

Casenote update: *Sali & Ors v Metzke & Allen*

by Jason Savage, Associate and
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The case of *Sali & Ors v Metzke & Allen*¹ is, on its face, a fairly straightforward case about loss of opportunity and an accountant's failure to give proper, timely advice. However, buried within it, is a useful clarification of the circumstances in which a defendant may use the proportionate liability legislation to his or her advantage.

Background

Sam and Alan Sali and their company, S Sali & Sons Pty Ltd (**the plaintiffs**), suffered losses as a result of the collapse of Universal Logistics Pty Ltd. They alleged that the losses were caused by breaches of contractual and other duties by Metzke & Allen, an accountancy firm.

In February 2001 a sequence of events revealed that profit reports over the previous three months had been misleading, which led to Universal Logistics going into administration. A large portion of the judgment is a scrutiny of what could (and ought to) have been done by the accountants in the months immediately prior, in order to minimise the plaintiffs' losses.

It was common ground that the profit and loss statements provided to the board of Universal Logistics in the second half of 2000 by the managing director, Mr Blizzard, were misleading. The plaintiffs originally chose not to pursue Mr Blizzard, and he was subsequently joined as a defendant by the accountants.

Whelan J found that Mr Allen of the accountants owed a duty to the plaintiffs and failed to exercise reasonable care by delaying for too long before taking steps which were necessary as a result of the shortcomings in the financial reports provided to the board. His Honour concluded that Mr Allen did take the appropriate steps in February 2001, but that he really ought to have taken those steps by the end of July 2000 at the latest.

In Brief

- § Legal liability to the plaintiff is required for proportionate liability between defendants.
- § The tests for general defamation and business defamation are the same.

By Mark Brookes, Partner

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Proportionate liability

An interesting part of this case, is its discussion of the operation of Part IVA of the *Wrongs Act 1958* (Vic) (**the Act**). It is relevant because the provisions of the Act are mirrored in all other State and Territory jurisdictions² and there is very little other authority on the particular issue raised.

The accountants joined Mr Blizzard as a third defendant for the purpose of arguing that he was a concurrent wrongdoer and that any liability that they might have to the plaintiffs should be limited pursuant to Part IVA of the Act.

The plaintiffs submitted that Mr Blizzard could only be a "concurrent wrongdoer" for the purposes of the section 24AH(1) of the Act if it could be established that the plaintiffs had a cause of action against him. This proposition was not attended by much authority, and the plaintiffs relied on papers presented at conferences³ and a decision of the Victorian Civil and Administrative Tribunal.

Whelan J found that the section required that before a person can be a concurrent wrongdoer, that person must be legally liable to the plaintiff. His Honour's analysis was based on:

- the use of the term "wrongdoer", suggesting direct liability;
- the requirement of causation, which his Honour found to be causation in the context of legal liability;
- use of the term "responsibility" in the context of the person responsible necessarily being a party to the litigation;
- the provision in the Act for subsequent action by the plaintiff against a concurrent wrongdoer; and
- an expectation that if it was the legislative intention for the concept to extend to parties who did not have a liability to the plaintiff, that the legislature would have expressly stated this.

Ultimately this did not serve the plaintiffs, as Whelan J found that Mr Blizzard *did* have a direct liability to the plaintiff. Mr Blizzard was therefore found to be a concurrent wrongdoer and the Act therefore required the

accountants' liability to be limited accordingly (reduced by 70% in this instance).

Conclusion

The proportionate liability regime is intended to give some protection to defendants from being left to bear the entirety of adverse judgments where there are other - although perhaps impecunious - defendants who have also caused the loss.

In this case, the plaintiffs fought valiantly in their attempts to target the defendant with the deepest pockets. They established that in order for a defendant to benefit from the proportionate liability legislation, the alternate "wrongdoer" must have a direct legal liability to the plaintiff. The "causation" must be in the limited context of legal liability and not some broader concept of causation that is divorced from legal liability.

However, the plaintiffs ultimately did not benefit from this argument as Whelan J found that Mr Blizzard *did* owe a duty of care to the plaintiffs directly. Nevertheless, this is an important clarification of the point.

This case comes as an important reminder to defendants (and their insurers) to ensure that all relevant parties are before the court, so to best take advantage of the proportionate liability legislation in the various states.

