

HEARN v O'ROURKE

What does it mean for journalists?

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Abstract

A decision by the full bench of the Federal Court of Australia last year(2003) may result in major changes to the way journalists and documentary makers approach their craft. In Hearn v O'Rourke (2003) the FCFCA ruled a documentary filmmaker who allegedly deceived an interviewee was in contravention of s 52 of the Trade Practices Act 1974. It is arguable this decision could open up a new 'minefield' of litigation that commercial news & current affairs journalists will have to negotiate. This paper will look at possible changes in journalists' codes of practice that may result if this decision is upheld by the High Court. It will also examine the Freedom of Speech issues that arise.

Facts

In 1998-99 the isolated western Queensland outback town of Cunnamulla became the subject of a documentary film that eventually became known as "Cunnamulla". Denis O'Rourke directed the documentary which was produced by Film Australia in association with CameraWork Limited and the Australian Broadcasting Corporation. Apart from being the film's director O'Rourke is also director of CameraWork Pty Ltd. The film could be described as an outsider's observation of a typical, some may argue atypical, western Queensland outback town. Instead of talking to official spokespersons O'Rourke interviewed ordinary townsfolk who he said were "emblematic" of all the issues that confront and affect people who live in places like Cunnamulla.¹ Cunnamulla residents

¹ Film Australia media release (2000) (copy held by author)

Taccara Jayne Hearn, 13, and Kellie-Anne Allardice, 15, took part in the film and were interviewed by O'Rourke without an adult present. It is alleged O'Rourke falsely represented to Cara Hearn and her mother that he wished to document her involvement in a contest called the "Miss Maid Contest". He is also alleged to have told Kellie Allardice's father that he wished to obtain her views on whether there was racism in the town. O'Rourke was granted permission by the two girls' parents to speak to the two girls alone on the basis he would not speak to them about matters other than those identified. It is then alleged they were deceived as he really intended to speak to each of the two girls about their sexual activities, which he did, and as such their revelations became an integral part of the documentary. "Cunnamulla" was selected to screen in a competition at the International Documentary Festival in Amsterdam and it was subsequently screened on the ABC and then exhibited for general release in national cinemas in 2001. The explicit nature of the girls' revelations shamed them into leaving the town and they sought redress in the Australian Federal Court for damages and other relief.²

What the courts had to consider

The claims made by the two applicants alleged that conduct engaged in by the two respondents was in contravention of s52 of the Trade Practices Act 1974(Cth). Section 52 is in Division 1 of Part V of the Act. That part is headed "Consumer Protection". Division 1 is headed "Unfair Practices".

Section 52 reads:

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1)".

The question to be decided was whether the conduct complained of was engaged "in trade or commerce". The respondents, O'Rourke and the film company, argued the statement of claim

² *Hearn v O'Rourke* [2002] FCA 1179 (20 September 2002).

should be struck out, as the conduct alleged did not take place "in trade or commerce" as S52 requires. The leading case on this point is *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990).³ In that case a construction worker alleged that while he was employed by a construction company, a foreman of that company had told him to remove certain grates from entry points to air-conditioning shafts and that each grate was secured by bolts. It was alleged that this statement was untrue. While the worker was removing one of the grates it gave way causing him to fall and suffer serious injury. He claimed damages against his employer upon the basis that the foreman's untrue statement constituted conduct which was misleading or deceptive or liable to mislead or deceive, contrary to the provisions of s52 of the Trade Practices Act. The High Court of Australia was required to determine whether the facts gave rise to a cause of action under The Act. In that case the court decided the phrase "in trade or commerce" is restricted in its operation to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. It does not extend to conduct which merely occurred in the course of carrying on an activity or carrying out a transaction of a trading or commercial character. Their Honours gave as an example the driving of a truck or the construction of a building were not, without more, trade or commerce because it was divorced from any relevant actual or potential trading or commercial relationship or dealing and would not of itself constitute conduct "in trade or commerce" for purposes of s52.⁴ The question is not whether the conduct was engaged in connection with or in relation to trade or commerce. It must have been in trade or commerce. In an interlocutory hearing O'Rourke and the Film Company successfully argued in the Court of first instance that their filming or interviewing of the two girls was analogous to the Concreter's case because it did not bear a trading or commercial character. It was pointed out that the girls were not paid for their appearance in the movie however, Keifel J said even if they had this would not have been sufficient. The contract would have been one of employment. It would not have provided

³ *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17.

