

Faculty of Humanities and Social Sciences
Humanities & Social Sciences papers

Bond University

Year 2005

Defamation and privacy: The view from
Down Under

Mark Pearson
Bond University, mark_pearson@bond.edu.au

Defamation and Privacy: The View from Down Under

Professor Mark Pearson, Bond University, Australia

Presentation to the Media Law Advocates Training Programme, PCMLP, Oxford University, July 15, 2005.

Australia is about as far from Oxford as you can get, so why would media law advocates at a summer school here find any relevance in hearing about defamation and privacy in that part of the world? Well, firstly, from what I have read about your program you come from many parts of the world so you seem to have a diverse range of backgrounds and interests. Secondly, we can often learn much more about our own legal systems and the issues they face by comparing and contrasting them with a case study from another jurisdiction. For those reasons, I sincerely hope you find the session interesting and useful.

Before we begin, I must declare my background and biases. I am not a media lawyer. I am not even a lawyer. I am a journalist and university teacher and my specialization is in trying to explain the law to working journalists, journalism students and, through my reporting and commentary, the wider community. Some of those speaking with you over these three weeks will be much keener than me to recommend new mechanisms for regulating the media. If there is a spectrum ranging from extreme censorship, through the realm of regulation, to unbridled media freedom, I sit much closer to the latter end of that scale. Frankly, I believe healthy democracies require a questioning, inquiring, fearless news media watching over the other societal institutions, performing the very role Edmund Burke noted when he dubbed them the Fourth Estate. Nevertheless, of course freedom requires responsibility, so my ideal would be to have a responsible media with a minimum of regulation. We are a long way from that ideal in Australia today, as you will see.

Let us first look briefly at some special features of the Australian legal system.

- **The Australian context**

Australia is a relatively new democratic nation, achieving the federation of its states into a Commonwealth with a national constitution in 1901.

It is unsurprising, given its origins as a British convict colony, that we adopted the English legal system and its common law, although our parliament has borrowed some elements from the United States, most notably a similar system of election for its upper house, also known as the Senate.

We are a federation of states and the powers of the national Commonwealth government are defined relatively clearly in our Constitution, with all other responsibilities falling to State governments. Disputes over such powers are adjudicated by our High Court, along with appeals on matters of law from our State Supreme Courts.

Relevant to the area of media law is the fact that, unlike the United States, the United Kingdom and our neighbour New Zealand, Australia has no Bill or Charter of Rights. Our Constitution simply states the mechanisms of the political and legal system but does not speak of particular rights and freedoms of the citizenry.

Despite this fact, our High Court justices took it upon themselves in a series of decisions during the 1990s to read into our Constitution a freedom of the citizenry to communicate on matters of government and politics. This implied freedom does, of course, have ramifications for media law given that one of the key forums for communication among citizens on political matters is via the media. However, the boundaries of this newly defined freedom are still being developed, and seem to shift with the High Court's membership.

Given that background, where does this leave defamation and privacy as our two topics of interest?

- **Defamation**

The legal and political system I have described above has resulted in a notoriously complicated defamation law. Because defamation did not sit comfortably within any of the Commonwealth Government's heads of powers, it has been controlled by the laws of our eight different state and territory jurisdictions. Some left the British common law virtually in tact while others have incorporated a range of acts and codes over the 217 years since British settlement. Two states are still working with a mid-19th century Indian Penal Code. The result is a maze of definitions, procedures and defences across the eight jurisdictions, to the delight of media lawyers and the dismay of working journalists.

The separate systems have created increasing problems as media and communication developed through the 20th century in defiance of state borders. They have encouraged so-called 'forum shopping' where plaintiffs with national or international reputations look for the most favourable jurisdictions in which to launch their actions.

Last year, our Commonwealth Government decided that, given the nature of the modern media, it may well be able to use its constitutional heads of power in regard to telecommunications and corporations to develop an overarching national defamation law. It has given the states and territories an ultimatum to co-operate to develop satisfactory complementary legislation by 2006.

Federal Attorney-General Philip Ruddock featured his own hobby-horses in his suggested reforms, including:

- provision for relatives to sue on behalf of the dead
- the requirement that true defamatory publications be also proved to be in the public interest
- a system of court-ordered correction notices
- insistence that juries be involved in defamation trials
- allowing corporations to continue to be able to sue for defamation.

