

Case Summary and Outcome

The present case deals with an important question of the liability of a publisher, i.e. the platform on which the content alleged to be racist, vilificatory, abusive and defamatory had been published. The court also observed that individuals involved in politics take up a risk of being subject to harsh public criticism and that might be acceptable as freedom of expression, nevertheless, not even politicians are expected to be made subject of abuses, hate, racism and defamation merely because they operate in a sphere of public interest. However, the publisher also has certain liabilities with regard to the content being violative of Law and violation of which can result in imposition of aggravated damages against the publisher.

Facts

John Barilaro, the former Deputy Premier of New South Wales approached the court herein pleading defamation because of the videos uploaded on YouTube by one Mr. Shanks. During the course of proceedings, the applicant and Mr. Shanks came into an agreement and thus the issues between them were settled. [Para 11] However, the Applicant also made Google Inc. a defendant as YouTube was operated by the Company and claims for aggravation of damages were brought against Google inc.

Decision Overview

Two YouTube videos, the first one referred to as the Bruz video containing the following accusations against the applicant: (i) him being a corrupt conman, (ii) him committing perjury nine times, (iii) him liable to be jailed for committing those perjuries, (iv) him giving \$3.3 million corruptly to a beef company, (v) him voting corruptly against a Royal Commission into water theft; and the second video referred to as the Secret Dictatorship video containing the following accusations against the applicant: (i) that his acts of blackmailing of councillors were corrupt, (ii) that such blackmailing was done using taxpayer money, (iii) that he has stolen millions of dollars from the Narrandera Shire Council which were created by an individual named Jordan Shanks were alleged to be racist, vilificatory, abusive and defamatory by the applicant Mr. Barilaro. The applicant also complained against Google for being liable for publication of the videos. [Para 1, 3, 4, 5 & 6]

Google pleaded that the videos were published on government and political matters and Google termed them to be a “qualified privilege” and being protected as “an implied constitutional freedom”. Google also claimed the defence under Section 30 of the Defamation Act 2005 (New South Wales) Act. With regard to the Bruz video, a separate defence was also raised that the video was an “honest opinion based on proper material” and was defended under Section 31(3) of the Act. Google also took a defence that the videos focused on “matters or issues of public interest” and the “publications were reasonably believed to be in the public interest” and were defended under Section 29A of the act. [Para 9] Google was assumed to have become liable as a publisher from 22 December 2020 as on that date, Applicant’s solicitors sent letters to Google making it aware of the unlawful content of the videos. [Para 138] Google made categorical defences: (i) the videos did not convey any of the complained imputations; (ii) the videos were having qualified privilege under three heads of the implied freedom, the common law, and section 30 of the Defamation Act; (iii) the Bruz video ‘concerned a matter of public interest’ and

was genuinely believed by Google that such publication would be in public interest' and thus protected under Section 29A of the Defamation Act; (iv) the complained videos were 'expressions of opinion of a person other than Google' and were not 'statement of fact' and the opinion therein related to matters of public interest and was based on proper material, or was perceived to be based on proper material and thus was protected under Section 31(3) of the Defamation Act. [Para 194] Later on, as the case progressed, Google was enquired as to whether it is maintaining these defences, to which it replied that the only defence it is not dropping and is still contending is that of Section 29A of the Defamation act. However, the said defence was later on dropped as well for the matter complained about had been limited by the applicant till 1 July 2021, and no claim has been made after the said date. Google also dropped the defence of honest opinion as the case progressed. [Para 375] Moreover, on the first day of trial, Google dropped the defence where it denied the conveyance of the imputations as complained of and in this manner, by the first day of the trial, Google had dropped all of its defences. [Para 250, 251, 252 & 253]

The court took factual evidence of the extent of publication, the earnings of Google from the videos, and the harm caused to reputation of the applicant. [Para 254 to 278] With regard to the claims and damages in the matter, the court made a detailed scrutiny. With regard to the Google's defence of earlier publications, the court was of the view that similar or earlier publications cannot be relied on to establish that no damage has been caused because of publishers' defamatory publication. [Para 284] The court observed that "the wrong done to the claimant includes the injury to both his or her feelings and reputation." [Para 287] The court declared Mr. Barilaro to be having sperate cause of action against Mr. Shanks and as well as against Google. The court also found Google to be aware of all of Mr. Shanks' videos attacking Mr. Barilaro and Google's act of allowing and keeping the videos uploaded made Google a publisher as well. [Para 290]

