Telecom challenge

from p7

efficiently and economically as practicable; and

(iii) the special needs for telecommunication services of Australian people who reside or carry on business outside the cities."

Enforceability of CSO's

Sub-section 6(3) (b) of the old Act provided (relevantly) that nothing in s.6 should be taken "to impose on the Commission a duty that is enforceable by proceedings in a Court". Sub-section 6(3) (b) was interpreted in **Queensland v Australian Telecommunications Commission** (1985) and **John Fairfax v Australian Telecommunications Commission** (1977) to the effect that the sub-section precludes the enforcement of any duty which may arise under s.6 by legal proceedings: that is, no plaintiff could sue under the old Act purely by reason of a failure by Telecom to offer or provide standard telephone services.

The new Act contains no statutory bar to proceedings seeking to enforce the community service obligations contained in s.27.

One of the key issues in the case will be the weighting to be assigned to the various community service obligations imposed on Telecom under s.27 of the new Act.

"Reasonably accessible"

Section 6 of the old Act provided that Telecom would "insofar as it is, in its opinion, reasonably practicable to do so, make its telecommunications services available throughout Australia to all people who reasonably require those services."

Section 27 of the new Act provides that "Telecom shall ensure that the service is reasonably accessible to all people in Australia ... where ever they reside or carry on business."

It could be argued that to make a service "available" is a higher duty than to make it 'reasonably accessible". This may be true but it is clear that s.6 when read as a whole allowed Telecom an unfettered discretion as to whether to provide a service at all.

Telecom does not have this discretion under s. 27. Presumably, whether a service can be said to "reasonably accessible" is a question which can be objectively determined by a Court.

Is a telephone booth in a town 1 kilometre away "reasonably accessible"? What if the town is 100 kilometres away? Obviously, this will also be a key issue in the Northern Territory Government's action.

"Equitable basis"

Under s.11 of the old Act, Telecom was empowered, from time to time, with the approval of the Minister, to make determinations fixing or varying the rental payable for standard telephone services provided by Telecom. Sub-section 11(6) of the old Act required Telecom to publish particulars of the rentals determined by it in the Commonwealth of Australia Gazette.

In contrast, the new legislation does not contain any provision analogous to s. 11 of the old Act.

Under s.27(4) of the new legislation, Telecom is obliged to ensure that the services are readily accessible "on an equitable basis". Predictably, "Equitable basis" is not defined in the new Act.

The normal commercial rates charged for the Iterra service are significantly greater than the rates gazetted in accordance with s. 11 of the old Act.

One of the key issues in the case is, therefore, whether the provision of an interim service by means of the Interra service at normal commercial rates is "equitable".

As the services provided by means of the Iterra system are standard telephone services and as the affected communities are situated in rural and remote areas, the communities argue that an equitable rate would be the rate gazetted under s.11 of the old Act in respect of rural and remote areas.

The Yugal Mangi Proceedings

The Northern Territory Government has also commenced, on behalf of the Yugal Mangi Community Government Council, proceedings against Telecom for the recovery of charges paid to Telecom in excess of the gazetted rates referred to above.

Yugal Mangi accepted Telecom's offer of an interim Iterra service and paid the normal commerical rates for that service.

The action is based on s.11 of the old Act and the Yugal Mangi community is claiming that Telecom was not lawfully entitled to demand charges for the standard telephone service provided by the Iterra service in excess of the gazetted rates under s.11.

Paul Nicols is a solititor with the firm of Allen Allen and Hemsley

Morgan v John Fairfax & Sons Limited

An editorial on a Government submission by telecommunications unions held to be defamatory but reasonable in the circumstances. John Evans discusses this leading case.

On September 1, 1989 Justice Matthews delivered a judgement which held that the conduct of a publisher, John Fairfax & Sons Limited as reasonable within the meaning of s. 22(1) (c) of the Defamation Act (NSW), 1974 and that in the absence of any evidence of malice a defence under that Section was thus made out.

Background

The plaintiff, Kevin Morgan, commenced proceedings in December 1983 complaining of an editorial written by Padraic McGuinness in The Australian Financial Review on 17 November 1983. The editorial said in part:

"Even more questionable is the role of the telecommunications unions which are determined to maintain the monopoly which they can manipulate, and hope to suppress the extension of competitive technologies, regardless of any concept of a general public interest."

