

## **HARBOUR RADIO PTY LIMITED v TRAD (S318/2011)**

Court appealed from: New South Wales Court of Appeal  
[2011] NSWCA 61

Date of judgment: 22 March 2011

Date special leave granted: 2 September 2011

Mr Keysar Trad alleged that Radio Station 2GB ("the Radio Station") defamed him in a program broadcast on 19 December 2005. At a trial pursuant to section 7A of the *Defamation Act 1974* (NSW), the jury found that a number of defamatory imputations had been both conveyed and were defamatory. These included:

- a) Mr Trad stirred up hatred against a 2GB reporter which caused him to have concerns about his own personal safety;
- b) Mr Trad incites people to commit acts of violence;
- c) Mr Trad incites people to have racist attitudes;
- d) Mr Trad is a dangerous individual;
- g) Mr Trad is a disgraceful individual;
- h) Mr Trad is widely perceived as a pest;
- j) Mr Trad deliberately gives out misinformation about the Islamic Community;
- k) Mr Trad attacks those people who once gave him a privileged position.

The Radio Station claimed that each of the impugned imputations was published upon an occasion of qualified privilege at common law. It also submitted that they were a response to an attack upon it by Mr Trad the previous day. The Radio Station further pleaded that imputations (b), (c), (d) (h) & (j) were matters of substantial truth and were therefore related to a matter of public interest. It also claimed that any substantially true imputation was published contextually and they did not therefore further injure Mr Trad's reputation. The Radio Station additionally submitted that imputations (b) to (g) constituted comment on a matter of public interest.

The Chief Justice at Common Law, Justice McLellan, upheld the defences in respect of each imputation, except the defence of justification to the imputations (h) & (j). His Honour found that imputations (b), (c), (d) and (g) were substantially true and that the Radio Station's response related to a matter of public interest. He also upheld the defence of contextual truth with respect to imputations (a), (h), (j) & (k). Justice McLellan further held that the matter complained of was published on an occasion of qualified privilege and he rejected the submission that that defence was defeated by malice. He further found that imputations (b), (c), (d) & (g) were defensible as comment.

On 22 March 2011 the Court of Appeal (Tobias, McColl & Basten JJA) allowed the appeal in part. Their Honours found that a defence of truth was unavailable with respect to an imputation characterized as a statement of fact. With respect to imputations (b), (c), (d) & (g) they found that Justice McLellan erred in finding that Mr Trad believed that the appropriate punishment for

homosexuality in modern Australia was death by stoning. His Honour had also failed to consider whether a right thinking member of the Australian community would consider that Mr Trad was the type of person (or that he actually held such views) giving rise to imputations (b), (c), (d) & (g).

The Court of Appeal further held that Justice McClellan had erred in finding that imputations (b), (c), (d) & (g) were defensible as comment and that (c), (h) & (k) were published on an occasion of qualified privilege.

The grounds of appeal include:

- In determining whether the broadcast was published on what the Court of Appeal had found was an occasion of qualified privilege arising from Mr Trad's prior public attack upon the Radio Station, the Court of Appeal applied wrong tests, namely, whether individual imputations "constituted a legitimate response", were "a relevant response" or were "a bona fide answer or retort by way of vindication fairly warranted by the occasion".

On 28 October 2011 Mr Trad filed a summons, seeking to file both a notice of cross-appeal and a notice of contention out of time. The grounds of the proposed notice of cross-appeal include:

- The Court of Appeal erred in upholding [the] defence of reply to attack to five imputations (a), (b), (d), (g) and (j) out of eight pleaded.

The ground of the proposed notice of contention is:

- That the decisions of the Court of Appeal relating to qualified privilege (reply to attack) and truth should be affirmed, but on grounds in addition to those relied upon by the Court below, that is to say on the ground that the whole of the qualified privilege defence should have been rejected because of malice and on the ground that the general community standard test was irrelevant to the termination of the truth defences.