



Précis Paper

O'Neill v Fairfax Media Publications (No 2) [2019] NSWSC 655

A discussion of the recent defamation case *O'Neill v Fairfax Media Publications (No 2) [2019] NSWSC 655*.

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O'Neill v Fairfax Media Publications (No 2) [2019] NSWSC 655

In this edition of BenchTV, Bruce McClintock SC (Barrister, Sixth Floor Chambers, Sydney) and Parisa Hart (Barrister, 2 Selborne Chambers, Sydney) discuss the recent defamation case of *O'Neill v Fairfax Media Publications (No 2) [2019] NSWSC 655*.

Overview

1. The case ran for 7 days in May 2018 in the Supreme Court of New South Wales and judgment was delivered in July 2019.
2. The plaintiff (Dr O'Neill) ultimately succeeded in defamation proceedings against Fairfax Media and the Sydney Morning Herald Columnist Peter Fitzsimons.
3. McCallum J awarded Dr O'Neill \$385,000 in damages.

Key facts

4. The proceedings arose out of publication of two articles in the Sydney Morning Herald both in print and online in February 2017.
5. The articles concerned the events of a boxing match held in Adelaide between Mr Anthony Mundine and Mr Danny Green. The plaintiff, Dr John O'Neill, was the ringside doctor for the contest. In the first minute of the first round, Mr Mundine struck Mr Green in the head with what was later ruled a foul blow. Dr O'Neill (the ringside doctor) excluded injury or concussion and the fight continued. Mr FitzSimons' articles made a strident criticism that the contest should have been stopped for the safety of Mr Green.
6. Dr O'Neill sued Fairfax Media and Sydney Morning Herald columnist, Peter FitzSimons over the defamatory articles.

Key issues

The key issues were:

1. whether the imputations conveyed to the ordinary reasonable reader;
2. whether the defendants established the matters of substantial truth; and
- with respect to the defence of honest opinion:
 - i. whether the imputations were established as opinion rather than fact;
 - ii. whether the imputations were proper materials for comment.

Defamatory imputations

7. Dr O'Neill claimed that the articles were defamatory and conveyed the following imputations:
- The plaintiff, a doctor, incompetently allowed boxer Danny Green to continue fighting in a boxing match despite the fact that Mr Green suffered bleeding on the brain;
 - the plaintiff, a doctor, negligently endangered Danny Green's life by allowing him to continue fighting in a boxing match when Mr Green obviously had brain damage; and
 - the plaintiff was such a reckless ringside Dr that he failed to stop the fight despite the fact that one of the boxers obviously had concussion.

What did the plaintiff need to prove?

8. Generally speaking, in defamation proceedings the plaintiff must establish that the defamatory meanings are conveyed and are false. The test is whether, on the balance of probabilities, the meaning contended for by the plaintiff was conveyed to the ordinary reasonable reader, a person *"of fair average intelligence who is neither perverse, morbid, suspicious of mind nor avid for scandal"*, who *"does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs"* and who does not engage in over-elaborate analysis in search for hidden meanings, nor adopt a strained or forced interpretation. (*Griffith v John Fairfax Publications Pty Ltd* [2004] NSWCA 300 at [19]).
9. Dr O'Neill had to prove that Mr Green's physical conditions in each imputation which were asserted in the matters complained of were false. The alleged physical conditions were:
1. he had "suffered bleeding on the brain";
 2. he "obviously had brain damage" and
 3. he "obviously had concussion".

