Offer of amends defence succeeds: Brennan v Nationwide News

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report on the first successful reliance on the apology defence in NSW

Background

In a recent defamation trial before Justice Badgery-Parker and a jury in the New South Wales Supreme Court, the offer of amends defence provided in Division 8 of the Defamation Act, 1974 (NS) as successfully raised by the publisher of *The Australian* newspaper. The defence provides that, in certain circumstances, an offer to publish an apology and pay costs is a defence to a claim for damages for defamation. It is rarely pleaded, and never successfully.

The first article complained of by Mr. Brennan, "Casualties of the MediFraud War", as published in *The Australian* on 23 March 1988. *The Australian* published a follow -up article on 26-27 March 1988 in the *Weekend Australian* which as also sued upon. Both the articles concerned an investigation of Dr. Frank Summers, a Newcastle general practitioner, by officers of the Health Insurance Commission. The articles described activities of the HIC's Investigation Unit "led by Mr. John Brennan" and referred in detail to his activities in the course of that investigation. The article reported interviews with several of Dr. Summers' patients, all of whom complained about the activities of the officer who carried out the investigations in Newcastle.

In May 1988, a statement of claim was served on the publisher of *The Australian* The plaintiff was described as John Brennan. Therew as no request, prior to the issue of the statement of claim, for an apology or correction to be published.

In September 1988, its acting chief of staff authorised republication of the original article in "New South W ales Doctor", the journal of the New South Wales branch of the Australian Medical Association. In November 1988, Mr. Brennan amended his statement of claim to include this republication.

Mistaken identity

During the months following the service of the statement of claim, the newspaper's solicitors, made enquiries and investigations concerning the matters raised in the articles and subsequently in October 1988 the newspaper filed a defence of truth and qualified privilege.

On 3 February 1989, in a conversation at the Defamation List, Mr. Brennan's counsel, Mr. Evatt, made the newspaper's solicitor aware for the first time of the fact that there were two persons known as John Brennan employed in the New South Wales HIC Investigations Branch. The solicitor found out that the plaintiff as the manager of the Branch and had not conducted the investigation referred to in the article, which as conducted by an investigations officer also called John Brennan. At the Defamation List, the newspaper's solicitor obtained leave to file an amended defence withdrawing the defences of truth and qualified privilege.

The offer of amends

On 17 February 1989, the newspaper made an offer of amends to Mr. Brennan pursuant to Part 3 Division 8 of the Defamation Act 1974 (NS). The offer was not accepted and on 3 March 1989 the newspaper obtained leave to file, and subsequently filed, a defence pleading the making of that offer. The newspaper also published an apology to Mr. Brennan, even though the offer had not been accepted.

In order to comply with the provisions of the Act, the newspaper had to establish that the publication of the articles as innocent. When an article is published and it may be defamatory of a person, the article is innocent only if at and before publication the publisher and the servants and agents concerned with its publication:

(a) exercised reasonable care in relation to the article and its publication;
(b) did not intend the article to be defamatory of that person; and
(c) did not know of circumstances by reason of which it may be defamatory of that person.

When the offer is made and not accepted, it is a defence to proceedings brought in respect of the article that:

(a) its publication was innocent in relation to the plaintiff;
(b) the offeror made the offer as soon as practicable after becoming aware that the matter in question is or may be defamatory of the plaintiff;
(c) the newspaper was ready and willing to perform any agreement arising by the acceptance of its offer before the commencement of the trial; and
(d) the author of the article was not motivated by ill will.

The paper proves its case

To prove its case, the newspaper called the journalist who wrote the articles, Mark McEvoy. He gave evidence of the extensive inquiries which he had made prior to writing the articles. He had spoken to each of the persons mentioned in the articles, and had copies of written statements from some of those persons. He had also attempted to contact the investigator, John Brennan, at the HIC but had been told that he as unavailable. The journalist's evidence was that he was not made aw are by anyone at the HIC that there was more than one John Brennan employed there, or that the Manager (Investigations) of the HIC's New South Wales branch went by the name of John Brennan. He was completely unaware of the plaintiff's existence. This evidence was accepted by the jury.

The editor of *The Australian* at the time the articles were published, Alan Farrelly, and the editor-in-chief of the newspaper at the time, Les Hollings, also gave evidence of procedures adopted by the newspaper and of their role in the preparation and publication of the articles. Neither of them were aware prior to publication of the existence of the second John Brennan.

The newspaper's solicitor gave evidence that she believed the John Brennan described as the plaintiff in the statement of claim to be the same person described in the articles, and she was not aware until the conversation with Mr. Evatt on 3 February 1989 that the plaintiff was in fact a different person to the person to whom the article intended to refer. This as despite inquiries which she had undertaken in about August 1988 which provided some evidence that there was some information available to the newspaper and its legal advisers at that time suggesting that another John Brennan had conducted the patient interviews in Newcastle.

The trial Judge held, in a ruling during the trial, that the knowledge referred to in S. 43(1)(b) of the Defamation Act meant actual knowledge, not constructive knowledge. For this reason, the relevant time when the

newspaper became aw are that the articlew as or may be defamatory of the plaintiff was in February 1989, rather than in August 1988 or earlier. The offer being put on shortly after that time as therefore made by the newspaper "as soon as practicable after becoming aware".

