REPUTATION IN THE DIGITAL ERA

CHRISTIEN CORNS

WITH THE NUMBER OF DIGITAL DEFAMATION CASES RISING DRAMATICALLY THE FINANCIAL AND EMOTIONAL COST TO PARTIES INVOLVED IN PROCEEDINGS IS CONCERNING.

One thing I have learned throughout my career is that the law must be concerned with striking an appropriate balance between personal freedoms and the protection of society. This is particularly stark, and challenging, when it comes to the law of defamation which seeks to balance freedom of speech against protection of one's reputation, the latter being an asset difficult to establish but easy to lose, and therefore of great worth.

The Australian common law of defamation has traditionally aligned with English law, and from 2005 each Australian state and territory has enacted their own, largely uniform, *Defamation Act* which operates alongside the common law. The often technical nature of defamation pleadings and the complicated array of available common law and statutory defences surely speaks to the challenges faced in striking the aforementioned balance.

Defamation law has, of course, had to adapt to changes in society. The advent of printing presses, and later the mass media, meant that defamatory publications were more easily disseminated to larger audiences, increasing the overall damage to personal reputations. The concept of what it is to be a publisher – and therefore the range of persons liable for defamatory publications – has expanded.

The rise, indeed explosion, of digital publishing platforms, particularly email, web-publishing and social media such as Facebook and Twitter, has undoubtedly presented challenges to lawmakers. A study published in March 2018 by the UTS Centre for Media Transition, "Trends in Digital Defamation: Defendants, Plaintiffs, Platforms", found that the majority of the 189 defamation cases in Australia between 2013 and 2017 primarily involved digital publications (compared to just 17 per cent in 2007), and a mere 25 per cent of defendant publishers were traditional media companies:16 cases involved Facebook posts, 20 emails, four tweets and two text messages; 37 cases involved websites not affiliated with traditional media, Facebook or Twitter; and in three cases (all relating to internet search results) Google was a defendant.

Only 21 per cent of plaintiffs were considered public figures, debunking the myth that defamation actions are reserved for the rich and famous. However, approximately two-thirds of plaintiffs were unsuccessful, meaning that the majority of aggrieved plaintiffs are left with considerable legal fees to pay and without the remedies sought.

Judge Judith Gibson, who manages the defamation list in the NSW District Court, has called for law reform. She has suggested that lawmakers might consider introducing a UK-style "serious-harm" test, which provides that "a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant" (s1(1) of the *Defamation Act 2013* (UK)). No Australian jurisdiction requires proof of harm in order to maintain a defamation proceeding, although our uniform defamation legislation does provide for a defence of "triviality". While a UK-style "serious harm" threshold might help eliminate at an early stage trivial cases involving personal spats fought out in the Twittersphere, Australian defamation law has several defendant-friendly protections which other nations do not. For example, there is a statutory cap on general damages, and most corporations are prohibited from bringing proceedings in the first place.

In my experience as a practitioner, the current laws are largely effective and Victorian courts have been readily capable of implementing them to changing technology. So while the UTS report is illuminating, it does not, in my view, herald a need for dramatic law reform. The financial and emotional cost to parties involved in proceedings is more concerning.

Defamation proceedings are ripe for interlocutory disputation, and notoriously expensive to run to trial. While the "concerns notice" and "offer to make amends" are dispute resolution processes created by the uniform defamation acts, they are not always well understood and can be cumbersome to engage in.

In that regard, perhaps one area of reform that might be considered is to encourage judges at a first directions hearing to order that before any interlocutory steps are taken, parties in "digital defamation" cases attend a compulsory without prejudice settlement conference.

Crucially, the settlement conference should be conducted by a judicial officer or other independent practitioner experienced in defamation law, and the plaintiff could be required in advance to provide a "statement of harm" which sets out the actual harm perceived by the plaintiff. Such a process will not suit every case, however given the burgeoning number of digital defamation cases, holding a settlement conference at the first possible opportunity would at least enable the parties to understand and narrow the issues in dispute, and at best would lead to the early resolution of a number of cases. ■

Christien Corns is a partner in K&L Gates' complex commercial litigation and disputes practice. He has experience advising plaintiffs and defendants on defamation and related media issues.