

Chakravarti v Advertiser Newspapers: lessons for journalists

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The lower courts are now interpreting the High Court's judgement in *Chakravarti v Advertiser Newspapers Ltd*, which was handed down in May 1998. As the lower courts grapple with the decision, journalists must still produce reports of complex legal matters. Unfortunately for Australian journalists, the *Chakravarti* decision has done little to clarify the uncertainty surrounding defamation law. In fact, the decision can be criticised for increasing that uncertainty. This article examines the effect of the *Chakravarti* case on journalism by analysing the text of the various judgements and:

- extracting the legal principles which bind journalists;
- identifying areas where the persuasive opinion of judges may create an environment of uncertainty for journalists; and
- discussing ways of maximising privilege protection when reporting matters of public interest.

Freedom of speech and a person's right to protect their good name are fundamental human rights. When the two collide and a person's reputation is harmed in the name of freedom of speech, very often it is the media who pay: they pay out large sums in damages but the greater cost is the curtailment of freedom of expression. This has resulted in many journalists believing that defamation is a major impediment to freedom of speech and investigative journalism (Schultz 1998: 163). The High Court's decision in *Chakravarti v Advertiser Newspapers Ltd* suggests the tort of defamation could also be a major impediment to reporting complex court matters,

which have traditionally been viewed as protected reports (Eisenberg 1998, 10). The non-binding observations made by the various judges, when handing down their judgement in this case, increases rather than removes the uncertainty of the tort of defamation, which aims to balance freedom of speech and the right of the individual to protect their reputation. This balance is achieved by outlawing the publication of material, which has a tendency to injure a person's reputation, but allowing a defendant to defend the publication by:

- denying the publication is defamatory; or
- accepting that the publication is defamatory but avoiding liability because the publication is true, fair comment or privileged.

Privilege is seen as a strong defence, giving complete immunity to some publications. The decision in *Chakravarti v Advertiser Newspapers Ltd* suggests, however, that journalists must be careful when relying on the qualified privilege of a fair and accurate report of protected proceedings. This is particularly the case where the proceedings are complicated and confusing (Eisenberg 1998: 10). This article examines the legal and practical implications of the *Chakravarti Case* for journalists. Before embarking on this analysis however, it is important to consider the facts of the case.

The facts

The case arose from two articles published in the *Adelaide Advertiser* reporting on the Royal Commission, set up in March 1991, to investigate the near collapse of the South Australian State Bank. The plaintiff was Mandobendro Chakravarti, the executive director of Beneficial Finance Corporation's Australian (BFC) business division. BFC was a wholly owned subsidiary of the State Bank of South Australia. Chakravarti sued the proprietors of *The Advertiser* over two separate publications, which he claimed damaged his reputation. Both articles were based on evidence given to the Royal Commission. The first article dealt with the oral evidence of David Simmons, a former chairman of the bank's board and BFC. He gave evidence about a meeting with the SA Premier in which the resignations of BFC directors were discussed. The article was headlined 'Bannon accused on

resignations' and included a photograph of four officers of BFC mentioned in the article, including Chakravarti. The first article related to evidence produced at the Royal Commission about the "real reason" for BFC executives resigning. It referred to all four executives together suggesting that Chakravarti was:

- one of the directors who had been forced to resign from BFC;
- involved in criminal or civil misconduct;
- involved in some dubious activity relating to "a Melbourne Joint Venture" which was not explained in the evidence (see Chakravarti 1998, 331).¹

Chakravarti claimed the article was not a true and accurate record of the proceedings, creating a false inference of him being involved in civil or criminal conduct and conducting himself in an improper manner as a director of BFC. He ordered a copy of the proceeding's transcript, which indicated that *The Advertiser* had inaccurately recorded a response from the witness quoted. Based on this, Mr Chakravarti wrote a letter seeking an apology and correction from *The Advertiser*. No apology or correction was published. It was later revealed that the transcript had been incorrect and the reporter's version of the evidence was correct. However, the court had to consider whether the report, as a whole, was inaccurate or unfair.