⁴ *Ibid.* para.8.

the necessary context of trade or commerce.⁵ O'Rourke & Co. successfully argued that the only trade or commercial dealings on their part occurred at the point when the completed film was promoted or distributed.

However, on appeal the majority in the Full Court of the Australian Federal Court took a different and, in my opinion, correct view by stating that there could be no documentary unless the appropriate interviews were secured:

"Securing such interviews, in our view, could properly be said to be central to the trading or commercial activity in which the second respondent (Camerawork Pty Ltd) was engaged in producing a film for profit. Correspondingly, the conduct engaged in by the first respondent (O'Rourke) for that purpose could itself be found to be in trade or commerce".⁶

According to the majority it was reasonably arguable that the girls were being asked to enter into a relationship which, for the film-makers, formed part of their commercial purpose. It was this aspect, their honours reasoned, that brought it into line with the majority judgment in the *Concrete*'s case because the interviews could be characterised as bearing a trading or commercial character although they did not give rise to a commercial relationship.⁷ The appeal was allowed with costs and the matter was ordered to be submitted to the primary judge for determination. That order has yet to be carried out as it is understood an application for special leave to appeal is to be heard by the High Court sometime this year.

Implications for journalists

The implications for journalists, especially broadcast journalists, from this decision are significant. During the appeal hearing counsel for O'Rourke put forward a hypothetical situation that if, for example, the filmmaker had said to someone in Cunnamulla, "I'd like to film your house". The

⁵ *Hearn v O'Rourke* [2002] FCA 1179, para 3.

⁶ *Hearn v O'Rourke* [2003] FCAFC 78 (2 May 2003).

person says, "Don't film the backyard; it's a mess," and the backyard appears in the film then that conduct, if *Hearn v O'Rourke* is upheld, could enliven S52 of the TPA.⁸ This means that Commercial Television news, in particular, faces some challenging times because their news can be assumed to be a commercial product of the company that owns them. It matters not that the subjects who appear in news stories are usually not paid; if they have been deceived in some way by the way they are represented, leaving aside defamation issues, then as a result of *Hearn v O'Rourke* they arguably would have a cause for action against the station. A deception of this nature would also arguably offend the Federation of Australian Commercial Television Stations Code of Practice. Section 4.3 states that in broadcasting news and current affairs programmes, licensees:

4.3.1 must present factual material accurately and represent viewpoints fairly, having regard to the circumstances at the time of preparing and broadcasting the program'.

4.3.5 'must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast'.

It is no secret that news gathering often requires a degree of subterfuge, presumably in the public interest, to induce reluctant subjects to tell their story or the story the media wants to hear.

However, not all reportage is in the public interest. One of the latest to experience media deception was Dame Diana Rigg who last year won more than \$A84, 000 in damages for libel, plus an extra \$17,000 for invasion of privacy at her home in France as well as her costs from the Daily Mail over two articles that portrayed her in an inaccurate light.⁹ Dame Diana explained that she “naively” agreed to give an interview to a Mail reporter to promote the Child with Aids charity, of which she is patron, not realising the reporter was more interested in talking about her private life. When the article appeared Dame Diana claimed she went into shock.

⁷ Ibid, para. 13.

⁸ *Hearn v O'Rourke* [2003] FCAFC, Transcript of Proceedings, (20 February 2003) p.28 (Finn J, Dowsett J and Jacobsen J during argument).

