



THE AGA KHAN UNIVERSITY

eCommons@AKU

Graduate School of Media and Communications

AKU-East Africa

January 2011

Uniform Defamation Law in Australia: Moving Towards a More 'Reasonable' Privilege

Rhonda Breit

Aga Khan University, rhonda.breit@aku.edu

Follow this and additional works at: http://ecommons.aku.edu/eastafrica_gsmc



Part of the [Journalism Studies Commons](#), and the [Mass Communication Commons](#)

Recommended Citation

Breit, R. (2011). Uniform Defamation Law in Australia: Moving Towards a More 'Reasonable' Privilege. *Media International Australia*(138), 9-20.

Available at: http://ecommons.aku.edu/eastafrica_gsmc/5

UNIFORM DEFAMATION LAWS IN AUSTRALIA: MOVING TOWARDS A MORE 'REASONABLE' PRIVILEGE?

Abstract

A new uniform defamation regime now operates in Australia. This article canvasses the Uniform Defamation Laws (UDLs), focusing on the defence of qualified privilege and its capacity to protect mass media publications in the public interest. Drawing on case law and analysis of the key approaches to statutory privilege, the article evaluates the current approach to statutory qualified privilege. Taking account of observations in O'Hara v Sims (2008, 2009) about the operation of qualified privilege, it questions whether the UDL statutory qualified privilege will ultimately censor publications in the public interest and restrict the application of the qualified privilege defence.

Introduction

Much of the literature surrounding the role of journalism in society relates to how journalists view their work or how audiences respond to work (see Wahl-Jorgensen and Hanitzsch, 2009). This article uses a legal research technique of case analysis to expand these approaches and view journalism in the context of an interacting system of professionals (Abbott, 1988; Abbott, 1993: 204), thereby taking account of inter-professional forces – namely how the law interprets and judges the quality of journalism through the law of defamation. As Justice Levine observed in *Sattin v Nationwide News Pty Ltd* (1996: 43):

Publications in instruments of mass communication involve competing questions of freedom of speech and protection of reputation ... the law deals with those competing questions by means of 'compromises'. The resolution of that tension between the two competing interests is represented by the law of defamation at common law and by its statutory modifications ... The introduction into the law of defamation especially involving instruments of mass communication of some common law duty of care to 'get the publication right' would amount to an unacceptable distortion of the principles of common law (as affected by statute) in the law of defamation relating to the balancing of freedom of speech and protection of reputation.

In relation to publication, journalists face the same duty of care as members of the public – that is, a duty of care not to defame. Through a review of the qualified privilege defence, centred on a case study of *O'Hara v Sims* (2008, 2009) as it operates under the unified defamation scheme, this article highlights the different standards of publication relating to individually generated content and content generated by media organisations.

O'Hara v Sims is the first decision surrounding the operation of the uniform qualified privilege defence in Queensland. An in-depth textual analysis of this decision provides insights into legal understandings of the role of journalism in society. It argues that the

new version of statutory qualified privilege is potentially problematic because it distorts the aim of defamation law away from protecting reputation to promoting responsible (media) publication. The article accepts that promoting responsible (media) publication is a legitimate aim; however, it questions whether defamation law is the most appropriate vehicle for promoting this aim. First, the key changes to the defamation law are mapped and the overall aims of the uniform scheme identified. The key approaches to qualified privilege are then outlined, with reference to the decision in *O'Hara v Sims*, and areas of possible confusion arising from the 2006 reforms identified. Given that *O'Hara v Sims* is a decision of the Supreme Court of Queensland, this article focuses on the *Defamation Act* (Queensland) 2005.

Background

Before 2006, different legal standards for publication applied in every state and territory in Australia, fostering uncertainty (see Dent and Kenyon, 2004; Schultz, 1998). Amendments to Australia's defamation laws came into effect in 2006. Each state and territory introduced essentially uniform legislation, which:

- repeals previous legislation relating to defamation
- reinstates the common law of defamation in each state and territory
- specifies a set of common legislative defences.

