Brian Martin, *Information Liberation*
London: Freedom Press, 1998

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Defamation law and free speech

The law of defamation is supposed to protect people's reputations from unfair attack. In practice its main effect is to hinder free speech and protect powerful people from scrutiny. Strategies for people to challenge oppressive uses of defamation law need to be developed.

Defamation law relies on the power of the state—via the courts—to fine those who lose a case. But only those with lots of money need apply. The power behind defamation law is corrupting, which explains why it is so difficult to make even minor reforms to the law to benefit those with little power or wealth.

What it is

The basic idea behind defamation law is simple. It is an attempt to balance the private right to protect one's reputation with the public right to freedom of speech. Defamation law allows people to sue those who say or publish false and malicious comments.

There are two types of defamation.

• Oral defamation—called *slander*—for example comments or stories told at a meeting or party.

• Published defamation—called *libel*—for example a newspaper article or television broadcast. Pictures as well as words can be defamatory.

Anything that injures a person's reputation can be defamatory. If a comment brings a person into contempt, disrepute or ridicule, it is likely to be defamatory.

• You tell your friends that the boss is unfair. That's slander of the boss.

• You write a letter to the newspaper saying a politician is corrupt. That's libel of the politician, even if it's not published.

• You say on television that a building was badly designed. That's libel due to the imputation that the architect is professionally incompetent, even if you didn't mention any names.

• You sell a newspaper that contains defamatory material. That's spreading of a defamation.

The fact is, nearly everyone makes defamatory statements almost every day. Only very rarely does someone use the law of defamation against such statements.

Defences

When threatened with a defamation suit, most people focus on whether or not something is defamatory. But there is another, more useful way to look at it. The important question is whether you have a right to say it. If you do, you have a legal defence.

If someone sues you because you made a defamatory statement, you can defend your speech or writing on various grounds. There are three main types of defence:

• what you said was true;

• you had a duty to provide information;

• you were expressing an opinion.

For example:

• You can defend yourself on the grounds that what you said is true.

• If you have a duty to make a statement, you may be protected under the defence of "qualified privilege." For example, if you are a teacher and make a comment about a student to the student's parents—for example, that the student has been disruptive—a defamation action can only succeed if

they can prove you were malicious. You are not protected if you comment about the student in the media.

• If you are expressing an opinion, for example on a film or restaurant, then you may be protected by the defence of "comment" or "fair comment," if the facts in your statement were reasonably accurate.

• There is an extra defence if you are a parliamentarian and speak under parliamentary privilege, in which case your speech is protected by "absolute privilege," which is a complete defence in law. The same defence applies to anything you say in court.

Defamation law varies from country to country. My outline here is oriented to the Australian context where defamation law is considered fairly strict. Even within Australia, the things you have to prove to use one of the defences may not be the same in different parts of the country. For example, in some Australian states, truth alone is an adequate defence. In other states, a statement has to be true and in the public interest—if what you said was true but not considered by the court to be in the public interest, you can be successfully sued for defamation.

What can happen

• You can be threatened with a defamation suit. You might receive a letter saying that unless you retract a statement, you will be sued.

There are numerous threats of defamation. Most of them are just bluffs; nothing happens. Even so, often a threat is enough to deter someone from speaking out or to make them publish a retraction.

• Proceedings for defamation may be commenced against you. This is the first step in beginning a defamation action. Statements of claim, writs or summons shouldn't be ignored. If you receive one, you should seek legal advice.

• The defamation case can go to court, with a hearing before a judge or jury. However, the majority of cases are abandoned or settled. Settlements sometimes include a published apology,

sometimes no apology, sometimes a payment, sometimes no payment. Only a fraction of cases goes to court.[1]

The problems

There are several fundamental flaws in the legal system, including cost, selective application and complexity. The result is that defamation law doesn't do much to protect most people, but it does operate to inhibit free speech.

Cost

If you are sued for defamation, you could end up paying tens of thousands of dollars in legal fees, even if you win. If you lose, you could face a massive pay-out on top of the fees.

The large costs, due especially to the cost of legal advice, mean that most people never sue for defamation. If you don't have much money, you don't have much chance against a rich opponent, whether you are suing them or they are suing you. Cases can go on for years. Judgements can be appealed. The costs become enormous. Only those with deep pockets can pursue such cases to the end. If you have say $100,000 or more to risk, go ahead and sue. Otherwise defamation law is not *for* you—though it might be used *against* you.

The result is that defamation law is often used by the rich and powerful to deter criticisms. It is seldom helpful to ordinary people whose reputations are attacked unfairly.

