IN THE HIGH COURT OF AUSTRALIA **No. S318 of 2011**

SYDNEY REGISTRY

BETWEEN:

HARBOUR RADIO PTY LIMITED

Appellant

AND

KEYSAR TRAD

Respondent

APPELLANT'S SUPPLEMENTARY OUTLINE OF SUBMISSIONS IN REPLY

Filed on behalf of the Appellant on 20 February 2012 by:

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1. Trad's outline of propositions dated 3 February 2012 is referred to below as "ROP".

The self-defence theory is wrong: *Norton v Hoare*

2. A fundamental problem with the self-defence analogy in *Norton v Hoare* is that the defence of qualified privilege is defeated by proof of malice. There is no analogous concept in the law of self-defence. The analogy fails at the threshold.

3. Trad's reliance on the self-defence analogy arises for the first time in this Court. It was not raised below. Trad's proposition that *Norton v Hoare* warrants an analysis of the defence of reply to attack qualified privilege within a framework of self-defence – and not duty and interest – is unsustainable.

4. *Adam v Ward* and subsequent decisions confirm the correctness of the duty and interest theory in relation to reply to attack. See *Adam v Ward* at 318.4, 321.2, 328-329, 343, 334-335; *Loveday* at 515.8 per Starke J, 515.7 per Dixon J (describing *Adam* and *Ward* as the leading case), (cf. 511.5 per Latham CJ); *Penton* at 243.2 per Latham CJ and Williams J, relying on both *Adam v Ward* and *Norton v Hoare*; *Stephen v West Australian Newspapers Ltd* (1994) 182 CLR 211 per Brennan J at 249.5-250.1 and McHugh J at 261-262; *Roberts v Bass* (2002) 212 CLR 1 per Gaudron, McHugh and Gummow JJ at [67], fn (87) and Hayne J at [241], fn 251 and [216], fn (257); *Bashford v Information (Australia) Newsletters Pty Limited* (2004) 218 CLR 366 per Gleeson CJ, Hayne and Heydon JJ at [26], fn (74) and McHugh J (in dissent but not on this point) at [65]-[67].

5. The reasoning of Barton CJ in *Norton v Hoare* at 318.7, therefore, is either wrong or must be understood as an acknowledgement that "[w]here the defamatory matter is published in self-defence or in defence or protection of an interest or by way of vindication against an imputation or attack, the conception of a corresponding duty or interest in the recipient must be very widely interpreted": per Dixon J in *Mowlds v Fergusson* (1940) 64 CLR 206 at 214-215 and also in *Guise v Kouvelis* (1947) 74 CLR 102 at 125.

6. Note also that the narrowness of Isaacs J's formulation at 326 cannot be reconciled with, eg *Penton*, in that his Honour allowed no "retaliation" (ie counter attack) and "nothing unnecessary", which does not reflect the wide latitude permitted in the defence.

Honesty is not an element of the defence

7. The plaintiff carries the onus of proving malice. The defendant therefore carries no onus to disprove malice or, put another way, to prove honesty or bona fides or subjective propriety of motive. See *Clark v Molyneaux* (1877) QBD 237 per Brett LJ at 247 and Cotton LJ at 249 and 251, approved in *Jenoure v Delmege* [1891] AC 73 per Lord Macnaghten at 79; *Adam* and *Ward* at 334.6; *Loveday* at 516.10-517 per Starke J; *Penton* at 242.10 per Latham CJ and Williams J; Cf Trad's outline of propositions (ROP) at [4].

8. *Koenig v Ritchie*, on the reference to which (in the reasons of Dixon J in *Penton* at 233) Trad relies so heavily, was itself a case about the jury direction on malice. It does not support Trad's submission that honesty is an element of the defence. Trad also relies on *Coward v Wellington* (1837) 7 CAR & P 532 and *Regina v Veley* (1867) 4 F & F 1117. The report of each case is obscure. In particular, there is no discussion in either case as to whether it is the defendant as opposed to the plaintiff who bears the onus on the question of honesty. To the

extent that the reports are capable of suggesting that malice is not for the plaintiff to prove but for the defendant to disprove, they would be plainly wrong.