The court made a detailed analysis of the 'YouTube's policies and guidelines on allowable content'. [Para 112 - 128] Mr. Shanks' had contended that for imputations Under the claim 9(b) and 9(c), justification as under Section 25 and 31 of the Defamation Act 2005, would apply for being 'honest opinion' which was regarding 'a matter of public interest' and was based on 'proper material'. These defences were denied as the same would be in contravention to Art. 9 of the Bill of Rights for 'questioning and/or impeaching proceeding in Parliament'. [Para 4, 5, 9, 186 & 371]

The court herein also mentioned the legal opinion shared by the Applicant's solicitors, Mark O'Brien Legal and Respondent Google's solicitors, Ashurst. The court noted the following contents of letter Written to Google's solicitors from the Applicant's solicitors: [Para 195, 196]

- (i) Disbelief was expressed as to Google's denial of certain imputations when the words are used in the video and Mr. shanks had also admitted the imputations being conveyed. The court found this expression to be justified.
- (ii) Questions were raised as to Google's plea of the defence of public interest under transitional provisions under Section 29A of the Defamation Amendment Act 2020 (NSW)

(iii) Lack of grounds were highlighted for the plea of common law qualified privilege, which were found to be correct by the court, based on *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

The court also noted the following contents of the reply of Google's solicitors:

(i) Google here noted that the denial of conveyance of imputations was made after proper and careful consideration.

(ii) Application of Section 29 was asserted to any download of the complained videos after 1 July 2021.

(iii) Google's asserted that plea of common law qualified privilege was distinguishable from *Lange* and also had additional attributes.

Mr. Barilaro and Mr. Shanks had settled the claims following a mediation. [Para 200] The responses received by the Applicant because of the videos which were repeating the key lines from the videos were observed by the court and the court found them to be 'vitriolic and hateful' and amounting to 'cyber bullying and harassment of Mr. Barilaro'. [Para 212] The court then observed that even though Politicians and Public figures are to expect that their conduct and policies will be subjected to public scrutiny criticism and even 'vehement disagreement', however, that does not extend to 'engaging in a torrent to gratuitous racial slurring, stereotyping, name-calling, or threats of violence against the personal safety of the persons, and his or her partner or children. [Para 213]

Exercise of Freedom of speech and communication of opinion is an essential feature of a healthy democracy, but nothing can be claimed to be absolute. The court quoted Jordan CJ in *Gardiner v. John Fairfax & Sons Pty Ltd.*, (1942) 42 SR (NSW) 171 at 174, "A critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord", the court also quoted *Austin v. Mirror Newspapers Ltd.* [1986] AC 299 at 313E "Those in public life must have broad backs and be prepared to accept harsh criticism but they are at least entitled to expect that care should be taken to check that the facts upon which such criticism is based are true" [Para 214 and 215]

The court discussed various legal principles with regard to award of damages for defamation. The purpose of awarding compensatory damages is threefold, (i) Consoling for the personal hurt and distress caused by the publication; (ii) Repairing damages done to reputation; (iii) Vindicating the personal reputation. [Para 292] The mandate of Section 34 of the Defamation Act is that the damages awarded should be having an 'appropriate and rational relationship' with the harm caused to the reputation. [Para 293] After analyzing the harm caused to the applicant because of the videos, and Google's inaction, the court was of the opinion that the compensation must include the "Google's aggravation of damages" as well. [Para 309]

The Applicant raised six additional grounds for the grant of aggravated damages against Google. (i) failure to remove the two videos complained of; (ii) continued failure to remove the videos despite being aware of the harassment and abuse against the applicant; (iii) Google removing the

video only by the first day of the trial; (iv) general conduct of Google; (v) Google remaining unapologetic; (vi) Improper examination of the applicant by Google. [Para 310] The court explained the nature of the aggravated damages as being compensatory, and not punitive. With regard to the conduct warranting the award of aggravated damages, the court gave a general observation that where the conduct of the publisher is beyond what is “proper, justifiable or bonafide”. [Para 311] The court also stated that defences lacking any basis whatsoever and were never warranted to even be raised at the first instance can constitute additional harm. [Para 313] Google with regard to the claim of additional harm, took factual defense that the Applicant did not use the proper form to lodge a complaint, and that the damage was caused by initial publication, and no further harm was caused because of Google not removing the videos complained of. The court, however, simply rejected this argument based on the testimonial contentions of harm by the applicant and the relevant factual situation. [Para 315, 316]

