

SELF EXPRESSION: A PRIVILEGE NOT A FREEDOM

This is the copy of a speech given by Shane Simpson in 1997 which discusses the sometimes-fine line between criticism and defamation.

The Illusion Of The Right of Self-Expression

There is no constitutional right of self-expression. The freedom of expression is an illusion. We have never had it.

If we don't express ourselves at all, we end up in a psychiatric ward. If we express ourselves in too forceful a manner, we may end up in jail. What's in between? Libel actions from the rich and powerful and bloody noses from the rest.

Far from being a right conferred by a democratic system of government, the freedom of expression is actually limited by that system. Our society has many strict laws about what it will permit us to express, where we may express it, when and to whom: Obscenity laws; defamation laws; racial sexual and religious anti discrimination and vilification statutes, laws which give the police the right to arrest members of the public for coarsely expressing themselves in public; postal and telecommunications laws which prohibit a wide range of communications; national security legislation; Trade Practices legislation; professional privileges imposed on priests, lawyers and some journalists; film, video, television and book censorship and classification systems. The list is not closed.

At least we know or can find out about these overt restrictions. More insidious are those restrictions on our self-expression which are covert: institutional, religious, political and business censorship.

Criticism By Public Figures

Where a person holds a position of power in a particular community, the members of that community have expectations and demands of that person. It doesn't matter how that person came to be in this position of responsibility. We assume that the robes of success are only attained by individuals who seek the position and who are prepared to bear the burdens that come with them.

Critics are powerful public figures within their communities. Professional critics and experts, (whether such expertise is self-proclaimed or conferred by others), are people of power within their community and must take responsibility for their professional conduct and opinions. It is one of the burdens of purporting to have greater training, knowledge and sensitivity of judgment than the hoi polloi.

Before the Capon and Schofield cases it was assumed that if critics stuck to criticising the work and didn't maul the individual behind the work, they could say what they liked.

What are juries telling us when they bring in verdicts against those who set themselves up as critics? It is certainly not that critics should not be critical. Perhaps they are acknowledging that critics are in positions of power and have a great ability to hurt and even destroy reputations. (It may be acceptable for a school student, a lawyer or a clerk to say of a painting, "yuk" or "simply rotten". The community does not give great weight to the opinion of the non-

expert. The opinion of the non-expert is seen as emotionally-based, obviously biased and essentially ignorant. It is treated as such and no artist would dream of suing one of the unacclaimed for denigrating his or her painting. The hurt would be momentary and easily dismissed).

Perhaps the juries are also telling makers of public criticism that they must be thoroughly responsible when exercising their considerable power and that it is not acceptable for professional tongues to be banal, intellectually lazy or unfairly opinionated. Although waving a rapier in cavalier fashion might be attractive to newspaper readers, the individuals behind the subject of the criticism have a right to be treated fairly.

This responsibility is not a muzzle. It does not stop those of influence and opinion from exercising their influence and expressing their opinions. Rather it obliges them to recognise and comply with the responsibilities of their privilege.

In short, those who are in positions of influence and public importance have a duty to express themselves with a certain care and responsibility. Their opinions are given more weight and attention than the opinions of others and therefore they must bear greater responsibility. With privilege comes responsibility.

Criticism of Public Figures

The present system interferes with our ability to tell and hear the truth about those in positions of power. Because defamation can be so costly to the balance sheet, media companies become vigorous self-censors. They not encouraged to support deep investigative journalism and are stifled in their ability to publish the results of their investigations.

If we had the ability to publish more spirited criticism of our leaders we would be better able to discover and expose corruption and incompetence. Would this not be in the community interest? Is it not absurd that we have to wait until people die before we can learn of the truth of their lives? If a politician were to involved in illegal gambling or in taking bribes from property developers or corruptly releasing prisoners from jail, would it not be in the public benefit to have such matters explored and either exposed or rebutted?

Our public figures must accept that in volunteering for their position of influence they expose themselves to a greater level of inquiry and criticism than the rest of the community. This was the approach taken by the US Supreme Court in *New York Times v. Sullivan*. In that landmark case, the court accepted that fearless criticism contributes to a healthy public life. The court held that even if a statement was proved to be untrue, it would not be defamatory unless the plaintiff proved that "the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless regard of whether it was false or not."

Such an approach provides a valuable balance between the community interest allowing the vigorous criticism of our public figures and the personal interest in protecting one's reputation.

Money v. apology

When RJ Hawke was Prime Minister he commenced a large number of defamation cases, almost all of which were settled handsomely before he got to court and could publicly clear his name. In spite of this, he was perhaps the most popular Prime Minister in Australian history. He clearly wasn't damaged by the slings and arrows that led to outrageous fortune.

While he undoubtedly had the right to sue for defamation, would his reputation be better or worse if he had received fulsome public apology rather than dollars? Money doesn't restore reputations; it replenishes bank accounts. Accordingly, if the aim of the laws of defamation is to compensate for the damage to reputation, we must ask whether money is the most appropriate way to deal with defamatory statements.

There are very few things said that cannot be repaired by public apology: fulsome, wholehearted apology published to all those who are likely to have heard or seen the defamatory statement. No one should be able to obtain monetary damages unless the public apology would be inadequate.

Conclusion

But what is all this talk about the balancing of powers against duties, of the freedoms against responsibilities, of rights against privileges. All of this is just a fantasy. Now let us be upstanding for the Defamation Anthem:

"Sticks and stones will break my bones, but words can pay for my tennis court".