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Submission by Ric Lucas, retired solicitor.

I lectured in media law at the University of Canberra in the 1980s, before representing scores of plaintiffs and defendants in defamation proceedings over a 33 year career as a solicitor. I wrote my LLM thesis on the defences to defamation, and was for many years Chairman of the ACT Law Society Defamation Committee.

Clause 7A of the draft presents the difficulty that the new test of serious harm to reputation will be uncertain for at least a few years, and may result in much wasted cost at trials. A decision upon it cannot be made until all the evidence has been heard. Much better would be a test which can be ruled on in a strike out application, once the plaintiff's pleading has been filed. I suggest that the defendant should be entitled to ask the judge to rule whether, by reason of the matter complained of, the imputations pleaded, and the extent of publication and any other matters disclosed in the particulars of claim, the claim should be struck out as not disclosing a substantial likelihood of serious harm to the plaintiff's reputation. Clause 7A as it now stands is a draconian solution to what seems to me to be a rare and relatively minor problem. I cannot think of a single decided case which would have had a different result had the 7A defence been available. Yet it is bound to produce much uncertainty. That is unfair, particularly to plaintiffs. It is important to remember that they are the injured parties in these matters, and that most defendants are seeking a licence to publish falsehoods. If their claims are true, they already have a defence.

Clause 12A requires that a concerns notice must be given before proceedings can be commenced. The only reasonable rationale for that, is to give the defendant notice of the claim, so that they can attempt to resolve it without litigation. What is completely unacceptable is the notion that this obligation should be enforced by preventing any later pleading of an imputation unless it is substantially the same as the imputations in the concerns notice. This is nonsense on stilts. It will create endless unproductive interlocutory argument. One of the most difficult issues in defamation law is the pleading of the meanings relied on. Change counsel and it is routine for counsel to want to change the imputations. In effect the so called "reform" demands of plaintiffs that they get their pleading right first time, before they have even commenced proceedings. In no other area of law is one forbidden from amending one's claim, for the obvious reason that such a prohibition is an outrageous injustice.

Provided that defendants are aware of the matter complained of, they are as well able as a plaintiff to see what are the "natural and ordinary" meanings of the words used. In fact in most defamation claims a defendant is in a better position to know the claim against them, than in any other field of law, because the whole case depends on the defendant's own words. It is useful before proceedings are commenced, to know which of the available meanings the plaintiff is thinking of relying on, but there is no valid basis for limiting the plaintiff to the meanings in the concerns notice, and no injustice to the defendant, when the defendant can see for themselves what potential meanings are conveyed by the natural and ordinary meaning of what are, after all, their own deliberately chosen words.

There may be a better argument against allowing meanings which depend on special knowledge of the reader (true innuendoes) to be raised only after proceedings have commenced. But even then any disadvantage to the defendant can be dealt with by the judge, who can allow time for negotiations, and perhaps a costs order in the defendant's favour. But that really is the full extent of any disadvantage.

Clause 21. I am strongly opposed to the trial of defamation actions by jury. I think that it results in longer and more expensive trials, and in some cases juries produce bizarre results. That is why even in jurisdictions which allow civil juries, many issues have been removed from juries. The survival of the antique civil jury, only for the tort of defamation, is an inexplicable peculiarity of the law of some States. Judges are much easier to predict, which greatly assists in advising litigants, and accordingly in the early resolution of disputes.

I think it especially unfortunate that it is suggested that the Federal Court should be required to offer each party an election for a jury. One of the attractions of that Court is that it has excellent judges, and gets matters on quickly. Those advantages are lost, and undeserving defendants benefit, from the cost complexity uncertainty and delay of a jury trial.

I shall be pressing the ACT government to adopt the views I have expressed above, in relation to these reforms.

Yours Faithfully

Ric Lucas

Sent from my iPad