Sattin and the Spectre of Media Liability for Negligence

Anne Flahvin looks at recent claims in negligence against the media and suggests that even if plaintiffs claiming damage to reputation are confined by Australian courts to an action in defamation, an action in negligence may still be allowed in respect of untrue communications which are not defamatory but cause a plaintiff economic loss

INTRODUCTION

Recent claims in negligence against the media have raised the question of the extent to which, if at all, the media owes a duty of care in relation to material it publishes. A decision of the House of Lords, *Spring v Guardian Assurance* (a non-media case), which allowed the subject of an inaccurate and unfavourable reference to sue the giver of the reference in negligence - despite there being a good defence in defamation - raised concern in the media that courts would impose a duty of care not to publish untrue statements. There was a collective sigh of relief when in NSW, Levine J declined to follow *Spring*, holding that for policy reasons the law of negligence and the law of defamation should be tightly demarcated. But we have not heard the last of negligence claims against media. Two long awaited reserved judgments by Levine J (*GS v TCN Channel Nine* and *GS v News Ltd and Scott*) will further explore the limits of the media's liability in negligence – in this case the liability of the media for the publication in breach of a non-publication order of true material, about the plaintiff, which causes the plaintiff to suffer mental distress. It is submitted that even if plaintiffs claiming damage to reputation are confined by Australian courts to an action in defamation, the English approach of allowing an action in negligence might be followed in respect of untrue communications which are not defamatory but cause a plaintiff to suffer economic loss.

UNTRUE PUBLICATIONS WHICH CAUSE A PLAINTIFF TO SUFFER FINANCIAL LOSS

At common law, it is not enough to ground a cause of action in defamation that a publication concerning the plaintiff be both untrue and likely to cause loss. It must also be defamatory, and generally speaking, this requires that there be some disparagement of reputation.

The position is different in Queensland and Tasmania.[1] In these Code States, an imputation concerning a person by which he or she is likely to be injured in his or her profession or trade is defamatory, without any requirement of disparagement. A false report that the plaintiff had ceased doing business, for example, would give rise to an action in defamation, thereby providing a remedy for loss suffered as a result of such a publication in circumstances where no remedy might be available for publication in other States. While reputation is often said to be the touchstone of defamation, and that which distinguishes defamation and injurious falsehood, the Code definition of defamatory matter - which also applied in NSW until 1974 - is wider than at common law. In its 1979 Report *Unfair Publication: Defamation and Privacy*, the Australian Law Reform Commission suggested it was 'right in principle' that the maker of an untrue statement about a person which causes that person loss should be liable to make good the loss, and recommended a right of action in defamation for such a publication.

At common law, however, the requirement of disparagement means that a factually inaccurate media report concerning a plaintiff which causes economic loss without disparaging reputation is, generally speaking, not actionable as defamation. It has been suggested that the 'shun and avoid' test of defamatory matter might be employed to prise defamation from its reputational moorings and provide a remedy where harm is caused simply because the media gets its facts wrong. This test of defamatory matter was applied most famously in *Youssoupoff v Metro-Goldwyn-Mayer Pictures* (1934) 50 TLR 581) to hold that a suggestion that a woman had been raped - while not imputing any blameworthy conduct - was nevertheless defamatory on the basis that it tended to make people 'shun and avoid' her. In an interesting exploration of possible future directions in defamation, Ray Watterson suggests that the shun and avoid test - hitherto applied only to 'imputations of insanity, rape and infectious disease' - could be used to seek a remedy in defamation for untrue statements which lead to a loss of business. (Watterson: *What is Defamatory Today?* (1993) 67 ALJ 811) But unless and until this novel argument is tried and tested, the only remedy available against the media in respect of a publication of the nature under consideration in States other than Tasmania or Queensland is the tort of injurious falsehood, with the onerous requirement of having to prove both malicious publication and actual damage.[2]

Might an Australian court allow a plaintiff injured financially by such a publication, but unable to show that the publication was actuated by malice, sue in negligence? Do the media owe a duty of care not to cause financial loss by publishing false material about a person? It will be suggested that such a development would not impose any greater burden on the media's freedom to publish than that imposed by the law of defamation. What's more, it could be said to reflect a judicial tendency to demand 'reasonable'conduct from the media in return for protection from liability for publications causing harm.