He has since given ground on the right of the dead to sue and has allowed truth alone as a defence, but there is still disagreement over whether corporations should have a right of action, whether courts should be able to order correction notices, and on the role of juries in the process.

Defamation is a complex beast, and three worrying issues have emerged from the tortuous negotiations between the Commonwealth government, the states, and stakeholders: the long-term price the media may pay for a truth-alone defence, the usefulness of the proposed qualified privilege defence, and the occasions on which a fair report defence might apply.

1. Truth alone

The effort that has gone into winning truth alone as a defence may have a longer term downside. The removal of a public interest or public benefit requirement is likely to increase pressure for a separate tort of privacy.

2. Qualified privilege

Media in Queensland and Tasmania have had an extremely generous qualified privilege defence available in situations where they wish to expose public wrongdoing but do not have quite enough evidence to prove the truth of their allegations.

The proposed new defence is a hybrid child. Its parent is a restrictive NSW qualified privilege which requires the newspaper's actions in publishing the material to be "reasonable in the circumstances". That has been mixed with some recent, relatively untested, NSW amendments designed to broaden the defence, and a more hopeful British adaptation based upon a judge's comments in the 1999 *Reynolds* case.

There is a risk here that the courts will still define "reasonableness" so narrowly that the media might as well run with a truth defence. There is a further requirement that they assess the integrity of the sources used for the publication, exposing journalists to the classic ethical bind over the revelation of confidential sources.

The Queensland s. 16 "good faith" defence remains the most favourable to the media, and it looks like it has been a casualty of the negotiation process.

If the new qualified privilege defence is interpreted too narrowly, journalists will be left with truth, fair report and fair comment as their only viable everyday defences. (The High Court's political qualified privilege defence is still formative and is at best a backup defence for matters of politics and government.)

3. Fair report

Ruddock's proposed legislation was also missing some important elements of the fair report defence.

While all jurisdictions protected fair and accurate reports of proceedings in their own courts and parliaments along with federal courts and parliament, they varied markedly in their protections of fair reports of other public occasions.

The federal attorney-general omitted local government meetings and other public meetings from his list of protected occasions.

This would be a devastating blow to regional and community newspapers because it would leave reporters exposed to the libelous statements made in town hall and council meetings.

A single uniform defamation law has the potential to be a vast improvement on the mishmash we have at the moment, but not if journalism is uniformly weakened in the process.

That said, it seems the States are pressing ahead with their version of the reforms, which have already been tabled in the South Australian Parliament.

Dow Jones v. Gutnick [2002] HCA 56 (10 December 2002).

The above appeal was the first time any of the world's superior courts had considered the vexed issue of jurisdiction for Internet publications and the case still has ramifications internationally.

The High Court had to decide whether Melbourne businessman Joseph Gutnick could bring a defamation action in the Victorian Supreme Court over an article published in the online edition of the weekly financial magazine *Barron's*, based in New Jersey.

It was proven that five copies of the print edition of the magazine were circulated in Victoria, but the key issue was whether Gutnick could sue over the Internet version which had 550,000 subscribers internationally, of whom only 1700 had Australian-based credit cards.

At issue, as Geoffrey Robertson QC argued for publisher Dow Jones, was whether the online edition was deemed to be "published from" New Jersey where it was "uploaded" or "published into" any location throughout the world where it was "downloaded" by subscribers, in this case Victoria, Australia.

There were several elements to this argument over publication and jurisdiction, but in the end the seven High Court justices decided unanimously that Gutnick had the right to sue in Victoria, his place of primary residence and the location where he was best known.

Many technical legal issues arose in the High Court judgment, but the decision translates into some key implications for the media.

Here are a few:

1. Internet versions of publications must be considered carefully in their own right every edition, not just automatically generated from the print edition.

There are still many smaller newspapers which feature "shovelware" web sites, basically an online replica of the key contents of their print version. This is a dangerous practice in the light of the Gutnick decision, which basically says media outlets are opting to publish wherever a reader chooses to download their products. Until Australia gets uniform laws, this leaves them open to actions in states or territories which may not be as favourable or predictable as their own. Newspapers which do not have the resources to vet their web editions separately might be better off without them.

