

Injurious Falsehood and the Fine Line Between Colourful Language and Malice:

Omega Plumbing Pty Ltd v Harbour Radio Pty Ltd t/as 2GB and 2GB 873 [2019] NSWSC 1576

Adaena Sinclair-Blakemore, Associate, Baker McKenzie, discusses the recent *Omega Plumbing v Harbour Radio judgment*, relating to establishing malice in injurious falsehood proceedings.

1 Introduction

When does a shock jock's colourful language cross the line between free speech to malicious conduct? This question was recently addressed by the Supreme Court of New South Wales in an application for an interlocutory injunction in *Omega Plumbing v Harbour Radio Pty Ltd t/as 2GB and 2GB 873* [2019] NSWSC 1576.

Omega Plumbing Pty Ltd (**Omega**) brought proceedings against the shock jock radio host Ray Hadley and his broadcaster 2GB for injurious falsehood in respect of comments made by Hadley and published by 2GB about Omega. Omega sought an interlocutory injunction to prevent further publication pending the final hearing in the proceedings. Although Justice Davies found in favour of Omega, the decision nevertheless provides a timely reminder of the difficulty faced by plaintiffs in succeeding on a claim for injurious falsehood given the high burden imposed upon plaintiffs to prove that a defendant acted maliciously.

2 Injurious falsehood

The tort of injurious falsehood seeks to protect a plaintiff's economic interests that have been damaged by false statements made maliciously.¹ There are four elements that a plaintiff must prove in order to succeed:

1. that false statements were made by the defendant;
2. that those false statements were published;
3. that those false statements were made maliciously; and
4. that the plaintiff has suffered actual loss.

Injurious falsehood is a similar cause of action to defamation but there are some distinct differences between the two, most notably the requirement to prove malice, which may be the most contentious element of the cause of action.²

"Malice" in the context of injurious falsehood is not easy to precisely define and there is no bright line delineating when false statements will or will not have been made maliciously.³ The key principles from the long line of case law are that:

- where a defendant has actual knowledge of the falsity of a statement this will be sufficient to show malice (however, it is often very difficult to prove actual knowledge of the falsity of the statement);⁴
- recklessness is not sufficient in and of itself to amount to malice. However, reckless indifference as to the truth in a way that amounts to wilful blindness will amount to malice;⁵

- mere carelessness or lack of a positive belief in the truth is insufficient to amount to malice;⁶ and
- malice is generally inferred from conduct and words of the defendant and the "grossness and falsity of the assertions and the cavalier way in which they were expressed".⁷

3 Facts of the case

Over the course of four days, between 29 October 2019 and 1 November 2019, Hadley made numerous statements about Omega, an emergency plumbing company that operates in the Greater Sydney area, in response to a limited number of complaints that Hadley had received from his listeners about Omega on his radio show. Hadley's broadcaster, 2GB, published these comments on air and in articles on its website. The table on page 13 provides the key statements that Justice Davies focussed on in the decision.

4 Decision

The defendants did not challenge that there was a prima facie case that the statements were false and that Omega had suffered actual loss,⁸ so the decision turned on whether the statements were made by the defendants maliciously.

1 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 694 (Gleeson CJ).

2 See, eg, *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at 419-20 (Kirby J).

3 *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275, 291 (Pincus J).

4 *Horrocks v Lowe* [1974] 1 All ER 662, 669 (Lord Diplock) cited in *Omega Plumbing v Harbour Radio Pty Ltd t/as 2GB and 2GB 873* [2019] NSWSC 1576 at [18].

5 *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275, 291 (Pincus J).

6 *Roberts v Bass* (2002) 212 CLR 1, 31.

7 *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2010] NSWSC 1395 at [32], citing *Joyce v Sengupta* [1993] 1 All ER 897, 905-6.

8 *Omega Plumbing v Harbour Radio Pty Ltd t/as 2GB and 2GB 873* [2019] NSWSC 1576 at [16].

Date	Statements made by Ray Hadley and published by 2GB
29 October broadcast	<ul style="list-style-type: none"> • “they’ve been excluded from the [Master Plumbers] Association for a long period of time, apparently” • quoted a representative of Omega who denied any wrongdoing: “Our business is primarily an emergency response business. This means we regularly have to give our customers bad news, the repair can run to thousands of dollars. This can sometimes be misconstrued.”
30 October broadcast	<ul style="list-style-type: none"> • “anyone that deals with Omega is as mad as a cut snake because they’re just like the Plumbing Detectives; they’re thieves.” • “it’s almost verging on extortion” • Omega trades under various names (e.g. Omega Home Services, Omega Plumbing, Omega Drains, Omega Heating and Cooling), to which Hadley commented: “this is done to dupe people”
30 October article	<ul style="list-style-type: none"> • “Omega is trading under 13 different company names, making it even more difficult to avoid their shonky practices” • “Give them all their money back, because you did bloody nothing ... you’re just thieves.”
31 October broadcast	<ul style="list-style-type: none"> • “[Omega] preys on immigrant families in wealthy areas who don’t have English as their first language” • “[one of my first questions to anyone from Omega would be that] having you in the studio makes my skin crawl”
31 October article	<ul style="list-style-type: none"> • “Omega Plumbing silences the victims of their rorts” • “Ray Hadley can reveal cowboy plumbers Omega Home Services are coercing dissatisfied customers into non-disclosure agreements”
1 November broadcast	<ul style="list-style-type: none"> • “Omega actively targets the elderly and affluent immigrant communities”

While Omega could not prove that Hadley and 2GB had actual knowledge of the falsity of the statements made, Justice Davies found that several of the comments did establish a prima facie case of malice because they evinced a reckless indifference as to the truth in a way that amounted to wilful blindness.