Unpredictability

People say and write defamatory things all the time, but only a very few are threatened with defamation. Sometimes gross libels pass unchallenged while comparatively innocuous comments lead to major court actions. This unpredictability has a chilling effect on free speech. Writers, worried about defamation, cut out

1. In Australia and the US, perhaps one out of five suits goes to trial: Michael Newcity, "The sociology of defamation in Australia and the United States," *Texas International Law Journal*, Vol. 26, No. 1, Winter 1991, pp. 1-69.

anything that might offend. Publishers, knowing how much it can cost to lose a case, have lawyers go through articles to delete anything that might lead to a legal action. The result is a tremendous inhibition of speech.

Complexity

Defamation law is so complex that most writers and publishers prefer to be safe than sorry, and do not publish things that are quite safe because they're not sure. Judges and lawyers have excessive power because outsiders cannot understand how the law will be applied. Those who might desire to defend against a defamation suit without a lawyer are deterred by the complexities.

Slowness

Sometimes defamation cases are launched years after the statement in question. Cases often take years to resolve. This causes anxiety, especially for those sued, and deters free speech in the meantime. As the old saying goes, "Justice delayed is justice denied."

In Australia, a common sort of defamation case brought to silence critics is political figures suing, or threatening to sue, media organisations. The main purpose of these threats and suits is to prevent further discussion of material damaging to the politicians. Other keen suers are police and company directors. People with little money find it most difficult to sue.

Defamation law definitely affects the mass media, having a chilling effect on free speech. There is a direct chill when stories are changed or spiked. More deeply, there is a structural chill when areas are not investigated at all because the risks of libel suits are too great.[2]

The examples in this chapter are Australian, where defamation laws are notorious for their severity and their use against free

2. Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson, *Libel and the Media: The Chilling Effect* (Oxford: Oxford University Press, 1997).

speech, and where there is no clear constitutional protection for free speech. In the US, things would appear to be better, with explicit constitutional free speech protection and a public figure defence against defamation. But the US legal system can still be used against those who speak out. In the early 1980s, two Denver University academics—law professor George Pring and sociology professor Penelope Canan—joined together to investigate a rash of cases in which legal charges were made against citizens who spoke out in one way or another.[3] For example, citizens

- testified at a hearing about a real estate development
- wrote a letter to the Environmental Protection Agency about pollution
- made a complaint about police brutality
- collected signatures for a petition
- reported law violations to health authorities.

In these and many other such cases, the citizens were sued by the real estate developer, the company complained about to the EPA, the member of the police, etc. The most common charge was defamation, but also used were business torts (such as interference with business), conspiracy, malicious prosecution and violation of civil rights. Pring and Canan dubbed these cases Strategic Lawsuits Against Public Participation or SLAPPs. These suits have very little chance of success and in practice very few actually succeed. However, they are very effective in scaring the targets, most of whom become much more cautious about speaking out.

Pring and Canan realised that a key to resisting SLAPPs was constitutional protection for the right to petition the government—an often overlooked part of the first amendment to the US Constitution. By emphasising the free speech and constitutional aspects of these cases, and just by calling them SLAPPs, it is much easier to resist and sometimes to win suits against the

3. George W. Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Philadelphia: Temple University Press, 1996).

SLAPPers for malicious prosecution. Pring and Canan's book is an essential guide for anyone threatened with a SLAPP. Yet the very prevalence of SLAPPs in the US shows that constitutional protection alone is not enough to prevent the use of the law to suppress free speech. For the reasons outlined here, such as complexity and cost, the legal system is a battleground that is biased in favour of those with more power and wealth. Greater formal protection by the law does not necessarily translate into greater freedom of speech in reality.

Media power and defamation

One of the best responses to defamatory comments is a careful rebuttal. If people who make defamatory comments are shown to have gotten their facts wrong, they will lose credibility. But this only works if people have roughly the same capacity to broadcast their views.

Only a few people own or manage a newspaper or television station. Therefore it is difficult to rebut prominent defamatory statements made in the mass media. Free speech is not much use in the face of media power. There are cases where people's reputations have been destroyed by media attacks. Defamation law doesn't provide a satisfactory remedy. Apologies are usually too late and too little to restore reputation, and monetary payouts do little for reputation.

Most media organisations avoid making retractions. Sometimes they will defend a defamation case and pay out lots of money rather than openly admit being wrong. Media owners have resisted law reforms that would require retractions of equal prominence to defamatory stories.

