Defamation laws have pole-vaulted original purpose

Free speech
The role of the courts is not to police rudeness or protect hurt feelings – let alone dampen free speech and silence journalists exposing poor business behaviour.

Jeremy Leibler

Take it from me: it is not pleasant being on the receiving end of Joe Aston's vitriol. Aston's fountain pen might have the sharpest tip in Australia, and he doesn't hesitate to spill ink (or blood) when his gaze fixes on a target. So I had some sympathy for beleaguered former Blue Sky director Elaine Stead when she attracted his ire in 2018 and 2019.

But the outcome of Stead's high-profile defamation case against *The Australian Financial Review* columnist and his employer last month may have concerning implications.

Justice Michael Lee of the Federal Court found that Aston defamed Stead by calling her a "cretin" who "rashly destroyed capital", "made stupid investments causing loss to unitholders", and is an "untrustworthy VC who fails to deliver on promises to shareholders". The court awarded Stead $280,000 in damages.

In his judgment, Lee recognised the fine line between the right to freedom of expression and the right to reputation, but found that Aston had "pole-vaulted" that line. I don't propose to comment on the correctness of the decision, which will likely be appealed, but it does raise the question of whether Australia's defamation laws have pole-vaulted their original purpose.

Satirical commentators such as Aston are paid to be pointed and unsavoury. But whether or not we welcome their impact, we are in peril if we seek to dampen free speech and discourage discourse by making journalists (more specifically, media proprietors and their legal teams) too timid to publish strong criticism.

While I don't endorse the language employed by Aston against Stead, which was unnecessarily personal and nasty, I don't believe it to be the role of government or the courts to police rudeness. Certainly not if it comes at the expense of the media fulfilling its critical role in exposing bad corporate behaviour.

Senior business people, and directors of public companies in particular, hold privileged and highly influential positions, and must accept the responsibility and scrutiny that comes with it.

Elaine Stead leaves court. Defamation law isn't meant to prevent insults. PHOTO: DEAN SEWELL

The public interest is best served when poor corporate decision-making is exposed and discouraged. Love him or loathe him, Aston serves this agenda with distinction (see Rear Window v Alex Malley).

Let's not forget that the board of the now collapsed ASX-listed fund manager Blue Sky, of which Stead was a member, oversaw what has been described as one of the worst corporate collapses in the past five years, after failing to adequately respond to a short seller's report on the value of its assets, followed by billions of dollars of shareholder value being destroyed.

If the media laws render journalists and commentators impotent to provide harsh commercial commentary, the operation of the market will be undermined.

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And what is it that we would prefer? Silence and sugar-coating from intelligent, well-informed members of the fourth estate? Or reliance on commentary from keyboard warriors in the anonymised chat rooms of Reddit and Twitter trolls?

The Stead case would suggest that, in some respects, defamation law in this country has developed beyond its original purpose. While the law exists to protect individual reputation, there is a general principle that it should not exercise its coercive power unless it is preventing harm.

Defamation law was never intended to prevent insulting language, general terms of abuse, or some defamatory imputation based on a word's archaic meaning. Nor was it intended to provide compensation for hurt feelings, which is unrelated to the protection of reputation.

Lee refers us to a 1942 case in which Sir Frederick Jordan observed in *Gardiner v John Fairfax & Sons Pty Ltd*, "a critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord".

Aston is very good at what he does. When he is at his flamboyant best (or worst, depending on your perspective), he is unrivalled. The judge in this case described Aston as variously "colourful, sarcastic and exaggerated".

As Lee says in his judgment, Aston is "no respecter of persons".

This was a case of the storyteller becoming the story – not a good look, just ask J.K. Rowling. But in this case, the judgment shouldn't mark the end of the story. We need to balance the interests of those privileged to occupy senior positions on public boards with the interests of retail investors and the market generally, who rely on the market's integrity.

Australia's regulatory environment already gives boards too much leeway to ignore the views of the very stakeholders they are meant to represent – shareholders.

Defamation laws need to draw clear and robust lines that focus on the legitimate protection of reputation without disproportionately limiting free speech.

They should not be used to silence legitimate criticism from the media.

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