THE BITER BIT - LITERARY CRITICISM AND THE LAW OF DEFAMATION

by

Hon. Mr Justice Peter Heerey*

In a paper presented at the Conference of the Law and Literature Association held at Monash University in September 1991 the author examines how criticism of literary artistic and theatrical subjects have fared when subjected to the law of defamation.

One of Australia's very greatest jurists was Sir Frederick Jordan who was Chief Justice of New South Wales from 1934 to 1949.

His judgments were not only celebrated for their scholarship and lucid expression but were usually presented in striking and memorable language which argued the underlying common sense logic of the law and its relevance to the needs of society.

His judgment in *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 NSWSR 171 is a classic statement of the law of the defence of fair comment in the context of literary or artistic criticism.

The following passage (at p.174-175) is a little lengthy but illustrates better than anything I can why Sir Frederick held the pre-eminence that he did:

> It is essential that the defamatory matter sought to be defended as comment should be statements of opinion only. Where, however, the matter complained of is, on the face of it, a criticism of a published work or public performance, the statements are *prima facie* comments unless they are seen to be statements of fact or are proved to be such.
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> The test whether comment is capable of being regarded as unfair is not whether reasonable men might disagree with it, but whether they might reasonably regard the opinion as one that no fair-minded man could have formed or expressed. The opinion must, of course, be germane to the subject matter criticised. Thus, if a critic denounced a book for its indecency it would not be beyond the bounds of fair comment if he also denounced the author for publishing such a book. But dislike of an artist's style would not justify an attack upon his morals or his manners. Whistler obtained his verdict, not because Ruskin had accused him of 'flinging a pot of paint in the public's face,' but because he was injudicious enough to call him a coxcomb into the bargain, and to suggest that he was guilty of wilful imposture.

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* Judge of the Federal Court of Australia.

> To establish malice, it is necessary to adduce evidence that the comment was designed to serve some other purpose than that of expressing the commentator's real opinion, for example, that of satisfying a private grudge against the person attacked. But this evidence is not supplied by the mere fact that the defendant has expressed himself in ironical, bitter or even extravagant language. A critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord.
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> English literature would be the poorer if Macaulay had not been stirred to wrath by the verses of Mr Robert Montgomery.
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> In a particular case, however, the language used may itself disclose an ulterior purpose in the criticism, or may serve to support independent evidence of malice or unfairness. But ridicule alone is not sufficient. A striking example of this is supplied by the recent case of *Bergman v Macadam* (1941) 191 LT Jo 131 in which a sporting critic, in order to express the opinion that a professional boxer was past his work, said, in a broadcast, 'Speaking of old men, why, just as soon as he has drawn his old age pension next Thursday, Kid Berg will totter along to Earls Court and fight Eric Boon.....After that fight Berg is almost certain to start thinking of a better way of earning his living.' In an action by Bergman for slander, malice having been negatived, the judge awarded the plaintiff £500 damages on the footing that the comment was unfair. The Court of Appeal set the verdict aside and entered judgment for the defendant, holding that the comment was not only not malicious but not unfair, notwithstanding that it was 'couched in language of exaggerated jocosity which seemed to characterise criticism of boxing contests.'

Thomas Babington Macaulay, politician and civil servant, poet, essayist and historian, was one of the great masters of English prose. He has a double relevance to today's topic. As well as providing the paradigm of libel-proof critical demolition, he played a major part in the drafting of the Indian Penal Code, which included provisions on defamation that found their way into the Criminal Code of Queensland and from there to statutory provisions in Western Australia and Tasmania.

Robert Montgomery was a popular poet in the heroic mould who wrote two epics, 'The Omnipresence of the Deity', which ran to eleven editions, and 'Satan: A Poem'. Macaulay reviewed those works in the April 1830 issue of the Edinburgh Review. The criticism has survived long after the works which provoked it, and their author, have sunk into merciful obscurity.