Whether the defamatory meanings were conveyed

10. Her Honour found that the imputations were defamatory and conveyed as the ordinary and reasonable reader would easily assume that Mr Green was concussed, had suffered bleeding on the brain and had a brain damage. Her Honour stated at [75] that:
- "in my view the tone and language of the articles, while being colourful and attention-grabbing, is also assertive and powerful. The statements that give rise to the imputations are made in absolute terms. The reader would understand from the language of the articles that Mr Green was in fact concussed; that he in fact had a bleeding brain and that he had suffered brain damage. Indeed it would in my view be a contorted meaning to draw some different or lesser meaning from expressions such as "Danny Green was concussed"; "there was in demonstrable fact such obvious brain damage"; and "he was a boxer with a bleeding brain, and it was dangerous for him to continue"."*

Defences relied upon by the defendants

11. The defendants relied upon the defences of justification and honest opinion under sections 25 and 31 of the *Defamation Act 2005* (NSW) respectively.

How to establish the defence of justification?

12. What is necessary to prove the truth of a justification defence is simply, as section 25 of the *Defamation Act 2005* (NSW) says, is to prove that the imputations relied upon by the plaintiff are matters of substantial truth. The section means what it says that is the defendant has to prove the imputation to be true. The only matter that requires clarification is the use of the word "substantial". The law in this area is not interested in technicalities but rather in the substantial merit of the defence. Thus, the defendant does not have to prove elements of the imputation to be true which are irrelevant to its sting. For example, if the imputation were that the plaintiff assaulted AB on 10 June 2019, it would not matter if the defendant proved that the assault was of CD on 20 June 2019. The point is that the defamatory element of the imputation is the assault and the identity of the person assaulted (all other things being equal) and the date do not affect the substantial truth of the imputation. There are some famous examples in the cases.

13. Her Honour Justice McCallum summarised the principles succinctly and accurately at [127] of the judgement:

"In order to establish the defence, it is necessary for the defendants to establish that every material part of the imputation was true. That does not mean the defendants must prove the truth of every detail of the words established as defamatory; the defence is concerned with meeting the steam of the defamation."

14. The defendants faced a number of problems in proving these imputations to be true. The first was that in relation to imputation (a), there was no suggestion that Green had actually suffered bleeding on the brain. That is an extremely serious condition with a risk of imminent death. No one present at the fight or the medical experts who gave evidence at the trial thought that Green actually had bleeding on the brain. Yet, the article published by the defendants had the headline "*Danny Green suffered bleeding on the brain against Anthony Mundine, and yet they let the fight go on*".

15. The consequence was that the imputation was obviously conveyed and there was no possibility of the defendants proving true. Despite this, the defendants attempted to prove this imputation to be true. Shortly after publication they had accepted by letter from the in-house counsel that it was not true. As her Honour says at [188] of the judgement, the attempt to justify this imputation was surprising:

"The defendants produced no direct evidence that Mr Green suffered bleeding on the brain as a result of the blow. Rather, the defence rested on inference on the basis that such bleeding is a possible incident of concussion."

16. As to the other two imputations, their truth depended upon whether the defendants were able to establish that Danny Green had suffered concussion as a result of the blow by Mundine. Dr O'Neill had himself carried out a ringside assessment and determined that Green had not suffered concussion. Another doctor (Dr Lewis) was present who after the fight made statements indicating that he thought the fight should stop. He was not called at the trial and, in any event, had apologised to Dr O'Neill for his statements suggesting that O'Neill was wrong in failing to stop the fight. Thus, the defendants were unable to establish concussion or brain damage. Her Honour summarised the position as follows:

"[197] for completeness, I am also not satisfied that Dr O'Neill was negligent, incompetent or reckless. No separate argument was put on that issue. The defendants' case was that those attributes would be inferred if Dr O'Neill had said Mr Green was "okay to continue" the fight at a time when he was in fact obviously suffering from concussion. It follows that the justification defence must fail."

How to establish the defence of honest opinion?

