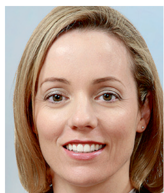
Jury election in defamation cases left untrammelled

By LESA RICHARDS

Defamation law practitioners should note an Appeal Court finding that election for a jury trial is a fundamental right, unaffected by case management considerations.



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THE FUNDAMENTAL RIGHT OF A party in defamation cases to elect trial by jury has been re-affirmed by the judges of the Court of Appeal in a recent defamation case, and is unaffected by case management considerations. The right may only be dispensed with in one of two defined circumstances and even then, the court must decide whether to do so, taking into account the important role juries play in defamation cases and our adversarial system of justice.

The case is an important reminder for defamation law practitioners that the right of a party to elect for trial by jury is regarded by the courts as a fundamental right, both historically and legally. A jury may only be dispensed with if an application is made to the court by the other side and not by the court's own motion, and will not be dispensed with lightly.

Facts

In *Channel Seven Sydney Pty Ltd v Senator Concetta Fierravanti-Wells*,[1] the Court of Appeal had occasion to consider the extent of discretion afforded to a court to override a party's election for trial by jury in defamation cases. McColl JA, Giles JA and Handley AJA, in a joint decision, came down firmly in support of leaving the right untrammelled.

The facts of the case before the court concerned a defamation action brought by NSW Senator Concetta Fierravanti-Wells against Channel Seven in respect of a broadcast on their "Today Tonight" program about the cost to taxpayers of overseas trips by parliamentarians.

The following defamatory imputations were alleged in the case:

"(a) The Senator wasted taxpayers money;
(b) The Senator went on a dubious study trip;
(c) The Senator abused her entitlement to have an overseas trip by spending more than $17,000 for a study trip to Italy, because the reason she went to Italy was not to study, but to reconnect with her heritage; and
(d) The Senator's abuse of her study trip was one of three examples of dubious study trips that led to the Special Minister of State Joe Ludwig to launch a complete review of the entitlements system and possible scrapping of study trips."[2]

Channel Seven elected trial by jury and in its defence pleaded justification,[3] contextual truth[4] and honest opinion[5] under the *Defamation Act 2005* (NSW), and fair comment at common law. In its defence of honest opinion, Channel Seven pleaded that the opinion related to a matter of public interest,[6] namely, that the cost of parliamentary entitlements by virtue of the *Parliamentary Entitlements Act 1990* (Cth) was funded by the taxpayer and there was a need to ensure that they represented value to taxpayers.[7]

On 16 July 2010, his Honour Judge Levy SC of the District Court, of his own motion, dispensed with the jury and ordered that the trial proceed without one.[8] Leave to appeal was granted on 14 December 2010 to decide whether the primary judge had power to dispense with the jury of his own motion.

Senator Fierravanti-Wells argued that the judge had the power to do so under the case management provisions, s.86(3) of the *Civil Procedure Act 2005* (NSW) and s.21(1) and s.21(3) of the *Defamation Act 2005* (Cth) (the Act). The Senator submitted that since the introduction of the Act, "media defendants in every case request a jury" and this has resulted in "bottlenecks and delays".[9]

The critical question on appeal was whether the primary judge had the power to dispense with the jury of his own motion.

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Adversarial system

The Court of Appeal unanimously held that the primary judge was not entitled to dispense with the jury and, in any event, the grounds for such an order were not established. The court found that while a grant of power should be given its full meaning, and as there is no specific reference in s.21 of the Act to a party moving for the power to be exercised, only the clearest intention can displace so fundamental a legal right as the right to trial by jury, once the election has been made.

The law is that either side may elect for trial by jury, unless the court orders otherwise.[10] The court may only order proceedings not to be tried by jury if either of the following two conditions under s.21(3) is established:

- the trial requires a prolonged examination of records – the primary judge had found that a report the Senator had produced after her overseas trip constituted a record for the purposes of s.21(3)(a) of the Act and this was not challenged on appeal;[11] or
- the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.[12]

The Appeal Court noted that even if the above conditions were established, the court must still decide whether to exercise its discretion to dispense with the jury in all the circumstances, taking account of both the role juries play in defamation trials and the adversarial system of justice in Australia.[13]

The Appeal Court said: "One of the cardinal principles of the adversarial system of justice is that a judge tries the case before him or her on the evidence and arguments presented by the parties in open court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides. This principle reflects a central element in the system of justice administered by Australian courts, that is that it should be fair, meaning that it must be open, impartial and even-handed: *Re JRL; Ex parte CJL* (1986) 161 CLR 342 (at 350) per Mason J; see also *Gipp v R* (1998) 194 CLR 106 (at [48]) per McHugh and Hayne JJ."[14]

It unanimously held that judges were not entitled of their own motion to exercise the court's powers under s.21(3) of the Act[15] because the adversarial system is such that the power is to be exercised on due application of a party, unless the Act specifically provides for such a power to be exercised on the court's own motion. It noted that discretionary powers are frequently conferred on courts in language such as "unless the court otherwise orders" (s.21(1)) or "a court may" (s.21(3)), but they do not indicate an intention to confer a power to be exercised by the court of its own motion but, rather, upon proper application by a party.