2. Publishers should be especially concerned over the place of residence of the subject of a story.

Those choosing to continue with their website publishing need to take special note of the place of residence of the individuals mentioned in their material and think through the defamation defences available in the states where their predominant reputation resides. As Justice Michael Kirby said in the Gutnick case (para 151): "The material has to be accessed or communicated in a jurisdiction where the plaintiff has a reputation. That will usually be the place where the plaintiff is resident." Of course, there will be some individuals who have substantial reputations in a number of jurisdictions, such as prominent politicians who might choose to sue in their home state or in Canberra, or prominent sports people who might have grown up in one jurisdiction but have their present base and business interests in another. In fact, Justice Ian Callinan remarked that he felt litigants should have the right to sue anywhere they had a reputation, so the point is contentious. Editors need to bear in mind the locations where individuals have a significant reputation when they are assessing the defamation implications of a web-based story.

One of the furphies raised at the time of the decision was that Australia might become the defamation capital of the world and that international entertainers might go there to sue our media organizations over defamatory material published on their web sites. As Justice Kirby pointed out, the courts would be reluctant to entertain a defamation action in a place where an individual is not resident unless they could show some major impact on their reputation. But it seems Australian singer Kylie Minogue would have a better case in Australia than English footballer David Beckham might.

3. There is little need to fear the long arm of the law reaching from obscure jurisdictions.

Despite the hysteria, there is little real risk of individuals bringing successful law suits in obscure foreign countries over material published on Australian-based newspaper web site. As Justice Kirby stated, “the costs and practicalities of bringing proceedings against a foreign publisher will usually be a sufficient impediment to discourage even the most intrepid of litigants.” (para 165). It is even more problematic if the publisher has no assets or business base in the jurisdiction where the action is being brought. Major corporations and wire agencies with diverse multi-national interests have more to fear from this prospect than smaller operations. Nevertheless, editors might reflect carefully on their publications before visiting such nations on their next travel junket. They might find themselves in court instead of the resort pool bar as planned.

4. Publishers should beware of ramifications for other laws like contempt.

There are obvious implications of the Gutnick decision for other laws such as contempt of court and parliament. Now the Web product is deemed to be published wherever it is downloaded, the Internet version of newspapers should not contain details of sub judice criminal matters in other states, identification of inter-state jurors or sexual offence victims (or even those *accused* of sexual offences in some states); or details on parliamentary committee deliberations in other states. Many other state-based laws can also enter the equation. The print version might be safe under a particular state’s laws but the web site might render a publisher liable to prosecution in another jurisdiction.

- **Defamation toolkit**

We at Bond University have developed a web site called The Australian Journalist’s Defamation Checklist (www.defamkit.bond.edu.au) designed to help guide journalists through the crucial questions about defamation ingredients and possible defences.

Of course it is not meant to be a substitute for legal advice. Journalists are encouraged at every point to take legal counsel if they have any doubt about the matter at hand.

The checklist consists of a series of gates through which journalists can pass when thinking through the possible defamation risks in a story.

It starts with a run through the basics of libel law and then invites journalists to start the checking process by asking them whether the publication meets the three basic criteria of defamatory material.

If so, it then directs them to each of the main defences – truth or justification, fair report, fair comment, qualified privilege and political qualified privilege. They can then pass through the various gateways of those defences to determine whether they might have a chance of applying them to the story.

It's definitely a reporter's facility rather than a lawyer's one. A solicitor would require much more legislative detail and citations for relevant cases. This site offers simple explanations in terms the layperson should understand.

That's all it sets out to do because the most we can expect of journalists is that they know when to sound the alarm bells. If it works properly they will not be sounding them unnecessarily and chalking up huge legal fees. In other words, it should engender a reasonable confidence so journalists can move ahead with a worthwhile story if there are green lights showing on all the basics.

On the other hand, it prompts journalists to seek legal advice at every juncture of doubt, so should save on damages payouts if used properly.

The site is based upon material from my text, *The Journalist's Guide to Media Law* (Allen & Unwin, 2004), which has been adapted and built into a web format by student researcher Everett Sizemore, with technical support from Bond University IT colleague Peter Stewart.

The starting point for the design was a defamation flowchart I featured in the book which looks something like a snakes and ladders game board, with explanations of each step in the libel checking process.