The second article led to a file note prepared by Simmons. The headline on page one read: 'Loans may be criminal: bank chief's diaries'. The story continued on page two under the headline 'Loans may be criminal — diaries'. It included a "graphic" described as an excerpt from Mr Simmons's diaries. It read: "Preliminary audit reveals Baker, Reichart (sic), Chakravarti and Martin have all loans which were not approved and were not authorised and are in excess of agreed benefits . . . May be criminal rather than civic (sic)".²

Chakravarti claimed the second article inaccurately represented what went on in the proceedings and gave rise to false imputations, suggesting:

- he was engaged in criminal or civil misconduct in connection with loans;

- he was a party to a conspiracy;
- he received unapproved and excessive benefits which at the least amounted to civil misconduct;
- he had been involved in an illicit joint venture; and
- he was not a trustworthy person or executive (Chakravarti 1998, 333).

The action first came before a *tribunal* without a jury, who found the articles conveyed the defamatory meaning pleaded by the plaintiff. The defendant failed to convince the judge that the report was protected as a fair and accurate of the Royal Commission Proceedings. The plaintiff was awarded \$268,000 damages. The respondent appealed to the Full Court of the Supreme Court of South Australia, where the majority of the court found that the first article did not convey the defamatory meaning pleaded by the plaintiff. The second article was found to have contained defamatory statements but “the damages could relate only to parts of the article that failed to fairly report the commission” (Kenyon 1999: 12). The plaintiff’s damages were reduced to \$40,000. Chakravarti appealed to the High Court on three “broad issues” (Kenyon 1999: 12). They were:

1. Were the imputations pleaded defamatory? (Kenyon 1999: 12)
2. Was the report protected by fair report privilege under section 7 Wrongs Act or at common law? (Kenyon 1999: 12)
3. Was the quantum of damages appropriate? (Kenyon 1999: 12)

The legal findings of the High Court do not alter the general principles about the tort of defamation and the availability of the defence of fair report privilege. This case is important because of the observations made in the various judgements on how these principles should be applied to the facts of a case. Each of the three judgements delivered provides a different interpretation on how these principles apply to media publications. This lack of consensus between the judges of the High Court increases the uncertainty surrounding the application of the tort of defamation and may result in some journalists censoring complex stories. To assist journalists’ reporting legal and quasi-judicial

proceedings, this article will identify the areas of uncertainty and give some practical guidelines on how to avoid legal problems. First, it is important to extract the legal principles from the case.

The High Court's findings

All five judges agreed on the final outcome of the case. Gummow J and Gaudron J delivered the “leading judgement”, upholding the appeal from the Full Court of South Australia which reduced damages from \$268,000 to \$40,000 and sending the matter back to the Full Court to reassess damages (Chakravarti 1998: 325, 326). Brennan CJ and McHugh J delivered a separate judgement, agreeing with the leading judgement with the exception of two matters. Kirby agreed with the outcome of the remainder of the court but he made some general observations about the tort of defamation. While some of the issues arising from this case are not binding precedent, the judges’ observations are important, settling some principles of defamation law while adding to the uncertainty of others.

A majority of the court agreed that the tribunal of fact must first determine whether the imputations pleaded are defamatory and then decide whether the report is protected by privilege (Chakravarti 1998: 297, 334). Gummow J and Gaudron J dissented from the remaining judges on this matter, claiming that the court must first consider whether the report is fair and accurate and then decide whether the imputations were defamatory (Chakravarti 1998: 306).

A majority found the defence of fair report privilege must be applied to the whole publication, not the specific imputations pleaded. This means that if a part of the report is inaccurate or unfair, then the whole publication may lose its privilege protection. (Chakravarti 1998: 322, 359)

It was also agreed that to attract privilege protection under the fair report privilege an article must:

- be a report, in that it must not carry commentary;
- it must be accurate; and
- it must be fair.

The tests for fairness and accuracy are linked. The report must be substantially accurate and a substantial inaccuracy in the text of an article, which goes to the reputation of the person claiming damage to their reputation, will render the report unfair. The test for a “substantial inaccuracy or misrepresentation is whether the publication would substantially alter the impression that a reader would have received had he been present at the trial”. (Chakravarti 1998, 298, 309, 347).

A majority of the court (Kirby dissenting) found that the common law privilege protection applies in addition to section 7 Wrongs Act (Chakravarti 1998: 321-322).

