soliciting information from a juror following a trial. *The End of Innocence* is not simply a book that uncovers an injustice; it's the story of a journalist's education in the ways of the legal world.

The End of Innocence is a remarkable story. It is not uncommon to read the commentaries of lawyers who have been involved in cases where the courts have been found to have been wrong at first instance. Nor is it uncommon for lawyers to describe how new evidence has been bought to light. Blackburn's book describes how, when and where that new evidence was found and the conflicts that may arise for journalists who venture into the unsafe territory of forensic journalism. In this journey towards truth, Blackburn writes with an easy flow, happy to divulge details of her private life, the breakdown of her finances caused through her obsession with the Button and Beamish cases, and the difficulties of dealing with temperamental lawyers. *The End of Innocence* is a worthy companion volume to the seminal work of *Broken Lives*. For those who lived in Perth during the 1950s and 1960s, *The End of Innocence* is a catalogue of connections that reduces Perth society to far fewer than six degrees of separation.

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CASE NOTES

Defamation and the difficulties with burden of proof

Macquarie Bank Ltd & Ors V Nationwide News Pty Ltd & Anor [2009] ACTSC 9

By Erica Lai

Modern defamation laws have developed over several centuries; but can still be described as an imperfect science, dealing with contemporary social and moral values, free speech and individual reputation.[1] Defamation laws should not place unreasonable limits on freedom of expression and on the publication and discussion of matters of public interest and importance.[2] But balancing the protection of individual reputation with freedom of expression is vital in order to avoid silencing criticism and chilling speech,[3] where journalists and publishers become reluctant to pursue significant stories for fear of defamation lawsuits.[4]

In assessing whether defamation has occurred, the defendant's intention is irrelevant; it is the effect of the defendant's actions that matters.[5] Defamation centres on the loss of reputation, and does not necessarily include all assertions that upset, offend or inconvenience individuals.[6] For published material to be considered defamatory, the imputations must either expose a person to ridicule; lower their reputation in the eyes of members of the community; cause people to shun or avoid them, or injure their professional reputation.[7]

The ACT, South Australia and the Northern Territory are the only Australian jurisdictions where juries are not used in civil proceedings; in NSW, juries are still used in civil defamation cases.[8] *Macquarie Bank Ltd & Ors v Nationwide News Pty Ltd & Anor* was heard by a single judge, Gray J, in the ACT Supreme Court. His Honour's frequent use of the term 'ordinary reasonable reader' begs the question as to whether or not juries should be used in ACT defamation proceedings. In fact, Gray J commented in his judgment, 'I don't have the benefit, as a jury would have, of discussion about the impact and impression that the article might make on others and particularly on persons who are not lawyers.'

BACKGROUND

The plaintiffs sued the defendants regarding the publication of material that they claimed defamed them. The plaintiffs were Macquarie Bank Limited (MBL), Warwick Morris and Jonathan Rourke, senior executives of Macquarie Bank's Treasury and Commodities Group. The defendant, Nationwide News Pty Limited (Nationwide), is the publisher of the *Weekend Australian* newspaper, in which the published matter complained of appeared on 5 March 2005.

The case against a second defendant – News Interactive Pty Limited, the publisher of the *Weekend Australian*'s online content – was dismissed, following a consensual agreement between the remaining parties to do so. Like most other laws, defamation is jurisdictionally defined based on geographical areas, which poses a problem, as the Internet is inherently trans-border in nature.[9] This can have serious implications for defamation laws and, while it is not an issue explored in this case, the challenges presented by the cyberspace era on longstanding laws cannot be ignored, or solved by partially uniform laws.[10] >>

The newspaper article entitled 'The Mine Shaft' was alleged by the plaintiffs to contain imputations of illegal conduct on their behalf, which they claim had defamatory implications. The published article concerned the involvement of Macquarie Bank in the financially troubled Allstate Exploration, which was a joint venture partner with Beaconsfield Gold in the Beaconsfield Mine Joint Venture (BMJV). The article focused on a particular BMJV creditors' meeting, which was held concerning Allstate's deed of company arrangement, where a proposal for MBL to purchase creditors' $77 million debts due to Allstate by Allstate's fully owned subsidiary companies, in return for a $300,000 contribution to be distributed to Allstate's unsecured creditors, was considered and passed.