The enactment of Uniform Defamation Laws (UDLs) is the culmination of several failed attempts to consolidate these laws, which historically are seen as having a 'chilling effect' on media publications in Australia (Dent and Kenyon, 2004: 5) and as one of the greatest obstacles to investigative journalism (Schultz, 1998). In response to this criticism, the UDLs aim to ensure that 'the law of defamation does not place unreasonable limits on freedom of expression, particularly in relation to the publication and discussion of matters of public interest and public importance' (*Defamation Act* 2005, s 3). This article questions whether this aim is achieved.

What is defamation?

An individual's right to reputation is protected by providing an action against anyone involved in the publication of defamatory material subject to the innocent disseminators' defence. This means authors, editors and publishers are potentially liable for the publication of material that has a tendency to:

- expose the person claiming to be defamed to hatred, contempt or ridicule (*Parmiter v Coupland and Anor*, 1840), or
- lower the person claiming to be defamed in 'the estimation of a right thinking member of society' (*Sim v Stretch*, 1936), or
- cause the person claiming to be defamed to be shunned or avoided without any moral discredit on his/her part (*Youssouf v Metro, Goldwyn Mayer*, 1934).

Under the UDLs, any individual and some corporations whose reputation has been harmed in these ways can bring a civil action against a publisher. The most significant changes to defamation law arising from the enactment of uniform legislation relate to the defences. The defences are the mechanisms by which defamation law gives effect to freedom of expression and other countervailing public interests that justify the publication of material harmful to an individual's reputation. These statutory defences operate in conjunction with common law defences (*Defamation Act* 2005, ss 6, 24).

Before the enactment of the uniform scheme, three key defences were available to publishers: truth or truth and public benefit/interest; fair comment; and privilege. The

position in relation to all of these defences has now changed. The UDLs specify that a publisher has a complete defence to the publication of defamatory material if the material published is substantially true, regardless of its public interest or public benefit. Therefore, a defendant has a complete defence if he or she can prove that the substance of an imputation is true. The uniform scheme also clarifies the situation where a person pursues an action on multiple imputations, providing the defence of contextual truth: ‘contextual’ imputations that do not further damage a plaintiff’s reputation can be published under the shield of substantial truth.

The defence of fair comment has been revised as a defence of honest opinion. The UDLs identify three situations where there are defences relating to publications expressing an opinion that is honestly held by the maker: the opinions expressed by the defendant; opinions expressed by the defendant’s employee or agent; and opinions expressed by a commentator other than the defendant or an employee or agent.

One of the most significant reforms emerging from the uniform scheme relates to the privilege defences. Privilege acknowledges overriding public and private interests that are fundamental to the welfare of society. Because the occasion is so important, all information on the topic has value, regardless of its accuracy. Therefore, the law permits the publication of untruthful defamatory material. Privilege can be either absolute or qualified. As noted by George (2007: 46), qualified privilege had its origins ‘in private and confidential communications which society saw fit to protect’. But the defence now applies to mass publications, generated by media organisations and individuals alike. In applying the defence of qualified privilege, the courts seem to be espousing a different set of publication standards for individuals and journalists. The following analysis of *O’Hara v Sims* (2008, 2009) sets out this argument.

Privilege defences

Absolute privilege offers a complete shield to the publication of defamatory material. It attaches to occasions of public significance, which are outlined in the Uniform Acts and cover legal, parliamentary, quasi-legal and quasi-parliamentary proceedings. These categories are now specified in legislation. Because of the potential harm that can arise from such extensive privilege, the categories of absolute privilege are quite limited.

Qualified privilege, on the other hand, is a conditional defence that arises only in certain situations. As the majority judges in *Bashford v Information Australia (Newsletters) Pty Limited* (2004, para 22) noted, qualified privilege does not give rise to a licence to defame. It *denies the inference of malice* that ordinarily follows from showing that false and injurious words have been published. If the occasion is privileged, the further question that arises is whether the defendant has fairly and properly conducted him or herself in the exercise of it (author’s emphasis).