Based on the decision in Chakravarti, an article summarising the evidence delivered to a Royal Commission (or other judicial or quasi-judicial proceedings) will only attract privilege protection in these circumstances:

1. The article is a *fair and accurate report* of the proceedings.
2. The article is limited to the evidence presented at the proceedings and not littered with commentary and the journalist’s opinion.
3. The report conveys to the ordinary reader the impression of being present at the proceedings. Any substantially inaccurate impression renders the publication inaccurate and unfair.
4. The whole publication must be substantially accurate and fair: if it is found that the report contains a substantial inaccuracy or is substantially unfair, the whole report loses its protection and the plaintiff is entitled to recover on all defamatory imputations contained in the report.

These findings have been adopted in at least one case since the High Court handed down its decision (Warren 1999: 2). However, the ‘damage’ for journalists is in the detail of the three judgements, most notably in these areas:

- How the courts interpret the meaning of words.
- Reporting suspicion of guilt.
- The limitations of the privilege available to fair and accurate reports.

- The effect of apologies on a fair and accurate report.

The meaning of words

A majority of the High Court found that where the defendant seeks to avoid liability by relying on a defence (as opposed to denying the publication is defamatory), the court must first determine whether the imputations complained of by the plaintiff are in fact defamatory (Chakravarti 1998: 287, 334). This means the court must decide what the words mean, before considering whether a report is fair and accurate. This is a logical starting point, because the defence only comes into play if the words are defamatory.

The judges went on to make a number of observations about how words are to be interpreted. First, all five judges agreed (with slight variations) that, at common law, a plaintiff is not limited to the meanings pleaded if the imputations conveyed are less serious than those pleaded (Chakravarti 1998: 302-4, 313, 340-1)³. In fact the court acknowledged the need for flexibility “if conveyed meanings do not correspond exactly with the pleaded meaning” (Kenyon 1999: 130), two judges rejected a similar ‘flexibility’ for defendants.

In Australia it has been accepted that where a publication contains a number of defamatory statements which “in their context may have a common sting” then “the defendant is entitled to justify the sting” (in Chakravarti 1998: 299). This has become known as the Polly Peck defence, which has been accepted in English and Australian courts since the mid-1980s (Kenyon 1999: 13). Brennan and McHugh have now cast doubt on that practice, stating “such approach is contrary to the basic rules of common law pleadings” (Chakravarti 1998: 299). They went on to say:

A plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence. It is immaterial that the defendant can justify or otherwise defend the meaning which it attributes to the publication. In our view, the Polly Peck defence or practice contravenes the basic principles of common law pleadings. In general it raises a false issue which can only embarrass the fair trial of the actions (Chakravarti 1998: 299).

While the other judges did not endorse these findings, the Polly Peck defence, which gives some latitude to defamation defendants, is now clouded in uncertainty. This issue was raised in the Supreme Court of the Australian Capital Territory in November 1999. Crispin J noted the statements of Brennan and McHugh about the availability of the Polly Peck defence and said that while he shared “the misgivings which their Honours expressed” he did not have to decide whether *Polly Peck (Holdings) v Telford & Ors* should be followed (*Steiner Wilson & Webster Pty Ltd t/as Abbey Bridal v Amalgamated Television Services Pty Ltd* 1999, par 199). If other courts do accept the reasoning of Brennan CJ and McHugh J (which it appears they might), the media will have to be more cautious when asserting the truth of publications and ensure they can prove the truth of all imputations pleaded.

The majority of the judges supported a more liberal approach to the pleading requirements for plaintiffs. This means it will be easier for plaintiffs to establish their case, provided the pleading covers the imputations they prove. However, if the Brennan CJ and McHugh J approach to the Polly Peck defence is accepted then defendants (who are frequently media organisations) will have to prove the truth of all imputations and not just the common sting. The judgement appears to have made it easier for plaintiffs to establish a defamation action thus making it harder for defendants to deny the defamatory nature of a publication. At the same time it is going to be harder for defendants to avoid liability by admitting the defamatory nature of a publication but justifying it because the defamatory imputations are true.

