the principled libel plaintiff cannot easily achieve in the litigation forest. This process should not inhibit the application of the proposals for legislative reform; experience demonstrates that successful news councils can exist alongside legislation.

Cast And Crew contracts - ASC provides prospectus relief

Katherine Sainty outlines a Class Order issued by the Australian Securities Commission

Producers who offer points to cast and crew as part of their package have been exempted from the prospectus provisions of the Corporations Law. Under a new Class Order effective from 6 October 1993, the ASC has exempted service contracts that offer points or an entitlement to revenue or copyright in a film.

The exemption is extensive and also applies to contracts offering a share in the final work or revenue to any person in the film, writing and entertainment industries who provides personal or professional services, or a script.

The exemption does not apply to private investors - a producer will still have to provide a prospectus for their contributions.

The Class Order effectively ends debate on the way in which contracts for cast and crew should be drafted to avoid the risk of contravention of the Corporations Law, by recognising and reinstating an industry practice. The exemption has a wider reach than the film and television industries and encompasses arrangements reached with recording artists and live performers in stage productions.

Practically, where a producer proposes a contract for a cast or crew member for a film