The court quoted YouTube policies to define harassment and cyberbullying as “content that features prolonged name calling or malicious insults such as racial slurs based on an individual’s intrinsic characteristics.” The court also quoted hate speech definition which stated that “content that promoted hatred against an individual based on attributes such as ethnicity or race, racial or other slurs or stereotypes that incited hatred on such a basis, claims that an individual is ‘mentally inferior’ on such a basis and putting conspiracy theories that an individual is ‘evil, corrupt or malicious based on any of those attributes.’ [Para 326, 327] The court also made reference to the Racial Discrimination Act 1975 and pointed out that the International Convention on the Elimination of all forms of Racial Discrimination has been ratified by Section 7 of the said act and the convention is set out in the Schedule to the act. The court stated the “An act done, communicated to the public, that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person and that is done because of the person’s race, national or ethnic origin” is unlawful by the virtue of Section 18C(1) of the act. The court also pointed out to the defense provided under Section 18D for “anything said or done reasonably and in good faith.” [Para 328, 329] A reference to Section 35(2) of the Defamation Act provided for the satisfaction of the circumstances of the publication of the defamatory material as a condition for award of aggravated damages by the court. [Para 345] The court expounded that “Hate filled speech and vitriolic, constant public cyberbullying, however, cannot be classified as in any way acceptable means of communication in a democratic society governed by the rule of law.” [Para 348]

The court also observed that as Google operates a sizeable business in Australia, an understanding of Australian law has to be expected. [Para 333] Google also contended that insulting was not the focus of the Bruz video, however, the court found that the “bruz video was a running stream of insults”. [Para 334] Google also submitted that it not the ‘creator of the content’ and thus is in a different position than Mr. Shanks. However, the court observed that “every publisher of defamatory matter is equally liable for its publication.” [Para 338] The court also observed that the Google’s knowledge of the videos, their impact and yet lack of any actions on part of the Google makes them liable for defamation. [Para 339 to 342] The court concluded that Google’s conduct in allowing the defamatory videos to remain online aggravated the hurt to

the applicant and also portrayed that Google had a 'bona fide' defence amounted to being unjustifiable, improper and non bona fide. [Para 348 and 349]

The court also found the pleading of qualified privilege on the implied freedom at common law, as raised by Google to be unjustifiable for the following reasons:

- (i) Lack of reciprocity of duty and interest between Google as a publisher and the general audience which warranted the communication of the defamatory matters. [Para 364]
- (ii) Unreasonableness of conduct on the part of Google, as a claim of qualified privileged or a claim under Section 30 of the Defamation act requires the conduct of the publisher to be reasonable. [Para 367, 368]

With regard to Google's defense of the amended section 29A defense, which was later on dropped by Google itself, the court stated that the requirements of new law would only be applicable to matters the cause of action for which arises after the commencement of the new law and thus no retrospective application will be present. [Para 379, 381] The court, nevertheless, stated that the hypothetical application of the amended act would require the establishment of the fact that Google had a reasonable belief of public interest in publication of the video. [Para 382, 387]

Google's continuous failure to apologize was also held to be have aggravated the damages to the applicant. [Para 394]

Decision Direction

The case and decision herein this matter was primarily regarding the liability of the publisher which allows unlawful contents, which goes beyond the limits of Freedom of Speech and Expression. While it is necessary to uphold the freedom of expression, and the role played by publishers like Google, YouTube, Twitter and other like platforms is very significant, it is also necessary that at the same time, these platforms play the role of protecting individuals from hate speech, racist expressions and cyber bullying and abuses.

Regional and International Authorities

Defamation Act 2005 (NSW)

Austin v Mirror Newspapers Ltd [1986] AC 299; (1985) 3 NSWLR 354

Gardiner v John Fairfax & Sons Pty Ltd (1942) 42 SR (NSW) 171

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

International Convention on the Elimination of All Forms of Racial Discrimination