Kirby J (who delivered a separate judgement) did not consider the Polly Peck defence, but his reasoning on the interpretation of words is of significance for a number of reasons. First he observed that the meaning of words should be interpreted from the perspective of the “reasonable reader” or “ordinary man”, who has a greater capacity than a lawyer to draw inferences, particularly where the language is loose (Chakravarti 1998, 335). He noted the ordinary person “approaches perception . . . with a greater willingness to draw inferences and to read between the lines”. He cautioned: “Where words have been used which are imprecise, ambiguous or loose, a very wide

latitude will be ascribed to the ordinary person to draw imputations adverse to the subject. That is the price which publishers must pay for the use of loose language” (Chakravarti 1998: 335). Therefore journalists, and particularly headline writers, need to select their words carefully. For example, instead of using the word “diaries” is the headline of the second article, it would have been better to use “note” or “file”. Diary suggests that what is contained in it is true. Therefore the ordinary reader will place great weight to the information contained in a diary, as was seen when the Abbotts and Costellos sued Random House over allegations supposedly contained in a diary.

Kirby also made observations about how the ordinary or reasonable person forms an opinion on the meaning of a publication. Gaudron, Gummow, Brennan CJ and McHugh all agreed that when determining the meaning of words, the publication must be considered as a whole. This means that headlines, graphics and other prominent features of a publication must be considered in context of the whole publication (Chakravarti 1998: 316, Pearce 1998: 3).

Kirby went further than the rest of the court on this issue, stating that when interpreting the meaning of words, account must be taken of modern communication practices. He warned:

In a society increasingly used to the immediacy of ‘channel surfing’ with remote controls and accessing the Internet with computers, publishers must take special care with prominently published matter. This obligation clearly applies to headlines, captions, photographs, pictures and their digital equivalents (Chakravarti 1998: 337).

Kirby rejected the House of Lords decision in *Charleston v News Group Newspapers Ltd*, in which a defamation action by two prominent Australian actors was unsuccessful. The actors sued over a publication, which used photographs of their faces (without their consent) and superimposed them on the bodies of two near naked people engaging in pornographic acts. The court found that the publication was not defamatory because, reading the publication as a whole, the text of the article neutralised the harmful effect of the headline and photograph (Charleston 1995: 456, 457). In reaching their decision, the Lords “rejected the proposition that the prominent headline . . . may found

a claim in libel in isolation from its related text, because some readers only read headlines” (Charleston 1995: 456; and in Chakravarti 1998: 336).

Kirby specifically rejected this approach, claiming it “ignores the realities of the way in which ordinary people receive, and are intended to receive, communications of this kind” (Chakravarti 1998: 336). In effect, he is rejecting the bane and antidote principle, which recognises that the harmful effect of a defamatory imputation can be neutralised by statements of an “ameliorating kind” (Morosi 1980: 418n). In *Morosi v Radio Station 2GB*, the court found that in deciding the impression conveyed by a publication, the jury must ask whether the defamatory statement is “overcome by the contextual matter of an emollient kind as to eradicate the hurt and render the publication as harmless” (Morosi 1980, 419).

Kirby claims modern communication practices require a reinterpretation of the law to recognise that headlines and prominent features can assume a defamatory meaning of their own. Modern communication practices can be accommodated within the common law principles espoused by the rest of the court. If when reading a publication as a whole the text does not neutralise the harmful effect of the headlines, graphics etc., then the publication is defamatory. Obviously the harmful effect of a headline, graphic or photograph would be harder to overcome than a defamatory imputation arising in the text of a story. Headlines, sub headings, graphics and other prominent features will be more damaging than material of less prominence in the text. Instead of rejecting the legal basis on which the law lords made their decision in Charleston, Kirby should have criticised the way they applied the bane and antidote test to the facts. Kirby’s approach is essentially making the media summarise difficult stories into three or four words, which form a headline. This approach would enable a plaintiff to extract prominent elements of a story from the context in which they are published. The media would need to consider the “meaning” of each prominent aspect of a publication on two levels: first as they stand alone and then in the context of the whole publication, where they can assume a defamatory meaning if the reader decided to pay the publication greater attention. Thus a

balanced story can assume a defamatory meaning because of the harmful effect from its prominent features. Kirby notes that defamation is not a negligence-based tort (Chakravarti 1998, 347), therefore even the most carefully prepared publication can be defamatory if the impression conveyed to the reader harmed an identifiable person's reputation.

Kirby's approach skews the balance between freedom of speech and the protection of a person's reputation too far against freedom of speech.