Thus the occasion must be of such significance that all published information relating to this occasion is important (see *Adam*, 1917: 334). The significance of the occasion is determined by reference to a ‘duty to publish’ and ‘interest to receive information’. Where a defendant can show he or she is under a duty to publish and the recipients have an interest to receive such information, the defence of qualified privilege will usually apply. To succeed in an action, a plaintiff then needs to prove that the defendant’s conduct was malicious by calling evidence to show that the defendant’s conduct was improper (went beyond the apparent interest) or unfair. Thus a defendant has a *threshold burden* of proving the duty/interest relationship needed to negate an inference of malice and the plaintiff carries a *rebuttal burden* of proving the defendant’s conduct was unfair or improper (malice).

This form of qualified privilege is known as *common law privilege*, where a person has a social, moral or legal obligation to publish untruthful information that is capable of defaming an identifiable individual. This defence usually applies to limited publications, not mass media publications. In some circumstances, the defence (together with its statutory modifications) is available to mass publications (journalism).

In the 1990s, the High Court of Australia reinterpreted the qualified privilege defence to take account of a freedom of political communication implied in the Commonwealth Constitution. In 1997, common law privilege was extended to protect ‘reasonable’ publication of defamatory material concerning political and government matters (Lange, 1997). A duty to publish and reciprocal interest to receive information will be implied where mass publications relate to political or government information. Given the potential harm arising from mass publications, the court requires proof that publication of this information is reasonable in the circumstances:

Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant’s conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant has reasonable grounds for believing the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material, and did not believe the imputation to be untrue. Furthermore the defendant’s conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff the opportunity to respond (Lange, 1997: 13).

Under the *Lange* privilege, the plaintiff’s burden of rebuttal (malice) became the defendant’s threshold burden for invoking the expanded common law privilege (proof of proper conduct or lack of malice). One rationale given for this approach was the power imbalance between defendant media corporations and individual plaintiffs, and the potential for harm arising from mass publications (see *Theophanous* 1994, per Deane: para 34; Lange, 1997).

In addition to these defences, the UDLs specify that a publisher will have a defence to the publication of defamatory material if he or she can prove that:

- the recipient has an interest or apparent interest in having information on some subject (interest)
- the matter is published to the recipient in the course of giving to the recipient information on that subject (relevance)
- the conduct of the defendant in publishing that matter is *reasonable* in the circumstances (reasonableness) (*Defamation Act 2005*, s 30).

By reinstating the common law and overlaying a set of unified defences, Australia’s UDLs have retained a complex set of privilege defences that operate at three levels:

- *common law privilege*, where there is a social moral and legal duty to publish and a reciprocal interest to receive the information
- *expanded common law privilege*, where there are reasonable mass publications of political and government matters
- *statutory privilege*, where there is an apparent interest to publish and the conduct of the publisher was reasonable in the circumstances.

The incorporation of ‘reasonableness’ requirements into the threshold standards for invoking qualified privilege suggests that a new species of privilege is being developed where the publication process is more important than the occasion. Not only does this change the nature of the defence of qualified privilege, it potentially might distort the

overall aims of defamation law from protecting reputation to promoting responsible (media) publications. This argument is supported by revisiting the rationale for recognising qualified privilege.

Qualified privilege

The rationale for recognising the defence of qualified privilege was expressed by the court in *Horrocks v Lowe* (1975):

The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has ... to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a *duty to perform or an interest to protect in doing so*. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue ... the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so.

In these circumstances, the welfare of society is served by allowing communication to be free and frank. The common law defence of qualified privilege will be made out if a defendant can prove that:

- he or she had a duty to publish and the people who received the material had a reciprocal interest to receive the information
- the information related to a matter of private or overriding public interest
- the publication was restricted to what is necessary to satisfy that private or public interest, and
- the circulation of the publication was limited to the audience with a reciprocal interest to receive the information.

The reciprocal duty and interest will not arise from the mere fact that the publisher has information that would interest the public. This relationship is not automatically inferred because a publisher is a journalist and/or media organisation. To determine whether a duty/interest relationship exists, the courts look at the *occasion*. The kind of interest that will justify the publication is an interest arising from some *particular quality in the subject*; it comes back to ‘*the common convenience and welfare of society*’ or the ‘general interest in society’ (*Comalco*, 1985: 31; *Lange*, 1997, author’s emphasis).

Thus the defence of common law privilege arises from a relationship between publisher and audience implied from the significance of the occasion. At times, the court will determine the significance of an occasion from the *type of information* being disseminated (*Lange*, 1997). But most commonly, the relationship between the publisher and readers determines the defence’s availability (*O’Hara*, 2008).