DO THE MEDIA OWE A DUTY OF CARE TO PUBLISH THE TRUTH?

The question of whether the media owes a duty of care to publish the truth arose for consideration in NSW in *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32. It was only a matter of time before such a case was brought following the decision of the House of Lords in *Spring*. While *Spring* was a reference case not involving the media, the holding of the House of Lords that public policy did not negative the finding of an enforceable duty to exercise due skill and care in the provision of a reference was bound to lead to plaintiffs seeking to impose such a duty on the media in respect of its publications.

SPRING

Spring was an insurance sales director who was dismissed from his job without explanation. His former employer forwarded a reference to a prospective new employer which was so unfavourable as to be described by one of the judges hearing the case as "the kiss of death". The reference described Spring as a "man of little or no integrity (who) could not be regarded as honest." Not surprisingly, he was hardly rushed with job offers. On finding himself unable to obtain employment selling insurance, Spring commenced proceedings against Guardian Assurance alleging malicious falsehood, breach of contract and negligence. He sought damages for the economic loss he claimed he suffered as a result of the negligently prepared reference. The actions in contract and malicious falsehood failed, but the trial judge allowed the action in negligence and found that Spring's former employer had breached a duty owed to him to take reasonable care that what it wrote about him was true. The decision was reversed by the English Court of Appeal, which adopted the approach of Cooke P in *Bell-Booth Group Ltd v Attorney General* [1989] 3 NZLR 148, in which the New Zealand judge held that "the law as to injury to reputation and freedom of speech is a field of its own", and that the imposition on the mass media of a duty to 'get a publication right' would distort the balance between free speech and protection of reputation struck by the law of defamation.[3]

A majority of the House of Lords (Lord Keith dissenting) overturned the Court of Appeal. While Lord Goff based his reasoning on the assumption of responsibility assumed by an employer towards his or her employees (a *Hedley Byrne v Heller* argument which would be difficult to apply to the media) the broader reasoning of the the other majority judges - that a duty of care arose because it was forseeable that harm would occur, the parties were in sufficient proximity and it was 'fair, just and reasonable' to impose the duty[4] - might provide a basis from which a plaintiff who had been injured in his or her business or trade by an untrue publication could seek to recover in negligence. (For a detailed discussion of the House of Lords decision see Tobin: *Negligence a Resurgence? Spring v Guardian Assurance in the House of Lords* (1994) NZ Law J 320).

SATTIN

Sattin involved the publication of a photograph of a man and woman who were described, falsely, as being married to each other. The woman, who was in fact married to someone else, sued in defamation, pleading that the material conveyed as true innuendo the imputations that she was a bigamist, or, alternatively an irresponsible person who lied to a newspaper photographer about her marital status. The only substantive defence pleaded by the defendant was that it had made an offer of amends as provided for by s 43 of the *Defamation Act 1974* (NSW).

For reasons which are not entirely clear, the plaintiff sought leave to amend her statement of claim to include a claim in negligence, with the particulars including the publication of the photograph without first ascertaining Mrs Sattin's marital status. In deciding the application, a question for Levine J was whether in the circumstances of the case a duty of care was imposed on the the newspaper defendant in the publication of the matter complained of, or whether the plaintiff's remedy must be found in defamation. While Levine J declined to allow Mrs Sattin to amend her pleadings on the ground that they failed to formulate the duty of care which she claimed the defendant owed, the judgment explores the broader question of whether publication of false matter which is damaging to a plaintiff's reputation and therefore actionable as defamation can also give rise to an action in negligence.

Recent High Court decisions considering the imposition of a duty of care in novel fact situations suggest that that policy considerations will play a central role. (*Hill v Van Erp* (1997) 71 ALJR 487; *Bryan v Moloney* (1995) 182 CLR 609.) In his approach to the task in *Sattin*, Levine J openly acknowledged the policy considerations. He followed the dissenting judge in *Spring*, Lord Keith of Kinkel, as well as the New Zealand Court of Appeal, in holding that 'the law of negligence has a limited role to play in the matter of communications.' (*Sattin*: 44-45) The courts should be slow to develop novel categories of negligence, and do so by analogy with established categories. Levine J's reasoning was founded largely on the argument that public policy - as articulated in the balance struck by the defences to defamation between protection of reputation and freedom of speech - "should logically transcend mere forms of action." (*Sattin*: 38) To apply the approach of the House of Lords in *Spring* would clearly frustrate the policy reflected in the law of defamation.

