Defamation Amendment (Costs) Bill

Second Reading

Mr BARR (Manly) [10.57 a.m.]: I move:

That this bill be now read a second time.

The Defamation Amendment (Costs) Bill takes a novel approach by focusing specifically on costs. It will prevent courts from being able to order costs against a defendant in defamation actions when the plaintiff has been awarded damages of less than $25,000. The bill follows on from the reforms to reduce legal costs in the Government's civil liability legislation, which Parliament passed last year. The bill will assist in clarifying Parliament's position in respect of Supreme Court Rules, section 52A, rule 33, which is not being enforced by the courts in defamation actions. This will address the concerns of Justice Simpson, as noted in Her Honour's recent decision in *West & Anor. v Nationwide News Pty Ltd*.

Defamation is an area of the law that is badly out of step with modern times and community values, and is in need of substantial reform. The law of defamation as it exists today had its origins in feudal times and in the concept of aristocratic honour. In those days noblemen who believed their honour had been harmed would challenge the accused party to a duel to settle their differences. In today's society, feudal honour has been replaced by the legal concept of reputation, and monetary damages has replaced the duel as the legally sanctioned remedy. While the law may have progressed, in that it no longer sanctions the use of violence to settle disputes, today the law of defamation is no less of the preserve of the aristocratic class than in feudal times.

The very high costs and risks associated with initiating defamation actions mean that normally only the very rich and powerful in our community can resort to the law to restore an injured reputation. The rough rule of thumb holds that in a case involving $10,000 in damages a party should expect to pay around $80,000 to $100,000 in costs. It is strange that given the high costs associated with defamation that there have been no recent attempts to address this issue. For example, last year's task force on defamation law reform did not mention costs in its report. I also note with interest that the more than 400-page report produced by the Irish Law Reform Commission on defamation law in the mid-1990s did not mention this aspect either.

Debate resumed from 18 September.2003

Mr DAVID BARR (Manly) [10.00 a.m.]: I have introduced the Defamation Amendment (Costs) Bill, which, basically, will prevent courts from being able to order costs against a defendant in a defamation action where the plaintiff has been awarded damages of less than $25,000. The purpose of this bill is to prevent the kind of litigation which can intimidate persons of ordinary financial means from expressing their feelings freely and openly in our democratic society. The defamation laws have what is sometimes called a chilling effect; in other words, people are inhibited in what they say for fear of being sued in defamation. The fear that people have is not necessarily that they have been responsible for a defamatory publication; it is not damages that they necessarily fear, but the costs.

Costs become, by far, the biggest single factor in defamation proceedings. Costs have a punitive effect on the whole situation, and it is a perversion of the judicial system wherein costs become a barrier for the delivery of proper justice to people. I am not the first person to introduce legislation in relation to costs. On 30 April 1886, a private member of the New South Wales Parliament, George Reid, gave a second reading speech in this place for a bill that was very similar to the one that I have introduced. In those days, which were not long after the introduction of responsible government, it was common for private members to undertake a significant share of the legislative load. It is a pity that it is not still the case.

George Reid later became the leader of the Free Trade Party, Premier of New South Wales, our country's fourth Prime Minister and the first High Commissioner to London. In introducing his bill he noted that a restriction on costs similar to that which was proposed had long been the established law in England. He noted that in 21 James, chapter 16, the law stated that in action for slander where a verdict was less than 40 shillings the costs should not exceed the amount of the verdict. Similarly, in 58 George III, chapter 30, the law stated:

That in all actions of suits of assaults and battery or for slanderous words to be sued or prosecuted in any court whatsoever which hath not jurisdiction to hold plea to the amount of forty shillings in such actions of suits if the jury for the trial of the issue … do find or assess the damages under thirty shillings then the plaintiff or plaintiffs in such action or suit shall have and recover only so much costs as the damages so given or assessed shall amount to without any further increase of the same.

Reid noted that the law in New South Wales at the time was much harsher than that which applied in England. He said that his object was:

… to meet the cases of individuals against whom actions are brought, and who, by the verdict of the jury, are substantially acquitted of the charge which forms the subject of the action—cases in which the jury returned a nominal verdict—for example, a farthing. These actions sometimes last a very long time and although the verdict is for a farthing only, the costs amount to hundreds of pounds, and a poor defendant, against whom such a verdict is returned, has to endure the term of twelve month's imprisonment.