- **Privacy**

ABC v. Lenah Game Meats

In Australia, the push for a general right to privacy has gained momentum since the 2001 *Lenah Game Meats* case where the High Court ruled a corporation could claim no such right against the media but left open the prospect of individuals suing over intrusions into their privacy.

In 2003, a Queensland District Court judge ruled in the case of *Grosse v. Purvis* there was indeed a right to privacy when he held the privacy of the former Sunshine Coast mayor Alison Grosse had been invaded by an ex-lover who continued to harass her after their affair had ended. This was an inferior court decision, and is yet to be seen whether superior courts will confirm this line of thinking. Several other causes of action were available to Ms Grosse in that case so the judge's initiation of the tort is seen by many as quite cavalier.

There has also been innovative use of the Trade Practices Act to pursue the media on privacy-related matters. The full court of the Federal Court of Australia held in 2003 that a film-maker who was shooting a documentary about the outback aboriginal community of Cunnamulla may have engaged in misleading and deceptive conduct "in trade or commerce". He had interviewed teenagers about their sex lives after allegedly leading them and their parents to believe the interviews would be about other matters to do with the town.

The Nine Network's *A Current Affair* felt the wrath of trespass laws in 2002 when they accompanied the Environment Protection Authority on their raid of a property near Wyee in NSW. The NSW Court of Appeal held the journalist and crew had an implied licence to enter the land to seek permission to film but they had in fact trespassed because there was no implied licence to actually film while on the property. The decision ended the tradition of tabloid television ride-alongs with the authorities, at least at the front gate of private properties.

There were indications as early as the 1980s that a privacy tort might evolve.

In *Church of Scientology v Woodward* (1982) [154 CLR 25](#), 68 Murphy J identified what he called "unjustified invasion of privacy" as a developing tort. However, more recently prominent actors and footballers have failed in attempts to have such an action recognised: *Cruise and Kidman v Southdown Press Pty Ltd* (1993) 26 IPR 125; *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, CA (NSW), BC9302147, 13 October 1993).

The 1937 decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) [58 CLR 479](#) has for several decades been viewed as our High Court's disapproval of such a development. There, Latham CJ refused to extend the law of nuisance to allow the owner of a racecourse to prevent radio broadcasts of events from a platform on neighbouring land.

Data protection legislation has developed in a similar way to many other jurisdictions. The Privacy Act 1988 (Cth) (amended by the Privacy Amendment (Private Sector) Act 2000 (Cth)) confers a degree of enforcement power upon the Federal Court and the Federal Magistrates Court but falls well short of conferring a statutory tort of privacy invasion because it focuses mainly on private information held by government departments and large corporations and it features a news media exemption.

As in Britain, plaintiffs have frequently turned to breach of confidence claims to provide redress.

The major recent case in the area was the 2001 decision of *ABC v Lenah* and that involved substantial disagreement among the High Court justices and a reluctance to progress a privacy tort in a case where the facts and pleadings did not provide a comfortable fit.

Lenah was a game meat slaughtering, processing and export company. An unknown person or persons trespassed into its abattoir and planted secret cameras which recorded the killing of cute and cuddly brush tail possums for export. There was nothing illegal about the company's operations and it followed best practice standards in its processes. The Australian Broadcasting Corporation came into possession of the footage and was about to broadcast it as part of a current affairs program when Lenah sought and obtained an interim injunction to prevent them broadcasting it.

The majority of the High Court discharged the injunction on the grounds the lower court did not have authority in equity to grant it, but in the process raised the prospect of a future privacy tort.

Gleeson CJ and Callinan J. favoured the English approach of extending the breach of confidence action to apply to the filming of private activities. All except Callinan J were unwilling to entertain the notion of it granting privacy rights to a corporation. Significantly, three of the justices spoke against a 70 year precedent in saying the *Victoria Park* case would not prevent a future court from developing a privacy tort, partly because modern conditions demanded a different outcome.

The NZ Court of Appeal turned its attention to the matter in 2004 in *Hosking & Hosking v Simon Runting & Anor* [2004] NZCA 34 (25 March 2004). It decided by a 3-2 majority to move ahead with a privacy tort, although the minority were extremely vocal in their criticism of the development and launched a strong defence of press freedom. The NZ test, as outlined by Gault, P at para 117 is:

Two fundamental requirements for a successful claim for interference with privacy:

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

The Hoskings were media personalities who had adopted twins and later separated. They asked for their privacy, but a magazine photographer snapped the mother walking the twins in their stroller in a public place. The court decided this fact scenario did not meet its new test of privacy invasion, but of course had to develop the tort in order to rule out this scenario. The work was done.

