DPP v Newcastle Newspapers and John Fairfax and Sons

A recent amendment to the Crimes Act 1900 in New South Wales has serious implications for journalists reporting sexual assault trials. Richard Coleman reports on the first prosecution under the new section.

The criminal prosecution was brought by the DPP against Newcastle Newspapers Pty Limited and John Fairfax & Sons Limited, publishers of The Newcastle Herald, over the publication in a court report of sexual assault proceedings of the first name of the victim of the sexual assault.

Such a publication is prohibited by section 578A(2) which states:

"A person shall not publish any matter which identifies the complainant in prescribed sexual offence proceedings or any matter which is likely to lead to the identification of the complainant."

This section was added to the Crimes Act in 1987. This amendment had the entirely praiseworthy purpose, as revealed in the Minister's second reading speech, of making the court processes less traumatic for child and adult victim-witnesses and of encouraging women and children to report crimes against them and to seek the assistance of police and court processes in protecting themselves from threats of future violence.

The section provides for fines and six-months' imprisonment for individuals who are convicted under it and substantial fines for corporations.

Matter likely to lead to identification

The particular problem for news organisations interested in reporting court proceedings involving sexual assault is the width of the prohibition. The section prohibits not only the publication of any matter which identifies the complainant, but also the publication of "any matter which is likely to lead to the identification of the complainant".

It is this second limb of the section that poses the greater danger for court reporters and news organisations. Even though the court report might leave out the name of the complainant, sufficient details of the sexual assault might nevertheless be published which would allow readers, viewers or listeners of the report with special knowledge to work out the identity of the complainant, thus leaving the reporter and news organisation in apparent breach of the section.

The Newcastle Herald prosecution proceeded on the basis that the offence was one of absolute liability. That is, the publishers were criminally liable irrespective of whether they had acted with neither criminal intent nor fault.

The prosecution was heard by Acting Justice Lusher in March 1990 in the Criminal Division of the Supreme Court. Both defendants pleaded guilty.

In the offending court report the complainant was referred to as the "boy" or "son" throughout with the exception of one mention of his first name in a reference to the evidence given by his mother.

In the judgment, Justice Lusher made this observation:

"Subjectively I must confess that at the outset of the hearing and being aware of the charge and on first looking quickly over the article, I was puzzled and not conscious of any identification and it was only on closer examination that the form of the identification became apparent".

Justice Lusher thought that the offence occurred under the second, broader limb of the subsection referred to above. That is, the offence occurred because the publication was likely to lead to the identification of the complainant rather than actually identifying the complainant.

Vigilance is not enough

The evidence presented by counsel for Newcastle Newspaper concentrated on the newspaper's good record as a publisher since 1876, its awareness of the prohibition against publishing the names of sexual assault victims, its training and supervision of reporters and the system of checks and double checks that has been established on the paper to prevent accidental publications of the sort in question.

Justice Lusher looked at the purpose of the legislation and said:

"Obviously total prevention of identification is impossible. The charge itself, the committal and the trial were reported and local and other awareness and discussion and curiosity are themselves instances and sources of public identification. Nevertheless the policy behind the legislation assumes ... that the impact on the victim of publication can be enormous and is to be avoided. There is also the question of deterrent."

He made the following assessment of Newcastle Newspapers' culpability:

"I accept the explanations offered and find that the first defendant's (Newcastle Newspaper's) efforts so far as selection and quality of personnel, training and supervision and efforts to inculcate proper standards of awareness of the need to comply with the legislation are substantial and impressive. Indeed accepting all the facts put before me by the defendant as I do, there is no question but that this matter aside, everyone concerned knew and was aware of the restriction and implemented it.

Likewise the system employed I find satisfactory and probably exceeds accepted standards and practice. It is easy to say it should have been picked up but experience, particularly of those who practise in these Courts, is that virtually no system is absolute proof against ever present fallibility and the capacity for unpremeditated human error. In short, I find that the degree of such criminal culpability in the first defendant as the section envisages is slight."

In light of these observations, he imposed a penalty of $1500 on Newcastle Newspapers Pty Limited and a penalty of $750 on John Fairfax & Sons Limited.

The experience of The Newcastle Herald in this matter emphasises the extreme - and perhaps even infallible - vigilance required by court reporters covering sexual assault trials not to publish anything that would either identify the complainant or be likely to lead to the identification of the complainant.

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