FUTURE DIRECTIONS

Can this reasoning be distinguished in relation to non-defamatory publications concerning a plaintiff which cause the plaintiff loss in his or her business or trade? Do the same policy arguments which have been advanced in favour of quarantining negligence from defamation apply to deny a remedy in negligence for non-defamatory publications?

While Levine J took the opportunity in Sattin to consider in detail the policy arguments for demarcating the torts of defamation and negligence, he did not give much consideration in his judgment to the question of how the court begins to determine whether a duty of care should be imposed in a novel fact situation. The traditional reluctance of courts to impose a duty to avoid purely economic loss flows largely from a concern to avoid the imposition of liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'. (*Ultramares Corporation v Touche* (1931) 174 NE 441 per Cardozo CJ) However, as will be argued below, a finding that a duty was owed to an individual about whom untrue material was published would not raise this 'indeterminacy' problem. Further, as has been noted above, in finding that a duty of care was owed in *Spring*, a majority of the House of Lords proceeded on a broader basis than the principle in *Hedley Byrne*, with its strict approach to liability for negligent misstatements. Arguably, a duty could be grounded in the reasonable forseeability that an untrue statement would cause loss, the close nexus between a publisher and a particualr individual about whom material is published and – on the basis of the arguments to be explored below – that it was 'fair, just and reasonable' to impose a duty of care.

FAIR, JUST AND REASONABLE

Leopold has argued that there are strong grounds for suggesting that "even where a publication has no impact on reputation, the law of negligence provides no basis for any claim, at least in the case of media publications." (Leopold: 16) Certainly in *Sattin*, Levine J refers with approval to the comment of Cooke P in *Bell-Booth Group Ltd* that "the common law rules...regarding defamation *and injurious falsehood* represent compromises gradually worked out by the courts over the years, with some legislative adjustments, between competing values. Personal reputation

and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other." (*Sattin*: 36 my emphasis) The view expressed by Leopold and Levine J - that it would be against public policy to interfere with the delicate balance struck between these competing interests - is highly persuasive. Levine J refers to the High Court's recent free speech jurisprudence and suggests it reflects a 'trend in this country to prevent the inhibition of freedom of speech in instruments of mass communication.' (*Sattin*: 44) This approach is also reflected in s 65A of the Trade Practices Act (and the Fair Trading Act equivalents) which strictly circumscribes the application of s 52 of the TPA to media organisations.

It is certainly arguable, though, that to allow a remedy in negligence for non-malicious publication of untrue material concerning a plaintiff which conveys no defamatory imputations but nevertheless causes actual damage would simply bring liability for such material in line with that imposed on the media for publication of defamatory material. For all practical purposes, the standard imposed on the media by the law of defamation - in circumstances where neither the justification nor comment defences are available (neither of which is relevant to a complaint about an untrue statement of fact) - is a negligence standard. Until recently, qualified privilege was almost never available to the mass media, and the new 'extended' qualified privilege defence available in respect of communications to a wide audience on matters of government and politics requires the defendant to show that publication was reasonable in all the circumstances of the case. (*Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818) Similarly, s 22 of the NSW Defamation Act requires the defendant to show it acted reasonably in publishing.[5]

In the defamation context, to the extent that the standard of 'reasonable publication' differs from the *Donoghue v Stevenson* standard of a failure to exercise due care, the difference would seem to advantage the defamation plaintiff. For example, while the onus under *Lange*-'extended' common law qualified privilege and s 22 of the NSW Defamation Act is on the defendant to show that it acted reasonably in publishing, a plaintiff suing in negligence would have the onus of establishing the elements of the tort. Similarly, proof of damage would be required for an action in negligence.

It is also arguable that the test for determining the negligence standard of care would operate more favourably for media defendants than the reasonableness test as it has been interpreted. The negligence standard would be the standard of care expected of a reasonable journalist in the circumstances.