First, the Court found that Hadley’s assertion that Omega traded under different names “to dupe people” was made maliciously. None of the complaints that Hadley had received from listeners concerned the identity of the company with whom the complainants dealt. The Court found that there was simply no evidence that the use of different business names or companies was designed to mislead consumers, which meant

that Hadley’s assertion was reckless to such an extent that it made out a prima facie case of malice.⁹

Secondly, Justice Davies took issue with the comment made by Hadley during the 31 October broadcast that the first question to any representative of Omega who came on his program would be how they felt about being a bloke “who duds the elderly and charging them 10, 20 and 30 times more than a job’s worth”. The Court found that that this statement supported a prima facie case of malice because “there was a complete absence of material to justify its being made”, as there was no evidence that Omega had charged anyone, let alone elderly customers, 20 and 30 times more than a job’s worth.¹⁰

Thirdly, there was the allegation made on a number of occasions that the plaintiff “preys” upon elderly people and affluent migrant communities. Justice Davies observed that while two of the complainants who expressed their concerns about Omega were elderly, this was “entirely different” to and fell far short of there being any evidence to justify that this amounted to “targeting” these groups of people.¹¹

Finally, a significant aspect of Justice Davies’ consideration of the submissions regarding malice is that his Honour accepted Omega’s argument that malice may be proved from conduct over a period of time and not from only one instance or statement.¹² While his Honour

⁹ *Omega Plumbing v Harbour Radio Pty Ltd t/as 2GB and 2GB 873* [2019] NSWSC 1576 at [45].

¹⁰ *Omega Plumbing v Harbour Radio Pty Ltd t/as 2GB and 2GB 873* [2019] NSWSC 1576 at [46].

¹¹ *Omega Plumbing v Harbour Radio Pty Ltd t/as 2GB and 2GB 873* [2019] NSWSC 1576 at [48].

¹² *Omega Plumbing v Harbour Radio Pty Ltd t/as 2GB and 2GB 873* [2019] NSWSC 1576 at [50]–[51].

accepted the defendants' submission that returning to the same subject-matter over the course of several days is not in itself any evidence of malice, his Honour noted the "more balanced" tone used by Hadley during his first broadcast on 29 October 2019, in which he read aloud a statement provided by Omega, with the escalation of the language used in the following days, such as "thieves"; "extortion"; "dupe people"; "preys on the elderly"; "having you in the studio makes my skin crawl"; and "making millions by targeting the elderly and immigrants". The Court again noted that it is relevant to consider

the "grossness and falsity of the assertions but also the cavalier way in which they were expressed".¹³

Justice Davies granted the plaintiff's request for an interlocutory injunction pending the final determination of the proceedings.

5 Implications and conclusions

This decision is noteworthy for several reasons. First, it is a timely reminder of the difficulties faced by a plaintiff in succeeding in a claim of injurious falsehood given the high threshold to be met to prove malice on the part of a defendant. This is a significant hurdle for plaintiffs who have been economically affected

by false statements made by a defendant, particularly where the plaintiff is a business with more than ten employees. This is because businesses with more than ten employees cannot bring claims for defamation, for which malice need not be proved,¹⁴ and are therefore limited to bringing claims in injurious falsehood.

Secondly, the case nevertheless demonstrates that there are limits to the way in which a talkback radio host or any other broadcaster can express their views, particularly when basing those views on unconfirmed complaints received by listeners. Furthermore, radio hosts and broadcasters should note Justice Davies' focus on the repetition of the statements and the escalation of the language used over the relevant time period.

¹³ *Omega Plumbing v Harbour Radio Pty Ltd t/as 2GB and 2GB 873* [2019] NSWSC 1576 at [51] (citing Brereton J's remarks in *AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd* [2010] NSWSC 1395 at [32]).

¹⁴ *Defamation Act 2005* (Vic) s 9(2); *Defamation Act 2005* (NSW) s 9(2)(b).

CAMLA YOUNG LAWYERS



PREPUBLICATION 101 WEBINAR



WHAT'S INVOLVED IN A MEDIA CONTENT REVIEW?

BRUSH UP ON THE BASICS WITH SOME OF AUSTRALIA'S LEADING MEDIA LAWYERS

Panellists include:

- **Larina Alick** | Executive Counsel at Nine
- **Marlia Saunders** | Senior Litigation Counsel at News Corp Australia
- **Prash Naik** | General Counsel Doc Society, Principal at Prash Naik Consulting, and member of Reviewed & Cleared
- **Leah Jessup** | Business & Legal Affairs Executive at Endemol Shine Australia

THURSDAY 25 JUNE

12.30PM - 1.30PM

FREE FOR CAMLA MEMBERS | \$10 FOR NON-MEMBERS

REGISTER AT [CAMLA.ORG.AU/SEMINARS](https://camla.org.au/seminars)

ashurst

CAMLA

Contributions & Comments

Contributions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at:
clbeditors@gmail.com