The trial judge ruled that the offers complied as a matter of law with the formalities required by the Act and left them to the jury in regard to all three publications.

The judge also directed the jury that Mr. Brennan was not entitled to damages in respect of avoidable loss, that is, loss which by the exercise of reasonable steps on his own behalf he might have avoided. Therefore, he could not recover damages resulting from the failure of the newspaper to publish a correction and apology until almost a year after publication of the original articles, as the plaintiff could have reduced the harm suffered by bringing to the newspaper's attention the fact that there were two persons known as John Brennan within the HIC.

In respect of the first and second articles sued upon, the jury found in favour of the newspaper. The jury found each of those publications were innocent in relation to the plaintiff and the offer of amends was made as soon as reasonably practicable after the defendant had become aware of the true facts.

In relation to the republication in *New South Wales Doctor Magazine*, the jury found that the matter complained of w as not innocent in relation to the plaintiff. The basis of that answer was a finding by the jury that the newspaper had not exercised reasonable care in allowing republication of an article upon which a statement of claim had already been issued. The jury awarded the plaintiff in respect of the third article $10,000 damages.

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The Bond amendments

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of licence renewal inquiries and transaction inquiries. It should not be long before the practical implementation by the Tribunal of the amendments contemplated by the Bill will be seen.

In his Second Reading Speech the Minister stated that the Bill "represents the first stage of legislation to reform the operation of broadcasting regulation." We await the "further reforms" which are to be contained in amendments to be introduced in the Autumn and Budget Sittings of Parliament in 1990.

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The Newspaper Rule

Grant Hattam examines the development of this rule and its recent application in Victoria.

Background

What is told to journalists is not rated in law with the same importance as what is told to priests, doctors or lawyers. The latter three professions have an absolute privilege. They do not have to reveal under any circumstances what has been told to them. Journalists don't have that privilege. What I'm told as a lawyer will never be revealed. A journalist, however, if ordered by a court to do so, must reveal his or her source or face the consequences.

That does not mean, of course, that a journalist will necessarily reveal the identity of the source, even though ordered by a court. He or she may refuse to do so thereby abiding by the journalists' code of ethics. As a result, there can be a conviction for contempt which may mean gaol.

That will only happen if a court in the first place refuses to apply what is known as "the newspaper rule".

Recently, the Supreme Court of Victoria did apply the newspaper rule and refused an application by the Guide Dog Owners and Friends Association (the Lady Nell School) for the journalists who wrote a story in *The Melbourne Herald* to disclose their sources.

Cynics say that the rule has evolved simply because some judges could not bear the adverse publicity of sending journalists to gaol for refusing to divulge their sources until absolutely necessary. In other words, a sort of semi-privilege has been afforded to journalists that has evolved as a matter of practice.

The Conjuangco Case

To understand the Cojuangco case is to understand the newspaper rule.

In an article in *The Sydney Morning Herald*, a man called Cojuangco was allegedly defamed. The article concerned his affairs in the Philippines and the allegation that he was corrupt. He felt sufficiently aggrieved to want to issue proceedings in Australia for defamation. But who could he sue? In New South Wales, there is a statutory defence available to a newspaper. Cojuangco was unlikely to succeed if he sued the newspaper because of this defence.

Therefore, what could he do in order to have his reputation, as he saw it, restored? As the article itself placed great reliance on the sources mentioned in the article for the information relied on, Cojuangco made application that the journalist concerned should reveal his sources. Indeed, the whole article had the striking feature of being based on statements from leading and senior figures. The court, whose ruling was upheld in subsequent appeals, agreed with Cojuangco's application.

The courts significantly found that there is such a thing as "the newspaper rule" which protects journalists from revealing sources. But that rule will not apply if justice demands that it should not.

Justice in the Cojuangco case did make such a demand. The courts felt that he would have been prejudiced without such disclosure. Cojuangco did not have any successful prospects of an action against the paper because of the special defence available to the newspaper. Such a defence, however, was not available to the sources. It was only by having the sources as defendants that Cojuangco could endeavour to restore his reputation. The court made it clear, however, that if he had had a reasonable action against the newspaper the journalist, at least until the trial of the action, would not have to reveal the identity of the source.

The Sydney Morning Herald was faced with the prospect of its journalist having to reveal his sources. It is not surprising that a very logical step then took place, The newspaper simply stated to the court that it would not rely upon the statutory defence. It would simply rely on other defences such as truth. It stopped itself from being in any better position of defending an action than any source would be.

Accordingly, the newspaper rule was applied upon the undertaking by *The Sydney Morning Herald* to abandon its statutory defence and the journalist did not have to disclose his sources. Cojuangco, in other words, was left with an action against *The Sydney Morning Herald* which was in no better position to defend that action that any source would be.

The Lady Nell Case

In the recent Victorian Lady Nell case, the Full Court of the Supreme Court believed that justice would not be denied to the plaintiffs if the newspaper rule was applied. The defendants in that case already had an