Macaulay opened by attacking the then fashionable means by which publishers promoted worthless authors:

> Devices which in the lowest trades are considered as disreputable are adopted without scruple, and improved upon with a despicable ingenuity, by people engaged in a pursuit which never was and never will be considered as a mere trade by any man of honour and virtue....We expect some reserve, some decent pride, in our hatter and our bootmaker. But no artifice by which notoriety can be obtained is thought too abject for a man of letters.

After commenting that '...the praise is laid on thick for simple minded people' Macaulay observed that:

> ...we too often see a writer attempting to obtain literary fame as Shakespeare's usurper obtains sovereignty. The publisher plays Buckingham to the author's Richard. Some few creatures of the conspiracy are dexterously disposed here and there in the crowd. It is the business of these hirelings to throw up their caps, and clap their hands, and utter their *vivas*. The rabble at first stare and wonder, and at last join in shouting for shouting's sake; and thus a crown is placed on a head which has no right to it, by the huzzas of a few servile dependants.
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> The opinion of the great body of the reading public is very materially influenced even by the unsupported assertions of those who assume a right to criticise.

Zeroing in on his target, Macaulay says:

> We have no enmity to Mr Robert Montgomery. We know nothing whatever about him except what we have learnt from his books, and from the portrait prefixed to one of them, in which he appears to be doing his very best to look like a man of genius and sensibility, though with less success than his strenuous exertions deserve. We select him, because his works have received more enthusiastic praise, and deserve more unmixed contempt, than any which, as far as our knowledge extends, have appeared within the last three or four years. His writing bears the same relation to poetry which a Turkey carpet bears to a picture. There are colours in the Turkey carpet out of which a picture might be made. There are words in Mr Montgomery's writing which, when disposed in certain orders and combinations, have made, and will again make, good poetry. But, as they now stand, they seem to be put together on principle in such a manner as to give no image of anything 'in the heavens above, or in the earth beneath, or in the waters under the earth'.

The work which gave rise to *Gardiner v John Fairfax & Son Pty Ltd* was, to put it mildly, undistinguished. It was a detective story called 'The Scarlet Swirl' written under the *non de plume* 'Mythrilla' and privately published by the author. Less than half a dozen copies were sold, but it attracted the idle talents of the Sydney Morning Herald reviewer. One of the passages complained of was:

> And when Braithwaite is not being impressive as leading detective ('he drew himself up, walked across the room to the victim, stooped down, examined him 'He's dead', he said, significantly and solemnly') the lovely Jean is making good resolutions that they could not meet again.

It had been earnestly argued on behalf of the plaintiff that this was a statement of fact and not comment and was inaccurate because it meant, literally, that the book was entirely or mainly taken up with descriptions of the matters referred to. Sir Frederick remarked (at p.176):

> He is evidently using clumsily a form of expression which was used effectively by the person who said, slanderously, of Jebb that he devoted such time as he could spare from the neglect of his duties to the adornment of his person. The way of a critic would be thorny indeed if clumsiness of expression were treated as evidence of unfairness;

The only Jebbs listed in the Dictionary of National Biography are Irish clerics, judges, prison reformers and physicians all of whose extensive good works suggest they could not have provoked the attack recorded by Sir Frederick Jordan. Our research continues.

Time for a little black letter law. We have been looking at the defence of fair comment, but of course no question of defence arises unless a plaintiff can show that what was published of him or her was defamatory, that is to say it imputes some condition or conduct which would damage the standing and reputation of the plaintiff in the eyes of members of the community generally. This need not be the assertion of a moral failing. It is defamatory to say of somebody that he or she is incompetent. However, as we shall see, sometimes what often provokes a plaintiff's claim for defamation in a critical setting is an assertion that there has been not just incompetence but a form of literary dishonesty.