Fortunately we no longer imprison people who are unable to pay their legal bills—we now have bankruptcy laws which are much more enlightened than that—but we still have a problem when costs in a defamation action greatly exceed damages. It is the cost component which is punitive and which the ordinary person fears most in defamation actions. Reid went on to describe how it came to be that poor defendants could be unjustly saddled with enormous costs bills. He said it worked in this way:

We will suppose that a man in a high position has been the subject of a libel or slander; he, of course, brings his action in the Supreme Court, and he of course is able to employ the best professional assistance, and is able to conduct the litigation in a most expensive way. The trial may be a long one, and the verdict on a question of law, owing to the difficulty of pleading in these actions, may have gone in favour of the plaintiff to the amount of a farthing; thereupon, under this rule, it would be held that it was an action fit to be brought before a superior court, the person attacked being a man in a high position, and then a certificate [for costs] would issue. Then, again, would the defendant, however poor his position, be exposed to the consequences of this enormous expenditure.

The nature of defamation is still as complex today. When I began my second reading speech some weeks ago I mentioned *Supreme Court Rules,* section 52A, rule 33, and I will come back to that because I have a disallowance motion in relation to rule 33. In the meantime the Supreme Court has omitted defamation from rule 33. Rule 33 does not allow for recovery of costs where damages under $225,000 have been awarded unless the plaintiff can justify there was a reasonable chance of success. That has now been thrown out the window. I shall return to that later because it is the subject of a disallowance motion standing in my name. Reid cited a number of cases to support his bill. One related to an event that took place at Clontarf in the electorate of Manly. It concerned a publication by a young journalist of a cartoon that depicted what was described as "disgraceful proceedings which occurred at a picnic on a public holiday in Clontarf".

Such things no longer happen there. The case ran for several days and the jury found that the defendant was substantially free from blame. Although only nominal damages were awarded, the costs were substantial. As the journalist was well regarded there was a public appeal to pay his bill. Reid noted that this trial would have ruined the promising career of the journalist and was a miscarriage of justice, if not a miscarriage of law. Reid's bill was passed by the House and contained in Act No. 26 of 1886, "An Act to amend the law relating to libel and slander". The substance of it stated:

If in any action for defamation the jury or the judge sitting as a jury return a verdict in favour of the plaintiff for damages in any sum less than 40 shillings the plaintiff shall not have judgment to recover any costs unless the Judge in any case of libel shall certify that the words charged as defamatory were published without reasonable grounds of excuse.

In this bill the threshold figure is $25,000, but 40 shillings in 1886 was a sizeable amount. Reid's bill was later re-enacted as part of the Defamation Act 1901 and the Defamation Act 1912. In 1957 the Defamation Act was re-enacted again in a substantially modified form and this time Reid's section was omitted. Although this was noted by some members in the debate as being a problem with the bill, an amendment was not moved, nor was it included in a further rewrite of the Act in 1974, the Act that is in force today. The situation varies between States and Territories. In Tasmania section 30 of the Defamation Act 1957 provides:

If the plaintiff in an action recovers a sum less than $4, he is not entitled to recover from the defendant any of the costs of the action.

South Australia has a provision that is similar to my bill. Section 101.02A of the South Australian *Supreme Court Rules* provides that plaintiffs are unable to claim costs in defamation provisions where the claim for damages is less than $25,000 unless the court otherwise orders. Although this is similar to my bill, my bill does not seek to give a discretionary power to the court. The experience in New South Wales in defamation actions is that the court is too inclined to exercise this kind of discretionary power in favour of the plaintiff.

The purpose of the threshold figure of $25,000 is to discourage trivial actions where the plaintiff's reputation might be slightly dented at worst but the costs incurred could be enormous. If the plaintiff succeeds in obtaining costs, the defendant could be ruined financially for what may be a trifling matter. People are often restrained from making free and fair comment about public matters because they fear being sued for defamation. That is the chilling effect. It applies to the media, which must exercise self-censorship in what it publishes, and to members of the community. The threat of defamation results in many taking the approach, "If in doubt, leave it out." Many statements that would be otherwise published are omitted because people do not want to risk defamation action.