9. Finally, although Trad now submits that honesty is an element of the defence that must be proved by the defendant, the case was never put this way below. *Suttor v Gundowda* precludes Trad from raising the point now.

Reasonableness and proportionality are not elements of the defence

10. Trad submits not only that reasonableness and proportionality are elements of the defence (which is wrong for the reasons in AWS [38]), but also that the test of this supposed element is not "wholly objective". No authority is cited in support of this proposition and the appellant is aware of none. While Trad refers to *Coward v Wellington* and *Regina v Veley* in this regard, those cases say nothing about reasonableness or proportionality.

Intention to exercise a right of response is not an element of the defence

11. At ROP [8], Trad submits that the defendant must prove that he, she or it intended to exercise a right of response to attack. Dixon J's remark in *Penton* at 232.7 goes to relevance; it does not require the defendant to prove a subjective intention to exercise the right of response to attack. Moreover this point was never raised below. Again *Suttor v Gundowda* applies.

Extent of publication is not an element of the defence

12. At ROP [10], Trad submits that the extent of the publication is a separate element (or perhaps an element of the supposed reasonableness/proportionality element). This proposition was not advanced below or even in the written submissions in this Court. The defence permits a public response to a public attack. In such cases, the defence could never operate if the defendant had to prove that every member of the public to whom it made the defamatory publication had also witnessed the plaintiff's earlier attack on the defendant. It follows that, in cases of public responses to public attacks, the question of excessive publication will necessarily be a matter of degree, rather than an element in the defence. Rather, questions of excessive publication go to malice.

Relevance

13. Once it is established that the occasion is privileged, the only remaining element of the defence on which the defendant carries the onus is relevance. That is, the defendant must prove that the particular defamatory portions giving rise to the imputation were objectively connected with the occasion. As Hirst LJ held in *Watt v Times Newspapers* [1997] QB 650 at 671C (emphasis supplied), a defendant may reply "with a considerable degree of latitude, so long as he [does] not overstep the bounds and include *entirely irrelevant* and extraneous material". His Lordship continued by observing that "unnecessary" words in a reply "may clearly [fall] within these bounds...[if] *not unconnected* with the theme" (at 671D, emphasis supplied). The test of relevance is not a test of legal or logical relevance such as would apply to the permissibility of questions by "cross examining counsel" in legal proceedings (cf. *Horrocks v Lowe* [1975] AC 135 at 151E).

14. The appellant accepts that the defence is not all-or-nothing, in the sense that particular portions of a publication may be so irrelevant to the occasion of privilege as to stand outside the defence, even though the balance of the publication is protected. Thus, where

Gummow J in *Bashford* at [132] referred to the imputation-based test in *Bellino v ABC* (1996) 185 CLR 183, this must be understood as referring to the portions of the publication giving rise to the imputations. That is particularly clear from the use of the words "matters" and "part" in *Bellino*. Otherwise, the imputations would be taken out of their context, which would be contrary to the whole rationale of the defence. Indeed, Trad's attempt to take the imputations out of the context in which they were conveyed shows the artificiality of his argument as to relevance on the facts of this case. In any event, the appellant submits that, here, all parts of the Broadcast giving rise to the imputations were a relevant response.

15. Finally, while it is true that the jury decides any disputed questions of primary fact (for example, what was published, to whom it was published etc.), the question of relevance to the occasion is a question of law for the Judge because it is tied up with the question whether a publication was prima facie made on the occasion of privilege: see *Adam v Ward* at 329.1.