The bane and antidote approach strikes a better balance between freedom of speech and protecting a person's reputation because the harmful effect of the story is determined by looking at the prominent features of the story in context. The harmful effects of prominent features of a story would have to be completely neutralised by other features, which is obviously quite difficult to achieve. If this is done however, the publisher should not be liable.

The practical effect of Kirby's observations is that journalists must place considerable emphasis on headlines, graphics, photographs and other devices used to capture audience attention when evaluating the accuracy of a report. Their use should not distort one aspect of the case to give a misleading impression. However, his observations increase the uncertainty about whether the harm of a headline or other prominent feature of an article can be overcome in the text of an article.

Reporting suspicions or allegations

The court also considered the difficulty in balancing the public interest in suspicions of guilt and the need to protect an individual from accusations of guilt. There is considerable uncertainty as to when a report of suspicion of guilt becomes elevated to an accusation of guilt.

Kirby observed that "although reporting that a person has been arrested and charged undoubtedly occasions damage to some degree to the reputation of that person, this must be tolerated on the basis of

the legitimate public interest in the reporting of such facts” (Chakravarti 1998: 337). He noted the mass media must report on matters of public interest such as a Royal Commission. But the law will only afford protection to fair and accurate reports of these proceedings “otherwise suspicion or accusation might be elevated in the public’s mind to guilt in fact” (Chakravarti 1998, 337). In *Chakravarti*, the two articles went further than reporting a suspicion of criminal or civil misconduct and gave the impression that Chakravarti was guilty of criminal or civil misconduct. The false inference of guilt arising from the reports helped to negate their accuracy. However, the High Court did not provide clear guidelines about when an accusation of guilt actually imputes guilt, leaving journalists in the dark over what can be published with safety. This issue is of relevance for two reasons: first, because of the uncertainty surrounding when a publication imputes guilt thus rendering it defamatory. Secondly, it is important because the elevation of a suspicion to an imputation of guilt will affect the fairness and accuracy of a report, and thus may limit the defences available to justify a defamatory publication.

Based on existing law and the observations of the court in *Chakravarti*, it is clear that by simply reporting the fact that charges have been laid does not give rise to an imputation of guilt (Chakravarti 1998: 337; Flahvin 1998: 9, *Mirror Newspapers v Harrison* 1982: 293). In many circumstances, however, journalists argue that more information than the basic charges is needed to satisfy the public interest, particularly where the case involves issues of public safety or political insight. The uncertainty surrounding when a suspicion becomes elevated to an imputation of guilt can result in the media censoring information of real public interest. *Chakravarti* does little to clarify how much information can be included in reports relating to suspicions of guilt before they are elevated to an imputation of guilt, and the law is less than certain on this issue. Flahvin cites two examples that highlight this uncertainty. In *Mirror Newspapers v Harrison* an action in defamation arose from a publication, which described charges laid against a suspect, but also carried a photograph of the victim and a description of the detective work that had led to the arrests. The High Court in *Harrison* found the article did not give rise to an imputation of guilt (Flahvin

1998: 9). Flahvin compares this case to an unreported decision of the Supreme Court of New South Wales, where a report was found capable of imputing guilt because it reported that “two school teachers had – after a lengthy police investigation – been charged with sexually assaulting students and suspended pending the hearing of the case”. (1998: 9).

Flahvin observes that while the principle in *Harrison* was approved by the Supreme Court of NSW, “journalists could be forgiven for thinking that in its application it (the principle) has been rendered quite useless” (1998: 9). This uncertainty again arises from the court’s apparent inconsistent application of the principles, rather than in the principles themselves. Where the courts are balancing rights, it is impossible to provide a line between right and wrong. Given the threat of censorship for fear of civil action in defamation, the court should aim to provide clear guidelines for journalists to balance these rights when they are providing information of public interest. However, this has not been done, therefore journalists must rely on common sense in drawing their own guidelines.

What is a fair and accurate report?

The court agreed that a defamatory imputation can be defended in the public interest if it is a fair and accurate report of the proceedings. Brennan CJ and McHugh J endorsed the test outlined in *Thom v Associated Newspapers Ltd (1964)*, which states:

The report need not be verbatim, but to be privileged it must accurately express what took place. Errors may occur; but if they are such as not substantially to alter the impression that the reader would have received had he been present at the trial, the protection is not lost. If, however, there is a substantial misrepresentation of a material fact prejudicial to the plaintiff’s reputation, the report must be regarded as unfair and the jury should be so directed (Chakravarti 1998: 298).