In *Porter v Mercury Newspapers* (1964) Tas SR 279 the famous Australian writer Hal Porter complained of a review which he said imputed that he inserted 'Anglo-Saxon' words in his autobiography 'The Watcher on the Cast Iron Balcony' not with any concept of literary necessity in mind but in order to promote publicity by attracting the attention of the censor. In *O'Shaughnessy v Mirror Newspapers* (1970) 125 CLR 166 the actor and director Peter O'Shaughnessy complained that a review in 'The Australian' of his production of 'Othello' meant that the plaintiff, having at his disposal as good a group of players as Australia could produce, wasted their talents in a dishonest production devoted to enhancing his own role at the expense of the rest of the cast.

It can also be the critic who complains, as in *Turner v Metro Goldwyn Mayer* (1950) 1 All ER 449 where a prominent film critic complained of a letter from MGM to her employer, the BBC, complaining that she was 'completely out of touch with the tastes and entertainment requirements of the picture going millions.'

Such a mild reproach can be contrasted with what was said of the plaintiff in *Cornwell v Myskow* (1987) 1 WLR 630. In a column in the 'Sunday People' headed 'Wally of the Week' the following blast was delivered:

> Actress Charlotte Cornwell made a proper pratt of herself in Central's crude new catastrophe, No Excuses. And then she foolishly prattled about it pompously in public.
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> This repellent rubbish about a clapped-out rock singer is without doubt the worst I have ever clapped eyes on. It bears no relation to rock and roll today - all concerned must have been living down a sewer for the last decade - or indeed to human beings.

> As a middle-aged star, all Miss Cornwell has going for her is her age. She can't sing, her bum is too big and she has the sort of stage presence that jams lavatories.
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> Worst, she belongs to that arrogant and self-deluded school of acting which believes that if you leave off your make-up (how brave, how real) and SHOUT A LOT it's great acting. It's ART. For a start, dear, you look just as ugly *with* make-up, so forget that. And as for ART? In the short sharp words of the series, there is just one reply. It rhymes.

The imputations, that is to say what are said to be the defamatory meanings arising from the publication, were drafted by the plaintiff's Counsel in the following elegant terms:

(i) that the plaintiff had taken part in a production so repellently filthy that she and the others taking part in it might have been living down a sewer,

(ii) that the plaintiff was a middle-aged failure as an actress and singer, with a stage presence that drove the audience to the lavatories,

(iii) that the plaintiff was a foolish, ugly woman whose pretensions at acting in an artistic manner were utterly bogus and unjustified,

(iv) that the plaintiff lacked any ability whatsoever as an actress and was guilty of arrogant self-delusion in presenting herself as an actress to the public.

The plaintiff was awarded £10,000 damages by the jury but the defendant's appeal succeeded on the ground of wrongful admission of evidence. It is worth noting that according to the law report, counsel for the defendant on the appeal, Mr Michael Beloff QC,

> ...suggested that the courts were not the place to deal with someone's sense of grievance that another person had been rude in print about their bottom.

Our defamation law imposes what a very experienced judge in the field has called a 'low threshold' of defamation. Thus it has been held defamatory to say of the leader of a political party that he has lost the confidence of his party: *John Fairfax & Sons Ltd v Punch* (1980) 31 ALR 624. Therefore if the case is sufficiently serious to warrant getting to court at all, the chances are that attention will be mainly concerned with whether the defendant has made out a defence, and particularly the defence of fair comment.

The defence of fair comment is important in this context because of the limitations which the common law places on the other two main defences of general application, justification and qualified privilege. To make out a defence of justification the defendant has to prove by properly admissible evidence the substantial truth of every defamatory meaning arising from the publication complained of. The defence of qualified privilege does not require the defendant to establish the truth of what was said, but it is only available

if the publication was made on what the law considers a privileged occasion. It is now well established, at least since *Blackshaw v Lord* (1984) QB 1 and *Morosi v Mirror Newspapers* (1977) 2 NSWLR 749, that the mere fact of publication in the general media of matters of public interest is not in itself sufficient to constitute a privileged occasion.

