ADVANCED HAIR STUDIO PTY LTD & ANOR v. TVW ENTERPRISES LIMITED[1]

Previous cases[2] have demonstrated the incursion of s. 52[3] of the Trade Practices Act 1974 (Cth) ('the Act') into the common law area of defamation. To prevent this occurring, Parliament enacted s. 65A.[4] Despite this measure, *Advanced Hair Studio Pty Ltd v. TVW Enterprises Limited* represented an attempt, subsequent to the amendment of the legislation, to use s. 52 as an alternative to pursuing common law avenue. This was the very kind of action the amendment was calculated to preclude.

This case is of particular significance to the media, publishers and others involved in the business of providing information, in regard to their liability for the publication of misleading or inaccurate information. In this decision by French J. of the Federal Court of Australia, it was established that s. 52 is not to be used as a substitute for common law defamation actions and that s. 65A exempts the media from the operation of certain consumer protection provisions. However, his Honour held that the media and other information providers were still subject to accessorial liability under s. 80(1). This liability was independent of s. 52. Hence, the s. 65A immunity did not apply. The case also has implications for consumers. Following the decision, it is possible that consumers, through the extended operation of the Act in s. 6(3), may be liable for damages under s. 52 for complaints that are broadcast.

However, it is necessary to keep these propositions of law in context. His Honour did not have to make a final decision on these issues. He had only to determine on the evidence available whether there was a serious issue to be tried and that the balance of convenience supported the granting of an interlocutory injunction. Thus the case is of limited authority.

1. *The Facts*

The applicants (Advanced Hair Studio) sought relief by way of an interlocutory injunction against the respondent (TVW Enterprises Ltd) to prevent it from screening a segment in a current affairs programme which contained an interview with a consumer (Dunwoody), a dissatisfied customer of the applicant's business. The applicants alleged that D's complaints about a hair fusion treatment amounted to misleading or deceptive conduct. The interview was pre-recorded and subject to editing before its probable inclusion in the segment.

The applicants argued on alternative bases that either the proposed broadcast would constitute a contravention by the respondent of s. 52 or that, even if the telecast did not attract the application of that section with respect to TVW, under the extended operation of the Act to television broadcasting

[1] (1987) 77 A.L.R. 615. Federal Court, 5 October 1987, French J.

[2] *Global Sportsman Pty Ltd & Anor v. Mirror Newspapers Ltd & Anor* (1984) 55 A.L.R. 25, and *Australian Ocean Line Pty Ltd v. West Australian Newspapers Ltd & Anor* (1985) 58 A.L.R. 549.

[3] A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[4] Nothing in ss. 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than —
(a) a publication of matter in connection with —
(i) the supply or possible supply of goods or services;
(ii) the sale or grant, or possible sale or grant, of interests in land;
(iii) the promotion by any means of the supply or use of goods or services; or
(iv) the promotion by any means of the sale or grant of interests in land,
where—
(v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or
(vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with —
(A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or
(B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or
(b) a publication of an advertisement.

in s. 6(3), the broadcast of D's comments would amount to a breach of s. 52 by D. The respondent was then liable as an accessory to the contravention under s. 80(1) of the Act if D's allegations were included in the broadcast.

The respondent relied on the special protection available to a publisher as a prescribed information provider in s. 65A to exempt it from injunctive relief.

In reply, the applicants submitted that the respondent was not entitled to the immunity in s. 65A because in screening the segment, it was not merely providing information to the public but was in reality promoting its own current affairs programme. Broadcasting involved the provision of information by TVW as a 'prescribed information provider'[5] and these services were relevant services within the meaning of s. 65A(3). Because broadcasting of the segment involved the supply of information, it would constitute a publication of matter in connection with the supply or possible supply of those relevant services under s. 65A(1)(a) and so would not attract the protection of s. 65A.

2. *The Respondent as Principal Contravenor*

First, French J. considered whether the conduct of the respondent, in broadcasting Dunwoody's complaints, contravened s. 52. The applicants had contended that in screening the segment, TVW was effectively conducting an advertisement for its own programme and so should not be protected. His Honour held that the applicants' construction, if correct, would remove much if not all of the practical operation of s. 65A.

