

HONG KONG 2018 INTERNATIONAL COMMERCIAL LAW CONFERENCE

SESSION 5, WORDS WITHOUT BORDERS: DEFAMATION AND THE INTERNET

SATURDAY, 22 SEPTEMBER 2018, 9:30 – 10:45 AM

POSSIBLE QUESTIONS ON NOTICE

1. When are search engines liable for the publication of:
  - (a) search results;
  - (b) underlying web pages?Under what circumstances should they be liable?
  
2. Do different principles apply to the liability for publication by the operators of social media platforms, such as *Facebook* and *Twitter*, and online forums and blogs? Should they?
  
3. In its 2018 report, *Statutory Review – Defamation Act 2005*, the NSW Department of Justice has recommended a number of changes to the *Uniform Defamation Laws*.  
  
Speaking generally (ie without reference to the detailed recommendations, some of which are referred to below), what are the main areas that require reform in relation to the operation of the law of defamation to the internet?
  
4. In *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858 (8 June 2018), McCallum J held (at [31]-[42]) that a threshold test of seriousness applies under the *Uniform Defamation Laws*.  
  
Recommendation 14 of the 2018 NSW Justice Department Report, *Statutory Review – Defamation Act 2005*, provides:  
  
*Recommend that the Council of Attorneys-General ask the Defamation Working Party to review application and effect of section 1 (serious harm) of the Defamation Act 2013 (UK) and consider whether:*
  - (a) a ‘serious harm’ or other threshold test should be introduced into the Model Defamation Provisions;
  - (b) proportionality and other case management considerations could or should be incorporated into a serious harm test;
  - (c) the defence of triviality should be retained or abolished if a serious harm test is introduced.

What is your view?

5. After the Victorian Court of Appeal decision in *Bauer Media Pty Ltd v Wilson* [2018] VSCA 68 (22 March 2018), is the controversy settled about the operation of the cap under s 35 of the *Uniform Defamation Laws*?

6. When is a defamation defendant liable for a plaintiff's loss of a commercial opportunity? What principles govern the review by an intermediate appellate court of determinations by a trial judge in that regard?

7. Recommendation 2 of the 2018 NSW Justice Department Report, *Statutory Review – Defamation Act 2005*, provides:

*Recommend that the Council of Attorneys-General ask the Defamation Working Party to review the Model Defamation Provisions equivalent to section 9 (certain corporations do not have cause of action for defamation) to determine whether the capacity of corporations to sue for defamation should be amended*

What is your view?

8. Recommendation 3 of the 2018 NSW Justice Department Report, *Statutory Review – Defamation Act 2005*, provides:

*Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provisions should be amended to include a 'single publication rule'. If the single publication rule is supported, it is recommended that attention be given to the following issues:*

- (a) *whether the time limit that operates in relation to the first publication of the matter should be the same as the limitation period for all defamation claims;*
- (b) *whether the rule should apply to online publications only;*
- (c) *whether the rule should operate only in relation to the same publisher, similar to section 8 (single publication rule) of the Defamation Act 2013 (UK).*

What is your view?

9. Recommendation 8 of the 2018 NSW Justice Department Report, *Statutory Review – Defamation Act 2005*, provides:

*Recommend that the Council of Attorneys-General ask the Defamation Working Party to consider whether the Model Defamation Provision equivalent to section 26 (defence of contextual truth) of the Defamation Act 2005 (NSW) should be amended to be closer to its predecessor, section 16 (defence of contextual truth) of the Defamation Act 1974 (NSW), to ensure the clause applies as intended.*

What is your view?