Examples where a reciprocal interest has been upheld include a reference written by an employer to another employer considering engaging a former employee, or the provision of a credit report by one creditor to another about their debtor, reports of suspected criminal activity to police or similar authority (see Butler and Rodrick, 2004: 72; Gillooly, 2004: 114). These occasions of qualified privilege do not usually extend to mass publications unless it can be shown that some general interest is being accommodated. Situations where mass media publications have been able to establish this duty/interest relationship include:

-
- statements made in the course of carrying out public functions or participating in election campaigns, whereby ‘traditional’ qualified privilege attaches to ‘statements by electors, candidates and their helpers published to the electors of a state electorate in matters relevant to the records and suitability of candidates for the election’
 - statements made for the protection of family and personal relationships
 - statements made by a person to further his or her own interest to a person who has a duty to receive this information – a shareholder needs to alert authorities to alleged wrongdoings of a company director
 - response by the defendant to an attack by the plaintiff
 - complaints about public officials or persons with public duties
 - statements made by a person to further an interest to a person with a common interest – communications between shareholders or club members (Tobin and Sexton, 2008).

To invoke the statutory defence of qualified privilege and the expanded common law defence articulated in *Lange*, mass publications must also prove the publication was reasonable in the circumstances.

What is reasonable?

The potential of mass communications to cause harm is the core rationale offered by the High Court for requiring proof of reasonable publication to invoke certain types of privilege:

No doubt it is arguable that, because qualified privilege applies only when the communication is for the common convenience and welfare of society, a person publishing to tens of thousands should be able to do so under the same conditions as those that apply to any person publishing on an occasion of qualified privilege. But the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients. Because the damage from the former class of publication is likely to be so much greater than from the latter class, a requirement of reasonableness ... which goes beyond mere honesty, is properly to be seen as reasonably appropriate and adapted to the protection of reputation. (*Lange*, 1997)

To invoke the UDL defence, a defendant must show he or she was reasonable at two levels. First, the defendant must have reasonable grounds for believing a recipient has an *apparent interest in having information on a subject* (*Defamation Act 2005*, s 30(2)). Second, the conduct of publisher must be reasonable in the circumstances. In determining whether the conduct of the defendant in publishing defamatory material was reasonable, the UDLs specify that the court *may* take into account:

- the extent to which the matter published is of public interest
- the extent to which the matter published related to the performance of the public functions or activities of the person referred to in the defamatory publication
- the seriousness of any defamatory imputations carried by the matter published
- the extent to which the matter published distinguishes between suspicions allegations and proven facts
- the urgency of the publication
- the nature of the business environment in which the publisher operates, which means taking account of the working realities in which publications are produced
- the sources of information and the integrity of sources
- whether the publication included the substance of the aggrieved person’s story
- whether reasonable attempts were made to obtain and publish a response
- other steps taken to verify information
- any other circumstances the court considers relevant.

These considerations relate predominantly to media/journalistic publications and have strong links to the UK qualified privilege defence set out in *Reynolds v Times Newspapers Limited* (2001), where publishers enjoy the protection of qualified privilege if the publication relates to a matter of ‘public importance’ and it was published ‘responsibly’.

There is dissent amongst the English judiciary as to whether *Reynolds* is an expansion of common law privilege. Some see it as reinstating the traditional flexibility of common law privilege (*Reynolds*, 2001, para 133; Scott, 2007), while others (*Reynolds*, 2001, para 43; Scott, 2007) see the use of the term privilege as ‘misleading’ because the object of privilege was the publication rather than the occasion. Scott (2007: n.p.) suggests this represents a distinct test of publication in the public interest. Kenyon (2004: 1) concurs, arguing that *Reynolds* ‘can be seen as conceptually, a different species of qualified privilege from the general duty-interest defence or at least as a substantial expansion of the circumstances in which the defence can be satisfied’. Coad (2007: 85) goes further to suggest that the defence ‘defeats the whole object of libel proceedings which is both to restore the individual’s reputation and to inform the public where untrue allegations have been communicated to them to the detriment of a person’s reputation’. In *O’Hara v Sims* (2008, 2009), the Australian judiciary offered some insights into the application of statutory qualified privilege under the uniform defamation scheme.

