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Talk Back - High Court Weighs in on 'Reply to Attack' Qualified Privilege

Sophie Dawson & Ben Teeger take a look at a recent decision by the High Court of Australia which considered the scope of the common law defence of 'reply to attack' qualified privilege in respect of defamatory statements made as a form of self-redress.

On 5 October 2012, the High Court of Australia delivered judgment in the defamation case of *Harbour Radio Pty Ltd v Trad*.¹

The Facts²

In December 2005, a number of riots took place in various locations across Sydney. The riots involved a series of sectarian clashes between Australian Muslims and Australians of European descent. The riots became known as the 'Cronulla Riots' - Cronulla being the suburb in which the first of the riots took place.

On 18 December 2005, approximately one week after the Cronulla Riots, Mr Keysar Trad, a spokesman for the Muslim community in Australia, attended and delivered a speech at a rally in Hyde Park in Sydney. The rally was attended by approximately 5,000 people including representatives of the media. In his speech, Mr Trad attributed part of the blame for the Cronulla Riots to 2GB, which is a radio station owned by Harbour Radio Pty Limited (a subsidiary of Macquarie Radio Network Limited). Mr Trad accused 2GB and 'those racist rednecks in tabloid journalism' of being 'the mouthpiece of the Howard government', for mustering '5000 people filled with hatred' to participate in the Cronulla Riots and for causing suffering to the Muslim community in Australia more generally.

The following morning, Mr Jason Morrison, a presenter on 2GB, hosted, and 2GB broadcast, a segment which lasted for eleven minutes and which purported to respond to the comments made by Mr Trad the previous day (the **Broadcast**). Mr Morrison described Mr Trad as a 'disgraceful individual' and a 'well-known apologist for the Islamic community spewing hatred and bile at anyone who did not agree with [his] philosophies and principles including this radio station'.

Procedural history

As the Broadcast was made before 1 January 2006, Mr Trad commenced a proceeding against 2GB in the Supreme Court of New South Wales under the *Defamation Act 1974* (NSW) rather than the *Defamation Act 2005* (NSW).³ Mr Trad alleged that the Broadcast conveyed imputations which were defamatory of him. 2GB raised a number of defences, including substantial truth, contextual truth, fair comment and qualified privilege at common law.

¹ *Harbour Radio Pty Ltd v Trad* (2012) 86 ALJR 1256.

² The facts set out hereafter are a summary of the Court's findings: *Harbour Radio Pty Ltd v Trad* (2012) 86 ALJR 1256, 1260-1.

³ *Harbour Radio Pty Ltd v Trad* (2012) 86 ALJR 1256, 1259. The *Defamation Act 2005* (NSW) only applies to publications made after 1 January 2006: see *Defamation Act 2005* (NSW) sch 4 cl 2.

Volume 32 N° 1
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Inside This Issue:

Talk Back – High Court Weighs in on
'Reply to Attack' Qualified Privilege

Telecommunications Data Retention:
A Step in the Right Direction?

The Courts v Twitter: The Future
of Live Court Reporting in NSW

Striking a Balance: News Regulation
in the Digital Age

Anonymity and the Law:
"The Darknet Rises"

The Costs of Data Retention

Communications Law Bulletin

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Contents

Talk Back – High Court Weighs in on ‘Reply to Attack’ Qualified Privilege

Sophie Dawson & Ben Teegeer take a look at a recent decision by the High Court of Australia which considered the scope of the common law defence of ‘reply to attack’ qualified privilege in respect of defamatory statements made as a form of self-redress.

Telecommunications Data Retention: A Step in the Right Direction?

Lisa Hill and Jessica Childs take a brief look at Australia’s potential telecommunications data retention laws, which may form part of the Government’s next package of reform of national security legislation.

The Courts v Twitter: The Future of Live Court Reporting in NSW

Chris Paver examines the use of Twitter in courtrooms and the challenges posed by social media to the administration of justice.

Striking a Balance: News Regulation in the Digital Age

Jarrod Bayliss-McCulloch sets out an approach to news regulation that balances a variety of competing interests.

Anonymity and the Law: “The Darknet Rises”

Felix Ralph examines the challenges that the anonymity of the “darknet” poses for the legal system, copyright holders, the community and human rights.

The Costs of Data Retention

Nikki Macor considers the implications of proposals for wide-sweeping data retention laws on carriers.

To be protected by the ‘reply to attack’ qualified privilege, journalists and media organisations should frame any reply to an attack such that it is commensurate with, relevant to and sufficiently connected with the attack

The jury found that eight of the imputations were conveyed in the Broadcast and were defamatory of Mr Trad. The imputations found to be defamatory were that Mr Trad:

- (a) stirred up hatred against a 2GB reporter, which caused the reporter to have concerns about his own personal safety;
- (b) incites people to commit acts of violence;
- (c) incites people to have racist attitudes;
- (d) is a dangerous individual;
- (g) is a disgraceful individual;
- (h) is widely perceived as a pest;
- (j) deliberately gives out misinformation about the Islamic community; and
- (k) attacks those people who once gave him a privileged position.

However, on 31 July 2009, Chief Judge at Common Law McClellan dismissed Mr Trad’s claims with costs.⁴ His Honour upheld 2GB’s defence of qualified privilege for all imputations on the basis that the defamatory imputations conveyed during the Broadcast fell within the ‘reply to attack’ category of that defence. ‘Reply to attack’ privilege permits defamatory statements to be made as a form of self-redress.