The highly technical nature of defamation law compounds this chilling effect. The layperson has great difficulty in understanding how the law works. Even those with a legal education but without expertise in defamation law can struggle to understand the complexity of the law. The emphasis on defences in the law also means that prima facie most criticism of others is actually defamatory. The law's construction means that the legal onus is heavily weighted against the defendant. Once a defamatory publication is alleged, a defendant must then establish one of the highly technical defences to escape liability. Simply the receipt of a writ for defamation can result in a defendant incurring thousands of dollars in legal fees.

The heavy onus placed on defendants means that so-called slap writs can be used by plaintiffs to stifle criticism of their action. If a wealthy person or corporation—and corporations with more than 10 persons cannot bring an action—do not like something that has been said or published, they can issue a writ and demand that the publication be withdrawn, an apology issued or compensation paid. The simplest and cheapest option for a person of modest means in receipt of such a notice is to simply comply with the demands, regardless of whether the publication was justified. In that way they do not incur the massive legal fees and risks involved in defending a defamation case. This aspect of the law of defamation is perhaps the most oppressive and the most in need of reform.

This is not the first time I have introduced a bill to contain costs in defamation actions. Last year I introduced a private member's bill entitled the Defamation Amendment (Costs) Bill 2002, which sought to restrict costs orders to the quantum of damages awarded. Although the bill did not receive the support of the Government at that time, I was able to negotiate an amendment to the Government's Defamation Amendment Bill 2002, which resulted in subsection 1 (b) being inserted into section 48A of the Defamation Act 1974. This section now

provides that the court, in awarding costs for defamation matters, may have regard to whether the costs in the proceedings exceed the quantum of damages to be awarded. Although I was pleased to have successfully negotiated the passage of that amendment, I am not convinced that this measure goes far enough and that it will have the intended effect of my original private member's bill, that is, to inhibit unnecessary and frivolous court actions.

This bill takes a different approach to my previous bill. Rather than restricting costs to the quantum of damages, the bill will prevent a plaintiff from obtaining an order for costs unless the plaintiff has been awarded more than $25,000 in damages. Plaintiffs and their legal advisers will need to be certain that the case is very strong before they bring a matter to court if they want to recover their costs. Under the law as it now operates it is too easy for a plaintiff to prosecute a trivial matter. Currently more than 60 per cent of cases are awarded less than $50,000 in damages. As the law currently stands it is too easy to prove a damaged reputation. The at-large nature of damage assessments and focus on vindication of reputation mean that courts are obligated to award at least a few thousand dollars in damages. This is the case even where a plaintiff cannot prove any actual financial damage.

Section 46 (3) of the Defamation Act provides that exemplary damages are not to be awarded in New South Wales. However, this measure is rendered useless by costs orders. When costs are added to the damages, awards in defamation cases become highly punitive. Plaintiffs can run up huge costs prosecuting a fairly minor matter, merely as a means to punish the defendant. A relatively trivial matter that should never have been brought before the court can turn into a powerful weapon when wielded against a person of normal means. In most trivial cases it is highly debatable whether any damage to reputation has occurred at all.

The highly technical nature of the law and its bias towards the plaintiff means that in reality no damage occurred to the plaintiff that the community would deem to be worthy of compensation. By removing the prospect of a costs order against defendants in cases where the damages award is less than $25,000, this bill will help to reduce the number of trivial cases brought before the courts and members of the community will feel freer to speak out without the fear of having a massive costs order made against them over a trivial mistake. It will also reduce the number of settlements and slap writs in cases involving trivial matters, as defendants will be more certain about where they stand in certain situations.

To reiterate, defamation law is the domain of the wealthy. The wealthy can afford reputations; people of ordinary means cannot. Unless the law addresses this issue, it is totally biased in favour of people with the financial wherewithal to use the courts when most people cannot. It has been argued that my bill might inhibit or work against the small person bringing a case or bringing an action. Let us get real. How many so-called small people or people of ordinary means do this now? They do not because they cannot. The law in New South Wales, as in many other instances, is beyond the means of ordinary people. It is just a fiction to think that somehow this bill will damage the rights of small people. The overriding mischief that this bill is trying to cure is to stop the law being used to intimidate free speech. In a democracy that is an overriding issue and one that the defamation law at the moment works directly against. Unless this Chamber and other State Chambers across this country recognise and address that issue, we will continue to inhibit free speech in this country.