IMPUTATIONS

The imputations claimed by the plaintiffs to have arisen from the published material include:

(a) Misleading conduct;
(b) Using their position to keep Allstate in administration for the improper purpose of recovering losses incurred by procuring hedging arrangements for Allstate;
(c) Breach of legal obligations;
(d) Withholding information from Allstate creditors regarding forecast rates of annual gold production in order to pursue its own commercial objectives;
(e) Improper threat;
(f) Caused decrease in Allstate's value;
(g) Improperly depriving shareholders of their economic benefits;
(h) The second and third plaintiff, Mr Morris and Mr Rourke, participated in the illegal or other improper conduct outlined in (a), (b), (d), (e), (f) and (g);
(i) Mr Morris lied to the creditors;
(j) Mr Morris wrongly neglected to inform Allstate creditors concerning forecast rates of gold production.

REASONING

Firstly, Gray J considered where and how the article appears in the newspaper. Gray J noted that being in the business section of the broadsheet newspaper, the serious article contained technical concepts related to finance and mining of which the ordinary reasonable reader would have only a general understanding,[11] but that it also employed emotive and sensational epithets, which allowed the reader to speculate.[12] Also, even though the headline itself made a punning reference to the derogatory meaning of the word 'shaft', the reasonable reader would not necessarily have appreciated the shade of meaning intended;[13] whereas the graphs depicted in the spread gave an overall impression that MBL had advantaged itself at the expense of others.[14]

In his judgment, Gray J drew defamatory definitions from several cases, including *John Fairfax Pty Ltd v ACP Publishing Pty Ltd* (2005),[15] which cited Lord Reid's general principle when dealing with matters of this kind – what do the words convey to an ordinary man, and what will the ordinary man infer from them? Lord Reid also pointed out, 'An imputation must, of course, reflect…the most damaging meaning an ordinary reasonable reader would attribute to them.'[16] However, what Gray J considered particularly pertinent to this case was a passage from the judgment of McHugh in *John Fairfax Publications Pty Ltd v Rivkin* (2003):[17]

> 'A reasonable person considers the publication as a whole…considers the context as well as the words alleged to be defamatory… But that does not mean that the reasonable reader does or must give equal weight to every part of the publication. The emphasis that the publisher supplies by inserting conspicuous headlines, headings and captions is a legitimate matter that readers do and are entitled to take into account.'[18]

What is very much in issue is whether the pleaded imputations summarised above are actually conveyed by the article. All the imputations were considered while having regard to the article as a whole, and from the ordinary reasonable reader's point of view. Gray J's ruling on each imputation is as follows:

- Misleading conduct – insufficient reference to say that shareholders were misled by Macquarie or that the ordinary reasonable reader would come to that conclusion.[19]
- Hedging arrangements – the ordinary reasonable reader would not draw the conclusion that Macquarie manipulated the hedge books or conspired with the administrators to act detrimentally to Allstate.[20]

Gray J stated:

> 'In the absence of a fair inference being drawn that the administrators were complicit in a joint intention to detrimentally affect Allstate, I do not consider that the ordinary reasonable reader would necessarily conclude that Macquarie had acted unlawfully or improperly…it falls short of conveying impropriety as opposed to shrewd and perhaps even manipulative conduct on Macquarie's part in advancing Macquarie's interests.'[21]

- Breach of legal obligations – nothing in the article, when taken as a whole, allows the ordinary reasonable reader to conclude that an accusation of guilty conduct was imputed.[22]
- Macquarie could not be said to have withheld information from Allstate creditors, because it cannot be inferred that Macquarie had any responsibility to the creditors to provide them with information.[23]
- Improper threat – this imputation is based on the fact that creditors did not have 'sufficient information about the prospects of the mine to make an informed decision about the proposal', and that an ordinary reasonable person would not conclude that it was Macquarie's responsibility to provide information about the mine's prospects.[24]
- Decrease in Allstate's value – allegations in the article do not give rise to an implication of blameworthiness arising from Macquarie's role.[25]
- Lying to the meeting – the imputation that Mr Morris misled the creditors by telling them something that was incorrect and which he knew to be incorrect is not pleaded; there was no deliberate untruth.[26]
- Regarding the second and third plaintiffs – on fair reading of the article, neither Mr Morris of Mr Rourke are

implicated in any allegation of illegal or other improper conduct.[27]

Although the defendants entered a defence of truth, it was 'strictly not necessary to consider the defendants' defence of truth' because Gray J had found that none of the alleged imputations pleaded by the plaintiffs were conveyed by the article. Nevertheless, Gray J commented on the defendants' failed attempt to establish that Macquarie had not properly provided material at the creditors' meeting, and that Mr Morris had manipulated the meeting to deceive creditors.[28] The defendants failed to show a probable inference from Mr Morris' evidence that there was a deliberate attempt to lie or to mislead creditors at the meeting,[29] which at first instance was a characterisation that Gray J found to be an unfair representation of what was reported in the meeting's minutes.[30] In fact, Gray J asserted that there was 'no justification for the tone of the article or what can only be described as "cheap shots" that the article takes at Macquarie's expense', and expressed disappointment at the journalist's approach to the article published in a newspaper he thought 'prided itself on accurate and responsible reporting'.