Mr Trad appealed the primary judge’s decision to the Court of Appeal of the Supreme Court of New South Wales on the applicability of the ‘reply to attack’ qualified privilege. On 22 March 2011, Justices Tobias, McColl and Basten unanimously reversed the decision of the primary judge in part.⁵ Their Honours found that the defence of qualified privilege should not have applied to imputations (c), (h) and (k).

2GB applied for special leave to appeal part of the decision of the Court of Appeal to the High Court of Australia. 2GB sought to have the primary judge’s initial finding on qualified privilege restored in respect of imputations (c), (h) and (k). Mr Trad sought to file a notice of cross-appeal, arguing that the defence of qualified privilege at common law was not available as the Broadcast was actuated by malice. Mr Trad also sought to have the defence of qualified privilege rejected for imputations (a), (b), (d), (g) and (j).

Decision

On 5 October 2012, a majority of the High Court of Australia:

- held that six of the eight defamatory imputations conveyed by 2GB (imputations (a), (b), (c), (d), (g) and (j)) were protected by the ‘reply to attack’ qualified privilege at common law, but that imputations (k) and (h) were not;
- remitted six of the defamatory imputations to the Court of Appeal for re-consideration of the substantial and contextual truth defences; and
- refused to grant Mr Trad leave to file a notice of cross-appeal.

Justice Heydon, in dissent, dismissed the appeal on the basis that 2GB had been actuated by malice as it had been reckless to the truth of imputation (a).⁶

⁴ Trad v Harbour Radio Pty Ltd [2009] NSWSC 750 (McClellan CJ at Common Law).

⁵ Trad v Harbour Radio Pty Ltd (2011) 279 ALR 183.

⁶ Harbour Radio Pty Ltd v Trad (2012) 86 ALJR 1256, 1271–5 (Heydon J).

plaintiffs should consider leading evidence which directly demonstrates that the defendant knew that their response was untrue (or were reckless as to its truth) at the time the reply to the initial attack was made

'Reply to attack' qualified privilege

Justices Gummow, Hayne and Bell (in a joint judgment), held that the 'reply to attack' qualified privilege at common law is available where a response to an attack is:

- commensurate with, relevant to and sufficiently connected with the attack; and
- bona fide for the purpose of vindication and not actuated by malice.

Their Honours found that a response may be 'sufficiently connected' with an attack by reference to the content of the attack, the credibility of the attack or the credibility of the attacker.⁷ Justice Kiefel reached the same decision as their Honours but wrote a separate judgment. Her Honour found that the proportionality of the response only goes towards the issue of malice and not towards the issue of relevance.⁸

In addition, the response must be made in the discharge of a public or private duty or pursuant to an interest. In this case, the majority held that 2GB had an interest in publishing defamatory material to the general public in response to the public criticisms Mr Trad had made of it, and that the general public had an interest in receiving 2GB's response.⁹

The majority found that Mr Trad had not discharged his onus of proving that imputation (a) was actuated by malice, as he failed to lead evidence which directly demonstrated 2GB's state of mind at the time the Broadcast was made.¹⁰ In the circumstances, it could not be said that 2GB knew that the facts which conveyed imputation (a) were untrue, or alternatively, were reckless as to its truth.

Substantial and contextual truth

The majority considered the test to be applied in considering whether material is defamatory and whether it is true. Their Honours preferred the approach of considering the truth defence by reference to 'an audience composed of ordinary decent persons, being reason-

able people of ordinary intelligence, experience and education who brought to the question their general knowledge and experience of worldly affairs', which they considered to be the approach taken in *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.¹¹ The majority emphasised that the 'right thinking person' test traditionally applied seeks to eliminate extreme views and 'may be seen as a benchmark by which some views would be excluded from consideration as unacceptable', rather than requiring application of a moral or ethical standard.¹²

Given the partial success of both parties, the Court made no order as to the costs of the appeal and cross-appeal.

Implications

The decision suggests that:

- To be protected by the 'reply to attack' qualified privilege, journalists and media organisations should frame any reply to an attack such that it is commensurate with, relevant to and sufficiently connected with the attack. In considering any reply, thought should be given to whether the attack was public, and whether a public response will be commensurate with that attack. The reply must also be bona fide for the purpose of vindication and not actuated by malice.
- To defeat the defence of 'reply to attack' qualified privilege at common law on the ground of malice, plaintiffs should consider leading evidence which directly demonstrates that the defendant knew that their response was untrue (or were reckless as to its truth) at the time the reply to the initial attack was made.

Sophie Dawson is a partner and Ben Teeger a lawyer in the Technology, Media & Telecommunications team at Ashurst. The views expressed in this article are the views of the authors only and do not represent the views of any organisation.

7 Harbour Radio Pty Ltd v Trad (2012) 86 ALJR 1256, 1265–6 [33]–[35].

8 Ibid.

9 Harbour Radio Pty Ltd v Trad (2012) 86 ALJR 1256, 1263–4 [26], 1266 [36] (Gummow, Hayne and Bell JJ), 1282 [128]–[129] (Kiefel J).

10 Harbour Radio Pty Ltd v Trad (2012) 86 ALJR 1256, 1267 (Gummow, Hayne and Bell JJ), 1286 (Kiefel J).

11 Harbour Radio Pty Ltd v Trad (2012) 86 ALJR 1256, 1268 [54]–[56] (Gummow, Hayne and Bell JJ), 1287 [154] (Kiefel J).

12 Ibid.

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