In New South Wales we have a high level of defamation actions. The Communications Law Centre at the University of New South Wales produced figures that showed that New South Wales has one defamation writ per 79,000 of population, compared with England, which has one defamation writ per 121,000 and the United States of America, which has only one writ per 2.3 million people. That is why New South Wales is known as the defamation capital of the world. It is a joke. It is a carbuncle on our democratic system; it is an inhibitor of free speech. This bill is not the first bill to propose limiting costs on litigation in tort issues, but it is the first in relation to defamation.

Last year, in response to spiralling costs in the insurance industry, the Government introduced the Civil Liability Bill 2002. That bill included a section that placed caps on the costs that could be ordered according to the size of the damages awarded in personal injury cases. The intention was to discourage the increasing tendency towards protracted litigation

that was leading to skyrocketing insurance premiums. It is useful to consider the comments contained in the Premier's second reading speech in relation to the cost-capping provisions of that bill. The Premier noted:

The cap on fees will promote efficiency on the part of the legal profession and help to contain claims costs.

Likewise, this bill will also promote efficiency on the part of members of the legal profession by discouraging them from litigating cases in which the client is unlikely to win more than $25,000 in damages. As the law currently operates, the high fees that lawyers can earn acts too much as an incentive for them to encourage plaintiffs to litigate on trivial matters. The legal profession already has a bad reputation in that regard, and this bill will help to address that problem. High costs in defamation actions also have an impact on the insurance industry. This bill will help the community to keep the lid on insurance premiums. I refer again to part 52A, rule 33 of the *Supreme Court Rules,* which states:

Where a plaintiff recovers the sum of not more than $225,000 they are unable to recover costs unless the court finds that they had sufficient reason for commencing or continuing proceedings in the court.

As I indicated earlier, recent changes to the *Supreme Court Rules*, which were tabled this week in this House, omitted defamation from this regulation. So, if there are damages of under $225,000 plaintiffs are able to recover costs, whereas they might not have been able to do so previously. That is working counter to this bill. I will address that issue later today when I speak in debate on my disallowance motion. This bill will override that. This bill will ensure that it is not possible for the courts to do anything other than not award costs if the damages awarded are under $25,000. In the case *West and Another v Nationwide News Ltd*, regulation 33 was brought to the notice of the lawmakers. Justice Simpson said that the rule had not been enforced in defamation actions for a variety of reasons. She drew this matter to the attention of the lawmakers and said:

If the lawmakers wish to make a special exception in cases of defamation, they are open to do so.

Hence we have had the change to the *Supreme Court Rules*. I will refer to that issue later this afternoon. I have had comments and feedback on the proposals in this bill from a number of parties with special knowledge and experience in defamation law. I am grateful for their comments. On 15 August I received a letter from Mr Jack Hermans, Executive Secretary of the Australian Press Council, informing me that at its July meeting the Press Council had agreed to support my proposals for changes to the New South Wales Defamation Act involving the limiting of costs.

This bill should be of assistance to the media. More than 80 per cent of defamation actions are taken out against the media and the Press Council is understandably keen to discourage frivolous actions where the damages sought are minimal. The costs involved in defending these actions for media companies is considerable and an unnecessary fetter on free speech and journalism. I also sought comment from the New South Wales Bar Association. On 1 August Mr Bret Walker, SC, President of the Bar Association, provided me with feedback on the bill. He noted:

The Bar Association regards the balance to be struck between the vindication of reputation by suing on a cause of action in defamation on the one hand, and the burdensome, sometimes ruinous, incidence of costs disproportionate to the monetary worth of the interest at stake, on other hand, as one in which Parliament has the pre-eminent role.

It was also noted that $25,000 seemed an appropriate sum to advance the intended policy. Mr Walker, through the Bar Association, pointed out that he does not believe there is a discernible increased trend towards minor or trivial defamation actions, and he states:

If there was such a trend this could be a mischief to be remedied by guidance of appellate

decisions or perhaps legislation.