CONCLUSION

Gray J handed down a verdict in favour of the defendant, dismissing the plaintiffs' claim against the defendants with costs. The ACT Supreme Court's verdict demonstrates the difficulty plaintiffs face in defamation proceedings, where the evidentiary burden of proof for defamatory imputations is hard to surmount. ■

Notes: **1** M. Pearson, 2007, *The Journalist's Guide to Media Law: Dealing with Legal and Ethical Issues*, 3rd ed, Allen & Unwin. **2** *Defamation Act 2005*: s3 (s115 ACT). **3** Electronic Frontiers Australia: Australian Defamation Laws and the Internet, <http://www.efa.org.au/Issues/Censor/defamation.html> **4** See note 1. **5** Butterworths, *Concise Australian Legal Dictionary*, 3rd ed, LexisNexis, 2004. **6** See note 1. **7** Communications Law Centre: Free Speech and Defamation, <http://www.comslaw.org.au/LeftMenu/FreeSpeechDefamation/tabid/59/Default.aspx> **8** See note 1. **9** See note 3. **10** Partly uniform defamation laws were introduced in 2005 in all jurisdictions, except the ACT (see the *Civil Law (Wrongs) Act 2002*) and the Northern Territory (see *Defamation Act 2006*). Also, sections in the South Australian legislation are sometimes numbered differently. **11** At [46]. **12** At [103]. **13** At [49]. **14** At [50]. **15** 157 ACTR 28 at 30 [8] – [14]. **16** At [90]. **17** 77 ALJR 1657; 201 ALR 77 at [26]. **18** At [92]. **19** At [118]. **20** At [88]. **21** At [88]. **22** At [129]. **23** At [136]. **24** At [145]. **25** At [148]. **26** At [160], [161]. **27** At [167], [172]. **28** At [175]. **29** At [187]. **30** At [182].

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Centrelink – Preclusion period

Morrison v Secretary, DEEWR (Centrelink)[1]

By John Green

Payments of medical expenses made under 'no-fault schemes' are no longer to be included in the lump sum used for calculating a preclusion period.

In this case, the AAT (consisting of Justice Downes, president, the Hon R J Groom, deputy president and Mrs A Cunningham, senior member, sitting in Hobart on 12 November 2008) decided that payments made under the no-fault provisions of the *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) cannot be included in the lump sum used to calculate the preclusion period.

The tribunal decided that payments made to medical practitioners were not lump sums within the meaning of s1171 of the *Social Security Act 1991* (Cth).

It also decided that such payments made directly by the Tasmanian Motor Accidents Insurance Board (MAIB) to the providers of medical services were not payments received by the person in receipt of relevant welfare payments.

In reaching the latter conclusion, the tribunal relied on the case of *Allianz Australia Insurance Ltd v Insurance Australia Ltd t/as NRMA Insurance*.[2]

The tribunal found that, although the payments may have been made for Mr Morrison's benefit or on his behalf, they were not *received* by him.

Joel Morrison was a 16-year-old boy who went for a drive in a Porsche car, driven by his 16-year-old friend, who had 'borrowed' it from his uncle. Joel received serious closed-head injuries and spent several weeks in hospital but, according to neuropsychological reports, had no significant ongoing disabilities.

The written statement of claim was lodged in the Tasmanian Supreme Court after Joel turned 18 and the MAIB's lawyer pleaded contributory negligence, involvement in a joint criminal enterprise, and *violenti non fit injuria* as defences, but offered to settle for $50,000, which was accepted by Mr Morrison.

The Tasmanian Motor Vehicle Accident Compensation Scheme is a two-tier system under which the MAIB is obliged to pay the medical expenses and 80 per cent of the income for two years of any person who suffers accident injuries through the use of a motor vehicle in the state of Tasmania.

Under s14 of the Tasmanian Act, the MAIB is bound to indemnify the user of a motor vehicle in respect of their liability (other than contractual liability) for the personal injury to a person resulting directly from a motor accident involving that motor vehicle in Tasmania.

Section 27 of the Tasmanian Act relevantly provides that 'if a liability has been incurred for the payment of damages >>