A leading English text (Duncan & Neill on Defamation, 2nd Edition, p.57) summarises the elements of the defence of fair comment as follows:

(a) The comment must be on a matter of public interest.

(b) The comment must be based on fact.

(c) The comment, though it can consist of or include inferences of fact, must be recognisable as comment.

(d) The comment must satisfy the following objective test:

Could any fair minded man honestly express that opinion on the proved facts;

(e) Even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves the defendant was actuated by malice.

The first requirement will usually not present any difficulty since the courts have held clearly that there is a public interest involved in the criticism of literary and artistic works presented to the public.

The second requirement, that the comment must be based on fact, is the legal equivalent of the old journalistic aphorism that 'Comment is free but facts are sacred'. The rationale is that if a defendant sets out true facts and then his comment on those facts, then as long as the facts are truly stated, the reader is equally able to make up his own mind as to whether he agrees or not with the defendant's comment. However, it has been recognised that it is unrealistic to expect commentators on matters of public interest to express themselves strictly in a fact plus comment formula. Therefore it is sufficient if the facts, although not stated in the article, are sufficiently indicated to the reader or if they are matters of public notoriety. In the case of literary or artistic criticism of course there is the twist that the more damaging the criticism, the less likely it is that the reader will buy the book or see the play or film, with the consequence that the reader will never be in possession of the facts and able to form his own opinion. However that theoretical difficulty has not troubled the courts much.

The importance of factual accuracy was demonstrated recently by the celebrated *Blue Angel* case in Sydney where a restaurant recovered $100,000 damages. A vital issue was the question of the lobster. The defendant argued that the review did not say that the lobster was broiled for 45 minutes, only that the reviewer had waited for 45 minutes to be served. It seems the jury disagreed.

The third requirement is often of critical importance because if a statement is held to be a fact, as distinct from comment, then it has to be

proved to be true, and so proved by means of admissible evidence. A comment is something 'which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation': *Clarke v Norton* (1910) VLR 494 at p.499 per Cussen J. But the law is not so ritualistic as to require a defendant to preface every comment by some formula such as 'in my opinion' or 'it seems to me that'. A comment can take the form of fact provided it is recognisable in the context as an inference from the facts on which the comment is based: *Kingsley v Foot* (1952) AC 345 at p.356-357. It was on this ground that the appeal succeeded in *O'Shaughnessy v Mirror Newspapers*. The High Court held that what at first blush might have seemed like an assertion of fact (that it was a dishonest production) was capable of being regarded by the jury as comment, and that the trial judge was wrong in withdrawing that issue from the jury.

The fourth requirement has recently become a controversial issue in the law of defamation. The defence we are considering is called fair comment, but that is a somewhat misleading label. The defendant may make out the defence even though the comment is by ordinary standards unfair, in the sense that it might be prejudiced, bigoted or unreasonable. The test usually referred to was formulated by Lord Esher MR in *Merivale v Carson* (1887) 20 QBD 275 at p.281 and is in these terms:

> ....would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said.

But does the emphasis on honesty, as distinct from reasonableness, mean that a defendant can only succeed if he establishes that he in fact held the opinion expressed in the comment? This question becomes important when the defendant is publishing a comment of somebody else, for example a letter to the editor or a review contributed by someone not employed by the publisher of a newspaper. In *Cherneskey v Armadale Publishers Ltd* (1978) 90 DLR (3d) 321 a majority of the Supreme Court of Canada held that the defendant has to satisfy two tests: the statement must be objectively a fair comment which could be made on the facts in the sense abovementioned *and* it must in fact have been the real opinion of the defendant. The question arose in this way. A newspaper published a letter which accused the plaintiff of holding racist views. The writers of the letter were not called as witnesses and there was no evidence as to whether or not the views expressed in the letter were the honest views of the writers. The defendants, the publisher of the newspaper, did give evidence that the letter did not represent the editor's view or the views of the newspaper. The majority of the Supreme Court held that the defence of fair comment failed because there was no proof of the honest belief of the writers and honest belief by the defendants themselves had been denied.