"Not surprisingly, the arguments of the Telecom Unions have had a strong influence in the councils of the Government. They have been willing to produce totally phoney estimates of costs and useage of the new satellite, employing supposedly reputable and independent commentators."

The plaintiff was not named in the editorial.

The following imputations were pleaded, That the plaintiff:

(a) was not reputable (as a consultant and commentator)

(b) was dishonest (as a consultant and commentator)

(c) was unfit to be a consultant and commentator

(d) knowingly made false estimates of the costs and usages of the new satellite

(e) as a consultant and commentator, was biased and not independent

(f) did not carry out his economic researches properly

(g) as a consultant and commentator, has deliberately endeavoured to deceive and mislead the Government of Australia and others

After an abor ted first trial the second trial commenced before Justice Matthews on 6 March 1989. After 14 hearing days the jury retired to answer a number of specific questions of fact which included questions directed to the defences of truth and comment.

After more than five hours of deliberation the jury was unable to answer unanimously the questions put to them. Accordingly, to avoid the necessity of a third trial both counsel agreed to accept a majority general verdict – that is a simple verdict... that the defamation had been proved or not proved.

The jury returned a general verdict in favour of the plaintiff and awarded damages of $150,000.

Justice Matthews then heard legal argument on the defence of qualified privilege under s. 22 of the Defamation Act.

Section 22(1) of that Act provides:

"1. where in respect of matter published to any person

(a) the recipient has an interest or apparent interest in having information on some subject;

(b) the matter is published to the recipient in the course of giving to him information on that subject; and

(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.

There is a defence of qualified privilege for that publication."

In determining the application of s. 22 of the Act, it was conceded by Counsel for the plaintiff that the "interest" requirement of sub-sections 1(a) and (b) had been made out. The issue to be determined was whether the defendant's conduct in publishing the defamator y material was reasonable in the circumstances.

Truth

Justice Matthews considered the implications of the jury's verdict in relation to the defence of truth. As the whole thrust of the defendant's case on truth was to show that the study prepared by the plaintiff for the Australian Telecommunications Employees' Association was not only misleading and inaccurate but that it must have been deliberately so, the jury's verdict indicated that the plaintiff's assertions that the conclusions he reached in his study were honestly arrived at had been accepted and that the most serious imputations alleging dishonesty, deception, bias, not reputable as a consultant and commentator and unfitness to hold that position were false.

The judge did not, however, accept that the jury's verdict bound her to find that the imputation that the plaintiff did not carry out his economic researches properly was false. Justice Matthews described this imputation as "the relatively minor sixth imputation". It was her view that the evidence pointed overwhelmingly to the existence of a number of inaccuracies, misstatements and flawed processes in the plaintiff's study and although a number of these criticisms might not be directly attributable to any defect in the plaintiff's researches, it would be difficult to isolate the flaws in the reasoning from the flaws in the research.

This was a matter of some significance in Justice Matthews' view on the question of qualified privilege. If she was obliged to conclude, contrary to her own view of the evidence, that the jury's verdict involved the finding that the plaintiff had properly conducted his researches and, by extension, that there were no serious inaccuracies or misstatements in his study, then it would follow that Mr McGuinness could not have logically concluded, on the basis of the study alone, that its author was deliberately embarking on a process of deception. That, then would necessarily have been the end to any defence under s. 22.

Justice Matthews concluded that she was not precluded from finding that there were serious defects and flaws in the plaintiff's study by adopting the reasoning of Glass JA in **Austin v Mirror Newspapers Limited** (1984) where His Honour said "the Judge should himself determine any disputed facts save and except to the extent that they are governed by jury findings". Justice Matthews accepted that the jury's rejection of the defence of truth required her to accept that any inaccuracies or flaws as did exist in the study were honest mistakes and that the plaintiff believed that the material in the study was accurate and that he had properly and legitimately set out the arguments against the satellite. However this left open the question of whether Mr McGuinness could rationally have concluded from the study itself that it was a dishonest document.

Comment

Justice Matthews then considered the implications of the Jury's verdict in relation to the defence of comment.

There was no issue as to whether, assuming it to have been comment, it was based on proper material for comment. Both parties had accepted that it was the plaintiff's study alone which formed the basis of Mr McGuinness' observations. Thus no question arose as to the truth or otherwise of the factual basis for the comment.