“I had been given a persona I didn’t recognise, attitudes I don’t possess, opinions I don’t hold and words I had not spoken,” she said.¹⁰

Last year in Australia a Media Entertainment and Arts Alliance complaints panel heard a complaint by a former policeman that he had been lured into an interview with the ABC's *Four Corners* programme by deceptive practices.¹¹ At the first instance the panel found that *Four Corners* had breached the journalists' code of ethics however, the case was later thrown out on appeal. Interestingly the committee members raised issues about when journalists were obliged to identify themselves. Some said it was standard practice for journalists to disclose who they were when speaking on the phone to a potential interviewee, but others argued that not revealing their identity at that stage was a reasonable investigative technique. Certainly there is also a world of difference between unsophisticated teenage girls living in a remote outback community and adults well able to look after themselves. Nevertheless, it does highlight the point that in future complainants of alleged media deception, who receive good legal advice, may be emboldened to seek relief in the Federal Court under S52 of the TPA. It may not be enough therefore for journalists and their managers to be *au fait* with defamation and contempt laws they should also be on top of Trade Practices legislation as well.

Freedom of speech

There are competing public interests involved. There is a specific public interest in the free flow of information relevant to the provision of consumer services. There is also a public interest in not being misled. It is interesting that the two girls brought an action under s52 of the TPA rather than launching an action for defamation. However, the law states there are a number of differences between the law of defamation and the Trade Practices legislation which prohibits misleading or

⁹ Ciar Byrne, 'Rigg backs calls for privacy law', *The Guardian* (London) Friday October 24, 2003, <<http://media.guardian.co.uk/print/>>

¹⁰ Ibid.

¹¹ Sally Jackson, 'Four Corners ruling thrown out on appeal', *The Australian Media* August 7, 2003, p.7.

deceptive conduct. One of the advantages for the applicants is that under the TPA the onus of proving falsity is on them and the misleading or deceptive conduct legislation does not invoke the defences to defamation, which ostensibly seek to strike a balance between injury to reputation and freedom of speech. There is also the question of whether it is possible to run a successful defamation case against yourself. Because in the 'Cunnamulla' case the two aggrieved subjects made the defamatory utterances themselves it was not the result of commentary by a third person. Unlike defamation laws liability does not depend upon 'publication',¹² but upon the making of a representation. Under the TPA the misleading or deceptive material does not have to be published "of and concerning"¹³ the applicant. The publication must however, be in the course of conduct "in trade or commerce". From this it is clear that the defamation defences of fair comment, qualified privilege and innocent distribution are not available under the legislation. By bringing an action alleging an infringement of this legislation, an applicant can therefore avoid most of the defences that are available to a defendant in a defamation case. The matter also raises the possible application of s65A of the TPA as it relates to prescribed information providers. This section was added to the Act when media proprietors became concerned that S52 could be used in place of defamation actions to their cost. In *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*¹⁴ it was held that the publication of information by a media organisation might constitute misleading or deceptive conduct. However, *Australian Ocean Line Pty Ltd v Western Australian Newspapers Ltd*¹⁵ was the first case in which a media organisation was made liable for breaching s52. These cases indicated that a critical factor in determining whether the publication of material by a media organisation constitutes misleading or deceptive conduct is whether the conduct of the media organisation conveys a misrepresentation. Subsequently, as a result of these cases, the TPA

¹² Publication in defamation terms means the plaintiff must establish that the defamatory material complained of has been communicated to a third person.

¹³ The test is whether the material is "such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to" as per *David Syme & Co v Canavan* (1918) 25 CLR 234 at 238.

¹⁴ *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* [1984] 55 ALR 25

¹⁵ *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* [1985] 58 ALR 549

legislation was amended to provide that S52 does not apply to radio and television stations, newspaper owners and others who carry on the business of providing information, where they publish information other than the matter connected with the supply or possible supply by them of goods or services or the publication of an advertisement. However, this section of the Act was not raised in *Hearn v O'Rourke* at any stage of the proceedings presumably because Camerawork Pty Ltd could not be said to be a prescribed information provider and therefore unable to avail itself of this protection. Also as Freedom of speech is 'vital to the maintenance of a democratic system of government and the exercise of democratic rights' consisting of the public's rights to discuss matters of public concern and to disseminate or receive relevant information, freedom of speech is essential for the notion of self-governance.¹⁶ Certainly this case raises freedom of speech and privacy issues, which would presumably loom large in any media organisation's defence of an alleged breach of s52.