The imputations

16. Trad's oral submissions suggested that the appellant's argument on the imputations was limited chiefly to notions of hypocrisy. While the appellant certainly does rely on the element of hypocrisy conveyed by the imputations as constituting relevant responses to Trad's attack, its arguments ranged far wider. For example:

17. ***Imputation A*:** here Morrison expresses his impression of Trad's attack upon first hearing it, namely a subversion of the "peace" rally to pursue Trad's own divisive agenda. At RWS [36], Trad relies on *Foretich v Capital Cities* 373(3d) 1541. *Foretich* (at 1560) held that such expressions of impression are relevant responses.

18. ***Imputations B and C*:** The defamatory portions of the broadcast from which they derive convey that Trad is not genuine in alleging incitement to racism or violence and that he makes those allegations for his own purposes of inciting people to hold racist views and inciting the crowd against 2GB. As to imputation C, Trad's reliance on case law is misplaced: AR[11].

19. ***Imputations D and J*:** The issue is not (or not simply) that Trad was "telling lies". Rather, the passages giving rise to these imputations convey that while Trad claims to represent Muslims, (i) he does not in fact represent them and (ii) he gives out misinformation about their views regarding Christian Australians.

20. ***Imputations G, H and K:*** In their context, each imputation conveyed that Trad, and by extension his attack on 2GB, lacked credibility.

Malice

21. The case as to malice particularised below consisted of the particulars in the reply (AB28-29) and a letter giving further particulars dated 15 May 2009 (a copy of which is attached to these submissions). That was exclusively a case of malice that depended on the state of mind of Morrison. Given Trad's case as to publication, that is hardly surprising.

22. For purposes of malice, the relevant state of mind must be that of the person whose act gives rise to the defendant's liability. Trad's pleaded case was that "[2GB] published on the Jason Morrison programme ... certain words" (AB 3). Accordingly, the relevant state of mind for

malice was Morrison's, as he did the act on which the allegation of publication *by 2GB* founding *2GB's liability* turned.

23. The position might have been different if the statement of claim had pleaded that Glasscock was on some basis *himself* liable as a publisher of what was later published by Morrison; that 2GB was then vicariously liable for Glasscock's tortious publication; and finally (in reply to a defence of qualified privilege) that Glasscock was actuated by express malice — the total effect of which, if proved, would be that 2GB was liable vicariously for Glasscock's tort. But that was not the case which was made. Instead, on the pleaded case, it was necessary to establish some basis upon which *2GB itself* could be shown, in making the publication, to have been actuated by malice. As Brennan J observed in *Stephens v West Australian Newspapers Ltd* at 254-255, "the liability of each defendant [is to be treated] as depending on the defendant's own state of mind, unaffected by the malice of any other defendant". The position is *a fortiori* where the supposed malice is that of a third party — Glasscock — who is not even a defendant. Relevantly, it was Morrison who made the publication on behalf of 2GB which was the subject of the statement of claim; and Glasscock's state of mind had no independent relevance on the pleadings since the Broadcast was not (and was not even alleged to be) his publication.

24. *Webb v Bloch* (reference to which arose first in oral argument) explains the principles on which a person who conduces to the making of a defamatory publication becomes liable as a "publisher" and thus can be made a defendant. It was not concerned with the principles as to whose mind is the relevant mind of a corporate defendant for the purposes of malice. Here, the only defendant was 2GB, a corporation, and the only question was whether it was actuated by malice in making the Broadcast. As Brennan J made clear in *Stephens* while discussing *Webb v Bloch*, the plaintiff must prove malice against each defendant independently. In the absence of a pleading of vicarious liability, *Webb v Bloch* and the question whether Glasscock was himself liable as a publisher were irrelevant.

25. Moreover, as the case was not pleaded or run on a vicarious liability theory, *Suttor v Gundowda* forecloses the issue of Glasscock's state of mind. And, in any event, the evidence, such as it is, does not establish that Glasscock published the Broadcast; or that his relationship to the appellant would give rise to vicarious liability for any tort he committed; or that he was actuated by malice.