¹ [2009] VSC 48

² *Civil Laws (Wrongs) Act 2002 (ACT)* Ch 7A

Proportionate Liability Act 2005 (NT) Pt 2

Civil Liability Act 2002 (NSW) Pt 4

Civil Liability Act 2003 (Qld) Ch 2 Pt 2

Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) Pt 3

Civil Liability Act 2002 (Tas) Pt 9A

Wrongs Act 1958 (Vic) Pt IVAA

Civil Liability Act 2002 (WA) Pt 1F

³ "Proportionate Liability: An Analysis of the Victorian and Commonwealth Legislative Schemes" by Uren QC and Aghion on 18 August 2005.

High Court overrules Gacic approach to "business defamation" - Radio 2UE Sydney Pty Ltd v Chesterton [2009] HCA 16

by Mark Brookes, Partner and Stacey Leeke, Solicitor

In the recent decision of *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 the High Court has clarified the proper approach for cases involving 'business defamation' and has overruled the current NSW authority on this point, being the decision in *Gacic v John Fairfax Publications* [2006] NSWCA 175 (**Gacic**).

The facts

The alleged published matter in this case concerned a radio broadcast made during the John Laws Morning Show on the defendant's radio station, regarding the

plaintiff (Chesterton). The presenter stated:

"Well that bombastic, beer-bellied buffoon Ray Chesterton, writes a column in the Telegraph called "The Final Word". Well its not the final word today.

What's the matter with you Ray?

I mean, you know, I always knew you were a bit of a creep, but can't you get over it?

He was fired by 2UE and blames me for it. He's never got over it and he talks about the Joey Johns saga and say (sic) Meanwhile the Johns saga is starting to run out of motivation.

You know that when 70-year-old disc jockeys are drawn into the fray to support the argument.

I talked to Joey Johns because I wanted to, because he is a friend of mine, a word you probably wouldn't understand because I doubt you'd have any, and those that you do have call you "Ankles" and for a very good reason.

I don't know. Why can't you get over it, Ray? I mean, you used to enjoy going to my farm and I used to give you the house and you used to take your family and your children up there. I was very happy that all that took place. But why can't you get over it?

Well, I suppose you have some kind of inferiority complex. Well, I have to tell you, I have never met a man who deserved one more."

At trial, the jury found that the six imputations arising from this broadcast were all defamatory.

The defendant's appeal was only made in respect of three imputations which involved the plaintiff's professional reputation as a journalist, on the basis that the jury was misdirected as to how the imputations were to be assessed. It argued that the trial judge had followed the decision in *Gacic* which erroneously distinguished between tests for general defamation and so called 'business defamation'.

The Gacic decision

In *Gacic*, the defendant published comments which conveyed imputations as to the quality of the food and service provided at the plaintiff's restaurant. At trial the jury decided that neither of the imputations were defamatory in nature.

On appeal, the majority reversed the jury's verdict, entering its own decision in favour of the plaintiff. The appeal was upheld on the basis that the majority considered the trial judge's direction, in so far as it suggested that "business defamation" was the same as defamation in its generally understood meaning, was incorrect.

The imputations regarding the plaintiff's restaurant were held to be defamatory in that they "caused injury to the plaintiffs' business, trade or profession as owners of the restaurant". The majority further stated that "a person may be defamed in their business, trade or profession regardless of whether defamation lowers the person in the estimation of others".

The majority of the court of appeal accepted that the common law test for defamation, being *whether the plaintiff is lowered in the eyes of ordinary, right-thinking members of the community*⁴, was the correct approach in situations of 'general defamation' involving a person's general character or conduct. However it regarded this test as inappropriate to determine 'business defamation'

involving injury to a person's professional or business reputation. Although, no suggestion was made as to what sort of test should be applied in the latter situation.

High Court's decision

The High Court was essentially required to determine two issues on appeal:

1. Whether the general test for defamation applies to published matter concerning a person's business or professional reputation, or whether its limited to those concerning the character or conduct of that person; and



2. If business defamation is to be determined differently, whether hypothetical referees are to be drawn from a class of persons who have particular knowledge associated with the business or profession.