O’Hara v Sims

The case arose from communications between members of the Gold Coast Turf Club, when Brian O’Hara claimed to be defamed in a letter sent by Mr Sims to members of the Turf Club. The letter criticised Mr O’Hara’s stance on the relocation of the Turf Club and advocated against his re-election.

The defendant argued that the imputations did not arise. If they did, he argued, the publication of the imputations was protected by qualified privilege. It should be noted that the defendant formed his views of the plaintiff based on incorrect reports in a local newspaper.

A jury found that the imputations were conveyed in the letter, but those imputations were not defamatory of Mr O’Hara. Chesterman J, on the invitation of counsel for the plaintiff, gave rulings on the defence of qualified privilege as set out in section 30 of the *Defamation Act* 2005. Common law privilege was not pleaded.

In commenting on the availability of statutory qualified privilege, Chesterman J (*O’Hara*, 2008, para 44) concluded ‘there is ... no doubt that Mr Sims’ letter was a communication of such nature that he had an interest in making it and the members to whom he wrote had a corresponding interest in having it made to them’. The communication was privileged ‘unless made maliciously or unreasonably’. By inference, Chesterman J (*O’Hara*, 2008, paras 49, 50) invoked the common law test for qualified privilege to determine the availability of section 30 privilege, whereby he noted that: ‘The case is one of a limited audience, all of whom had an interest in receiving Mr Sims’ views of the appropriateness of Mr O’Hara as their representative on the committee.’

In interpreting section 30(3), Chesterman J observed:

when judging whether the publication of defamatory matter was reasonable the inquiry is not limited to the particular topics identified in subsection 3 nor is it necessary to have regard to any of them. The subsection provides only that the Court ‘may’ take the enumerated circumstances into account. In a particular case, none of those factors may be relevant though one expects that in most cases some at least of them will be, while other factors relevant to the question of reasonableness of publication will be pertinent. (*O’Hara*, 2008, para 11)

This suggests that where a person *has* an interest to receive information, the publisher will be able to meet the threshold requirements for invoking section 30 privilege. There is little to distinguish between common law and section 30 privilege (UDL privilege).

Chesterman J found that the publication was reasonable (*O'Hara*, 2008, para 65), but refused to take account of the criteria outlined in section 30(3), preferring instead to look at the circumstances of the case. He stressed the status of the defendant, the importance of the issue, the limited size of publication and the commonality of interest. These last two factors are essentially the duty-interest requirements applied generally in common law privilege. Chesterman J's comments suggest that in limited (or possibly non-media) publications, a person's status and the importance of the issue might be additional factors to be taken into account in determining reasonableness of a publication.

The plaintiff claimed that the publication of the imputations was unreasonable because they were serious; the sources relied on were 'flimsy'; the plaintiff's side of the story was not sought before publication; the accuracy of the media story was not verified; and the defendant admitted he would have proceeded with the letter even if he had known the publication on which he based his views was inaccurate (*O'Hara*, 2008, para 45).

Chesterman J (*O'Hara*, 2008, paras 55–57) was unconvinced by these arguments, noting that Mr O'Hara had done nothing to correct 'the erroneous representation of his views to the world' and took no action to clarify his position internally within the club or in the public domain (see *O'Hara*, 2008, paras 56, 57). This point was clarified by the Supreme Court of Queensland on appeal, where the Keane JA clarified that it was reasonable for a member of the public to rely on an article published in the local newspaper (*O'Hara*, 2009, para 57).

At first instance, Chesterman J was highly critical of the plaintiff's conduct in this case (*O'Hara*, 2008, para 48), stating the case should have been heard in the Magistrates Court and suggesting the plaintiff had been hypersensitive to criticism. Chesterman J remained unconvinced the imputations conveyed were serious (*O'Hara*, 2008, paras 48–50). In rejecting the plaintiff's claim, he referred to a number of factors, including:

- the status of the defendant (an 88-year-old man who was a life member of the Gold Coast Turf Club)
- the hypersensitivity of the plaintiff to criticism
- the limited publication and limited audience
- the imputations related to an internal club dispute.