In determining the validity of the applicants' interpretation, his Honour found it instructive to look to the background and purpose of s. 65A. Under the original enactment, there were already specific defences available to publishers in s. 85 but these were either limited to criminal proceedings (s. 85(1)) or to the publication of advertisements (s. 85(3)) and did not cover media articles and comments of interviewees.

French J. referred to a number of previous significant decisions on the application of s. 52 to statements published by the press or electronic media. In *Global Sportsman Pty Ltd v. Mirror Newspapers Ltd*,[6] the Full Court of the Federal Court held that the publication of statements, including statements of opinion, made in the ordinary course of reporting the news, if inaccurate, can amount to conduct which is misleading or deceptive within the meaning of s. 52.

The use of s. 52 in relation to actions against newspapers reached its climax in *Australian Ocean Line Pty Ltd v. West Australian Newspapers Ltd & Anor.*[7] There the judgment of Toohey J., then a Judge of the Federal Court of Australia, in respect of a report of passenger criticism of a cruise ship was of a similar effect. However, his Honour held that the mere publication by a newspaper of reported opinions which did not accord with the facts would not, of itself, constitute a contravention of s. 52:

> There must be something in the articles referable to the publisher's conduct which is likely to lead a reader into error.[8] . . . There is a contravention if the statement goes beyond the mere reporting of opinions by others and contains a representation by the newspaper itself.[9]

On the facts, this means that the broadcaster breaches s. 52 if the segment indicates that a statement by D is right.

Concerned at the application of s. 52 in these cases to the common law area of defamation and in recognition that to use s. 52 in such a manner would restrict freedom of expression, Parliament enacted s. 65A to prevent this recurring. S. 65A was intended to be a final clarification of the application of certain consumer protection provisions to the media and others in the business of providing information.

French J. then referred to the second reading speech of the then Attorney-General on the Statute Law (Miscellaneous Provisions) Bill 1984[10] which described the purpose of s. 65A:

5 'Prescribed information provider' means a person who carries on a business of providing information: s. 65A(3).
6 (1984) 55 A.L.R. 25.
7 (1985) 58 A.L.R. 549.
8 (1985) 58 A.L.R. 549, 587.
9 *Ibid.* 586-7.
10 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 September 1984, 1296.

> The Government recognises the need to maintain a vigorous, free Press, as well as an effective and enforceable Trade Practices Act . . . New section 65A will operate to exempt the media and other persons who engage in businesses of providing information from the operation of those provisions of Division 1 of Part V of the Trade Practices Act which could inhibit activities relating to the provision of news and other information.[11]

There were, however, limits on the exemption. French J. approved of the *obiter dictum* of Wilcox J. in *Horwitz Grahame Books Pty Ltd v. Performance Publications Pty Ltd*[12] in which it was considered that statements promoting future issues or programmes were excluded from the operation of s. 65A and so were still governed by s. 52.

In a general sense, the same may be said of everything published or screened by the media. The material presented is intended to stimulate interest and induce consumers to watch further programmes or purchase future issues. It was this wide construction that was sought to be applied by the applicant. However, French J. agreed with the decision of Wilcox J. that the qualification in s. 65A(1)(a) is intended to relate to 'self-advertisements' or the promotion of future issues corresponding with advertisements published on behalf of others covered in s. 65A(1)(b). This view was consistent with the objective for limiting the s. 65A immunity.[13]

The intention of s. 65A was to exclude the application of specific consumer protection provisions of the Act to ordinary items of news and comment but where there is 'a commercial interest in the content of the information',[14] the information provider should be as amenable to s. 52 as anyone else. There was no reason in principle to extend the application of s. 65A(1)(a) to promotional matter.

Further, French J. decided that the reference in s. 65A to 'a publication of matter' indicates that it is the content and not the general character of the material that is important. Therefore, both the language and the purpose of the section did not support the applicants' contention.

Thus his Honour held that it was inconsistent with the evident purpose of that provision to adopt the applicants' construction which removed all practical effect of s. 65A. In the interests of a free press, the media was exempted from the operation of s. 52 in relation to the supply of news and other information except in the publication of advertising (as it already had a defence in s. 85) and to the extent that any items amounted to a direct promotion of its own business.