As regards the first issue, the High Court concluded that the court of appeal in *Gacic*, incorrectly focused on the damage to the plaintiff's restaurant business and failed to relevantly consider the impact on the plaintiff's personal reputation. It wrongly suggested that different aspects of the plaintiff's reputation should be distinct and subject to different standards or considerations or to be determined by a different class of referees.

Rather, it held that **any** alleged imputation must satisfy the general common law test in order for it to be defamatory at law. The answer to this test is a conclusion as to a plaintiff's reputation and it may relate to any aspect of the reputation including the plaintiff's standing in the community, its estimation in the eyes of others or its professional or business reputation.

In respect of the second issue, the court held that no particular class of referee is required. The hypothetical "ordinary decent person" referred to in the general test is simply one which will apply general community standards. The particular standards which will be applied in a case will vary depending on the nature of the imputation. Furthermore such standards are not limited to morals and ethics and in some situations will not require consideration of standards at all.

The court stressed however, that where standards are applied they must always be those of the general community and not of a discreet class. In circumstances where imputations concern matters not within the general knowledge of the general community, a plea of true innuendo is appropriate. This would require evidence of special knowledge of those to whom the imputations were published such as would lead a reasonable person having the knowledge to conclude that the words have another defamatory meaning.

Conclusion as to the present proceedings

As regards the present proceedings, the High Court considered that, in the absence of the *Gacic* authority, an appropriate direction to the jury would have advised that the imputations regarding the plaintiff's professional reputation were to be assessed by reference to whether they would cause an ordinary reasonable person to think less of the plaintiff.

Although the trial judge followed aspects of the *Gacic* decision, her direction to the jury as regards the appropriate test did not contain the same errors of law. She explained to the jury that while there were two different aspects to the plaintiff's reputation (to which different imputations were to be attributed), both were to be assessed from the point of view of ordinary, reasonable, decent members of the community. This direction was found to be sufficient as the jury was directed to consider injury to the plaintiff's reputation and not financial injury he suffered in the practice of his profession.

The High Court concluded that there had ultimately been no miscarriage of justice, despite the trial judge having followed an erroneous authority. Thus the appeal was dismissed.

The joint judgement of French CJ, Gummow, Keifel and Bell JJ also provides a concise summary of the origin and applications of the accepted common law test, the distinction between defamation and injurious falsehood and the current statutory interpretation of 'defamation' under the *Defamation Act 2005* (NSW). This judgement is definitely worth a read as a refresher.

⁴. Originally propounded by Lord Atkin, applied in *Slatyer v The Daily Telegraph Newspaper Co Ltd*(1908) 6 CLR 1 and confirmed by the high court in *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 638-639 and *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 545.

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Upcoming presentation...

Is your business ready for the latest reforms to workplace relations in Australia?

Will the reforms make any difference to your business costs and the way in which you deal with workplace relations?



Clayton Payne, Senior Associate will be presenting a complimentary in-house seminar entitled "**Back to the Future? - The Fair Work Act 2009**" on **Thursday 16 July 2009** in relation to:

- awards;
- collective agreements;
- unfair dismissals; and
- the new "one stop shop" for workplace relations, known as "Fair Work Australia".

To register your interest, please contact Jaqueline Stephan on (07) 3000 8335 or via email at jstephan@carternewell.com.

Staff news...

Carter Newell Lawyers congratulates **Stephen Humphreys** on his elevation to Partner within the Commercial Dispute Resolution team.

As a specialist in the Commercial Dispute Resolution team Stephen advises boards and senior management on commercial risk management, credit risk, general litigation risk and dispute prevention strategies.

Stephen has significant experience in both prosecuting and defending complex multi party disputes and acts for various corporate entities both nationally and internationally. He has a specific focus on insolvency issues and has provided advice in relation administrations and liquidations of many major companies.

Glenn Biggs (Insurance) and **Jonathan Cheyne** (Corporate & Commercial) have also been promoted to Partner. In addition, **Clayton Payne**, who specialises in Workplace Relations, has been elevated to Senior Associate.

Dr Peter Ellender, CEO, said that the recent promotions reflect the strong growth of the firm's three key practice areas Commercial Dispute Resolution, Insurance and Corporate & Commercial.



Commercial Dispute Resolution Partners - L to R: Mark Brookes and Stephen Humphreys

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