These observations suggest the conduct and motivations of the plaintiff might be taken into account in determining whether a publication is reasonable for the purposes of section 30 qualified privilege. In addition to splitting the burden of proof relating to malice, Chesterman's reasoning suggests that section 30 privilege splits the burden of proof relating to reasonableness. On appeal, Chesterman's decision was upheld on the grounds that it was not unreasonable for a person to form an opinion based on uncorrected media reports (*O'Hara*, 2009, para 60).

Chesterman went on to outline how the club did not hold the promised information session on the proposed relocation (*O'Hara*, 2008, para 66) and concluded that 'this recital of circumstances of the publication are (sic) enough to establish its (the letter's) reasonableness' (*O'Hara*, 2008, para 67).

Discussion

Chesterman's observations (*O'Hara*, 2008) raise a number of questions about the operation of qualified privilege defence in Queensland, and in other Australian states and territories. The first concern relates to the availability of common law qualified privilege defence and how it will coexist with statutory privilege. *O'Hara* (2008) represented a classic situation

where common law privilege would normally apply. Instead, Chesterman J was asked to comment on the application of statutory privilege. Although the defendant was able to prove that an actual duty/interest relationship existed, there was still ambiguity about what constituted a *reasonable belief* that recipients had an interest in receiving defamatory material. Chesterman J appears to conflate common law and statutory approaches, leaving some uncertainty about the standards applicable at common law and under the uniform scheme.

Before the enactment of the UDLs, the courts accepted that the question of what is reasonable in the circumstances depends on the context in which defamatory material was published. Thus a range of factors (which were not precisely defined) were taken into account. The more serious an allegation, the greater the obligation on publishers to show such publication was reasonable. To prove reasonableness, the courts required a publisher to show that:

- (a) reasonable care was exercised to ensure the conclusions drawn from facts believed to be true were correct. In most circumstances this will involve making proper inquiries and checking on the accuracy of sources.
- (b) the conclusions drawn (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information obtained by the publisher
- (c) the manner and extent of the publication did not exceed what was reasonably required in the circumstances
- (d) each imputation intended to be conveyed was relevant to the subject about which he is giving information to his readers (*Amalgamated Television Services v Marsden*, 2002, para 984).

Section 30(3) purported to overcome some of the uncertainty surrounding proof of reasonableness, setting out a list of considerations. Chesterman J ignored these reasonableness guidelines, preferring instead to take account of the circumstances of publication. He stressed the defendant's status, the importance of the issue and the fact that the defendant was under a duty to publish and the recipient had an interest to receive the information. The certainty gained from legislating this list of considerations is now ostensibly lost. It suggests these considerations are application to media publications rather than individually generated material – a troublesome distinction given the shift towards user-generated content.

Another more troubling issue arising from Chesterman's reasoning relates to the object of the defence. In assessing reasonableness for the purposes of section 30 privilege, the focus is squarely on the conduct of the publisher – the publication process and possibly the conduct of the plaintiff rather than the privileged occasion. Therefore, is this a defence of qualified privilege or some other species of defence (see Kenyon 2004)? The factors, set out in section 30(3) of the *Defamation Act 2005*, traditionally were treated as issues indicative of malice. The practical effect of the statutory defence is to split the burden of proof relating to malice. In addition, Chesterman's reference to the plaintiff's conduct suggests splitting of the evidentiary burden relating to reasonableness. Instead of clarifying the operation of privilege defences, section 30 seems to muddy the water even further.

The application of the defence becomes more complicated when judges are called on to determine the 'reasonableness' of journalistic publications. Understandings about journalists' roles in society are quite varied among High Court justices (see Breit, 2008), suggesting some confusion. In fact, this confusion has prompted Gummow J to question: 'What does this word 'journalist' mean, by the way?' (*Radio 2UE Sydney Pty Ltd v Chesterton*, 2009). Courts acknowledge that journalists can get the facts wrong despite exercising reasonable care. 'But a member of the public is at least entitled to expect that

