

CAMLA COMMUNICATIONS LAW BULLETIN

Communications & Media Law Association Incorporated

Volume 36, No 2, June 2017

Special Free Speech and Defamation Issue: Vol 1

Melania Trump, Her Husband and US Defamation Law

Matthew Richardson, Barrister at Level 6 St James Chambers, and Joy Guang Yu Chen offer some insights into US defamation law as pursued by the Trump family.

We're going to open up those libel laws, so that when the New York Times writes a hit piece ... we can sue them and win money instead of having no chance of winning because they're totally protected...

We're going to open up those libel laws, folks, and we're going to have people sue you like you've never been sued before.¹

Donald Trump, then a candidate for the Republican presidential primary, made this threat at a rally in Texas in early 2016. He further complained of the mainstream media's propensity to publish 'purposefully negative and horrible and false' articles about him. To what extent can the new President follow through on his threat to 'open up' defamation law in the US?

In the most recent round of the libel litigation that has been a feature of the new President's life for years, his wife sued Mail Online in the US, and Daily Mail and Associated Newspapers in the UK for a 20 August 2016 publication titled 'Racy photos,

and troubling questions about his wife's past that could derail Trump'.² The article contained allegations that prior to marrying Donald Trump, Melania Trump had, in her modelling days, worked as an 'elite escort' in the 'sex business'. Interestingly, a few weeks earlier the New York Post had published an article titled 'The Ogle Office' which contained ('before she was famous') naked modelling photographs of Melania Trump from 1995. This piece of tabloid titillation had been blithely praised by the Trump campaign - '[t]hey're a celebration of the human body as art. There's nothing to be embarrassed about. She's a beautiful woman.'³ The subsequent publication met with a very different reaction.

The legal actions in the UK and United States were commenced despite the publication of a handsome apology on 2 September 2016.⁴

For the US suit against Mail Online, Melania Trump engaged Charles Harder, the Californian attorney who

Contents

Melania Trump, Her Husband and US Defamation Law	1
Defamation, Online Communication and Serious Harm: An Alternate Approach	4
Tell Them They're Dreaming - Media Defendants and the Defence of Triviality	7
Profile: Larina Mullins, Senior Litigation Counsel at News Corp Australia	10
Journalism, The Arts and Data Protection: The Potential Reach of the Privacy Act	12
Free Speech Developments in the US: A Discussion with the Dean of Yale Law School	15
Does the Border Force Act Inhibit Free Speech and Media Communication?	18
Honest Opinions - Are They Still Defensible?	22
Free Speech and Protecting Journalists' Sources: Preliminary Discovery, the Newspaper Rule and the Evidence Act	24
Music Piracy Siteblocking Injunction Granted	33



Editors

Victoria Wark & Eli Fisher

Editorial Assistant

Imogen Yates

Printing & Distribution

BEE Printmail

1 See video imbedded at Hadas Gold, 'Donald Trump: We're going to open up libel laws', *Politico* (online), 26 February 2016 <<http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>>.

2 The same article published on Mail Online was titled 'Naked Photoshoots, and troubling questions about visas that won't go away: The VERY racy past of Donald Trump's Slovenian wife'.

3 See Jackie Wattles, 'Trump adviser (Jason Miller): Melania nude picture "nothing to be embarrassed about"', *CNN* (online), 1 August 2016 <<http://money.cnn.com/2016/07/31/media/donald-trump-melania-new-york-post/>>.

4 See Daily Mail Reporter, 'Melania Trump: A Retraction', *Daily Mail* (online), 2 September 2016 <<http://www.dailymail.co.uk/news/article-3769798/Melania-Trump-retraction.html>>.

famously, and successfully, sued Gawker on behalf on Hulk Hogan and bankrupted the magazine. Harder initially filed suit in Maryland but that suit was dismissed after the Court found it lacked jurisdiction because of the lack of physical connection between Mail Online and the State of Maryland.⁵ Not to be deterred, the Trump legal team immediately filed the suit again in New York, where Mail Online had offices. This new filing sought damages in excess of US 150 million⁶ and included this incendiary claim: '[t]he economic damage to the Plaintiff's brand...is multiple millions of dollars. Plaintiff had the unique, once-in-a-lifetime opportunity, as an extremely famous and well-known person.'⁷ After a moderate (for this family) scandal, the lawsuit was refiled with that sentence omitted.

On 12 April 2017, both US and UK matters were reportedly settled in Trump's favour for around US 3 million. An apology, agreed by both parties, was read in open court before Nicol J in the Royal Courts of Justice in London.

