"Defamation in Transition"

Macquarie University - Conference on Defamation,

12 March 1994.

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MACQUARIE UNIVERSITY

CONFERENCE ON DEFAMATION IN TRANSITION

SYDNEY, 12 MARCH 1994

DEFAMATION IN TRANSITION

The Hon Justice M D Kirby AC CMG *

A REFORM THAT FAILED

My authority to introduce a conference on defamation in transition derives from the time I served as Chairman of the Australian Law Reform Commission.

In 1976, that Commission was required by the Federal Attorney-General to review the law of defamation in the Australian Territories, which was subject to Federal regulation, and in other areas of Federal responsibility, including radio and television. At the same time the Commission was committed to an investigation of the law of privacy in Australia. The coincidence of these two tasks and the leadership of an original lawyer of open mind (Mr Murray Wilcox QC) led to the report to the Commission on *Unfair Publication: Defamation and Privacy* (ALRC 11) 1979. That report proposed new substantive protections for reputation and privacy. It contained novel procedural reforms, including provision for a right of reply and a right of correction. It was hoped by the Commission that these reforms would help to replace the "pot of gold" mentality which many felt had infected Australian media law, and defamation law in particular.

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In the course of its investigation, the Commission naturally examined the law and practice of many foreign countries, including the United States of America. Naturally too, the Commission had urged upon it the need for the adoption of the "public figure" concept accepted as the law of the United States in *New York Times Co v Sullivan*, 376 US 254, (1964). For reasons stated in appendix F to the Commission's report, that proposal was rejected. The Commission drew attention to some of, what seemed to it to be, the more bizarre and unacceptable consequences of the United States jurisprudence, such as the decision in *Ocala Star-Banner Co et al v Damron* 401 US 295, (1971).

Once the Law Reform Commission's report was produced, it was committed to public discussion, media consideration and ultimately political scrutiny. The political scrutiny took the report to the Standing Committee of Attorneys-General. At meetings in far-away places - usually resort towns - the Attorneys-General laboured over the reforms. In the result, nothing was done.

More lately, attempts have been made to revive at least some of the Law Reform Commission's proposals. Now the New South Wales Law Reform Commission is re-examining the law of defamation. It may be hoped that it will enjoy greater success than crowned the efforts of the Federal body. Experience teaches that in the path of defamation law reform stand powerful and opinionated interests who tend to have very considerable political clout. If they do not like the reforms proposed, they can usually effectively stop their passage into law. Chief amongst the opponents of any reform which would liberalise the law of defamation in Australia may be the political figures who number a large proportion of the plaintiffs who successfully recover under the current law. Chief amongst those who oppose reforms of procedure that might be deemed to inhibit their editorial "independence" are the media owners and editors. Their resistance has helped to ensure the continuance of the current laws and procedures. These promote delay. They often result in very high verdicts. They do not always adequately protect free speech. And by emphasising

money damages, they often fail to protect the public's right to know the truth about, or alternative opinions upon, matters in contest.

TECHNOLOGICAL CHANGE

One of my teachers in the field of the social response to HIV/AIDS has been Professor June Osborn of the University of Michigan in the United States. In that context, Dean Osborn constantly emphasises the need for laws to combat HIV/AIDS to rest upon a sound foundation of empirical data. It is all too easy to base laws upon preconceptions, hunches or mythology. But June Osborn insists that laws on HIV/AIDS, to be effective, must be designed with a full knowledge of the social phenomena with which they are dealing.

It is the same in the case of defamation. The Australian Law Reform Commission paid a great deal of attention to the actualities of the operation of the law of defamation. It may be expected that this conference will again put the spotlight upon the way that law operates in practice in the context of the Australian media.

Things have not remained the same since the Law Reform Commission's report was delivered in 1979. The caravan has moved on. My point in this introduction is to call attention to three important changes. In the ongoing consideration of the law of defamation in this country, it is essential that those changes be kept in the forefront of the reformer's mind.

The first consideration relates to media technology. It is interesting to reflect that when Queen Victoria came to the throne in 1837 there were no swifter means of sending her messages to the far part of the Empire than had been available to Julius Caesar, or, for that matter, Moses. The galloping horse and the sailing ship remained the swiftest means of communicating information.

Since that time, there has been a remarkable revolution in media technology. It began in the 1840s with the invention of telegraph. In 1875 Alexander Graham Bell invented the telephone. There followed wireless in 1890. Hollywood came upon the scene in the 1920s. The first submarine cable was laid in 1956. The first satellite

went up in 1960. It was followed by Telstar in 1962. Fibre optics enormously increased the flow of data in 1977. William Gibson's Cyberspace was described in 1984. And now we face the phenomena of interactive telecommunications and computers (informatics). The rapid spread of telefacsimile and the gigantic expansion of intercontinental media, produced in both print and electronic form, mark our time.

