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THINKING REPUTATION

with Christopher K.C. Serow

A person or small company ("the aggrieved") may be defamed when someone ("the publisher") recklessly makes or publishes untrue statements that malign the reputation of another. When a publisher does not make amends and retract defamatory material the law of defamation may be invoked to obtain compensation and protect the aggrieved party's reputation.

Impact of Defamation

Reckless untrue allegations about an individual may be considered malicious and defamatory. Ultimately such statements can be expected to cause a negative impact on a person's reputation and self esteem. This may be particularly so in a small community. The emotional impact on the aggrieved person can be overwhelming causing anxiety, hurt feelings, financial loss and depression. Individuals or in some cases companies may suffer both economic and non-economic loss. So what can an aggrieved person do?

Legislation

In NSW the Defamation Act 2005 ("the Act") provides steps involved in taking action against the publisher of defamatory material. The objects of the Act however, provide that the law of defamation is not intended to place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance.

In addition to written publications, defamatory material may also include untrue verbal statements ("slander"). The Act also provides various defences that are available to a publisher such as where the statement is substantially true or in cases of parliamentary or other privilege. Under provisions of the Act, not only are individuals entitled to take action in defamation but also not-for-profit organisations and companies that employ less than 10 full time equivalent staff.

Resolving Matters Without Going to Court

The first step is usually for an aggrieved person to write to the publisher. This is known under the Act as a concerns notice. The concerns notice must be in writing and inform the publisher of the false and defamatory allegations that they have made ("the imputations"). If the aggrieved fails to properly particularise the imputations adequately, the publisher may request further particulars to understand the concerns of the aggrieved. Those particulars must be supplied in writing by the aggrieved to the publisher within 14 days after a request. The publisher then has 28 days in which it

may make a written offer to make amends either in relation to the matter generally or limited to part of the defamatory imputations.

An offer to make amends however, cannot be made if 28 days have lapsed since the publisher was provided with a concerns notice or if the aggrieved person has filed Court proceedings and the publisher has filed a defence. An offer to make amends must be made in accordance with the Act and include among other things a retraction and offer to pay the aggrieved persons reasonable legal costs incurred before the offer was made and in consideration of the offer. It may also include any other action to redress the harm such as financial compensation.

Going to Court

If an offer to make amends is not provided or does not satisfy statutory requirements, the aggrieved may take formal action to sue the publisher through either the District or Supreme Court of NSW or, in some cases, through the Federal Court system. Defamation matters in NSW cannot be filed in the Local Court. An action must be filed by way of a Statement of Claim within 12 months of the defamatory material being published.

Before proceeding to determine any claim for compensation, a party may elect to have the matter tried by jury. Initially a hearing of usually around 1 day takes place before a jury to determine if there is at least one defamatory imputation conveyed by the publisher. If found, the parties then proceed to a trial to determine if any defences are available and if not what compensation should be awarded to the aggrieved.

Compensation & Costs

Apart from any economic loss, the aggrieved may claim compensation up to \$250,000. The level of compensation however, is ultimately determined by the Court. In addition to any award for compensation, an unsuccessful party will usually be required to pay not only their own but also the legal costs of the successful party which are usually quite substantial.

While the law of defamation is complex, your reputation and the possible consequences of reckless defamatory material may be of critical importance. It goes without saying that obtaining proper, competent legal advice to consider resolving matters without the cost and imposition of Court proceedings is essential.

- Christopher K.C. Serow

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