How to make defamation threats and actions backfire

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Abstract

Defamation threats and actions often discourage free speech, sometimes in low-profile cases that never come to the attention of journalists or lawyers. To respond to oppressive uses of defamation law, it is useful to learn from the ways that other sorts of attacks (such as attacks on protesters) backfire on the perpetrators. The main methods for ensuring that appropriate outrage occurs in relation to a defamation threat or action are to expose what happens, validate the target, interpret the action as censorship, avoid or discredit the courts and resist intimidation and bribery.

Defamation actions often serve as a form of legal intimidation, suppressing free speech. Threats of defamation suits are more frequent than suits themselves, and can have the same effect. In Australia, where defamation laws are quite favourable to plaintiffs, defamation law is an especially powerful tool against free speech (Pullan, 1994).

Before proceeding further, it is important to note the effect of defamation law on any commentary about problems with defamation law. In giving examples, writers must be careful not to make themselves, or their publishers, vulnerable to defamation suits. As a result, it is risky to tell the full story about many cases. Nevertheless, it is possible to give a few illustrations:

- Robert Askin, premier of NSW from 1965 to 1975, was widely known to be corrupt. But the media did not publish what they knew for fear of defamation actions. Only after Askin's death in 1981 were stories of his involvement in organised crime published (Hickie, 1981);
- In 1985, Avon Lovell's book *The Mickelberg Stitch* was published. It analysed the police case against the Mickelberg brothers, jailed for swindling gold from the Perth Mint, and concluded that they were framed. The book sold briskly until the police sued Lovell, his publisher and distributor, and threatened to sue bookshops and newsagents. West Australian police paid a levy on their paycheques for years to fund dozens of defamation

cases concerning *The Mickelberg Stitch*. After more than a decade, a settlement was reached that allowed Lovell's book to be sold. In 2004, an appeals court quashed the convictions of the Mickelbergs (Mayes & King, 2004);

- The owners of a marina on Hindmarsh Island, near Adelaide, sued environmental organisations and individuals, as well as media organisations, over statements critical of a proposed bridge to the island. This had the effect of discouraging public comment about the development (Kumarangk Legal Defence Fund, 1998);

- In the late 1970s, Mick Skrijel blew the whistle on drug importation in South Australia and suffered numerous reprisals. In 1996, in an episode in his long-running saga, Skrijel distributed leaflets in the Hobart electorate of Duncan Kerr, then federal Minister for Justice, because Kerr had not acted on Skrijel's complaints about the National Crime Authority. Kerr sent the Australian Federal Police to Tasmania to interview Skrijel and threatened defamation actions against media outlets that were due to interview him (Ackland, 1996).

What is distinctive about these and many other similar examples is that the media are a key target of defamation actions. This is partly an artefact of the choice of prominent examples, because they are the ones that receive media coverage. But there are other, less obvious, effects of defamation law that are manifested in low-profile cases, many of which never come to the attention of a lawyer, much less a journalist. Here are some examples, inspired by actual cases that have come to our attention, but with details altered:

- A group of disenchanted high school students circulated an anonymous leaflet making fun of some of their teachers. One teacher responded with defamation threats against anyone involved;

- A member of a service club sent an email to another member making critical comments about the club president, in particular concerning use of funds. The recipient showed the email to officers at the club. The sender of the email then received a writ for defamation;

- A teacher wrote a report on a poorly performing student. The student's parents threatened to sue unless certain comments were retracted;

- Several individuals heard about abuse in a residential service for people with disabilities. They obtained documentation from workers about the abuse and reported it to the head of the service. They received a defamation writ;

- A woman was assaulted at work by a co-worker. She reported the assault and the attacker was moved. The attacker threatened to sue for defamation if anything further was said about the matter;

- A man complained to an estate manager about lack of assistance in obtaining some personal documents from a relative's estate. He received a reply

demanding an apology for the criticisms and threatening an action for defamation if no apology was received;

- A couple made a posting on an email list critical of the views of another poster. They received a letter demanding an apology and payment of a specified sum, otherwise they would be taken to court;

- The editor of an academic journal, in editing an article to be published, removed some sentences that referred to individuals, believing them to be potentially defamatory. The editor did not consult with the author of the article.