This reasoning was supported by Gummow J and Gaudron J who observed:

It is well settled that a report need not be a complete report of the proceedings in question. Nor need it be accurate in every respect. It must however, be substantially accurate, and the question whether it is substantially accurate is a question of fact (Chakravarti 1998: 309).

Kirby agreed with the rest of the judges stating: “Where there is a dispute whether a report is fair and accurate, that dispute must be resolved as a factual question by comparing the relevant record of the proceedings with the matter complained of. The test has been expressed in terms of whether the report substantially alters the impression which its recipients would have gained had he or she been present during the proceedings.” (Chakravarti 1998: 347).

He went on to say:

The mistakes and inaccuracy may deprive the defendant of the defence of fair report. Of their nature, they may also contribute to the damage done to the plaintiff’s reputation. They may therefore warrant consideration in the context to identify what it is about the matter complained of that is defamatory of the plaintiff (Chakravarti 1998: 347).

Kirby stated the court must look at the entirety of a report to determine its accuracy, but when considering its fairness, particular attention will be paid to headlines, and graphics “which have the object of capturing maximum public attention” (Chakravarti 1998: 347).

The relationship between fairness and accuracy was also explored by Kirby. “A report must retain substantial accuracy in all material respects. If it contains untrue statements of a material fact, which have the potential to damage the reputation of the person referred to, the report will be unfair.” (Chakravarti 1998: 347) A substantial inaccuracy strips the publication of its privilege protection, exposing the publisher to liability for all of the defamatory imputations contained therein, even if the rest of the information is substantially accurate. The rest of the court supported this principle (Chakravarti 1998: 347, 314). In essence the court will weigh up the inaccuracies, by comparing the report to what was said in the proceedings, and if a substantially inaccurate impression arises then the report is unprotected by fair report privilege. The inaccuracy contaminates the whole report, even if the

reporter has been extremely diligent. The loss of fair report privilege is a serious blow to a publisher, who would have to look for some other way of defending the publication.

Commentary can contaminate report

To be a report, a publication must accurately summarise the events. The summary does not have to be correct in every sense, but it must be substantially correct. Kirby noted that a commentary can contaminate a report, thus rendering it unprotected under privilege because it does not accurately record what is going on.

To the extent that (a publication) goes beyond a report, and the reporter engages in comment, description and elaboration of the reporter's own, the privilege provided for a report will be inapplicable and may be lost entirely . . . Excessive commentary or misleading headlines which amount to commentary run the risk of depriving the text of the quality of fairness to attract the privilege (Chakravarti 1998: 346).

Kirby's observations about commentary are important for two reasons:

- The use of comment, description and independent elaboration could see the report classified as a commentary and not a report of the proceedings.
- The comments could render the publication inaccurate and unfair even if they appear in a prominent headline.

If the commentary contaminates the fair report privilege, all is not lost, because the publisher may be able to rely on the defence of fair comment or political communication privilege if the issue involves government and political matters. (Based on the High Court's interpretation of government and political matters in *Lange v Australian Broadcasting Corporation*, judicial and quasi-judicial proceedings would be covered). Although the Royal Commission related broadly to political and government matters, this issue was not raised by the defendant in *Chakravarti*. Both sides agreed that because it was a report of a Royal Commission journalists were expected to "ensure the report was strictly accurate" (Chakravarti 1998, 334). This raises the question

whether the court will expand its reasonableness guidelines set out in *Lange* to include a requirement that a report of judicial, legal or political proceedings must also be fair and accurate⁴.

With respect to the fair comment, true facts are required to enable the public to assess the value they will put on a person's opinion. The defence will be lost if the facts stated are not true. The political communication privilege recognises the public's right to take part in the democratic process, and requires information published to be reasonable. In some circumstances, for example reports of court and parliament, the communication about political and government matters may only be reasonable if they are substantially accurate. Therefore, a journalist cannot avoid their obligation to accurately report the facts of a legal or quasi-legal matter.

