> to a person in respect of a personal injury, the payment to that person of a scheduled benefit, in respect of that personal injury, shall, so far as it extends, be taken to be a payment in or towards the discharge of that liability, and the amount of those damages shall be reduced accordingly.'

Because the decision turned upon the meaning of the words 'lump sum payments', the exact wording of the statutory scheme would not appear to be relevant and the decision would apply to all jurisdictions where payments of medical expenses are made on a no-fault basis, either by workers' compensation insurers, workers' compensation authorities, or by a statutory authority in respect of motor vehicle accidents in those states with such a scheme.

The MAIB paid $51,528.86 in 33 payments to individual providers of medical services, 15 of which were amounts less than $100. The largest was a payment to the Royal Hobart Hospital Private Patient Scheme for $14,763.10. With one exception, all payments were made before Mr Morrison instituted legal proceedings.

In reaching its decision, the tribunal said (at paragraphs 37 and 38):

> 'Von Doussa J, in Banks [(1990)23 FCR 416 at 422], said: "A 'lump sum' payment is simply one which includes a number of items". In accordance with this definition we cannot see how the individual payments for single items made to doctors can be lump sum payments. It would not, however, be a logical scheme, of the kind one would attribute to Parliament, to include any payments addressing, for example, multiple days in hospital and to exclude those covering single consultations with doctors.
>
> We have concluded that, wherever the limit is to be found, more is required to amount to a lump sum payment for the purposes of the scheme than a set of payments for medical services whose grouping is neither entirely logical nor uniform which links items together in some cases and not in others.'

The tribunal summed up its decision as follows (para 46):

> 'We accordingly conclude that whatever is the precise ambit of the phrase "lump sum payment" in the statutory scheme, it does not cover a schedule of payments for medical expenses not dependent on fault and paid continuously over a period of time and not lumped in any organised or ordered way for the purpose of payment and where many items could not be lump sums.'

The tribunal found that definition of 'receives compensation' in s17(5) of the *Social Security Act* was irrelevant because s1171 refers to lump sums but not to compensation and, similarly, the definition of compensation in s17(2) was of no assistance to the department, not only for the above reason, but also because that subsection refers to payments '*made wholly or partly in respect of lost earnings or lost capacity to earn resulting from personal injury*'. Clearly, such payments are not made in relation to lost earnings or earning capacity in Morrison's case.

The tribunal criticised Centrelink, saying:

> 'In a case in which wider concepts of justice seem to have been secured by the decision of that tribunal [SSAT] it is difficult to see why it was thought to be good administrative decision-making to incur the time and expense of an application for review the cost of which must have substantially exceed the amount at stake, namely $3,568.32.' (para 13). ■

Notes: **1** *Morrison v Secretary, Department of Education, Employment and Workplace Relations (Centrelink)* [2008] AATA 1017. **2** [2006] ACTCA 26.

John Green *is a barrister based in Hobart.* **PHONE** *(03) 6228 0755.* **EMAIL** *johngllb@bigpond.com*

Does the general test for defamation apply to business and professional reputation?

Radio 2UE Sydney Pty Ltd v Chesterton [2009] HCA 16

By Tilda Hum

The decision of *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 considered the test that should be applied in determining whether a statement is defamatory, particularly in the context of business and professional reputation, and discussed the distinction between defamation and injurious falsehood.

FACTS

The facts of the case concerned statements made by John Laws about the plaintiff journalist, Ray Chesterton, on the *John Laws Morning Show* broadcast on Radio 2UE. Mr Chesterton brought an action for defamation against 2UE as the licensee of the radio station on which the comments were made.

The specific imputations that were the subject of the appeal to the High Court related to the plaintiff's professional reputation as a journalist; more specifically, that:

- the plaintiff is a 'bombastic, beer-bellied buffoon';
- as a journalist, the plaintiff is not to be taken seriously; and
- the plaintiff was fired from Radio 2UE.