Anyone familiar with defamation law will realise that many of the threats described here are unlikely to result in writs, and that many of the individuals had adequate defences and did not need to worry. For example, the teacher, in writing a report on a student, would be protected by qualified privilege. But few individuals in such cases are knowledgeable about defamation law; many of them are easily intimidated by a threat and even more so by a writ. Defamation law thus operates to inhibit free speech in a wide range of circumstances unknown even to those who follow the big cases.

What can be done? The usual prescription is law reform. This has a long history of failure. Law reform commissions have been recommending change for decades, but usually with no impact. Some proposals for unifying Australian defamation laws would actually make free speech more difficult. The problems have remained the same over a long period: defamation law is expensive, slow and complicated. It is not very good for protecting reputations – especially for anyone who does not have financial resources – and is regularly used in ways that inhibit free expression. A wider problem is that defamation is only one of the legal means used to suppress free speech. For example, the Tasmanian timber company Gunns has sued environmentalists using a variety of torts. Legal actions attacking free speech are commonly called SLAPPs: Strategic Lawsuits Against Public Participation (Donson, 2000; Pring & Canan, 1996; Walters, 2003). Defamation is one of many types of actions used in SLAPPs.

A law reform response to SLAPPs is anti-SLAPP legislation, as implemented in a number of US states. A possible solution in Australia would be to establish a legal right to comment. Such initiatives can be valuable, but there is still a limitation: in many cases, threats are made and legal actions initiated even though they have little chance of success. In the US, SLAPPs routinely fail in court because of the First Amendment's guarantee of the right to petition the Government, but the SLAPP as a technique is still effective because so many targets are frightened.

Rather than focusing on changing the law, another option is to give people knowledge and skills that they can use against speech-inhibiting threats and suits. For this we use the backfire model, as described in the next section.

Defamation backfire

An action that is perceived as unjust can backfire against those held responsible by creating outrage and mobilising opposition constituencies. To illustrate this, we use an example dramatically different from defamation. In 1991, Indonesian troops opened fire on protesters at a funeral in Dili, East Timor, killing a large number of them. Previous massacres had been covered up, but this one was witnessed by a number of Western journalists and recorded on videotape by filmmaker Max Stahl. When the recording was shown internationally, it generated massive outrage and provided an immense boost to the East Timor support movement. The massacre, intended to crush the independence movement, had exactly the opposite effect.

Attackers can take various steps that inhibit outrage from their actions and thus reduce backfire. The most common methods fit under the five categories of: (1) covering up the action; (2) devaluing the target; (3) reinterpreting the action; (4) using official channels; and (5) intimidating or bribing participants. After the Dili massacre, Indonesian officials: (1) cut off phone connections out of East Timor and alerted Australian Customs officials to search Max Stahl; (2) made derogatory comments about the protesters; (3) claimed that only a few protesters died and the incident was provoked by the protesters; (4) set up inquiries into the event that whitewashed the military's role; (5) immediately arrested and assaulted many East Timorese involved in the independence struggle.

The five methods of inhibition can be met by a variety of methods of amplifying backfire, along the lines of: (1) exposing what happened; (2) validating the target; (3) emphasising the injustice involved; (4) avoiding or discrediting official channels; (5) resisting and exposing intimidation and bribery. The Dili massacre backfired because: (1) the Western eyewitnesses and the video cut through Indonesian censorship; (2) Western audiences thought the East Timorese were just as worthy as Indonesians; (3) credible sources, and the video, challenged Indonesian interpretations of what happened; (4) official inquiries had little credibility for Western audiences; (5) Western audiences could not be directly intimidated or bribed: indeed, stories of intimidation increased their outrage. This model has been applied to censorship (Jansen & Martin, 2003, 2004), whistleblowing (Martin with Rifkin, 2004), dismissal of academics (Martin, 2004a), police beatings (Martin, in press), torture (Martin & Wright, 2003) and the invasion of Iraq (Martin, 2004b).

It is straightforward to apply the backfire model to uses of defamation law that suppress free speech. Indeed, such uses of defamation law can be conceived of as one form of censorship. But there is a peculiar feature of defamation cases: the suppression occurs through an "official channel", namely defamation law. Because the law exists, many people assume it is legitimate. Therefore, in opposing the injustice of defamation actions, it is especially difficult to avoid or discredit the official channels, namely defamation law itself.