This legislation seeks to restrict the amount of litigation that is taking place and, in the process, to free up speech in our democratic system. Last year I received a critical analysis of the proposal in my previous Defamation Amendment (Costs) Bill 2003 in an article written by Mr Roy Baker, a senior legal officer at the Communications Law Centre, which was published in the centre's journal. Mr Baker noted that the proposal was worthy of consideration—this is where he limits costs to the quantum of damages—but he had concerns that it could act as a disincentive for defendants to settle. That concern has now been addressed as the new bill operates by placing the limit at $25,000 and no longer caps costs at the quantum of damages. I thank Mr Walker, the Press Council and the communication law centres for their thoughtful responses.

Debate resumed from 16 October.2003

Mr DAVID BARR (Manly) [10.00 a.m.]: The Defamation Amendment (Costs) Bill seeks to prevent a court from making an order for payment of a plaintiff's costs unless the amount of the damages ordered to be paid to the plaintiff exceeds $25,000. The reason for this is to discourage frivolous actions before the District Court or before the Supreme Court. Now with the amendment to the Supreme Court Rule 33, which will not include defamation actions, more cases will be heard before the Supreme Court. My concern all along has been the issue of costs. Many law reform areas have focused on the issue of damages and the capping of damages, but very little has been done in relation to costs, and really nothing has been done in relation to costs in defamation. I have argued that costs are the punitive aspects of defamation actions.

Costs are the great inhibitors of free speech. If someone fears a defamation action against them, the fear is not necessarily that the action has any justification but rather that the defendant knows that defending the action will incur significant costs. New South Wales is the defamation capital of the world on a per capita basis. We have to ask the question why is it that there are so many more defamation actions per head of population in New South Wales than in other jurisdictions, and far more than in the United States of America? It is because the law is out of kilter. At the moment the law works in favour of the wealthy and the powerful. The small person does not really get a look-in. The law can be used to inhibit free speech, and my primary concern about defamation actions is the inhibition of free speech.

The Legislation Review Committee has made some comments about the bill. I commend that committee, which is under the chairmanship of the honourable member for Miranda, for a really terrific job. It is a huge task to go through all the bills that come before this House and to analyse them and make some comment. The committee stated that it understands that the purpose of the bill is to provide a disincentive for potential plaintiffs to bring actions based on a trivial injury to reputation, or which do not have a reasonable chance of success. This is particularly aimed at reducing the incidence of wealthy plaintiffs using defamation to suppress free comment and reducing the significant costs of a defamation action that can burden a defendant even in the absence of a significant injury or a meritorious case.

That is a spot-on summary of what the bill is all about. The idea is to discourage people bringing actions unless there has been a serious injury. One of the problems we face is that we have not really provided an appropriate cause of action for more minor matters and an appropriate venue to bring actions where there may be some slight damage. What happens as cases balloon out? They end up in the District Court or the Supreme Court with costs spiralling, and both defendant and plaintiff end up on a roller-coaster ride that costs megabucks. And it could all be for something that is fairly small to begin with.

There needs to be an appropriate cause of action and an appropriate remedy. The court system is not providing those at the moment. It is an abject failure and it is about time that this House addressed the issue. My theme all along has been that as they exist now defamation laws inhibit free speech. This Chamber is about free speech. This Chamber should be concerned about the shackles on free speech that the defamation laws present. I believe that rather than looking at the costs aspect of damages and trying to tinker with the incredible

complexities of defamation law, we should cut straight to the heart of the matter and provide a disincentive for people to bring actions unless they have a very strong case, unless their reputation has been severely hammered by a publication. I believe that we should be discouraging defamation actions and we should perhaps be looking at other venues and other causes of action.

At the moment the law is entirely unsatisfactory. It has been unsatisfactory for a long time and it seems that governments and parliaments find it all too difficult to deal with and it ends up in the hands of the vested interests of the courts and the barristers, who have an interest in maintaining the law because it is a good source of revenue for barristers. It is about time we stop this and it is about time that we look realistically at concepts of reputation instead of looking back to notions of reputation that existed prior to the 20th century. I ask that the House support this bill as a necessary step to bring some sanity to this whole defamation issue. I commend the bill to the House.