By contrast, if you are defamed on an electronic discussion group, it is quite easy to write a detailed rebuttal and send it to all concerned the next hour, day or week. Use of defamation law is ponderous and ineffectual compared to the ability to respond promptly. Promoting interactive systems of communication as an alternative to the mass media would help to overcome some of the problems associated with defamation.

Examples

These examples are all Australian because they are the ones I'm most familiar with. I need to know each case reasonably well to avoid defamation! There are plenty of similar examples from other countries.

• Physicist Alan Roberts wrote a review of a book by Lennard Bickel entitled *The Deadly Element: The Men and Women Behind the Story of Uranium.* The review was published in the *National Times* in 1980. Bickel sued the publishers. He was particularly upset by Roberts' statement that "I object to the author's lack of moral concern." There was a trial, an appeal, a second trial, a second appeal and a settlement. Bickel won $180,000 in the second trial but received a somewhat smaller amount in the settlement.[4]

• Sir Robert Askin was Premier of the state of New South Wales for a decade beginning in 1965. It was widely rumoured that he was involved with corrupt police and organised crime, collecting vast amounts of money through bribes. But this was never dealt with openly because media outlets knew he would sue for defamation. Immediately after Askin died in 1981, the *National Times* ran a front-page story entitled "Askin: friend to organised crime."[5] It was safe to publish the story because, in Australia, dead people cannot sue. (In some countries families of the dead can sue.)

• In 1992, students in a law class at the Australian National University made a formal complaint about lecturer Peter Waight's use of hypothetical examples concerning sexual assault. Waight threatened to sue 24 students for defamation. Six of them apologised. Waight then sued the remaining 18 for

4. David Bowman, "The story of a review and its $180,000 consequence," *Australian Society,* Vol. 2, No. 6, 1 July 1983, pp. 28-30.

5. David Hickie, "Askin: friend to organised crime," *National Times,* 13-19 September 1981, pp. 1, 8

$50,000 for sending their letter to three authorised officials of the university. He later withdrew his suit. Subsequently the students' original letter of complaint was published in the *Canberra Times* without repercussions.[6]

• In 1989, Tony Katsigiannis, as president of the Free Speech Committee, wrote a letter published in the Melbourne *Age* and the *Newcastle Herald* discussing ownership of the media. Among other things, he said of a review of the Broadcasting Act "that its main concern will be to save the necks of the Government's rich mates." Although he mentioned no names, he and the newspaper owners were sued for defamation by Michael Hutchinson, a public servant who headed the review of the Broadcasting Act. Hutchinson sued on the basis of imputations in the letter, which can be judged defamatory even when not intended by the writer. Hutchinson said he wouldn't accept just an apology; he wanted a damages payment and his legal costs covered. Katsigiannis received $20,000 worth of free legal support from friends, but after three exhausting years of struggle he agreed to a settlement in which he apologised but Hutchinson received no money.[7]

• In 1985 Avon Lovell published a book entitled *The Mickelberg Stitch.* It argued that the prosecution case against Ray, Peter and Brian Mickelberg—sentenced to prison for swindling gold from the Perth Mint—was based on questionable evidence. The book sold rapidly in Perth until police threatened to sue the book's distributor and any bookseller or other business offering it for sale. The Police Union introduced a levy on its members' pay cheques to fund dozens of legal actions against Lovell, the distributor and retailers. The defamation threats and actions effectively suppressed any general availability

6. Graeme Leech, "Lecturer drops suits against students," *Australian,* 28 April 1993, p. 13; Andrea Malone and Sarah Todd, "Facts and fiction of the Waight saga," *Australian,* 5 May 1993, p. 14.

7. Robert Pullan, *Guilty Secrets: Free Speech and Defamation in Australia* (Sydney: Pascal Press, 1994), pp. 27-28.

of the book. For ten years, none of the suits against Lovell reached trial, but remained active despite repeated attempts to strike them out for lack of prosecution. Eventually, in 1996 Lovell reached a settlement with the Police Union. All the cases were dropped and he became free to sell his books in their original form. (Financial details of the settlement are confidential.)[8]

• In the late 1970s, fisherman Mick Skrijel spoke out about drug-running in South Australia. Afterwards, he and his family suffered a series of attacks. The National Crime Authority (NCA) investigated Skrijel's allegations but in 1985 ended up charging Skrijel for various offences. Skrijel went to jail but was later freed and his sentence set aside. In 1993, the federal government asked David Quick QC to review the case; Quick recommended calling a royal commission into the NCA, but Duncan Kerr, federal Minister for Justice, declined to do so. Skrijel prepared a leaflet about the issue and distributed it in Kerr's electorate in Tasmania during the 1996 election campaign. Kerr wrote to the Tasmanian media saying he would not sue Skrijel but that he would sue any media outlet that repeated Skrijel's "false and defamatory allegations." The story was reported in the *Financial Review* but the Tasmanian media kept quiet.[9] Skrijel's view is that most media wouldn't have published much on his case no matter what and that defamation law provides a convenient excuse for media not to publish.