Apologies and the issue of fairness

Section 7 Wrongs Act (SA) gives an aggrieved person a right of reply, which if refused without negotiation will be taken into account in determining the reasonableness of the response. All five judges considered whether the letters written by Mr Chakravarti were reasonable thus barring *The Advertiser* from relying on section 7 Wrongs Act SA to defend publication. Gaudron J and Gummow J, with whom Brennan CJ and McHugh J agreed, concluded that the question of reasonableness was not a live issue (Chakravarti 1998: 321; Pearce 1998: 4). Before reaching this conclusion, they found that the "reasonableness" of a letter of reply is a "value" judgement (Chakravarti 1998: 321).⁵ This does little to clarify what is a reasonable reply, however they noted:

- Generally, it will be unreasonable for the reply to controvert the fairness and accuracy of the report in question (Chakravarti 1998, 320; Pearce 1998, 4).
- A "measured assertion of a belief", which is subsequently shown to be incorrect, is not necessarily unreasonable (Chakravarti 1998, 320; Pearce 1998, 4).

- The consideration of reasonableness is not limited to the facts known at the time the letter was sent (Chakravarti 1998: 321, Pearce 1998, 4).

These observations that provide little guidance for an editor facing the decision of whether to publish a reply. Although these guidelines represent the majority of the court's opinion, an editor may find Justice Kirby's observations more helpful (and easier to understand). Pearce suggests editors should keep a copy of Justice Kirby's guidelines handy for ready reference (Pearce 1998, 5).

Kirby J went further than his fellow judges, suggesting that the Wrongs Act provision must be interpreted in light of its aims and:

- For a letter to be reasonable it must be more than a mere "request for a retraction . . . letter of protest or insult" (Chakravarti 1998: 351; Pearce 1998: 5).
- The request and report must be contemporaneous (Chakravarti 1998: 351; Pearce 1998: 5).
- The response must be objectively reasonable (Chakravarti 1998: 351; Pearce 1998: 5)
- Reasonableness is objectively measured in terms of the purposes of the provision: to correct incorrect information that has been published (Chakravarti 1998: 351; Pearce 1998: 5).
- In determining reasonableness the court will look at the length of the letter/statement; the terms in which it is expressed and its ability to negate harm to a person's reputation (Chakravarti 1998: 351; Pearce 1998: 5).
- The concept of "reasonableness" does not include a concept of editorial veto; but publishers are entitled to respond to the letter by way of an editorial note (Chakravarti 1998: 351; Pearce 1998: 5).
- A refusal by an editor to negotiate about the publication of a letter of correction can be taken into account in determining the reasonableness of the letter (Chakravarti 1998: 352).

This discussion suggests editors can no longer afford to refuse to publish letters of correction or clarification, instead they should opt to publish the letter with a note clarifying the claims of the letter writer

Effect on journalists

This discussion reveals that the *Chakravarti* decision does not alter the law governing fair report privilege but it does affect the way the law will be applied to the facts a case, raising a variety of issues for journalists.

First, journalists have to pay particular attention when reporting complex court matter, ensuring that any report produced is a substantially accurate account of the proceedings. Journalistic commentary or opinion and sensationalisation of some parts of the report or headline or graphic could render the “report” inaccurate or unfair. When considering the “impression” of the report, journalists must remember modern reading practices and pay particular attention to the harmful effects of headlines, graphics and photographs.

When writing reports, journalists should use “precise” language, because “loose” language could give rise to more inferences.

When reporting allegations of suspicion of guilt, the reporter must be careful not to elevate the accusations to an inference of actual guilt by providing too much information or indicating that the suspicion emanates from a particularly reliable source. And finally, when a person writes a “reasonable” letter of clarification, then editors should think seriously about running the letter with an explanatory editorial note.

If a report is littered with commentary, then a reporter will need to structure the report to ensure it is protected by fair comment or the expanded political communication privilege.

Practical steps to minimise risks

Newspapers reporting complex legal matters can take a number of practical steps to maximise their chances of relying on the fair report privilege.

All court reporters should have excellent shorthand skills. Shorthand is an underrated skill and is essential if court reporters are to ensure their report is fair and accurate.