Justice Matthews had no reservation in accepting Mr McGuinness' evidence that he was genuine in his criticism of the plaintiff's study and that he did hold the view that the study was a biased and dishonest document notwithstanding a pre-Austin case answer to interrogatory which said that at the time of publication the defendant did not intend the words contained in the matter complained of to convey any of the alleged defamatory imputations. Evidence was led at the trial that at the time Mr McGuinness wrote the editorial he did not know who the author of the study was. However in respect of the author or authors he believed that his criticisms were entirely justified.

This finding was extremely important on the issue of qualified privilege as a defendant will generally fail to establish reasonableness under s. 22(1) (c) without evidence of belief in the truth of what was published (**Barbaro v Amalgamated Television Services** (1989).

Justice Matthews then considered the rationality of Mr McGuinness' conclusions notwithstanding the jury's verdict had shown that his conclusions were wrong. Her Honour found that although the conclusions were wrong they were, in her view, anything but unfounded or irrational. She then considered whether Mr McGuinness' failure to seek out the palintiff prior to writing the editorial was reasonable. The failure to seek out the author of the study was explained on the basis that Mr McGuinness believed the document was such a dishonest one that he would have been wasting his time.

The jury's verdict which showed that Mr McGuinness was wrong led Justice Matthews to question whether this reflected upon the reasonableness of his conduct at the time. She took the view that although there was more than a hint of arrogance in the approach adopted by Mr McGuinness it was amply justified by the material he had before him. The requirement of reasonableness under section 22(1) (c) does not impose upon a publisher an obligation to seek out and obtain explanations from a person in all cases regardless of the strength of the adverse inferences to be drawn from that person's writings. Whether a publisher who wishes to rely upon a section 22 defence must make further enquiry will depend upon the circumstances of the case.

In assessing whether a reasonable publisher should have made further enquiry, one need only have regard to the material which was properly available to the publisher at the time of publication. The fact that a publisher's adverse conclusions are later shown to have been wrong will no doubt

continued on p12

Morgan v John Fairfax

from p9

cause a court to give special and and critical scrutiny to whether those conclusions were well founded and to the process by which they were reached. If there is material which should alert a responsible and prudent publisher that an innocent explanation was possible then reasonableness will normally require that some further enquiry be made.

But the fact that later events show that a publisher was wrong does not ex post facto render unreasonable that which was reasonable at the time.

Justice Matthews said that to find otherwise would be to place an impossible burden upon publishers as newspaper proprietors require ascertainable criteria by which to measure the reasonableness of their conduct when they publish criticisms of written works and their authors. To measure the quality of reasonableness by reference to a jury's later findings in relation to other defences would not only introduce criteria which are both unascertainable and uncertain but would also deprives. 22 of any independent application in relation to literary criticisms.

An appeal has been filed.

John Evans is a solicitor with the firm Mallesons Stephen Jaques.

Contributions

From members and non-members of the Association in the form of letters, features, articles, extracts, case notes, etc. are appreciated. Members are also welcome to make suggestions on the content and format of the Bulletin.

Contributions and comments should be forwarded to:

Grantly Brown
Editor
Communications Law Bulletin
c/ Gilbert & Tobin Lawyers
GPO Box 3810
SYDNEY NSW 2001

Communications and Media Law Association

The Communications and Media Law Association was formed early in 1988 and brings together a wide range of people interested in law and policy relating to communications and the media. The Association includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants.

Issues of interest to CAMLA members include:

- defamation
- broadcasting
- copyright
- advertising
- telecommunications
- contempt
- privacy
- censorship
- film law
- freedom of information

In order to debate and discuss these issues CAMLA organises a range of seminars and lunches featuring speakers prominent in communications and media law and policy.

Speakers have included Ministers, Attorney-Generals, judges and members of government bodies such as the Australian Broadcasting Tribunal, Telecom, the Film Censorship Board, the Australian Film Commission and overseas experts.

CAMLA also publishes a regular journal covering communications law and policy issues – the Communications Law Bulletin.

The Association is also a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join the Communications and Media Law Association, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

To: **The Secretary, CAMLA, Box K541, Haymarket. NSW 2000**

Name .....

Address .....

Telephone ..... Fax ..... DX .....

Principal areas of interest .....

I hereby apply for the category of membership ticked below, which includes a Communications Law Bulletin subscription, and enclose a cheque in favour of CAMLA for the annual fee indicated:

- Ordinary membership $40.00
- Corporate membership $70.00
- Student membership $20.00
- Subscription without membership $40.00 (Library subscribers may obtain extra copies for $5.00 each).

Signature .....