Options

In practice, the court system and the media serve to protect the powerful while doing little to protect the reputation of ordinary people. They undermine the open dialogue needed in a democ-

8. Avon Lovell, *The Mickelberg Stitch* (Perth: Creative Research, 1985); Avon Lovell, *Split Image: International Mystery of the Mickelberg Affair* (Perth: Creative Research, 1990).

9. Richard Ackland, "Policing a citizen's right to expression," *Financial Review*, 9 February 1996, p. 30.

racy. There are various options for responding to uses of defamation law to silence free speech. Each has strengths and weaknesses.

Avoid defamation

Writers can learn simple steps to avoid triggering defamation threats and actions. The most important rule is to *state the facts, not the conclusion.* Let readers draw their own conclusions.

• Instead of saying "The politician is corrupt," it is safer to say "The politician failed to reply to my letter" or "The politician received a payment of $100,000 from the developer."

• Instead of saying "The chemical is hazardous," it is safer to say "The chemical in sufficient quantities can cause nerve damage."

• Instead of saying, "There has been a cover-up," it is safer to say "The police never finalised their inquiry and the file has remained dormant for nine years."

Be sure that you have documents to back up statements that you make. Sometimes understatement—saying less than everything you believe to be true—is more effective than sweeping claims.

If you are writing something that might be defamatory, it's wise to obtain an opinion from someone knowledgeable. (Remember, though, that lawyers usually recommend that you *don't* say something if there's even the slightest risk of being sued.)

Another way to avoid being sued for defamation is to produce and distribute material anonymously. Some individuals do this with leaflets. They are careful to use printers and photocopiers that cannot be traced. At times when few people will notice them, they distribute the leaflets in letterboxes, ready to dump the remainder if challenged. Gloves of course—no fingerprints. For those using electronic mail, it's possible to send messages through anonymous remailers, so the receivers can't trace the sender.

These techniques of avoiding defamation law may get around the problem, but don't do much to eliminate it. They illustrate that defamation law does more to inhibit the search for truth than foster it. If an anonymous person circulates defamatory material about you, you can't contact them to sort out discrepancies.

Say it to the person

Send a copy of what you propose to publish to people who might sue. If they don't respond, it will be harder for them to sue successfully later, since they haven't acted to stop spreading of the statement. If they say that what you've written is defamatory, ask for specifics: which particular statements or claims are defamatory and why? Then you can judge whether their objections are valid.

It's not defamatory to criticise a person to their face or to send them a letter criticising them. It's only defamation when your comments are heard or read by someone else—a "third party."

Keep a copy for posterity

If you have to censor your writing or speech to avoid defamation, keep a copy of the original, uncensored version—in several very safe places. Save it for later and for others, perhaps after all concerned are dead. You might also inform relevant people, especially those who might threaten defamation, that you have saved the uncensored version. (Be aware, though, that you might be called to produce this material as part of the discovery process in a defamation action!)

Defamation law distorts history. How nice it would be to read old newspapers in uncensored versions, if only they existed! By saving the unexpurgated versions, you can help challenge this whitewashing of history.

Call the bluff

If you are threatened with a defamation action, one strategy is to just ignore it and carry on as before. Alternatively, invite the threatener to send the writ to your lawyer. Most threats are

bluffs and should be called. The main thing is not to be deterred from speaking out. The more people who call bluffs, the less effective they become.

If you receive a defamation writ, try to find a lawyer who is willing to defend free speech cases at a small fee or, if you have little money, no cost. Shop around for someone to defend you or contact public interest groups for advice.

Use publicity

Just because you are sued doesn't mean you can't say anything more. (Many organisations avoid making comment by saying that an issue is *sub judice*—that is, under judicial consideration—but that's just an excuse.) You can still speak. In particular, you can comment on the defamation action itself and its impact on free speech. It's also helpful to get others to make statements about your case.

A powerful response to a defamation suit is to expand the original criticism. Defamation suits aim to shut down comment. If enough people respond by asserting their original claims more forcefully and widely, this will make defamation threats counterproductive.