3. *The Consumer as Principal Contravenor*

If TVW had not contravened s. 52, French J. then had to consider the applicants' alternative submission that the statements in the telecast amounted to a breach of s. 52 by the consumer (D). As the application of s. 52 is limited to the conduct of corporations, D could only be caught by the extended operation of the Act under s. 6(3)(a) to natural persons who engage in conduct that 'takes place in a radio or television broadcast'.

D's allegations were made in a pre-recorded interview and therefore did not literally take place in a telecast. This raised the question whether a pre-recorded statement, subject to editing, can, if screened, constitute conduct in a television broadcast.

French J. made an analogy with *Barton v. Croner Trading Pty Ltd*[15] where it was held that a wholesaler supplying falsely labelled goods made representations to the consumer through the medium of the retailer. Applying the reasoning in *Barton's* case and in line with the intention of the legislature that the extended operation of the Act have a wide application, his Honour held that a recorded statement for later transmission by a television licensee can amount to conduct for the purposes of s. 6(3), and so falls within the application of s. 52.

There was therefore a serious question to be tried that D's statement for pre-recording for later inclusion in whole or in part in a telecast, would, if screened, constitute conduct which took place in a television broadcast within the meaning of s. 6(3).

11 *Ibid.*
12 [1987] A.T.P.R. §40-764, 48, 275.
13 The second reading speech of the Attorney-General, Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 September 1984, 1296.
14 *Ibid.*
15 [1984] A.T.P.R. §40-466.

His Honour then considered the issue of whether the licensee's publication of D's statement could attract to D's conduct the immunity conferred by s. 65A. It was held as a matter of construction that s. 65A did not confer any exemption upon D. The purpose of s. 65A did not afford any reason for protecting third parties such as rival traders, consumers or others from the application of s. 52.

4. *In Trade or Commerce*

It was submitted by TVW that a complaint about a completed contract was not sufficiently connected to the transaction to be in trade or commerce for the purpose of s. 52 of the Act. On this point, French J. held that it is not essential that a statement be related to a commercial transaction. It may do no more than add to the sum of information (including opinions) available to prospective consumers. Whether a statement amounts to conduct in trade or commerce will depend on the circumstances and the nature of the statement.

Thus it was held that a statement by a dissatisfied consumer to other prospective consumers of a particular service, can amount to conduct in trade or commerce for the purpose of s. 52. Consequently, there was a serious question to be tried on the issue of whether D's statement in the pre-recorded interview constituted conduct in trade or commerce.

5. *Accessorial Liability of the Telecaster*

The next issue was whether TVW could be found liable for aiding and abetting a contravention. This was obviously dependent on the finding of a contravention against D. French J. held that the external elements required to establish that TVW would aid or abet Dunwoody within the meaning of s. 80(1)(c) were satisfied in the form of the use of TVW's facilities and the intended broadcast of the statement. His Honour found that as the language of s. 80(1)(c) has the same origin as s. 75B of the Act, the same construction of s. 75B in *Yorke v. Lucas*[16] should be applied to s. 80(1)(c).

However, on the authority of the High Court decision in *Yorke v. Lucas*, intention is required for accessorial liability, that is, knowledge of the facts which constitute the breach of s. 52. Therefore to find that TVW had aided or abetted the contravention by broadcasting the statement, it would have to be demonstrated that TVW was aware or was reckless as to whether D's allegations were false. The strange consequence is that whilst s. 52 is a strict liability section, accessorial liability derives from the criminal law and so requires an element of intention, that is, knowledge that the statement of the principal contravenor was false.

On the facts, TVW had two conflicting accounts of D's treatment by Advanced Hair Studio to contend with. French J. held that '[t]o know that [D's] statement is disputed, is not to know that it is false'.[17] Thus the test for intention would be difficult to satisfy and in line with this, his Honour found, on the evidence before the Court, that knowledge of TVW or recklessness as to whether D's statement was false was not established.

6. *Whether s. 65A Applies to Accessorial Liability*

On the assumption that TVW did intend to aid a contravention of s. 52, the question was raised whether TVW would be exempted from liability by s. 65A. French J. considered that the purpose and language of s. 65A was inconsistent with such extensive protection. The legislature could not have intended the grant of immunity to the media for the knowing or reckless dissemination of misleading or deceptive information.