This decision caused a major controversy and provoked some legislative changes in parts of Canada. The reason is not hard to see. If a newspaper were to publish conflicting views by writers of letters to the editor or other commentators, the publisher could not possibly hold an honest belief in all the views expressed. Therefore the defence of fair comment would not be available and one of the vital functions of a free press, that of providing a forum for public debate, would be gravely impaired.

The decision in *Cherneskey's* case was criticised in the 2nd Edition of Duncan & Neill (1983) and in *Hawke v Tamworth Newspaper* (1983) 1 NSWLR 699. See also (1985) 59 ALJ 371.

Recently the English Court of Appeal in *Telnikoff v Matusevitch* (1991) 1 QB 102 has in my respectful opinion comprehensively demolished the *Cherneskey* heresy. The court (at p.119) expressly adopted as correct the statement of the law from Duncan & Neill to which I have already referred.

The fifth requirement also bears on the question of the state of mind of the defendant, but with this important difference. If the defence of fair comment is made out it will only be defeated if the plaintiff shows that the defendant was actuated by malice. Thus it is up to the defendant to establish the honesty of his state of mind. Malice in this context is a technical concept which includes what would ordinarily be considered as malice, that is to say spite or vindictiveness, but also extends to what might be called wrongful or improper motives or a lack of honest belief in the view expressed or, to use the example given by Sir Frederick Jordan, the gratification of a private grudge.

Finally, I need to mention a continuing controversy affected the law of fair comment where the comment imputes dishonourable conduct to the plaintiff. There are, on the analysis of the cases by Duncan & Neill (p.67) three possible views:

(a) the defence of fair comment does not apply at all. Suggestions of dishonourable conduct have to be justified by showing they are correct inferences from primary fact, that is by a defence of justification;

(b) the defendant has to show that the comment was a reasonable inference from the facts;

(c) the ordinary test of fair comment applies, viz could any fair minded person express that opinion on the proved facts.

There are authorities which support each view, but I think the third is to be preferred. This conclusion is supported by a remark of the High Court in *O'Shaughnessy* where their Honours said (at p.174):

> To safeguard ourselves from too broad a generalisation we would add that it is not our view that an imputation of dishonesty is always an assertion of fact. It is part of the freedom allowed by the common law to those who comment upon matters of public interest that facts truly stated can be used as the basis for an imputation of corruption or dishonesty on the part of the person involved.

It is difficult to see the logic behind the contrary views. Dishonesty is to be deplored and an imputation of it is plainly defamatory, but there are other human failings just as bad or even worse.

In conclusion I think that the literary or artistic critic is not too badly restricted by the law of defamation. As Duncan & Neill say (at p.69), almost

any comment is defendable as fair comment provided the contents of the work criticised is not misrepresented and no personal attack is made on the plaintiff.

It remains to be seen however whether the review of a recent work in England will provoke a libel action. The book in question was 'Memoirs of a Libel Lawyer' by solicitor Peter Carter-Ruck and it was reviewed in 'The Spectator' by Ian Hislop, who commented:

> When journalists read a particularly dull piece about a potentially interesting subject they tend to conclude that it has been 'lawyered', i.e. that everything of interest has been removed for legal reasons. This is a whole book that has been 'lawyered' by its author and the result is that all Carter-Ruck's clients are praised extravagantly and so are all the solicitors, barristers and judges he has ever come across.

Is it defamatory to say of a libel lawyer that he has written a book which is dull because it is not defamatory?

Conclusion

Public criticism is essential to the healthy cultural life of a society. The author's assessment is that the law currently accommodates that need reasonably well and has not given excessive weight to the protection of individual reputation.