The development of global media has exacerbated phenomena which already existed in 1979 when the Australian Law Reform Commission reported. But one important consequence of the developments since has been the increasing difficulty of national law to address successfully media bombarding the national jurisdiction from international sources. Local legislatures and courts cannot always stand up - or stand up effectively - against the powerful global sources of information beamed in from outside the country. To some extent, globalisation has been a beneficial development. The global media undoubtedly contributed to the demise of the authoritarian states of the Soviet Union and Eastern and Central Europe. On the other hand, the precious diversity and variety of humanity - and its cultural, social, linguistic and other norms - are undoubtedly endangered by the global media - most of it speaking one language of one set of values and with an American accent.

Illustrations of the limited power of the law to control and regulate this global media abound. Take the limited power of the British Government and Parliament to enforce its perceptions of the control by law of terrorists who will not submit to democratic procedures. Take the only partly successful attempts to impose standards in respect of pornography beamed into European countries of the region in the form of the cable programme "Red Hot Television". Take also the attacks on institutions by the debasement of Royal and Presidential power into a form of soap opera and the reduction of so many serious national and international issues to entertainment. When bushfires raged over a third of the Australian continent in January 1994, causing devastation unequalled since the commencement of European settlement, the only news which I could procure in my hotel room in Madrid, day after relentless day,

concerned Mr Bobbit's severed penis and a fight between two ice-skaters of American origin, of neither of whom I had previously heard.

CHANGING MEDIA OWNERSHIP

In the Law Reform Commission's report, attention was drawn to the problem which any attempt to reform Australia's media laws presented, namely the concentration of ownership of the mass media in relatively few hands. Since 1979 that concentration has actually increased. Of course, the expanding technology has enlarged the power of communication between individuals. But in the mass media, from which the great majority of the population secures its social, political, economic and like data, the controls can ultimately be traced to relatively few owners. Some of those owners have made it plain that there would be no point in media ownership if it did not permit the owner occasionally to influence community discussion and opinion.

Two developments have occurred since the Australian Law Reform Commission's report was published. The first has been the large scale dismantlement of the PMG (PTT) monopolies which formerly controlled much of the electronic media in countries both developed and developing. The moves towards privatisation have swept through these countries, including Australia. Although in some this has meant the removal of the authoritarian, censorship-ridden government media, it has also tended to accentuate the homogenisation process. Thus in Australia, the national broadcaster is now but a pale shadow of the informative, neutral, internationally-focussed instrument of public information which existed in my youth. Increasingly it has become a copperplate of the privately owned media: chasing chimerical ratings and focusing its news interests increasingly upon local rather than global events. The opportunity which the international media presents for a global outlook is all to often debased to banal local stories or the replication of cheap satellite programmes beamed in from the United States of America.

The power of media barons has increased enormously. In February 1994, Mr Rupert Murdoch arrived in New Delhi to a reception akin to that given to a head of

state. He protested surprise. But he should not have been surprised. His hosts merely reflected a realisation of the true power now concentrated in the hands of a media owner of this magnitude. His power to stand up for human rights values in relation to China - or to subordinate those values in the quest for markets in that great country - demonstrates in a flash the influence which his judgments have upon the lives of millions, if not billions of ordinary people. Television, especially, is vulnerable to the tendency to produce superficiality. Over-simplistic news presentation has now replaced, for many, the detailed news analysis or in depth consideration of issues which used to be gleaned from national broadcasters and/or well established print media. Glitz has all too often replaced information. The packaging and intercontinental transmission of instant information has substituted coloured pictures with banal commentary for thoughtful messages on the state of our planet.

This is the reality of the media today. The power of a local law to enforce its will against this reality is distinctly circumscribed. The British government may be able to control the way the BBC reproduces interviews with murderous terrorists. But it can scarcely regulate the news broadcasts of CNN which beam into London or the newspapers, magazines and other print material that are brought flooding into the country. With the loss of political and legal control comes a growing realisation of the incapacity of the legal system to enforce the standards of the local community. This loss of power, even since 1979, has to be kept in mind when considering reforms of defamation and other media law which one jurisdiction adopts for itself. It is to that extent that all countries, including Australia, become profoundly influenced by the standards which are accepted in the United States and enforced under the First Amendment to that country's Constitution. Those standards range from the presentation of sexuality and violence to the pre-trial publicity of Michael Jackson, the courtroom entertainment trial of Mr Kennedy Smith and the obsessive scrutiny of the private lives of Presidents and Royalty. It is there that we see the great power of the intercontinental media at work. Against that great power, local lawmakers often stand as powerless as King Canute. They can talk about media law reform - including

defamation law reform. But their voices are shouted at a sea which continues to rush in.