a journalist will take *reasonable care to get his facts right* before he launches an attack upon him in a daily newspaper.’ (*Austin v Mirror Newspapers Ltd* 1985: 360) Courts accept that reasonable conduct should not require some pinnacle of unreal perfection. However, the Supreme Court of Queensland confirmed that it was ‘not unreasonable’ for a person to base their opinion on a newspaper article that contained uncorrected inaccuracies (see *O’Hara*, 2009, paras 55–60). Therefore, a stranger can rely on an incorrect newspaper report to negate an inference of malice. Their actions will not amount to recklessness. However, a journalist will be required to take steps to verify information. If *O’Hara v Sims* involved an action against a media publication, it is likely that the qualified privilege defence would have failed for want of reasonableness because the standard of verification expected of journalists is greater than the standard expected of individual publishers. This distinction is problematic during times where every individual has the ability to be a mass media producer and the occupational divisions between journalists and citizen publishers increasingly are being blurred.

In addition, the legal standard of reasonable conduct differs from the professional standard espoused by the industry. Several codes of ethics and codes of professional conduct set out what is seen as responsible publication (see MEAA (AJA) Code of Ethics, APC Statement of Principles). In each of these codes, a matter of public interest justifies breaches of the professional standards. Using the terminology of the qualified privilege defence, the journalism codes of ethics and codes of professional conduct specify that a matter of public interest will justify irresponsible or unreasonable publication. The statutory qualified privilege, on the other hand, requires publications in the public interest to be reasonable. Thus the objective standards of publication expected by the courts appear to differ markedly from professional standards within journalism.

Conclusions

This article questions the focus of statutory reforms of qualified privilege defence in Australia’s uniform defamation law. In particular, it questions whether these reforms promote publication in the public interest when the traditional objects of qualified privilege are altered. Is the common convenience and welfare of society being promoted when citizens, whose reputations have not been harmed in the eyes of others, can force publishers to justify their publication? This question requires discussion of a range of issues not canvassed in this article.

The article has pointed to a number of uncertainties relating to the application of qualified privilege defences in Australian defamation law. These uncertainties relate to the following issues:

- What is the application of the common law tests for defamation and the standards to be applied?
- Given that the object of the defence has moved from the occasion to the publication process, is section 30 of the *Defamation Act* 2005 a form of privilege or a new defence?
- What is the status of common law privilege and how does it coexist with statutory privilege defences?
- What constitutes a reasonable belief in recipients having an interest in publishing? To what extent should the plaintiff’s motives and actions be taken into account?
- What constitutes reasonable publication? Are the factors listed in section 30 of the *Defamation Act* 2005 only relevant to media publishers? What factors are to be taken into account for non-media publishers beyond status, importance of the issue and reciprocity of duty and interest?
- Is section 30 a media-only defence?
- Has malice been extended to take account of the conduct of both plaintiff and defendant?

In addition, the article raises concerns about the bifurcation of the burden of proof relating to malice and reasonableness, which potentially promotes confusion for publishers and plaintiffs alike.

Chesterman J's comments do little to clarify the operation of section 30 privilege in relation to media publications, non-media publications and the burden facing plaintiffs attempting to protect their reputations. In addition, this article highlights a divide between professional standards of reasonableness articulated by media organisations and those standards required by law to invoke the qualified privilege defence.

Chesterman J appears to conflate common law and statutory privilege. Currently, there is a complex system of privilege that seems to overlap and potentially create confusion. Given the move towards statutory defence, should common law privilege be rescinded? This would mean *all* publications would need to be reasonable in the circumstances, which might seriously fetter freedom of expression for media and non-media defendants. Therefore, clearer directions are needed in terms of how common law and statutory privilege will coexist.

Given the aims of qualified privilege (promoting the common convenience and welfare of society) and the changing media environment, the reasonableness of publication could be taken into account in determining the question of malice rather than operating as a threshold to invoking the defence.

Another issue arising from this analysis relates to the appropriateness of courts to impose objective standards of media performance and conduct without reference to communication research that offers insights into how publications affect public attitudes and a plaintiff's reputation.

