

***Murray v Raynor* [2019] NSWCA 274 (13 November 2019)**

Judgment: 13 November 2019

Macfarlan JA, Payne JA and Emmett AJA

The Court of Appeal of Supreme Court of New South Wales allowed appeal and set aside the orders of Gibson DCJ made on 17 May 2019 and ordered that the proceedings be dismissed with costs.

In 2017, the appellant was a tenant at an apartment building (the Building) in Manly. The respondent lived in an apartment which he owned in the Building and was the chairman of the Strata Committee. An issue arose because the appellant frequently left her mailbox unlocked. The respondent sent a number of emails to the appellant and expressed concerns about the security of mailboxes at the Building. The respondent formed a view that the appellant's unlocked mailbox increased the risk of theft from all letterboxes in the Building. The appellant sent an email to the respondent and copied 16 other recipients (being the owners of the units at the Building) claiming that she had been harassed by the respondent ("the matter complained of").

The respondent brought proceedings for defamation in the NSW District Court against the appellant and complained that the email was defamatory of him. The primary judge found in favour of the respondent and awarded him \$120,000 in damages. The appellant appealed from the orders made by the primary judge.

The issues in the appeal were:

- (1) Whether the primary judge erred in failing to uphold the defence of common law privilege.
- (2) Whether the award of damages was manifestly excessive.

Defence of common law qualified privilege

The appellant submitted that the defence of qualified privilege was established and the respondent failed to prove malice.

The appellant contended that the defence of common law qualified privilege comprised the following three elements:

- 1) identification of the privileged occasion;
- (2) relevance of the defamatory statements to the privileged occasion; and
- (3) whether malice had been established.

and the primary judge:

- failed to identify the nature of the privileged occasion where there was a clear occasion of privilege;
- erred in finding that the “communication has not been made for the reason that makes the occasion privileged” which was a conflation of the questions of relevance to the occasion and malice.
- failed to identify the occasion of privilege and by failing to have regard to “reply to attack”, did not consider the appellant’s motive in publishing in context.

The Court made the following findings:

- “the critical first step in determining whether a defamatory publication is made in circumstances attracting a qualified privilege at common law is to identify the privileged occasion”. And the primary judge should have concluded that it was the communication to residents of Building on the subject of management of the building including the mailboxes` security. (*LVMH Watch & Jewellery Australia Pty Ltd v Michael Lassanah & Ors* [2011] NSWCA 370)
- Secondly, there must be a sufficient connection to the privileged occasion to attract the defence. “No narrow view should be taken of the pursuit of duty or interest in what was said on an occasion of privilege.” (*Cush v Dillon* (2011) 243 CLR 298 at [22]). The primary judge’s findings that the publication was made for “the purpose of humiliating, belittling and insulting [the respondent] in the most hurtful way possible” was indicative of conflating malice and relevance to the occasion of qualified privilege. Therefore, the matter complained of was relevant and germane to the occasion of privilege.
- The primary judge “should have found that there had been an “attack” for the purposes of the reply to attack subset of qualified privilege. However, the reply was made to a different “body” than the matter complained of, so did not attract the defence”.
- “Proof of ill-will, prejudice, bias, recklessness, lack of belief in truth or some improper motive is insufficient of itself to establish that malice actuated the publication”. Therefore, the primary judge’s conclusion that malice had been proven should be set aside.

Consequently, the Court held that the defence of common law qualified privilege was established.

Damages

With respect to the award of damages, the court found that “an award of \$120,000 for an email in these terms addressed to 16 people was a manifestly excessive award”.

The Court noted that there were no findings of any damage to the respondent's reputation and the only possible relevant finding on that issue was that "at least one recipient wondered what had really happened" which was an insufficient basis for the award of damages. The Court held that no more than \$25,000 should have been awarded for general damages.

The court found that the primary judge awarded aggravated damages on the basis of the appellant's "knowledge of the falsity contained within the matter complained of" in circumstances that there was no occasion in this case for the award of aggravated damages.

Representation

Appellant: B McClintock SC, S Chrysanthou, P Hart instructed by Kalantzis Lawyers

Respondent: R Potter, A Munro instructed by Goldsmiths Lawyers