We now examine each of the five main avenues for amplifying backfire, seeing what they imply for countering suppression of free speech through defamation law. These tactics are suggested only for those cases where participants are willing and able to use them. There are many situations when it is advisable to make apologies, keep a low profile or focus on defending oneself in court. The suggestions here are for cases in which free speech issues can be easily highlighted and in which defendants are willing and able to pursue attempts to make defamation threats backfire. It is always wise to proceed with care and with good advice.

Expose what happens

One of the most effective ways to prevent outrage from injustice is to cover up the injustice. Therefore, to amplify outrage, it is essential to provide information about what is happening to significant audiences. However, in many defamation cases, neither party wants publicity. The plaintiff seldom wants attention drawn to the matter: after all, preventing further comment is the whole point. But defendants often are reluctant to go public, for various reasons. Some are embarrassed by the allegations. Others are afraid, and sometimes believe they might further defame the plaintiff or imagine that the matter cannot be discussed because it is sub judice.

To maximise backfire, publicising the defamation threat or suit is a powerful tool. For example, if a public official threatens to sue over criticisms, the critic can report the criticisms, plus the threat, in leaflets, emails and/or a website. To publicise the threat or suit, it can be advantageous to have a supporter or support group that takes responsibility for getting the message out, thereby protecting the defendant from legal complications.

Cover-up also occurs when settlements of defamation cases include a silencing or gagging clause, requiring all parties to keep quiet about the original matter. Plaintiffs often insist on such clauses, sometimes refusing to settle otherwise. To magnify backfire, defendants should refuse such clauses when possible. But when financial concerns make a settlement hard to resist, it is still possible to publicise the matter by making sure, in advance, that sympathisers, not bound by the settlement, have adequate information to continue to raise the matter.

Validate the target

A prime way to reduce outrage over an injustice is to denigrate the target. The poor, the homeless and people with disabilities are often the victims of an uncaring system. By blaming them for their plight, outrage is reduced. When people are sued or threatened with defamation actions, the implication is that

they have broken the law and have done something objectionable. In addition, in some cases defendants are verbally abused, often via rumours. To resist this process of devaluation, defendants and their allies should do everything possible to present an honest, principled, upright image. Depending on the case, they can present themselves as defenders of the truth, as straight speakers, as principled objectors to censorship.

Interpret the action as censorship

Defamation actions serve to redefine an issue as one of damage to reputation. Defendants must emphasise that free speech is the central matter.

Avoid or discredit the courts

Because many people believe the legal system provides justice, defamation law is a powerful ally of censors. But once inside the court, matters of justice are submerged by procedural matters; the issue of censorship is not even on the agenda. Therefore, the courtroom is an unpromising venue for producing outrage.

Luckily, most defamation threats never graduate to suits, and few suits reach court. In terms of promoting outrage, defendants need to avoid putting lots of effort into legal niceties and instead think in terms of publicity and mobilising support. Every stage of the legal process is a potential angle for publicity about the original matter. Supporters should emphasise that the courts do not necessarily deliver moral justice.

Resist intimidation and bribery

Many people are frightened by defamation threats and suits. They are truly a form of "legal intimidation" (Donson, 2000). Likewise, the attraction of a settlement induces many defendants to agree to silence. To make defamation actions backfire, it is vital to overcome feelings of being intimidated and to proceed with publicity. Defamation actions can instead be thought of as opportunities for revealing what opponents will do to stop free expression.

Some people, due to their financial or personal circumstances, are not in a position to stand up against defamation threats and actions. But others are. To oppose oppressive uses of defamation laws, it is useful to find indigent advocates of free speech: people with few financial assets but a willingness to speak out, for example, by writing accounts, circulating leaflets or sending emails. Ways need to be found to reward such individuals, for example, through fame or subsidised housing and food. Another method for resisting intimidation is to spread the risk by involving many individuals in publishing materials. For

example, if a website comes under attack, the author can seek several others to post the material. If these others are threatened, they in turn can find yet others, further afield.

Examples of defamation backfires

In 1990, McDonald's sued several members of the anarchist group London Greenpeace over its leaflet *What's wrong with McDonald's?*. McDonald's had a history of suing its critics, and most of them acquiesced (Donson, 2000). But in this instance, two individuals, Helen Steel and Dave Morris, refused to give in. The court case, the longest in British history, triggered the creation of an international support network for the activists and became a public relations disaster for McDonald's (http://www.McSpotlight.org; Vidal, 1997).