More importantly, this discussion raises questions about the ability of Australia's UDLs to meet the aim of protecting reputation and promoting freedom of expression through the publication of information in the public interest. The complexity and uncertainty surrounding the operation of qualified privilege defences suggest that the uniform defamation laws have gone only part of the way towards meeting their aims. Lack of clarity about the operation of the statutory qualified privilege defence could continue the chilling effect of defamation law in Australia – deterring defendants from publishing relevant information. These uncertainties could also act as a deterrent to plaintiffs instituting actions as their conduct comes under scrutiny and there is little hope of restoring their already damaged reputation.

This discussion argues that the legal attempts to balance the rights of individuals and the public through reasonable publication suggest the tort of defamation has become distorted to such an extent that it is failing all interested parties – the public, people who want to protect their reputation, the media and the law itself (which increasingly is being criticised). The overall effect of the new legislation might be a reduction in defamation actions, but this is not the result of greater certainty.

References

- Abbott, A. 1988, *The System of Professions: An Essay on the Division of Expert Labor*, University of Chicago Press, Chicago.
- 1993 'The Sociology of Work and Occupations', *Annual Review of Sociology*, vol. 19, pp. 187–209.
- Baker R. 2003, 'The Ordinary Reasonable Person in Defamation Law', *Communications Law Bulletin* vol. 22, no. 4, pp. 20–23.
- Bell, P. 2006, 'Defamation and Reputation in the Australian Press', *Australian Journalism Review*, vol. 28, no. 1, pp. 125–41.
- Breit, R. 2008, 'How the Law Defines Journalism', *Australian Journalism Review*, vol. 30, no. 1, pp. 13–25.

-
- Butler, D. and Rodrick, S. (2004) *Australian Media Law*, 2nd ed., Law Book Company, Sydney.
- Coad, J. 2007, 'Reynolds and Public Interest: What about Truth and Human Rights?' *Entertainment Law Review*, no. 3, pp. 75–85.
- Dent, Chris and Kenyon, Andrew T. 2004, 'Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers', *Media & Arts Law Review*, vol. 9, no. 2, p. 89.
- George, Patrick 2007, *Defamation Law in Australia*, LexisNexis, Sydney.
- Gillooly, M. 2004, *The Third Man: Reform of the Australasian Defamation Defences*, Federation Press, Sydney.
- Kenyon, A. 2004, 'Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice', *Melbourne University Law Review*, no. 27, pp. 406–37.
- Kux, Y.C. 2006, 'Notes from a Defamation Seminar', *Gazette of Law and Journalism*, 25 May.
- Schultz, J. 1998, *Reviving the Fourth Estate: Democracy, Accountability and the Media*, Cambridge University Press, Melbourne.
- Scott, A. 2007, 'The Same River Twice? *Jameel v Wall Street Journal Europe*', *Communications Law*, vol. 12, no. 2, pp. 52–59.
- T.K. Tobin and M.G. Sexton 2007, *Australian Defamation Law and Practice* (electronic resource), Butterworths, Sydney.
- University of New South Wales 2004, 'The Proposed Defence of Honest and Reasonable Opinion', *National Defamation Research Project*, University of New South Wales, Sydney.
- Wahl-Jorgensen, K. and Hanitzsch, T. 2008, *The Handbook of Journalism Studies*, Routledge, New York.

Cases

- Adam v Ward* [1917] AC 309.
- Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419.
- Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354.
- Bashford v Information Australia (Newsletters) Pty Limited* [2004] HCA 5.
- Coleman v Power* (2004) HCA 39 (1 September 2004).
- David Russell Lange v Australian Broadcasting Corporation* (1997) [1997] HCA 25 (8 July 1997).
- Horrocks v Lowe* [1975] AC 135.
- John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164.
- Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374.
- O'Hara v Sims* [2008] QSC 301 (3 November).
- O'Hara v Sims* [2009] QCA 186.
- Parmiter v Coupland and Anor* (1840) 6 M & W 104.
- Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 (22 April).
- Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.
- Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32.
- Sim v Stretch* [1936] 2 All ER 1237.
- Theophanous v Herald & Weekly Times* (1994) 182 CLR 104.
- Yousoupoff v Metro, Goldwyn Mayer* (1934) 50 TLR 581.

Legislation

- Defamation Act* 2005 (Qld).

Rhonda Breit is a Senior Lecturer in the School of Journalism and Communication, University of Queensland. She lectures and researches in the area of media law and ethics.