Some thoughts on US Defamation Law

It is curious that Trump's legal team chose to sue Mail Online in the US as well as Daily Mail in the UK for the printed version of the article. Plaintiffs often pursue defamation actions outside of the US because foreign jurisdictions lack the strong protection given to free speech (especially speech concerning public figures) provided by the First Amendment. The phrase 'libel tourism' has been coined for this practice of forum shopping.

In response to this libel tourism, the US enacted the *SPEECH Act*⁸ in 2010. Under the *SPEECH Act* foreign defamation judgments are unenforceable domestically, unless it is shown that the foreign jurisdiction has a similar guarantee as the First Amendment, or that the matter would have succeeded if heard in the US. In terms of legislative change to libel laws that Trump could attempt, repealing the *SPEECH Act* would be one of the only options. Outside of the *SPEECH Act*, there are no federal defamation laws for Trump to amend or repeal. Defamation laws are made by State legislatures and State libel laws are notoriously tough and defendant-friendly.⁹

Rather, at the heart of 'those libel laws', which Trump referred to in his speech, stands the 1964 US Supreme Court decision of *NY Times Co v Sullivan*¹⁰ and its interpretation of the First Amendment. That ground-breaking judgment found that a public figure cannot succeed in establishing defamation against reporters or publishers unless there was actual malice, that is, the publication was published 'with reckless disregard of whether [information] was false or not'. Affirming the significance of the First Amendment, Justice William Brennan wrote 'debate on public issues should be uninhibited, robust, and wide-open, and that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'¹¹

Trump's indignation and subsequent threat to 'open up' libel laws is perhaps understandable, given the high threshold established by *NY*

Times Co v Sullivan and the fact that the First Amendment has thwarted him personally in the past.

In 2005 Tim O'Brien, then New York Times journalist, published *Trump Nation, The Art of Being the Donald*. In the book (which Trump had co-operated with and which was certainly no hatchet job), O'Brien had the temerity to challenge Trump's public statements that his net wealth was in the billions, instead citing various sources that placed Trump's wealth around US 150-250 million. Incensed, Trump sued O'Brien for US 5 billion in a defamation suit that dragged on for three years. During depositions, when Trump was asked whether his public statements about his net wealth were truthful, Trump gave this memorable answer: '[m]y net worth fluctuates, and it goes up and down with markets and with attitudes and with feeling, even my own feelings, but I try [to be truthful]'.¹² Unwilling to actually disclose his financial records in compliance with discovery requirements, Trump was unable to substantiate his claim that he was, in fact, worth billions and not mere millions. Further, the Court applied *NY Times Co v Sullivan* and found there was no actual malice and dismissed the matter.¹³ On appeal, a bench of three appellate judges affirmed the dismissal.¹⁴

Trump also unsuccessfully sued Paul Gapp, Pulitzer Prize-winning architecture critic for the Chicago Tribune. In 1984 Gapp wrote a column critiquing Trump's proposal to build a 150-storey skyscraper in Manhattan, calling it 'one of the silliest things anyone could inflict on New York'. The Court found that

5 *Trump v Mail Media Inc*, (NY Sup Ct, WL 477997, 6 February 2017).

6 Trump only sought 75,000 USD in the Maryland filings.

7 See the pleadings filed by the plaintiff on 6 February 2017, available at 'Melania Trump lawsuit argues "once in a lifetime" chance to make millions', *National Public Radio* (online), 7 February 2017 <<http://www.npr.org/2017/02/07/513970871/>>.

8 *Securing the Protection of our Enduring and Established Constitutional Heritage ('SPEECH') Act*, 28 USC § 4102 (2015).

9 See, eg, *Libel Terrorism Protection Act*, NY CPLR § 5304 (McKinney 2008).

10 *NY Times Co v Sullivan*, 376 US 254 (1964).

11 *Ibid* 376.

12 Ian Tuttle, 'The Litigious and Bullying – Mr Trump', *National Review* (online), 19 February 2016 <<http://www.nationalreview.com/article/431575/donald-trump-tim-obrien-courtroom-story>>.

13 *Trump v O'Brien*, (NJ Sup Ct, WL 2841286, 15 July 2009).

14 *Trump v O'Brien*, 422 NJ Super 540 (App Div 2011).

Gapp was expressing his opinion, which is protected by the First Amendment.¹⁵ Further in 2014 Blair Kamin, another architecture critic for the Chicago Tribune, called the 'Trump' sign on Chicago Tower a 'wart' on a 'handsome skyscraper'.¹⁶ This time, Trump turned to Twitter rather than a defamation suit.