CONSTITUTIONAL GUARANTEES

The third change which must be noted in this connection arises from the decisions of the High Court of Australia in late 1992 in *Australian Capital Television Pty Limited and Ors v The Commonwealth of Australia [No 2]* (1992) 177 CLR 107 and *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1. In those decisions, the High Court recognised that the legislative powers of the Federal Parliament were subject to an implied prohibition that the laws of that Parliament could not unduly restrict recognised freedom of communication, at least upon political matters.

Behind this idea was the notion that a representative elected democracy was an implication of the Australian constitutional framework which could not be undermined by legislative enactments, however well intentioned.

The *Capital Television* case arose out of an attempt by the Federal Parliament in Australia to impose restrictions on paid political advertising. See *Political Broadcasts and Political Disclosures Act* 1991 (Cth). The regulation introduced by that statute was by no means unique for the democratic world. Many countries with representative democracies, have introduced and enforced such laws. They include the United Kingdom, Denmark, Austria, the Netherlands, Ireland, France, Norway, Sweden, Israel and Japan.

Naturally enough, the assertion of the implied constitutional guarantee was welcomed most enthusiastically by representatives of the media. It appeared to vindicate a predicted development of the Australian constitutional law put forward many years earlier by Justice Lionel Murphy. How well I recall the contempt and derision heaped by the judiciary and the legal profession at the time upon Murphy's opinions. But how quickly his heresy has become orthodoxy. Even Justice Mason dealt contemptuously with Murphy's idea when it was first put forward. He declared that he had looked carefully but could not find a s 92A (with guarantees of free

speech) in the Australian *Constitution.* Subsequently, in the *Capital Television* case, he looked again and found the implications to which he was earlier blind. His judicial colleague, Justice Dawson and various academics have repeatedly cited Chief Justice Mason's jest about s 92A in the face of his later judgment. It is an object lesson in the dangers of attempting to lace a judgment with humour.

The result of the High Court decision is, as Peter Creighton has pointed out, that everyone is once more "free" in law to advertise on the electronic media in Australia. See P Creighton *The Implied Guarantee of Free Political Communication* (1993), 23 WALRev at 163, 168ff. But that author goes on:

> *"[...] to ignore practical effect and shelter behind an absence of legal discrimination seems at odds with the Court's prevailing approach to constitutional guarantees. It deserves the rebuff delivered by J Skelly Wright to the United States Supreme Court:*
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> > *'A latter day Anatole France might well write ... 'The law, in its majestic equality, allows the poor as well as the rich ... to drown out each other's voices by overwhelming expenditures in political campaigns' ... When money becomes more important than people, when media mastery weighs more heavily than appeals to judgment, when opportunities to communicate with voters are extremely unequal, the result is a cynical distortion of the electoral process.'"*

Yet whether we like the notion of implied guarantees of free communication or not, whether we believe that the idea was good but the occasion for its application was inappropriate, or whether we think that such rights should be left to the people to adopt or reject in a Bill of Rights for Australia, the law of Australia is now undoubtedly changed. The constitutional setting for the law of defamation in Australia is altered. The law now includes an implied constitutional guarantee for free speech in political, economic and possibly other matters necessary to the working of a representative democracy.

This context cannot be ignored as it affects the development of media law generally and defamation law in particular. Already cases are being presented to the Court by which an attempt will be made to import what is in effect a public figure standard in the law of defamation where this has been rejected by the Law Reform Commission and never enacted by a representative Australian Parliament.

CONCLUSIONS

For someone who was labouring the garden of defamation law reform nearly twenty years ago, a return to that subject in 1994 has an inevitable element of the *deja vu* about it. Of course, nothing may come of the current attempts to reform the law by legislation. The real path of reform may lie through the courts and especially through the development of the new notions of implied guarantees under the Australian constitution.

However that may be, it is essential that the reformer to keep in mind the changing technology, the changing media ownership and the changing constitutional setting. Any law of defamation which fails to take these realities into account would fail to address the real needs of legitimate public defence of reputation and privacy in Australia.

I have no doubt that the papers and discussions of this conference will elicit numerous purple passages. Speakers will wax eloquently about free speech, the free media and the fundamental importance of these rights to a free society. There will be demands for still greater freedom for journalists - whether of great training and of no training at all - to enjoy privileges hitherto reserved to trained and highly disciplined professions. There will be ringing calls for Australians to embrace the jurisprudence of the First Amendment. There will be countless references to Watergate and ignorant assertions that its exposure could not have happened in Australia. The different cultural values so far as reputation and privacy are concerned may be overlooked. This is normal fare for consideration of defamation law reform when it is left substantially to media people themselves and those in frequent symbiosis with them.

My simple appeal, on behalf of a more sceptical general Australian community, is that these large boasts and claims should be tempered by occasional consideration of the reality of the media of which we are speaking. Since I last looked at it its technology has changed. Its ownership has become more concentrated in fewer hands. Its respect for local cultures, norms and languages has continued to be eroded. We should remember these features of reality as we contemplate the future directions of law reform. Good laws - and good law reform - rest upon sound empirical data.