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Defamation damages: expert's view rejected

Li & Anor v The Herald Weekly Times Pty Ltd & Anor [2007] VSC 109

A series of newspaper articles that appeared in the Herald Sun between mid-2003 and 2004, resulted in legal proceedings seeking damages for defamation. Ms Abbie Li and her employer, Forever Young Pty Ltd, claimed to have been defamed by the eight articles.

Ms Li was previously a registered doctor of traditional Chinese medicine, whose registration and entitlement to call herself a doctor had lapsed. Her employer, Forever Young, advertised services including acupuncture and remedial massage.

Justice Gillard heard that the Herald Sun journalist Keith Moor, a defendant in the proceedings, wrote a series of articles implying that Ms Li:

- Operated an illegal brothel in Collins Street, Melbourne
- Was a prostitute in the sense of receiving money for sexual services
- Was dishonest because she provided fake receipts relating to sexual services that enabled her patients to claim on their health insurance

One of the articles appeared under the provocative headline of "Medi-Bonk".

Moor's story claimed a conman allegedly recorded Ms Li providing services to a politician and a barrister, with the intention of using it for blackmail or to get payment from the Herald Sun. However, the conman died of natural causes before completing the crime.

Justice Gillard found that the articles were defamatory against Ms Li, but not defamatory against Forever Young: they contained little to defame its trading reputation. However, Justice Gillard also found that the defendants were not liable because the defamatory words were justified and were in fact true.

As a result, Justice Gillard ruled that the proceedings be dismissed. However, he made a number of helpful observations about damages in the event of an appeal.

The judge's first observations highlighted the requirement that expert evidence comply with Order 44 of the rules of the Victorian Supreme Court. Specifically in this case, he found that the evidence provided by the expert engaged by Ms Li and Forever Young was not of assistance because, amongst other issues:

- The expert did not understand the code of conduct

When the Herald Sun was sued for defamation following a series of racy articles, the plaintiff relied on an expert witness whose evidence was found wanting



- Some of the issues upon which he sought to provide evidence fell outside his area of expertise – for example, valuing comparable businesses
- He did not provide source material to articulate his evidence, nor the facts, matters and assumptions on the opinions expressed

In his conclusion, Justice Gillard commented that the expert evidence on damages was totally inadequate, lacking in evidence and based on speculation. He also expressed the view that the case on damages would not have been a difficult exercise, and outlined methods that might have been acceptable to the Court.

While the calculation of damages is not always straightforward, Justice Gillard's views on the diminishing quantum of damages arising from a series of defamatory acts are of interest. He treated each of the eight articles as a separate cause of action, the result of which the plaintiff may have been entitled to recover damages in respect of each publication.

Justice Gillard also said that, where there are similar defamatory imputations made in a number of articles, the award for damages should initially be assessed on the first article. The award of damages for later articles would usually be substantially less. Further, where a defendant is able to prove partial justification of the defamatory words contained in one article, the defendant is still liable for the part not justified.

Significance:

This case highlights the importance of engaging a forensic accountant that has expertise in each area in which the accountant is providing evidence. It also highlights the importance of a forensic accountant's compliance with the conduct outlined in the Court's rules. Experienced forensic accountants are more likely to be familiar with the Court's requirements than accountants who have not previously appeared in Court.

Finally, Justice Gillard's views on the damages that may flow where there are repeated acts of defamation and how the quantum of those damages might diminish with further publications may be relevant in other defamation cases.



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