17. Under the Defamation Act there are three elements in the defence of honest opinion on *section 31* of the Act. In summary, the defendant must prove that the publication, first, related to a matter of public interest, secondly, was based on proper material for comment and thirdly was the opinion of the defendant or of persons in the other categories mentioned in the section. There are a number of matters of defeasance also set out in *section 31* but they do not play a part in the outcome of the *O'Neill* case. The counsel for O'Neill conceded that the matter complained of relating to a matter of public interest because boxing itself was a matter of public interest and the issue whether a well-known boxer had suffered concussion was also such a matter. Proper material for comment is defined in section but essentially means that the defendant must prove that the facts upon which the comment is based were accurately stated. The third element is that it actually be an expression of opinion which is what comment is. The defendants failed to establish the defence because her honour found that the imputations were conveyed as matters of fact not as expressions of opinion. The honest conclusions are in the following terms:

"[100] in my view, the defamatory sense of the article is captured in Dr O'Neill's imputations was clearly conveyed as fact rather than as an expression of opinion. Indeed, in my respectful opinion, the contrary view is barely arguable. The article included the statement that "Danny Green suffered bleeding on the brain against Anthony Mundine", that he was "a boxer with a bleeding brain", that "there was, in in demonstrable fact, such obvious brain damage on the light" and that "one of the [the ringside doctors], Dr Lou Lewis... Had no doubts, Green was concussed", adding "and he was right, as confirmed by Green afterwards.

[101] in my view, those assertions would clearly be understood as statements of fact, an alarming fact at that, forming the premises for Ms Simon strident opinion."

How to determine what is opinion and what is fact?

18. A comment or opinion is an expression of belief based on facts which are stated. It is often not easy to tell what is fact and what is opinion and the context is crucial in doing so. But to give an example, if I said "the plaintiff is unfit to be a solicitor because he stole money from his trust account", it can be seen that the claim that he stole money from his trust account is a statement of fact-he either did or he did not. On the other hand, it can be seen that the words plaintiff is unfit to be a solicitor are an expression of belief and therefore a comment or expression of opinion. In this case the judge determined that there was no relevant expression of opinion but rather the allegations encapsulated in the imputations were statements of fact. That is the reason why the defensive comment failed in this case

Application of section 31 (4) (a), (b) and (c)

19. Section 31 (4) of the Defamation Act sets out the matters of defeasance in respect of the honest opinion defence. Thus, where it is alleged to be comment of the defendant himself or herself, the plaintiff can succeed if he or she proves that the opinion was not honestly held by the defendant at time of publication. Where a defence of comment of an employee is relied upon, the matter of defeasance is that the defendant did not believe the opinions honestly held by the employee at time of publication. In the case of comment by a third party, that is, what used to be called comment of a stranger, it is that the defendant had reasonable grounds to believe that the opinion was not honestly held by the person in question at the time of publication.

Application of section 31 (5) (a), (b) and (c)

20. Section 31(5) Of the Defamation Act sets out the definition of proper material for comment. It will be recalled that for the defence to succeed the defendant must establish that the comment was based on proper material. This subsection defines proper material is material that is substantially true or publish on occasion absent or qualified privilege or on occasion that attracted a defence under section 28 of 29 that is provisions that generally deal with reports.

Components of damages in defamation proceedings

21. Section 34 of the *Defamation Act 2005* (NSW) requires the Court to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.
22. Section 35 of the Act defines that the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings (unless the Court orders otherwise under subsection (2)). The amount is increased annually. The current amount is \$407,500 as at 1 July 2019.
23. There are three elements to speak slightly inaccurately in an award of damages to defamation. The first is a monetary sum to compensate the plaintiff for the harm to his reputation which was caused by the defamatory publication. The second is an award for compensation for the for hurt to the feelings of the plaintiff for being publicly defamed. The other relevant matter is that the award must be sufficient to vindicate the plaintiff for the harm to his reputation. That is not a separate head of damage but a guide to the calculation of the damages. To illustrate, if the plaintiff had been falsely accused of going to a bondage brothel on the front page of the Daily Telegraph, an award of, say, \$100,000 would be manifestly inadequate to vindicate his reputation.
24. Some harm to reputation is presumed to follow from the publication of defamatory material. Thus, it is unnecessary to actually call a witness to prove that the plaintiff's reputation was actually harmed. Nevertheless, very frequently, plaintiffs give evidence of people shunning and avoiding them and, rarely, call people who say that their estimation of the plaintiff went down as a result of the publication. The reason such evidence is rare is that people rarely inform someone who has been defamed that they think the less of them. Thus, the plaintiff may never know.
25. As to hurt to feelings, while in some circumstances it might be appropriate for the court to infer from the nature of the defamation that the plaintiff's feelings have been hurt, the usual approach is to elicit from the plaintiff evidence of how he or she felt when it became apparent that he or she had been defamed. Such evidence can be very powerful.