26. Finally, this is not a case which was run off the pleadings. All the evidence that was admitted was relevant to the case particularised about Morrison's state of mind. The fact that counsel for Trad made a glancing reference to "the knowledge of Mr Glasscock" (AB303) in address, after the evidence was closed, does not turn this into a *Leotta*. The address on behalf of the appellant at AB334.42-48 shows that, consistently with the pleadings, the appellant was proceeding on the basis that "the relevant state of mind ... is that of the person who does the act" of publication alleged, namely, Morrison. See also at AB340.20. Evidence of Glasscock's state of mind was relevant on the pleadings to the extent that it might support an inference about Morrison's state of mind. But Glasscock's state of mind was not independently relevant to malice in its own right.

Malice – disproportionate and irrelevant material

27. Malice is constituted by a dominant, actuating, subjective, improper purpose: *Roberts v Bass* per Gleeson CJ at [8]ff, Gaudron, McHugh and Gummow JJ at [75]ff. Trad failed to particularise any such improper motive or purpose contrary to *Gross v Weston* (2007) 69 NSWLR 279. In any event, on the facts of this case, in all the circumstances, including the nature and ferocity of the attack, the broadcast was not disproportionate and Morrison's choice of language was not excessive. Still less, was the response so disproportionate or excessive as to found an inference of improper purpose which would discharge the plaintiff's heavy onus on malice.

Truth defence

28. The appellant committed no volte-face. At first instance and in the Court of Appeal, the contest about community values focused on imputation G. The somewhat infelicitous language of AWS[58] must be read in light of AWS[56] which made clear that, again in this Court, the issue was imputation G. The references in footnote 15 at AWS[58] were simply to the primary findings that underpinned the ultimate finding in relation to imputation G. The analysis of the actual findings as to truth made by the trial judge at the end of his judgment at AB [99]-[123] shows that any suggestion that his Honour was relying on community values in support of the truth of the other imputations is without foundation.

29. It was never put by Trad below that the court should not apply any standard at all on the truth findings: see AR [26]; AB1208. And the idea that the trial judge failed to apply any test of truth arose for the first time in the reasons for judgment of the Court of Appeal: that is why there was no notice of contention.

30. As to the "acts" which Trad has done which justify the finding at AB 802 that imputation G was true, the appellant refers to its lengthy submissions on the evidence made to the Court of Appeal. See AB1143ff, 1252ff, 1053ff, AWS [23].

Response to attack and the mass media

31. Trad submitted that the appellant's approach gives the mass media a sweeping defence with which it could not be trusted, not least because the media could contrive an opportunity for defamatory reply by goading a plaintiff into attack. This is not so. The defence virtually never succeeds for the media. That is usually because there is no "attack" as such (see eg *Chesterton v Radio 2UE Sydney Pty Ltd* [2010] NSWSC 982 per McCallum J at [82]-[83]); or the publication is not in fact a "response" at all; or because qualified privilege does not attach to a "tit for tat" response to a reply to an attack (*Kennett v Farmer* [1988] VR 991). Also, if the opportunity for a reply were contrived in the way Trad suggested, the publication would not be made for a proper purpose and the defence would be defeated by malice.

Dated: 20 February 2012

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Dear Practitioners

RE: KEYSAR TRAD V HARBOUR RADIO PTY LTD
SUPREME COURT PROCEEDINGS 20324 OF 2006 DEFAMATION LIST

We refer to the Reply herein and advise that the Plaintiff proposes to add to the Particulars of Malice the following paragraph;

2(c) "The Defendant by itself, its servant and agent Jason Morrison spoke and published of and concerning the Plaintiff the words set out in annexure "A" of the Amended Statement of Claim including words relating to the intimidation of and misconduct towards Chris Glasscock which said words the Defendant, its servant and agent Jason Morrison either knew to be false or were spoken with reckless indifference to their truth or falsity."

Yours faithfully
TURNER FREEMAN

Per: Terence Goldberg
Partner

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