The court noted that its view is borne out of the legal and historical context concerning civil jury trials.[16]

Role of juries

Historically, the role of juries in defamation actions is regarded as "an essential feature of real democracy".[17] The court first examined the statutory history of the use of jury trials in NSW. It concluded that the guiding principle in proceedings/actions other than defamation is that they are not to be tried by jury. No such guiding principle governs the question of whether a jury tries a defamation case.[18]

The court then examined the importance of the role of juries emphasised in cases in the UK and NSW. The question of whether someone's reputation has been falsely discredited is thought best put to other ordinary men and women, who "represent the very audience to which the defamatory publication was addressed" and who are "better placed than judicial officers to assess how ordinary reasonable people understand mass media publications".[19]

The court noted that after the Act was enacted, while only five of the eight jurisdictions in Australia preserve jury trials for defamation cases and all questions of damages have been removed from the jury,[20] the importance of the jury's role is not in question in those jurisdictions that preserve the right in defamation actions.[21]

A party electing for a jury trial is entitled to that mode of trial and it is for the other party, not the court, to challenge the right and it bears the onus of showing that the court should exercise its discretion to deprive a party of the entitlement and to change the mode of trial.

The court found that the reversal of this onus by the trial judge was wrong – in acting of its own motion, the primary judge was compelled to tender the Senator's report to make his decision. "This underlines the embarrassing position in which a court which creates a controversy can find itself when it acts of its own motion."[22]

Section 21 requirements

The court further held that even if the primary judge did have power to act of his own motion to dispense with the jury, the grounds for such an order were not established. The pre-condition to the exercise of a discretion require either a prolonged examination of records or technical or scientific issues not conveniently resolved by a jury. As regards the former, the nature of the records and the burden cast upon the jury need to be considered in light of the fact that the right to a jury trial should not be set aside lightly. There must be something difficult about the prolonged examination to enliven the discretion.[23] There was uncontradicted evidence before the primary judge that no technical issues would arise from the Senator's report. The court found that despite its length, it was not complicated or technical[24] and that the primary judge erred in finding that a trial would involve a prolonged examination of it.[25]

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Case management considerations

While the primary judge was at great pains to clarify that "his decision was not based on questions of allocation of court time and resources",[26] the question having arisen in the course of a case management review, the Senator contended that case management provisions were the source of the primary judge's power. The Appeal Court held that the case management provisions and s.86(3) of the *Civil Procedure Act 2005* do not empower a judge to act of its own motion under s.21 for three reasons.

First, s.86(1) and s.86(2) empower a court to make orders where the court has an express power already and s.86(3) is confined to powers conferred by either the *Civil Procedure Act* or the rules of the court[27] and does not extend to powers granted under other Acts, such as s.21, which permit the court to make orders of its own motion. Channel Seven's lawyers submitted that a construction of s.86 empowering the court to act of its own motion under any legislation would be tantamount to authorising courts to exercise inquisitorial powers.[28] The court also held that Rule 29.2A of the Uniform Civil Procedure Rules 2005 (NSW) which refers to a s.21 order, whether or not of the court's own motion, is inconsistent with s.21 and ultra vires.

Second, case management is not a licence for courts to assume the tactical conduct of proceedings, such as whether proceedings are tried by jury.[29]

Third, s.21 was enacted after the *Civil*

Procedure Act so it must be assumed that both should operate independently. The case management powers in the *Civil Procedure Act* do not address the issue of juries.[30]

Matters of law for the court

The Appeal Court also found that the primary judge's discretion had miscarried in finding that a jury would be required to consider the operation of the *Parliamentary Entitlements Act 1990* in connection with the report and the public interest defence – when these issues were matters of law for the court to determine, not the jury.[31] The court found the judge had misdirected himself because the question of the construction of an Act is a question of law for the judge and not a question of fact for the jury.

Section 22(5)(b) of the Act expressly carves out these matters from the jury's determination. It is for the judge, not the jury, to decide whether the matter commented on is a matter of public interest.

The court allowed Channel Seven's appeal and set aside the primary judge's order for the trial to proceed without a jury. It also gave the Senator a certificate under the Suitors' Fund. ❑

ENDNOTES

1. [2011] NSWCA 246 at [15].
2. Ibid.
3. *Defamation Act 2005,* s.25.
4. Ibid, s.26.
5. Ibid, s.31.
6. Ibid, s.31(1)(b).
7. Above n.1, at [19].
8. *Senator Fierravanti-Wells v Channel Seven Sydney Pty Ltd* [2010] NSWDC 143.
9. Above n.1, at [38].
10. *Defamation Act 2005,* s.21(1).
11. Above n.8, at [24].
12. *Defamation Act 2005*, s.21(3).
13. Above n.1, at [44] and [48].
14. Ibid, at [49].
15. Ibid, at [94].
16. Ibid, at [52].
17. Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Supp) 49 (at 49, 67) referred to in n.1 at [70].
18. Above n.1, at [68].
19. *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148, per Rares J, at [19].
20. *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, per Heydon J, at [231]-[239].
21. Above n.1, at [79].
22. Ibid, at [116].
23. Ibid, at [121].
24. Ibid, at [124].
25. Above n.8, at [26].
26. Ibid, at [21].
27. Above n.1, at [106].
28. Ibid, at [40].
29. Ibid, at [107].
30. Ibid, at [108].
31. Above n.8, at [9]. ❑