

SORRY ABOUT THAT . . .

An offer to make amends can dispatch a defamation claim.

Legal practitioners can stray into defamatory terrain with an injudicious choice of words or a communication made indiscreetly.

Once that line has been crossed, it is important for practitioners to understand that an offer to make amends can provide a total defence to defamation proceedings.¹

In the typical scenario, a practitioner makes assertions with the aim of advancing the client's position, but takes things one step too far. The offended party responds by threatening to issue defamation proceedings. The practitioner's strategy at this point is critical to containing damages and legal costs.

A simple and effective measure of damage control was introduced in Part 3 of the *Defamation Act 2005* (Vic) to resolve this kind of dispute without litigation. A timely and appropriate offer can operate like a "get out of jail free card" for practitioners facing a defamation liability.

In a recent claim at LPLC, if the practitioner had been aware of the Part 3 procedures, he would undoubtedly have adopted this route to contain the damage.

The practitioner was acting for the wife in bitter matrimonial proceedings. Unable to contact the unrepresented husband by telephone or ordinary mail, the frustrated practitioner sent him a fax. The husband had sent faxes from this number in the past.

The fax announced that an agreed timetable for exchanging financial statements was in doubt because the Australian Taxation Office was investigating the husband for submitting a fraudulent tax return.

Unfortunately, the fax destination was an office where the husband worked part-time as an accountant. It was read by work colleagues before being passed onto him later in the week. The husband alleged that as a result of this fax, his professional reputation had been seriously damaged.

The husband instructed lawyers, who served a letter of demand within the week. They demanded from the practitioner a written apology, modest damages and a small amount of legal costs but offered to resolve the matter if the apology was made and legal costs paid within the week.

The practitioner's reaction was defensive, given the acrimonious nature of the dispute between husband and wife and because the husband had previously made a spurious complaint to the Legal Services Board.

The practitioner's impulse was to nip the allegations in the bud with a swift denial, reasoning that the fax had only mentioned that the matter was being "investigated".

He did not give much more thought to the exchange and did not notify LPLC.

The husband issued proceedings and there was no offer of amends to assist the defence of the claim.

Valid offers

The *Defamation Act 2005* (Vic) provides that a publisher can make an offer to make amends on a without prejudice basis; however, the offer cannot be made 28 days beyond the time the offended person sent a "concerns notice" to the publisher.

A concerns notice means a written communication outlining the defamatory imputations: s14.

Once the publisher makes a valid offer to make amends, the ball is in the aggrieved party's court. If they accept the offer, proceedings cannot be maintained. If they reject the offer, s18 outlines the criteria relevant to determining whether the offer was reasonable and timely and so provides a defence.

One of the relevant factors is whether the publisher made the offer as soon as practicable after becoming aware of the defamatory potential of the publication. Given this requirement for a timely reply, practitioners are urged to contact LPLC sooner rather than later to discuss damage control.

Even if the imputations put by the aggrieved party are unsustainable, there is a further particulars process to be satisfied within 14 days as set out in s14 of the Act.

Lessons

The ultimate risk avoidance strategy in defamation cases is to think carefully before you send a strongly worded or controversial communication. As this claim demonstrates, it is sometimes the mode of communication as much as the message which carries the risk.

In many cases an alleged defamation can be redressed with a timely offer of amends.

Clearly, an appropriately worded reply is a valuable addition to the practitioner's defence arsenal and practitioners are well advised to negotiate this process with the assistance of LPLC rather than going it alone. ●

This column is provided by the **LEGAL PRACTITIONERS' LIABILITY COMMITTEE**. For further information ph 9670 2001 or visit the website www.lplc.com.au.

1. *Defamation Act 2005* (Vic) Part 3 deals with the making of offers of amends.



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