Sub-s. 80(1) empowers the Court to grant an injunction not only against persons who contravene provisions of Parts IV and V of the Act but also against various defined classes of accessory in sub-s. 80(1) itself. Consequently,

> '[t]he liability to injunctive relief under sub-s. 80(1) . . . derives directly from that section and not from any application of s. 52 to their conduct'.[18]

Thus his Honour concluded that s. 65A would not operate to protect TVW from liability as an accessory under sub-s. 80(1).

16 (1985) 158 C.L.R. 661.
17 *Advanced Hair Studio supra* 628.
18 *Ibid.* 629.

7. *Balance of Convenience*

In reaching its decision, the Court had to weigh up the competing public interests involved. It found that there was 'a specific public interest in the free flow of information relevant to the provision of consumer services'.[19] Underlying this was a broad interest in freedom of the press within legal constraints; a factor to be given considerable weight. Against this was a conflicting public interest in preventing the making of misleading statements.

The balance of convenience tended to favour the applicants on economic impact. It was probable that some damage would occur to the business if the segment went to air. Even if the applicant had taken the opportunity offered by TVW to reply, for many members of the public the fact that a complaint exists, even if responded to immediately, would be sufficient to deter them from dealing with that business. On the other hand, TVW would not have suffered any economic damage other than inconvenience and waste of resources if it were to be restrained from broadcasting D's allegations.

Although broadcast of the interview could have an adverse economic impact on the applicant and could result in the propagation of inaccurate material, his Honour was of the view that these factors were 'redressed by the opportunity for response and the public interest in avoiding unnecessary restrictions on the free flow of information'.[20]

In French J.'s opinion, there were elements of the case advanced by the applicants which while they raise arguable issues, had little prospect of success in a substantive hearing. Therefore, in all the circumstances, his Honour dismissed the application for the grant of an interlocutory injunction.

8. *Practical Implications*

Advanced Hair Studio changes the approach and direction of the application of s. 52. Whilst previous cases established that the publication of misleading or deceptive material in the course of reporting the news was capable of breaching s. 52, this decision provides the first statement, albeit of limited authority, since the enactment of s. 65A on the liability of the media for the publication of false or misleading information. French J. held that in the interest of the free flow of information s. 65A excludes the media and other information providers from the operation of s. 52 except where the item constitutes a 'self-advertisement'. This finding has clarified the extent and scope of the exemption. S. 52 can no longer be used as a *de facto* defamation action.

Under the extended operation of the Act in s. 6(3), coupled with a wide interpretation of 'in trade or commerce',[21] the decision has opened up the potential liability of aggrieved consumers under s. 52 for the broadcast of their complaints.[22] This application of s. 52 is somewhat ironic in view of the fact that it is intended to be a consumer protection provision. This aspect of the case appears to be unjust in that it provides traders with a means of preventing the broadcast of consumer complaints about their business. It is also bad for policy reasons as the possibility of litigation is likely to deter consumers from voicing their opinions, restricting the free flow of information.

Following this decision, the only way to attack the media for defamation under the Trade Practices Act is to prove that the intervention of the broadcaster in screening the statements aided or abetted the principal contravention as the s. 65A exemption does not extend to ancillary liability. However, in practice, this test is difficult to satisfy because the broadcaster is not liable on an accessorial basis unless it is aware that the conduct of the principal wrongdoer is misleading.

The decision of French J. to refuse the injunction was based partly on the difficulty of showing that the broadcaster intended to aid a breach of s. 52 and partly on the balance of convenience. His Honour placed great significance on the invitation to respond to the complaints. In reality, this opportunity is of little value as mere allegations, even if rebutted, will cause at least some damage to a business reputation.

19 *Ibid.* 630.
20 *Ibid.*
21 Within the meaning of s. 52.
22 Including pre-recorded interviews.

9. *Conclusion*

Advanced Hair Studio clarifies the application of the consumer protection provisions of the Trade Practices Act to the media and other persons who are in the business of providing information. In doing so, it also raises some disturbing implications for consumers with regard to their liability for inaccurate or misleading statements in a radio or television broadcast. It is, however, necessary to keep the potential ramifications of the decision in perspective. As an interlocutory proceeding, the case is of limited authority.

ELISA MCCUTCHEON*

* Student of Law at the University of Melbourne.