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When reasonableness is unreasonable

Why are the states and territories persisting with dragging NSW's useless version of statutory qualified privilege into the uniform Defamation Act? Peter Applegarth SC argues that the qualified privilege defence drafted by Sir Samuel Griffith in 1889 is a far more effective mechanism for media defendants and other participants in public affairs

QUALIFIED PRIVILEGE

When Reasonableness is Unreasonable

A plea to stop the entrenchment of NSW's version of statutory qualified privilege in the uniform Defamation Act

From P.D.T. Applegarth SC

The recent decision in John Fairfax Publications Pty Ltd v OShane confirms that judicial interpretation of s.22 of the NSW Act renders qualified privilege practically useless for media defendants and many other participants in public affairs.

Yet the media seems to have resigned itself to the fact that the defence of statutory qualified privilege in the uniform Defamation Act will reflect s.22 of the NSW Act.

The proposed uniform defamation law does not contain a qualified privilege defence that provides practical protection to report and discuss public affairs. The defamation debate in the last year has been sidetracked. The defence of statutory qualified privilege rarely rates a mention.

As interesting as issues about defamation of the dead and the right of companies to sue for defamation may be, they are far less important to the life of our democracy than a robust defence of qualified privilege.

It may be hard to persuade politicians that there is anything wrong with a reasonableness test of the kind contained in s.22 of the NSW Act. But the last 30 years is littered with unsuccessful attempts to rely upon the s.22 defence.

In recent years, the Lange defence has been interpreted as picking up judicial interpretations of s.22 of the NSW Act. Influential decisions like Morgan v John Fairfax & Sons Ltd (No 2) subject defamation defendants to harsh, retrospective judgments to which few of us would like to be subjected in our daily communications.

Section 22 was never intended to operate so strictly. It was supposed to capture and simplify the qualified privileged defences contained in the 1958 Act.

The potential of the 1958 Act to protect harsh criticism of public figures was confirmed in Calwell v IPEC Australia Ltd. Initially, s.22 of the NSW Act was interpreted as the NSW Law Reform Commission had intended, namely to replace but

not alter the effect of s.17 of the 1958 Act. But a series of Court of Appeal decisions dramatically narrowed its protection: see Wright v ABC and the observation of Hunt J in Barbaro v Amalgamated Television Services noting that the trial judge in Wright proceeded on the basis that the new statutory defence of qualified privilege in the 1974 Act was to be interpreted in accordance with a long line of authorities which had been built upon s.17 of the 1958 Act.

As Hunt J has pointed out, in Calwell's case, there was no inquiry into the circumstances of the publication itself. There was no inquiry as to the defendant's belief in the truth of what was published. If the interest of readers in knowing the truth about a subject matter was sufficiently strong, then the defendant was able to argue that it was reasonable in the circumstances to publish the defamatory matter. Any inquiry into the defendant's belief in the truth of what was published arose in determining whether the publication was made "in good faith". It was not a pre-condition to proving that an occasion of qualified protection existed.

Section 17 of the NSW had its origins in an Act drafted by Sir Samuel Griffith in 1889. The 1889 Act remains the law in Queensland. It protects robust expressions of opinion. It also has provided in recent decades extensive protection for the media and others to make and report defamatory statements of fact about matters of public interest.

This is well illustrated in Bellino v Australian Broadcasting Corporation. The ABC succeeded at the retrial ordered by the High Court because the plaintiff failed to prove an absence of good faith. One wonders whether the same result would have been reached if a reasonableness test had been applied.

It was this "bread and butter" defence that was relied upon by the ABC and other media defendants to defend publications that exposed political and police corruption prior to the Fitzgerald Inquiry in Queensland. But if the proposed model Defamation Act 2005 had applied back then, the media and individuals would have had far less protection to expose corruption in Queensland.

In short, a qualified privilege defence drafted by Sir Samuel Griffith in 1889 has been shown to provide far more protection than the qualified privilege defence proposed by politicians in 2005. Can this be regarded as progress?

Oddly, the media seems content to accept this. But if it accepts a practically useless statutory qualified privilege defence, there won't be any realistic opportunity to improve it. An inadequate defence will be entrenched across the nation.

In recent weeks, I have been contacted by colleagues in Sydney voicing concern about rumours that the Queensland Attorney General has expressed reservations about losing the statutory qualified privilege defences that currently apply in Queensland. Concern has been expressed that the Queensland Attorney General is rumoured to want to "break ranks" with the other states.

I do not know if this rumour is mischievous or true. If it is true, it is interesting that a politician seems more concerned about having a protective qualified privilege defence

than the media (which, dare I say it, has a commercial interest and a public duty to defend itself against defamation actions like O'Shane v Fairfax).

The purpose of this note is to inquire whether at this late stage, in a terribly flawed process of defamation law reform, anyone has an interest in improving the protection offered by s.30 of the Model Defamation Provisions.

Conclusion

The recent Court of Appeal decision in O'Shane provides a nice illustration of the fact that the statutory defence of qualified privilege proposed by the Attorneys General of the States and Territories provides inadequate protection to report and discuss subjects of public interest.

A better and simpler qualified privilege defence than has been proposed by the Attorneys General is surely possible. Section 22 of the current NSW Act has been interpreted in a manner which was not intended. It was intended to replace, but not alter, the Code provisions that Griffith drafted in 1889. Judicial interpretations of s.22 have rendered it practically useless as a defence, and decisions like Morgan have influenced the interpretation of the Lange defence.

Rather than have a statutory qualified privilege defence based on s.22 of the NSW Act, and all of the judicial baggage that comes with that section, any uniform Defamation Act should contain a simple and stronger defence. There should be a defence to communicate about matters of public interest. The defence should be defeated if the defendant is shown to have been reckless or malicious.

It may be too late to achieve this simple, but significant, modification to the draft legislation. But it would be a shame if we spent the next few decades thinking, "I wonder what would have happened if wed tried?"