

How Australia's strict defamation laws could thwart our 'Weinstein moment'

MICHAEL BRADLEY

Managing Partner, Marque Lawyers



My advice to potential defamation plaintiffs is, routinely, “don’t sue”. But, of course, they do. As Australia’s “Weinstein moment” begins to burst the banks of that lazily flowing river called Male Privilege, the word defamation is going to be as prevalent here as it has been absent from the American conversation.

This is a critical distinction, because the attitude that Australia’s media adopts to the risk of defamation suits will determine how differently the stories play out here and in the US. It’s regrettable that the peculiarities of the law will have such profound influence on a movement that promises to fundamentally change societies.

However, publishers will have to deal with, and are actively contemplating, the law as it is.

Australia has, notoriously, the most repressive defamation laws in the English-speaking world. There are several enormous differences between them and the US position, derived from the fact that the American people have an enshrined constitutional right to free speech and we don’t.

The biggest difference is how we deal with the “you can’t handle the truth” question. In Australia, the media’s primary line of defence is truth. The burden is on the publisher to prove the truth of what they published, once it has been established that it’s defamatory (which isn’t hard).

By contrast, in the US the burden cuts the other way. To have a case, a defamation plaintiff has to prove that what has been published about them is false. If they are a public official, they also

have to prove that the publication was made with malicious intent (meaning knowledge or recklessness as to its falseness).

This basic reversal of onus explains the happy abandon with which the US media publishes every accusation of sexual assault as soon as it emerges, while its Australian counterpart proceeds with relatively extreme caution.

Australian defamation law does provide a back-up defence for publishers, if truth fails. It's called qualified privilege, and it's difficult to prove. You have to identify an interest that the audience has in receiving the information (something better than that we all love celebrity gossip), and that you behaved reasonably in publishing it. That includes taking reasonable steps to verify the story, giving notice and a right of reply to the target, that kind of thing. In practice, the defence rarely succeeds.

Which brings us back to truth. In the context of allegations of sexual misconduct, such as those being thrown at Don Burke at present, it will often be the case that the action allegedly happened in private between the complainant and the alleged perpetrator, with no other witnesses.

For example: say a woman comes forward 20 years after she says she was indecently assaulted by a man in a position of relative power. She brings her story to a media publisher. Hardly fanciful, it's happening all over town right now. What does the publisher do?

If the newspaper runs the woman's story, and the man sues for defamation, the newspaper will plead truth as its defence. But the truth will be determined in the defamation proceedings. If the woman is not believed, then the defence will fail.

Of course, stains on a blue dress will do it every time, but mostly you'll be making do with a circumstantial case supporting a direct allegation by the victim. As a publisher, you have to do the police work; piece together all the strands and see how it hangs. Take sworn statements from the victim and witnesses. Then put it all to the target before going to press so that you can at least try the back-up qualified privilege defence.

Finally, there is the undeniable power of the tsunami effect. The more the merrier. A man facing one allegation of sexual misconduct from his past by one woman, published by one media outlet, may feel pretty confident about suing. Each time the number of complainants goes up by one, the attractiveness of a defamation suit goes down by a factor of 10. From the media's standpoint, there is massive strength in numbers despite the fact that each allegation is independent in the eyes of the law.

Defamation is a minefield for everyone in this country. Our media is mostly gun shy because they so often get burnt (ask Bauer Media how it's feeling after the Rebel Wilson case, or the masseuse who accused Chris Gayle of exposing himself to her). So, they will mostly proceed cautiously through this storm, but I expect increasing confidence and sometimes recklessness as the numbers of complainants and alleged perpetrators exponentially grow.

For lawyers, of course, a picnic. For society, a necessary and overdue catharsis.