In 2013 on NBC's 'The Tonight Show', (during the midst of the furore concerning then President Obama's birthplace gripping parts of US society) host Bill Maher made viewers an 'unconditional offer' to donate US 5 million to charity if Trump provided his birth certificate so as to prove he was not 'spawn of his mother having sex with an orangutan'.¹⁷ Trump attempted to sue but was forced to withdraw the matter against Maher. Not dissimilarly, *Hustler Magazine v Falwell*¹⁸ involved the publication of a joke; an advertisement parody that portrayed Falwell in a drunken incestuous rendezvous with his mother. The US Supreme Court found that no reasonable person would take the publication as representative of true events, and so the author of the publication could not be liable in defamation.

Ironically, the new President may not wish people to sue him like he's never been sued before under the more relaxed libel regime he proposes. Unsurprisingly, he has also been the defendant in defamation suits, and he has of course benefited from reliance on the First Amendment. During Trump's campaign to be the 2016 Republican presidential nominee, Trump and Cheryl Jacobus, a GOP consultant, started what a judge later described

as a 'hyperbolic dispute cum schoolyard squabble', which resulted in Trump tweeting that Jacobus was a 'dummy' and 'major loser' who 'begged' Trump for a place on his campaign. Jacobus sued Trump on the basis that the accusations of unprofessional conduct damaged her reputation.

In *Jacobus v Trump*,¹⁹ the judge considered defamation in the age of social media and commented, in what sounds like something approaching despair, that 'truth itself has been lost in the cacophony of online and Twitter verbiage to such a degree that it seems to roll off the national consciousness like water off a duck's back'.²⁰ In this context, the Court found that no reasonable reader would have taken Trump's tweets to be a statement of fact. Rather, following *Trump v Chicago Tribune*, the tweets were an expression of opinion protected by the First Amendment.

And so to 'open up those libel laws' Trump would be required to convince the US Supreme Court to revoke its decision in *NY Times Co v Sullivan*. As President, Trump can of course make Supreme Court nominations, however, it is unlikely any conservative judicial appointee will go soft on the First Amendment or be willing to stifle opinion and public debate.²¹ Indeed, Neil Gorsuch, Trump's nominee and the latest addition to the Supreme Court bench, has a record of ruling favourably for the media in libel matters.²²

The difficulties in finding anti free speech justices for the Supreme Court pale in comparison to the President's threat to use legislation

to 'open up' libel laws, which would be a direct attack on the First Amendment itself. Constitutional amendment, under Article V of the US Constitution, provides a two-step process. First, the amendment must be proposed and accepted by both legislative Houses with a two-thirds majority. Second, the legislatures of 38 States (75% of the States) must ratify the amendment. Since federation, there has been some 11,000 proposals put to the Houses. Only 33 have made it to the second stage, and the States have ratified 27 of these. Constitutional amendment is a mammoth task and for a President who is struggling to capitalise on a Republican majority in Congress, even to secure legislation on his core promises, it seems, at least for now, distinctly improbable.

On 1 May 2017 Reince Priebus, Trump's chief of staff, revealed that the Trump administration is actively looking into changing libel laws, especially how it applies to news media. Evidently aware of the aforementioned difficulties, Priebus concluded with the proviso, 'as far as how that gets executed or whether that goes anywhere is a different story'.²³

There does not seem to be any need for free speech warriors to panic yet. However, this administration is young – it has 45 months to run and the new President tends to defy prediction.

15 *Trump v Chicago Tribune Co*, 616 F Supp 1434 (SD NY, 1985).

16 Blair Kamin, 'Donald Trump: Giant sign on his Chicago Tower like Hollywood sign', *Chicago Tribune* (online), 5 June 2014 <http://articles.chicagotribune.com/2014-06-05/news/ct-trump-sign-kamin-met-0606-20140606_1_hollywood-sign-chicago-tower-donald-trump>.

17 Joseph Ax, 'Trump withdraws "orangutan" lawsuit against comic Bill Maher', Reuters (online), 2 April 2013 <<http://www.reuters.com/article/entertainment-usa-trump-lawsuit-idUSBRE9310PL20130402>>.

18 *Hustler Magazine v Falwell*, 485 US 46 (1988). This case is also authority for the proposition that public figures may not seek damages for the intentional infliction of emotional distress for satirical publications or parodies unless actual malice can be established.

19 *Jacobus v Trump*, 45 Media L Rep 1097 (NY Sup Ct, 2017).

20 *Ibid* 19.

21 As an example the unanimous bench in *Hustler Magazine v Falwell* included conservative stalwarts then Chief Justice Rehnquist and Justice Scalia.

22 'Special report on Supreme Court nominee Neil Gorsuch', *Reporters Committee for Freedom of the Press* <<http://www.rcfp.org/gorsuch-report>>.

23 Martin Pengelly, 'Reince Priebus says White House is looking into change to libel laws', *The Guardian* (online), 1 May 2017 <<https://www.theguardian.com/media/2017/apr/30/reince-priebus-libel-law-change-media-white-house>>.