What elements amount to general damages in defamation proceedings?

26. The purpose of damages is to vindicate the reputation of the plaintiff and compensate him/her for the damage to the reputation caused by the publication. It is generally perceived that there are two elements the first is compensation for actual harm to reputation and the second is compensation for the hurt to feeling of the plaintiff caused by being defamed.

What factors amount into aggravated damages in defamation proceedings?

27. Aggravated damages which is properly referred as aggravated compensatory damages are awarded in circumstances where something has occurred that increases the hurt to the plaintiff. For example, an insulting cross examination of the plaintiff may aggravate damages but in such circumstances the conduct is unjustifiable, improper and lacking in bona fides.

Dr O'Neill was awarded \$385,000 in damages

28. In calculating general damages, McCallum J stated at "I am satisfied that the damage to reputation occurred within the circles in which Dr O'Neill's reputation counts most". Her Honour said at [206]:
"The imputations are very serious, striking at the heart of Dr O'Neill's professional reputation. The publication of such imputations would be extremely hurtful to anyone in Dr O'Neill's position."
29. As to hurt to feelings her Honour relied on Dr O'Neill's evidence that he felt *"devastated, haunted"* with the situation *"something that's like a black cloud or a black mark on my whole being. I can never escape from this"*.
30. Her Honour further stated that she had regard to
"... the nature of the imputations, the high profile of the fighters in question and the unhappy tendency of people particularly in professions such as law and medicine to repeat negative gossip, I am satisfied that the allegations probably spread widely amongst medical professionals and persons known to Dr O'Neill."
31. Her Honour found that aggravated damages were warranted on the following basis:
- Dr O'Neill was not contacted before the articles were published;
 - The defendants' failure to apologise in regard to the *"bleeding on the brain"* imputation while Fairfax's solicitors had made an early concession in response to a concern notice that the reference to *"bleeding on the brain"* was incorrect; and
 - The defendants' persistence as to the truth of this imputation in the *"complete absence of any cogent evidence"* to justify it.
32. Her Honour found there were no facts led in support of the failed defences which would warrant findings to justify mitigation of damages.
33. McCallum J stated that if Dr O'Neill was named in the column, an amount at the top of the range would have been awarded. Nevertheless, her Honour was still satisfied that *"this was a very serious defamation"* and awarded the plaintiff \$350,000 in general damages with ten percent added for aggravated damages, \$385, 000 in total.

BIOGRAPHY

Bruce McClintock SC

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Bruce graduated from the Australian National University in 1975 (BA, LLB(Hons)) and Columbia University in 1978 (LLM).

He was called to the Bar in 1983 after practising as a solicitor in Sydney and an attorney in New York. He was appointed Senior Counsel in 1996.

Bruce conducts cases in, and advises on, the areas of media and defamation law, commercial and corporate law, competition and consumer law, equity and trusts, and environmental law.

Parisa Hart

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Parisa was called to the Bar in 2016 and conducts and advises cases in the areas of Commercial, Communications/Media, Defamation, Criminal and Family provision. She has a diverse practice in a range of Courts and Tribunals, including the Federal Court, the NSW Court of Criminal Appeal, the NSW Supreme Court and the NSW District and Local Courts

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Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_16-07-2019_insurance.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5cf5dbafe4b02a5a800c1416>

Cases

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Legislation

Defamation Act 2005 (NSW)