ISSUE UNDERLYING THE APPEAL BY 2UE

It was alleged by the appellant, 2UE, that at trial, Simpson J did not make clear that the jury should consider the inferences relating to professional reputation by reference to the general test for defamation; specifically, whether the imputation has the tendency to lower the person in the estimation of ordinary reasonable persons within the community. 2UE argued that this omission in the jury directions, in essence, created a new tort of 'business defamation' that followed what they alleged was the incorrect decision in the case of *Gacic v John Fairfax Publications Pty Ltd (Gacic)*.[1]

In *Gacic*, the NSW Court of Appeal set aside the verdict of a jury that held that imputations from a restaurant review regarding bad service and unpalatable food were not defamatory. Beazley JA drew a distinction between defamation relating to character (where it was relevant to apply the community standards test) and cases of professional defamation, where that general test may not apply.

When the appellant, 2UE, appealed to the NSW Court of Appeal, the court considered *Gacic* in the context of the imputations against Mr Chesterton. The majority declined to accept the submission from Radio 2UE that the decision should not be followed, and dismissed the appeal.

DECISION OF THE HIGH COURT

The appellant brought a further appeal to the High Court, where it was held that the decision of *Gacic* was wrong as: 'It assumed, incorrectly, that the relevant injury was that to the plaintiffs' business, not to their reputation....To say that imputations may injure the plaintiff "in their business or calling" does not identify their reputation as relevant.'[2] The court held that such an approach may be relevant for an action for injurious falsehood – where malicious statements cause damage or loss to a person's business or goods – but is not appropriate in an action for defamation.

It further held, in the context of the test of community standards, that it is important to distinguish between the general test and other assessments that may be required to assess the impact of the imputation: 'Some statements may convey more than one meaning and bring into question moral or ethical standards as well as conveying a lack of ability to carry on a business or profession.'[3]

The court then moved to consider the trial judge's directions more specifically. Her Honour had begun directions to the jury by clearly articulating that defamation occurs where a person's reputation is injured. With the imputations relating specifically to Mr Chesterton's character, her Honour had asked the jury to consider these by applying the general test relating to community standards. However, with the imputations the subject of this appeal, her Honour did not specifically reiterate that the general test should be applied.

The High Court considered how the jury would have understood these directions, and whether it would have led them to improperly consider the financial implications of the imputations relating to the plaintiff's profession, rather than their impact on the plaintiff's reputation. It was held that no miscarriage of justice had arisen as a result of the jury directions as: 'It was made abundantly clear that they were to consider the effect upon his professional reputation... [and] in that regard they had been told that the question was whether ordinary reasonable members of the community would think less of the plaintiff.'[4]

The court explained that, where special knowledge of a business or trade may be required to assess the relevant imputation and its impact, it may be necessary to plead 'true innuendo', which allows special facts and evidence to be admitted where that knowledge is beyond the scope of the hypothetical ordinary reasonable person. The court noted that true innuendo was not pleaded in this matter, as 'The ordinary reasonable reader could apply their general knowledge to the imputations in order to determine their defamatory meaning.'

CONCLUSION

Heydon J said in a separate judgment: 'The court is invited to embark on the enterprise of considering whether it should interfere with the refusal of a divided intermediate appellate court, comprising three judges experienced in defamation law, to overrule an earlier decision of that court, comprising another three judges experienced in defamation law.' Heydon J declined to do that, dismissing the appeal on the basis that there was no misdirection, and that if there had been, it would have resulted in a substantial wrong or miscarriage of justice. Heydon J held there were 'many other passages conforming to what is being assumed to be the correct approach that the jury cannot have misunderstood the point'.[5]

The rest of the judges in a joint judgment held that while the Court of Appeal should have made it clear that the general test does apply to the imputations in question, the appeal by 2UE should nonetheless be dismissed with costs, as the directions of the trial judge did not result in a miscarriage of justice. The justices did, additionally, hold that the decision of *Gacic* was incorrect in requiring juries to be directed that the general test for defamation did not apply to imputations relating to business and profession. ■

Notes: **1** [2006] NSWCA 175. **2** *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 at 32 per French CJ, Gummow, Kiefel and Bell JJ. **3** *Ibid* at 45. **4** *Ibid* at 59. **5** *Ibid* at 72.

Tilda Hum *is a final year journalism and law student at the University of Technology, Sydney and the Australian Lawyers Alliance's former Legal and Policy Officer.* **EMAIL** *tilda.hum@gmail.com*