The most worrying outcome of all these privacy-related actions is that the legal system (and most of society, for that matter) does not distinguish between the very different media functions of Fourth Estate scrutiny and trashy gossip.

Every judicial precedent resulting from a paparazzi prank can make it that much harder for the responsible press to perform its watchdog role which great historical figures like John Stuart Mill, John Milton and Thomas Jefferson had envisaged.

Major media organisations need to act now to add resonance to the rhetoric they scream from their leader pages every time the courts threaten their freedoms.

Firstly, they need to establish a credible independent self-regulatory body which operates as a one-stop ethical tribunal for all media. The disparate print, broadcasting and journalist union systems now in place are seen as confusing and partisan.

Secondly, they need to resource a major public education campaign about the benefits of media freedom in a modern democratic society. Civil libertarians who, a century ago, might have been supporters of press freedom, have been recruited to the privacy cause in the post 9/11 era of anti-terrorism and internet surveillance. The Americans have numerous First Amendment institutes, lobby groups and resource centres which lobby for media rights and we just have the Australian Press Council which, despite good intentions, is a lonely voice trying to do too much with scarce funding.

- **The High Court and press freedom: *Some theorising in progress***

As part of a recent research grant project, I took the comments of two of our High Court justices who are commonly viewed to hold quite distinct philosophical and jurisdictional perspectives. Justice Michael Kirby is a highly regarded civil libertarian and reformist, while Justice Ian Callinan is a former defamation barrister known for his conservatism. The project involved identifying their obiter statements about the media from five recent judgments and processing them in a qualitative software program to identify themes, differences and commonalities.

I found there has been an identifiable shift in the High Court's attitude to media, journalism and free press principles, evident in the five recent judgments by Justices Callinan and Kirby. It is encapsulated in the term 'The Modern Media' used by both Justices Callinan and Kirby in their *Lenah Game Meats* judgments.

Its symptoms are the explicit questioning of previously established values and principles, including the media's Fourth Estate role, the special position of public trust it holds, its special circumstances of production, and its 'benefit of the doubt' in the realm of public interest issues such as court reporting defences and prior restraint.

Key questions arising from the study include:

- *Do we need new arguments about press freedom for this new era?*
- *Is the notion of press freedom and the public's right to know more complex than it has seemed in the past, demanding more detailed exposition?*
- *How can our notion of press freedom and the public's right to know accommodate this strong 21st century push for the individual's right to privacy, often promoted vigorously by the very people who might previously have been defenders of press freedoms?*
- *Is press freedom and the public's right to know taken seriously in media boardrooms, or is it just a device to shore up profits?*
- *Who should be defending press freedom and the public's right to know?*
- *Are the High Court perceptions reflecting those of society generally?*

It should first be noted that this is preliminary research only. Nevertheless, the reading of the cases indicates at the very least that there are few powerful voices left defending traditional notions of a free press and there are indications that other High Court justices are willing to air their own concerns about this value and issue their own challenges to it. The High Court's statements demonstrate that press freedom is no longer sacrosanct, if it ever was so. Our highest jurists are questioning it and the privileges it invokes. It needs a new articulation in the modern era and perhaps some demonstrable accommodation of other values such as privacy.

It needs a new language and line of argument because the old rhetoric is being both questioned and even attacked in our highest courts. In many ways it has been left to 20th century bodies (some might argue 19th century bodies) like the Australian Press Council and the Australian Journalists Association, to defend press freedom with occasional submissions and public statements from academics and research groups. Harking back to old slogans will not suffice. Are there other powerful individuals or groups who even care about this value?

Perhaps the ultimate test is the extent to which media corporations believe the public has the right to know the complete truth about their own media operations. Those seeking transparency in society generally need to demonstrate it in their own corporate households.

Courts are supposed to reflect the views of society, but too often they are accused of holding elitist and lofty values. Nevertheless, perhaps this is one occasion when they might just have it right. This attitudinal shift cannot be dismissed as the rantings of two radical judges. The ball seems to be in the court of those citizens who value the media's role in modern democratic society, and can come to the debate with clean hands. Please step forward.