While ultimately the standard of care to be met is a question of law to be decided by the court (*F v R* (1983) 33 SASR 189) the practices of the defendant's profession are relevant in deciding whether the standard has been met. A court determining whether a journalist had acted negligently in publishing untrue material would likely hear evidence from other working journalists about the usual steps taken to verify the accuracy of material in the particular circumstances under which journalists operate. While some commentators have criticised the development of a 'responsible publishers' standard, arguing that publishers with an 'unpopular philosophy, unorthodox journalistic style or limited resources' should have their conduct measured against the standards of similar publishers (Anderson, Libel and Press Self-Censorship (1975) 53 Texas Law Review 422), a standard which took into account the evidence of working journalists about journalistic practices and imperatives would be far more media-friendly than the present judicially imposed standard of 'reasonableness' which media defendants must meet in a defamation action.

The spectacular lack of success by media defendants pleading s 22 of the NSW Defamation Act can be ascribed largely to the failure of judges to understand the dynamics of publishing news on a daily basis. It is certainly true that the High Court has recently indicated in *Rogers v Whitaker* (1992) 175 CLR 479) a willingness to find that the required standard of care has not been met no matter that the defendant can be shown to have complied with the general practice of his or her profession. However, the court acknowledged in that case that in certain circumstances the views of the relevant profession would be influential or even decisive. Greater input from the media profession in determining the standard of care required of a reasonable journalist would surely lead to a more realistic, media-friendly standard.

BALANCING OF INTERESTS

No doubt the media would support Leopold's suggestion that proper protection of freedom of speech militates against ever imposing a general duty of care on the media to 'get a publication right'. But as I hope I have demonstrated, the media operate under a similar – if in some respects more onerous – standard already in relation to defamatory publications. In the light of this, to deny a remedy to an individual who has suffered a particular and identifiable loss as a result of an untrue but non-defamatory publication – on the basis of a seemingly arbitrary distinction between loss caused by disparagement of reputation and loss caused by a journalist simply 'getting it wrong' - seems not to accord with principle.

As noted above, the legislature has seen fit to strictly circumscribe the circumstances in which the media can be made subject to the operation of s 52 of the Trade Practices Act. However, the protection afforded to freedom of the press by the insertion of s 65A needs to be viewed in the light of the quite open-ended liability which would have attached to the media had this amendment not been thought necessary. In contrast to this, injurious falsehood is a tort available in respect of a publication 'about or affecting' the plaintiff. (*Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 692 per Gleeson CJ) To allow a suit in negligence at the behest of an individual about whom material is published does not raise the same policy concerns as those identified by commentators who warn that imposing a duty of care on the media would expose publishers to unlimited liability for 'almost any imaginable type of journalistic faux pas.' (Drechsel: *Negligent Infliction of Emotional Stress: New Tort Problem for the Mass Media* (1985) 12 Pepperdine L Rev 889, 912)[6]

As Post has noted, the failure of the common law to offer redress for untrue communications which are not defamatory, 'even if they cause damage to an individual's business or credit opportunities', can be explained only by reference to a concept of reputation other than that of reputation as property. (Post: *The Social Foundations of Defamation Law: Reputation and the Constitution* (1986) 74 Cal LR 691) In its proposed reform of defamation law, the NSW Law Reform Commission acknowledged that at common law an award of damages in defamation serves to advance notions of reputation as 'honor; through the vidication of reputation, and reputation as 'dignity', through the compensation to the plaintiff for injury suffered to reputation and hurt feelings. But damages also serve to compensate for economic

loss. (NSWLRC: Report 75 2.10) In proposing a declaration of falsity as an alternative to an action in damages, the Commission acknowledged that such a remedy would address only the first notion of reputation. However, the Commission recommended that plaintiffs choosing declaratory relief should still be entitled – 'for basic reasons of corrective justice' – to recover all economic losses which they can prove are attributable to the defamation. (2.21) Arguably, a court faced with a claim in negligence for publication of untrue, but non-disparaging, material about a plaintiff would decide that both principle and policy dictated that a remedy be available.

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1 Defamation Act 1889 (Qld) s 4(1); Defamation Act 1957 (Tas) s5(1)(b).

2 *Ratcliffe v Evans* [1892] 2 QB 524.

