

DEFAMATION REQUIRES TIMELY ACTION

Defamation actions are subject to unusual extension of time provisions.

Defamation issues tend to materialise as claims at the Legal Practitioners' Liability Committee (LPLC) in two guises. Some claims arise when practitioners are alleged to have defamed another party in the course of conducting a file. The other context involves practitioners acting for clients who may have been defamed by others and wish to take action. Limitation problems can arise where practitioners miss the one-year time limit for bringing a claim.

For practitioners on the receiving end of a defamation complaint, we discussed the benefits of the "offer of amends" procedures under Part 3 of the *Defamation Act 2005* (Vic) in our July 2009 column. This avenue allows the parties to resolve defamation disputes swiftly and without resort to litigation. If the offer is rejected, the offer of amends can assist in the defence of a claim and potentially provide a total defence. This alternative route can also be used to effect on behalf of clients.

The problem of missed limitation periods for defamation claims is more unforgiving. The *Limitation of Actions Act 1958* (Vic), s5(1AAA) provides only one year from the date of publication to bring a defamation action.¹

Extension provisions

The extension provisions governing defamation claims are under Division 2A of the *Limitation of Actions Act 1958* (Vic). They offer fairly cold comfort if a plaintiff or practitioner misses the one-year limit. Under s23B there is a right to ask the court for leave to extend time, subject to a long stop period of three years.

But the wording of these extension provisions is unlike other extension provisions we are familiar with, where the court is given a degree of discretion. The onus is on the plaintiff to show that it was not reasonable to have commenced proceedings within 12 months. This is the only basis on which a court may order an extension.

A recent Queensland Court of Appeal decision construed the legislation strictly, demonstrating that it will be very tough for a plaintiff to discharge the onus.

In *Noonan v MacLennan & Hookbam* [2010] QCA 50 the Court considered the Queensland

equivalent of the *Limitation of Actions Act 1958* (Vic), s23B.

In the months after the alleged defamation by colleagues, the plaintiff, Noonan, became caught up in alternative dispute procedures set out by his employer, a university. He lodged a complaint about his colleagues, who were suspended. Initially, he followed the university's grievance procedure and he read this procedure to mean that he had to choose either this route or a defamation action in court.

About seven months after the alleged defamation, a settlement was reached between the suspended staff and the university. Mr Noonan learned his complaint against them had been set aside but discovered that a defamation action was still available to him. Three months after this and with the limitation period soon to expire, he determined to pursue defamation proceedings.

question as to the time that might be permitted for extension (which cannot be beyond the long stop period of three years from publication).

- The fact that the plaintiff might be pursuing some other remedy does not make it reasonable not to have commenced proceedings.
- Ignorance of the time limit is not a reasonable excuse for not complying with it.

The judgment shows there is a heavy onus on the plaintiff, and it will be quite difficult to discharge that onus.

Risk management

Missed limitation periods remain a persistent source of claims at LPLC. Awareness about the range of time limits for bringing claims is an essential part of every practitioner's armoury.

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He started preparing the materials to brief a solicitor and "distilled" his instructions to "several hundred pages". Naturally, this took some time and the limitation period expired in the meantime. He had not yet retained a solicitor when the 12-month limitation period expired. The application to extend time was granted at first instance but set aside on appeal.

The Queensland Court of Appeal commented on the extension of time provisions governing defamation claims:

- These provisions are not the same as extension provisions in other legislation.
- The onus is on the plaintiff to show that it was not reasonable to commence an action within 12 months.
- The court has no discretion in this question. The only discretion is the secondary

proceedings are issued within 12 months, even if the writ is then kept in the drawer while settlement negotiations occur.

Given the strict time limits that govern both offers of amends under the *Defamation Act* and the extension of time provisions under the *Limitation of Actions Act*, prompt action is critical. We recommend the earliest possible notification to LPLC when potential problems emerge. ●

This column is provided by the LEGAL PRACTITIONERS' LIABILITY COMMITTEE. For further information ph 9672 3800 or visit www.lplc.com.au.

1. Section 5(1AAA) of the *Limitation of Actions Act 1958* (Vic) applies to publications after 1 January 2006 when the *Defamation Act 2005* (Vic) came into force. For publications prior to this, the old regime applies.