In an interview O'Rourke said he did not experience any conflict about using the two, young girls descriptions of their sex life in the "Cunnamulla" documentary.¹⁷ He said that it was his role to record certain truths no matter how uncomfortable they were. Uncomfortable they certainly were. Cara Hearn told *The Courier-Mail* that the documentary forced her to flee the town. "I couldn't go anywhere, people made me feel like I was the bad one out of the crowd," she said.¹⁸ For journalists the issue is relatively clear. Clause 8 of the MEAA Australian Journalists Association Code of Ethics states:

"Use fair, responsible and honest means to obtain material. Identify your self and your employer before obtaining any interview for publication or broadcast. Never exploit a person's vulnerability or ignorance of media practice".

¹⁶ Mo John S, 'Freedom of Speech v Administration of Justice', *Australian Bar Review*, (1992) Vol.9 No. 3 November

¹⁷ Film Australia media release (2000) p.5.

¹⁸ Michael Median, Amanda Gearing, 'Court backs girls from Cunnamulla', *The Courier-Mail*, 3 May 2003 <<http://global.factiva.com/ebn/arch/display.asp>

Therefore had O'Rourke and his film company been working under the Journalists' Code they would have been in breach of Clause 8, especially the sentence referring to exploitation of a person's vulnerability or ignorance of media practice. The Code's guidance clause that "Only substantial advancement of the public interest or risk of substantial harm to people allows any standard to be overridden" would also be a matter for debate. For his part O'Rourke seemed to be untroubled. He claimed the overriding issue was the way that Cara and Kellie-Anne were spoken of and abused by men and boys in the town.

"I realise that it's a huge thing for them to be recorded, but what they admit is not going to be news to anybody in Cunnamulla" and this "All I can say is that there are worse things happening in these kids' lives than being in the film, and worse things will probably continue to happen, although I hope not".¹⁹ With respect that does not seem to be the reaction of the girls (now young women) who not only were shamed into leaving the town but will, in all likelihood, carry that stigma with them for the rest of their lives. That alone would make them in many people's eyes deserving candidates for an award of substantial damages, which is precisely what they are seeking. There is, of course, no guarantee they will succeed despite winning their Federal Court appeal 2-1. Indeed, the joint judgment warned that the girls Trade Practices Act claim "faces formidable obstacles for reasons we have not had to consider."²⁰ While Dowsett J, dissenting, favoured the majority judgment in the *Concreteer's* case that argued s52 only protects consumers. It was his opinion that adoption of the applicant's submission would lead to s 52 having virtually unlimited operation which was precisely the result which all members of the High Court in the *Concreteer's* case were concerned to avoid.²¹

Conclusion

So what does this mean for journalists? It is necessary to point out that the tort of negligence has expanded in Australia in recent years notwithstanding government moves to limit its reach. So far

¹⁹ Film Australia media release (2000)

²⁰ *Hearn v O'Rourke* [2003] FCFAC 78 para.14.

there has not been an expansion to the extent that it imposes a duty of care on the media in relation to its publications. Nevertheless, as Butler points out, it would be unsafe to dismiss the possibility of such an eventuality at some time in the future.²² If the High Court upholds Cara Hearn's & Kellie-Allardice's appeal then it may mean journalists will have to arm themselves with interview "consent forms" before every interview they conduct for fear of litigation. Electronic journalists may also be advised to obtain recorded consent before beginning an interview. This may have the effect of limiting the free flow of information by alerting subjects to the line of questioning they are about to face. It does not take too much imagination to foresee controversial subjects refusing to cooperate with a journalist once they know what is coming. This can only be an impediment to fearless investigative journalism for whom the element of surprise is a legitimate weapon in their armoury.

On the other hand it could be seen as a necessary safeguard for vulnerable people and those ignorant of media practice. As noted above it certainly resonates with the current MEAA Code of Ethics and therefore could be seen as unexceptional by some. In the end it all depends on the difficult argument of how far journalists should go in advancing the public interest or precisely what the public interest means.

²¹ *Hearn v O'Rourke*[2003] FCFA 78 para. 37.

²² Butler D & Rodrick S, *Australian Media Law*, (1999) LBC (Sydney).

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