Any commentary about cases should be run in separate articles based on the actual report. This will ensure that the commentary does not contaminate the report. The report would be defensible as a fair and accurate report of the proceedings and the commentary would then be defended as fair comment. Any harmful imputations arising from the commentary will be defensible provided:

- the commentary is an honest opinion;
- about a matter of public interest; and,
- the facts upon which the commentator is basing his/her opinion are set out (by referring to the report) in the text of the publication; and
- these facts are true or absolutely privileged, remember however, that the test for truth and privilege brings up the issues raised in this article: the facts must accurately and fairly reflect what was said in the proceedings and when proving the truth of statements, it is not enough to prove the common sting.

If the report and commentary are run in the same story, the commentary could render the report unfair. If the report is unfair, then it loses its privilege protection completely and the journalists and publisher will be liable for the defamatory imputations it contains, unless they can be defended on some other basis. But caution must also be exercised when running stories side by side because the court will look at the publication as a whole. If a commentary is run as a side-bar story under a common headline, the commentary may be regarded as a part of the whole story and run the risk of contaminating the fair report privilege. So when laying out reports of judicial and quasi-judicial proceedings, think carefully about where commentaries are placed.

It may be possible to defend mass reports of judicial and quasi-judicial reports under the expanded duty/interest privilege recognised to protect reports to the general public of political and government

matters. To attract this expanded qualified privilege the report must be reasonable and not actuated by malice. Whether a report is reasonable is determined on the circumstances of each case, but a publisher will not be reasonable unless:

- there were reasonable grounds for believing the imputation was true;
- proper steps were taken to verify the accuracy of the information;
- the imputations were not believed to be untrue; and
- a response was sought from the person defamed and the response published wherever practicable (Lange 1997: 13).

These factors are only guidelines as to what constitutes a reasonable publication. Given that the public only has an interest in receiving fair and accurate reports of judicial and quasi-judicial matters, it could be argued that to be reasonable the report would also have to be fair and accurate. Therefore the practical issues raised by *Chakravarti* will still have to be addressed.

The *Lange* defence also gives rise to a right of reply and highlights the need for editors to allow people, who claimed to be defamed by reports of judicial or quasi-judicial proceedings, to publish letters in response.

When reporting judicial or quasi-judicial proceedings, journalists should use precise language and ensure all reports are balanced, paying particular attention to prominent features because the harmful effect in these prominent features will be harder to correct than imputations arising in the text.

When reporting charges and suspicions of guilt, the reporter should not include too much information about the investigative process nor suggest the information they have published has come from an official source. For example, it could make a difference to suggest that information published had been included in a person's diary when in fact it merely formed part of a file note. The ordinary person considers that people publish the truth in diaries, so they tend to give more weight to information contained in them.

If a publisher cannot prove the truth of all of the imputations arising from a publication, then they should seriously consider leaving the information out or considering rephrasing the statement to ensure it can be defended as fair comment or some form of privilege.

Conclusion

Fair and accurate reports of judicial and quasi-judicial proceedings are protected reports for the purposes of the tort of defamation. Chakravarti has not removed that defence, it has just interpreted what is a fair and accurate report. The court has sent a clear message that no concessions will be made for the mass media who sensationalises a report, in fact they have to assume that they are publishing to a more inattentive audience. When publishing to this inattentive audience, which forms its impressions from prominent features of a story, the media must not convey a misleading impression. This suggests balance and accuracy are the key to maintaining the fair report privilege.

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Notes

- 1 For the full text of the first article see Kirby's judgement on page 331.
- 2 For the full text of the second article see Kirby's judgement on page 332-333.

- 3 In New South Wales each imputation is a cause of action, therefore each pleaded meaning must be strictly interpreted. The High Court, in *Chakravarti*, has refused to adopt this practice at common law. (see Kenyon 'Pleading defamatory meaning, fair report defences and damages: *Chakravarti* in the High Court' (1999) 7 *Torts Law Journal* 9 at 13.
- 4 This issue will be discussed again later in this article.
- 5 The observations about section 7 Wrongs Act SA are applicable to most states in Australia, because right of reply provisions apply pursuant to these sections: Victoria ss5(3), 5(A)(3) Wrongs Act; Queensland Defamation Act 1889, s13(4); Western Australia, s 354 Criminal Code; Tasmania s 13(2)(b) Defamation Act 1957; ACT s5 Defamation Act Amendment Act 1909; NT s6(1), proviso (b) Defamation Act 1938.

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