3 It is important to note, however, that the duty asserted by the plaintiff in *Bell-Booth* was a duty to take care not to injure reputation by the publication of *true* statements. Such a duty would clearly interfere with the balance struck by the law of defamation – by way of the defence of justification - between protection of reputation and freedom of speech. In *GS v TCN Channel Nine* the plaintiff is seeking to assert a duty not to cause mental distress by the publication of true statements in breach of a non-publication order.

4 The test set out by Lord Bridge in *Caparo v Dickman* [1990] 2 AC 605. See Swanton and McDonald: *The Reach of the Tort of Negligence* (1997) 71 ALJ 822 where it is suggested that in two recent decisions the Australian High Court has "accepted that the position in Australian law is substantially similar to that in English law as stated by the House of Lords in *Caparo Industries Plc v Dickman*."

5 For a detailed statement of what a defendant must show in order to satisfy the requirement of reasonable conduct under s 22 (1)(c) see *Morgan v John Fairfax* (no 2) (1991) 23 NSWLR 374.

6 In *Bowes v Fehlberg* (Tas SC) (1997) Aust Torts R 81-433, Crawford J held that the law of negligence 'does not recognise a simple duty to publish only accurate statements about other persons although the law did recognise a duty with regard to the publication of statements in some circumstances.'

Telecommunications Access - A View from the ACCC

At a recent ATUG conference the Director of Telecommunications at the ACCC, Rod Shogren, reflected on some of the major issues under the new telecommunications regime. This paper summarises part of that speech

As the ACCC progresses with its administration of the telecommunications provisions of the trade practices act, it recognises that the major concerns in industry are:

- access and interconnect;
- non code access;
- data access service; and
- local service local number portability ("LNP").

There have been calls from persons in the industry for the Commission to "take control" and somehow "sort out" access and interconnect arrangements through inquiry process to put negotiated outcomes in place by the end of the year. The usual concern has been that the ACCC should take "prompt and decisive action" with the implication that somehow the ACCC is not acting as quickly as it could.

It is not correct to say that the ACCC is unwilling to use its powers or that we are "sitting on our hands" as some would have it. It is important to understand what our powers are, and in particular, how our powers for dealing with anti-competitive conduct differ from our powers on access issues.

I would point out that those asking us to act on access issues as anti-competitive conduct are in fact seeking the litigation route. My first response is to ask why anyone would want to involve the courts, with their rigid rules of evidence, and go through the hoops of market definition, market power and proving the elements of substantial lessening of competition, when there is a more manageable process in Part XIC, designed specifically for the purpose. Anyone suggesting that we should immediately issue a competition notice against a carrier for demanding too high an access price is asking for exactly the same process that was followed in New Zealand, for the same conduct.

Let me now deal with the major areas of concern as indicated in my discussions with industry.

ACCESS AND INTERCONNECT

The first one is access and interconnect. By this I refer to PSTN originating and terminating access and the price Telstra charges for it. This is probably the biggest issue and the biggest irritant to service providers, though data access is a similar problem.

First of all, I should address the current state of play. Telstra provided a preliminary, or draft, access undertaking to the Commission. In addition to meeting with them, we very promptly gave them our comments. We also made it very clear that Telstra had an obligation to negotiate on access rights, now.

As everyone knows, Telstra and Optus have been negotiating on interconnect, and I am not surprised that Telstra has not lodged an undertaking with us while those negotiations are continuing. There is no obligation under the Act for them to do so.

It is a little unclear whether service providers are saying that Telstra is refusing to negotiate, in other words refusing to discuss price, or whether the price Telstra is offering is too high. Perhaps from a service provider's point of view it makes little difference. The question for the ACCC is: how can the impasse be resolved?

First, from a procedural point of view, it ought to be obvious that this is an access issue, to be dealt with under Part XIC, and that it is not a Part XIB matter, dealing with anti-competitive conduct. Some may feel it is anti-competitive conduct if Telstra is not negotiating satisfactorily over access and I would agree that it could be anti-competitive conduct if it amounted to a constructive refusal to deal. But there is no way we would want to immediately issue a competition notice to Telstra simply for not offering the price that a service provider wanted. Anyone saying the