Legislative Assembly

26/09/2002

Defamation Amendment (Costs) Bill

Hansard

Extract

Second Reading

Mr BARR (Manly) [10.19 a.m.]: I move:

That this bill be now read a second time.

Defamation law has been much debated recently; indeed, it is a continuation of the debate that has taken place for a couple of decades with all sorts of bodies looking into defamation law reform. The debate has occurred because our defamation laws are not working and, I believe, are a travesty of justice. The Defamation Amendment (Costs) Bill focuses on costs. The task force that recently looked into the issue of defamation and the consequential proposals that the Government will put forward in its bill do not focus on costs at all. The focus is on capping non-economic loss, reducing the limitation period from six years to 12 months, barring corporations from being able to bring actions in defamation, and various other measures.

Costs are a significant problem in the defamation debate, because parties use costs to punish their opposition. Costs become a huge factor in defamation cases. For example, even if the mischief done is fairly minor, the costs to a defendant can be significant. In a number of cases the costs have far exceeded the damages awarded for the mischief. The Ballina Shire Council case is one such example. That case basically determined that councils cannot sue in defamation. In another case that is being heard at the moment a councillor is seeking damages of $10,000 and costs of $450,000. Costs are used as a device to intimidate the opposition. The practice is not new; it has been going on for a long time.

This State's defamation laws are antithetical to the democratic process. They inhibit free speech and force self-censorship upon newspapers, individuals, councillors and many other people because people fear being sued. The fear of being sued is not simply that someone may be liable in damages; it is the fear of having to go to court and have enormous costs imposed. In other words, costs are very much used as part of the process, and I suggest that is a perversion of the way the justice system should work.

Defamation laws are not just a pimple on the face of democracy; they are a festering sore. They are a festering sore because they inhibit free speech, which is the very basis of our justice system. If there is not sufficient free speech we do not have a full, flourishing democracy. New South Wales has a statutorily modified common law system, a very cumbersome, two-process system in which there is a trial before a jury followed by an appearance before a judge. The process drags out proceedings endlessly and it becomes enormously expensive. This State's defamation laws startlingly reveal the full pomposity of the law and the pretentiousness of the legal profession. A trivial matter can reach court and become a sick parody of legal mannerisms, phoney wordplay, and feigned protestations about the saintly and impeccable character of the plaintiff and the supposed terrible hurt done to his or her reputation by what may be a few relatively innocuous words.

I cite the example of a case in Victoria involving the Bannockburn Yellowgum Action Group. The group was formed after the local water authority, Barwon Water, announced plans to clear 20 hectares of woodland and the group conducted a campaign against it. The chief executive officer of Barwon Water was a person called Frank De Stefano. The objectors put up stickers that read "Barwon Water, Frankly Foul". In response, Frank De Stefano sued the group for that slogan and sought $2 million in damages from the seven members of the group. The writ stated that in saying "Barwon Water, Frankly Foul" the group was saying that Mr De Stefano "was a foul person, was a person smeared with the sewerage of that authority of which he was chairman; was a person who smelt like sewerage and was a person who was unfit to hold the position of the chairman of Barwon Water". That kind of exaggeration and posturing takes place in defamation actions. The lawyer representing the plaintiff will seek to allege imputations far in excess of any word that may have been printed or said about that person by the defendant. As a result, the legal profession and the courts are tied up with unnecessary litigation on fairly trivial matters.

The purpose of this bill is to restrict costs to the quantum of damages, thereby ensuring that much less litigation takes place than currently is the case. It is often said that New South Wales is the litigation capital of the world. The *Sydney Morning Herald* of 23 May this year quoted figures indicating that in New South Wales there is one defamation writ for every 79,000 persons. In England the figure is one for every 121,000, and in the United States of America the figure is one for every 2.3 million. I am not aware of the variance from state to state in the United States, but I think no-one would deny that New South Wales has a lot of defamation litigation. The situation is out of control, and it has never been taken properly in hand.

The Government has a golden opportunity in this session of Parliament to take serious action with regard to

the defamation laws. My proposal is that we should not get caught up in the legal issues, such as public figure tests and many other issues that have been discussed over the years. In one fell swoop this bill will reduce the number of cases brought before the courts. Under the bill it will not be worthwhile for a plaintiff to bring an action for a minor matter, because the plaintiff would know that he or she may incur enormous costs in bringing the case and that those costs may not be recovered.

Under the existing defamation laws, the wealthy and the powerful can intimidate the ordinary people because they have the resources to bring defamation actions. They can put on slap writs. There are many instances of local community members having slap writs against them. This inhibits everyone else from taking action or saying too much in relation to something that may be happening in their neck of the woods that they do not like. Similarly with local councils, people are inhibited in what they say because of this issue of defamation.

Currently the law acts in favour of the wealthy and the powerful and against the ordinary person. The ordinary person does not have the resources to fight the big, powerful players. Under the Defamation Amendment (Costs) Bill, the not so wealthy, ordinary people will know that the worst that could happen to them is that they may have minor damages awarded against them. They would have minor levels of costs, instead of having minor damages awarded against them and the plaintiff seeking a higher level of costs. Schedule 1 [1] inserts new section 57A. New section 57A (1) provides:

> In proceedings for defamation, the amount of the costs of the plaintiff (or of any particular plaintiff if there is more than one plaintiff) that are payable as party/party costs in the proceedings is not to exceed the amount of the damages ordered to be paid to the plaintiff in the proceedings.

I have run this provision by a number of people to see what possible complications or difficulties there may be, and it seems that there are very few. It seems that the main objection to the provision is that if a not-so-wealthy plaintiff comes up against a big player, that circumstance could cause some difficulties. However, the overriding concern that we must have in a democracy is to make sure that the little players, the ordinary people, and public officials are not inhibited by the fear hanging over them of being sued in defamation by powerful interests. I believe this House should look at the defamation law as it now stands as imposing a great inhibition on the democratic process, and that we should make sure that we free up our democratic system so that we do not have this inhibition.

The Free Speech Victoria Committee speaks about four forms of freedom it would like to see enshrined in law: freedom to speak about corporations, freedom to speak on matters of public interest, freedom to speak about the performance of public officers, and freedom to speak without fear of unspecified damages. If we are to function as a thriving democracy we must ensure that free speech is not inhibited. We can achieve that aim by reducing costs to the quantum of damages. I believe that will reduce significantly the amount of litigation and free up public debate.

I call on the House, particularly the Government—I have spoken to officers of the Attorney General's Department about this matter—to support this bill. It presents a chance to clean up the defamation system dramatically, in one fell swoop. Rather than getting tangled in legal technicalities, the bill attacks the problem from a different angle: the cost side. I am sure the Government will propose the inclusion of mediation and that sort of thing. However, we do not want to reach even that stage: We do not want patently absurd cases even to begin. We want to stop the slap writs, and encourage free and open expression. If we limit costs to the quantum of damages people will feel more able to comment publicly about all sorts of issues. I call on honourable members on both sides of the House to support this bill.