A group called London Greenpeace produced a leaflet critical of McDonald's. McDonald's sued five people who were involved in distributing it. Two of them, Helen Steel and Dave Morris, decided to defend themselves—they had no money to pay lawyers. They used the trial to generate lots of publicity. Because of the trial—the longest in British history—their leaflet has reached a far greater audience than would have been possible otherwise. The whole exercise has been a public relations disaster for McDonald's.[10]

Law reform recommendations

Law reform commissions have been advocating reform of defamation law for decades. Possible changes include:

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10. http://www.mcspotlight.org; John Vidal, *McLibel* (London: Macmillan, 1997).

• public figure defence so that it's possible to make stronger criticisms of those with more power;

• adjudication outside courts, to reduce court costs;

• elimination of monetary pay-outs, requiring instead apologies published of equal prominence to the original defamatory statements.

In spite of widespread support for reform among those familiar with the issues, Australian law remains much the same. That's because it serves those with the greatest power, especially politicians who make the law and groups that use it most often.

Reforms sometimes don't help as much as planned. The US has a public figure defence, for example, which means that suers must prove malice. This has become the pretext for highly intrusive discovery exercises that can themselves deter free speech.

Fixing the law is at most part of the solution. It's also necessary to change the way the legal system operates.

Campaigns for reform of the legal system

Any change that makes the system cheaper, speedier and fairer is worth pursuing. The sorts of changes required are:

• reducing costs that are excessive compared to damage done or large compared to a party's income;

• allowing court orders to remove tax deductibility for the legal costs of corporations assessed to have acted high-handedly;

• making laws simpler;

• introducing compulsory conciliation;

• speeding up legal processes.

There's a much better chance of change when concerned individuals and groups organise to push for change. This involves lobbying, writing letters, organising petitions, holding protests, and many other tactics. In the US, campaigning by opponents of SLAPPs has resulted in some states passing laws against SLAPPs.

Set up defamation havens

The World Wide Web creates the possibility of undermining the use of defamation law to suppress free speech. There are cases in which documents that are defamatory in one country have been posted on web sites in other countries where it is harder and more inconvenient to sue.

If a country decided to abolish its defamation law, it could become a defamation haven, namely a safe place to post documents on the web that could be read throughout the world. Local writers could volunteer to author such documents or indigent writers in other countries could do it. There are no such defamation havens yet but, like tax havens, becoming one could become lucrative for some small countries.

In the spirit of free speech, managers of web sites that publish controversial material can offer to post responses. The best remedy for defamatory statements is a timely response. This is quite easy to arrange on the Internet.

Speak out campaigns

Petitions, street stalls and public meetings can be used to directly challenge the use of defamation law against free speech. One possibility is to circulate materials that have been subject to defamation threats or writs. Another is to protest directly against those who attempt to use defamation law to suppress legitimate comment. If enough people directly challenge inappropriate uses of the law, it will become harder for it to be used. Freedom of speech is a product of social action, not of law.[11]

Conclusion

Defamation law doesn't work well to protect reputations. It prevents the dialogue and debate necessary to seek the truth. More speech and more writing is the answer to the problem rather than defamation law, which discourages speech and

11. David Kairys, "Freedom of speech," in David Kairys (ed.), *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982), pp. 140-171.

writing and suppresses even information that probably wouldn't be found defamatory if it went to court. Published statements—including libellous ones—are open, available to be criticised and refuted. The worst part of defamation law is its chilling effect on free speech. It has a corrupting influence on the powerful, who use defamation threats and actions to deter or penalise criticism. The availability of defamation law in its present form encourages powerholders to suppress criticism rather than openly debate the critics.

The most effective penalty for telling lies and untruths is loss of credibility. Systems of communication should be set up so that people take responsibility for their statements, have the opportunity to make corrections and apologies, and lose credibility if they are repeatedly exposed as untrustworthy. Defamation law, with its reliance on complex and costly court actions for a tiny fraction of cases, doesn't work.

Defamation actions and threats to sue for defamation are often used to try to silence those who criticise people with money and power. The law and the legal system need to be changed, but in the meantime, being aware of your rights and observing some simple guidelines can help you make informed choices about what to say and publish.

In the long run, the aim should be to establish a series of processes that foster dialogue and honesty, without giving anyone excessive power over others. This can include replacing mass media with interactive media, enabling free speech by workers, and transforming or replacing systems that allow surveillance, as described in earlier chapters. As well, there might be "reputation mediators," to advise disputants on contentious claims. There might be voluntary "reputation tribunals" that would make statements about contested claims after receiving testimony and documents. A tribunal's credibility would depend on its perceived independence, fairness and promptness. With these and other possibilities, there would be no power to invoke financial or other punitive sanctions. The main tool would be speech itself.