Contracts, Agreed Remedies and Free Speech

Robyn Carroll

Contractual agreements between parties with regard to dispute resolution processes and remedies are supported and enforced by the courts, within limits. These limits reflect the law’s concern not to hold parties to obligations that are penal in nature or that unjustifiably interfere with important interests, for example, the freedom to earn a living. In some cases the issue can arise whether to enforce a contractual obligation that interferes with a contractual party’s freedom of expression. This issue also arises when a claimant/plaintiff seeks to enforce a contractual agreement to apologise. This is the topic explored in this paper. The paper examines the way in which courts resolve the conflict between freedom of contract and freedom of expression and how these concerns should be addressed when a party enters into a scheme that confers the power on a person or body to order a party to publish an apology. This question will be examined in the context of proposals for self-regulation of the press in Australia and the UK which would confer on a regulatory body the power to require a news media outlet to publish an apology. These proposals signal a marked divergence between tort law responses to wrongful conduct by the press and remedies available in contract. The paper argues that the voluntary assumption of an obligation to apologise or to a scheme of remedies alleviates some of the concerns that might otherwise exist about an order to apologise, but that closer attention must be paid to the nature of apologies and their use as a remedy.