Steel and Morris did nearly everything right to amplify backfire. (1) They, and their support network, publicised the defamation action, breaking the normal pattern of cover-up; (2) As low-paid activists, they obtained sympathy for their plight in being sued by a powerful multinational corporation. They also gained credibility by not seeking personal gain from the process; (3) They successfully interpreted the suit as a matter of free speech; (4) They used the court process to present damaging testimony about McDonald's, which was subsequently publicised; (5) They were not intimidated. They also refused offers to settle.

John Marsden, a prominent Sydney solicitor, sued Channel 7 over two television broadcasts in 1995 and 1996 that alleged he had had sex with underage boys. Channel 7 defended vigorously, and the whole process further damaged Marsden's reputation (ABC Radio, 2000; Marsden, 2004; McClymont, 2001). (1) There was continuing media coverage about the trial, repeating the original defamatory allegations; (2) Witnesses called by Channel 7 made damaging claims about Marsden; (3) Channel 7 successfully presented the matter as one of public interest; (4) Channel 7 used the court case to focus on Marsden, neutralising the law as a means of attack; (5) Channel 7 was not intimidated by Marsden's suit but instead fought the case tenaciously.

Marsden won in court, receiving about half a million dollars for injury to his reputation plus millions in costs, and later further millions in a settlement. But the publicity surrounding the case damaged his reputation far more than the original broadcasts. Channel 7, by being willing to spend millions of dollars on the case, was able to make it backfire on Marsden.

One of the authors of this paper, Brian Martin, provides on his website at the University of Wollongong many documents on suppression of dissent. In 1997, he put a document on the site about Dudley Pinnock, a professor of entomology at the University of Adelaide who had been declared redundant. Martin was instructed by the Vice-Chancellor of the University of Wollongong to

remove the page, and did so, but arranged for it to be posted on several other websites, and put links to these sites on his revised Pinnock page, describing what had happened (Martin, 2000). The attempt to hide information about Pinnock's redundancy was countered by these tactics. (1) The request to remove the site was revealed; (2) There was no public attempt to denigrate Martin; (3) The matter was presented as one of free speech; (4) Official instructions to remove the page were followed, thereby avoiding entanglement in disciplinary procedures or court cases; (5) Martin was not intimidated, but used the situation as a tool for increasing attention to the Pinnock matter and to the use of the Web for challenging censorship.

Tim Field supports individuals subject to bullying at work and runs a website at www.bullyonline.org. He says that:

> threats of libel are a hazard of the job, especially when I blow the whistle on bullying cases. As a self-employed individual I cannot use the UK's Public Interest Disclosure Act, but bullies often don't realise that a defamation action resisted with a backfire strategy can provide a much more prominent platform for public disclosure. (2004)

Conclusion

The usual responses to the problem of defamation law being used to suppress free speech are either to acquiesce or to seek law reform. Neither is satisfactory. We propose an alternative approach: encourage more people to use tactics that make such injustices backfire. Insights drawn from backfires in diverse arenas can readily be applied to defamation.

Defendants have five main ways to make defamation threats and actions backfire: expose what is going on, validate the target, interpret the action as censorship, avoid or discredit legal processes, and refuse to be intimidated or bribed. For powerful organisations sued by individuals, these rules are easy to follow, as shown by John Marsden's disastrous suit against Channel 7. The immediate lesson for individuals is that it is unwise to sue any person or organisation with more money and staying power.

For individuals sued by those with more money and power, matters are less clear-cut. In many cases, individuals cannot afford the time and money to resist legal bullying. However, many individuals can do better than they imagine if they follow the steps to amplify backfire. The first thing is not to give up immediately, but instead to carefully examine options. In some cases it is wiser to acquiesce, but in others a valiant defence can be successful.

For society, it is certainly better if more individuals attempt to make defamation actions backfire: society benefits from dissent, even if individual

dissenters do not (Sunstein, 2003). The valiant efforts of Helen Steel and Dave Morris against McDonald's have made large corporations more reluctant to sue and thus have benefited consumers and citizens generally. Such exemplary struggles have an influence far beyond their immediate circumstances. The challenge ahead is to offer encouragement and skills to more people so that they are able and willing to resist legal intimidation.

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