YELDHAM PRICE O'BRIEN LUSK

SHOULD I PUT THAT IN A LETTER?

Introduction

The Supreme Court of Victoria has recently considered whether a defamatory letter sent by a solicitor to a third party during the course of litigation was absolutely privileged.[1] Justice Beach considered that the letter was published on an occasion properly incidental to judicial proceedings and necessary for them. Accordingly, the defence of absolute privilege was applied to the solicitor's letter.

This was the first occasion an Australian Court had considered this specific issue. The case provides a good insight into the nature and extent of the immunity granted to legal practitioners when communicating with third parties for the purposes of litigation.

The authors conducted the case on behalf of the successful defendant.

Facts

The relevant factual findings of the court are summarised below.

The plaintiff and defendant were solicitors engaged in protracted litigation in the Supreme Court of New South Wales.

During the course of the New South Wales proceedings the plaintiff defaulted on a court timetable. The plaintiff filed and served an affidavit explaining the reason for his default of court orders. That affidavit, amongst other things, stated that he was called upon at short notice to fill in as in-house counsel for a software company.

After reading the affidavit, and seeking instructions from his client, the defendant wrote a letter to the chief executive officer (**CEO**) of the software company seeking to confirm the accuracy of the plaintiff's affidavit (**the matter complained of**). The defendant gave evidence at trial that it was his intention to test the plaintiff's evidence by sending the matter complained of to the CEO, and if necessary, to deploy it and the CEO's response in the New South Wales proceedings.

The matter complained of referred to the New South Wales proceedings, the plaintiff's affidavit, and a conversation that the defendant had had with one of the plaintiff's former partners (who purportedly informed the defendant that the statement in the plaintiff's affidavit concerning his employment with the software company was unlikely to be true).

The CEO did not respond to the matter complained of. The matter complained of came to the plaintiff's attention. The words that the plaintiff particularly took issue with were:

> 'One of [the plaintiff's] former partners in a discussion I had with that person expressed the view that the statements in the above paragraph (ie the paragraph of the affidavit concerning the plaintiff's employment with the software company) are unlikely to be true.'

The plaintiff commenced defamation proceedings against the defendant in the Supreme Court of Victoria (as the matter complained of was published in Victoria). The plaintiff contended that the natural and ordinary meaning of the matter complained of conveyed four imputations centring on meanings that he had sworn and relied upon an affidavit in court which he knew to be false.

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[1] *Cunliffe v Woods* [2012] VSC 254

In answer to the plaintiff's claim, the defendant asserted that the matter complained of merely sought to ascertain whether or not the plaintiff was employed by the software company at the relevant time. His argument was that the matter complained of did not impute any guilt and accordingly the imputations did not arise. In short, it was argued the matter complained of was simply an enquiry of the sort that is commonly made by solicitors during the course of litigation.

The defendant also raised defences of qualified privilege, absolute privilege and triviality. This article focuses on absolute privilege which was the principal defence raised by the defendant.

At trial

The matter came before Justice Beach on 12 June 2012. The first issue that was dealt with by His Honour was the meaning of the matter complained of. His Honour considered that the imputations pleaded by the plaintiff were pitched too high. In other words, His Honour considered that, rather than imputing that what the plaintiff had sworn was actually untrue, the matter complained of imputed that there were reasonable grounds for suspecting that what the plaintiff had sworn was untrue. Those imputations were of a lesser gravity. His Honour went on to conclude that imputations of suspicion, rather than guilt, were conveyed by the matter complained of and that they were permissible variants upon which the plaintiff could recover damages.

Absolute privilege

The defendant submitted that the publication of the matter complained of was protected by the defence of absolute privilege at both common law and pursuant to section 27(1) of the *Defamation Act* (Vic) 2005.

Absolute privilege is a complete defence to a defamation claim. Malice by the publisher does not defeat the defence.

Absolute privilege is commonly applied in the context of publications or statements made in court. However, the defence is broader than that. It extends to any document published on an occasion properly incidental to judicial proceedings or necessary for them. In this respect, absolute privilege can be divided into three categories:

- firstly, all matters that are done *coram judice*. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses and includes the contents of documents put in as evidence;
- secondly, all documents brought into existence for the purpose of the proceedings including pleadings, witness statements, affidavits and evidence produced or filed in proceedings; and
- thirdly, out of court communications with third parties, including witnesses.

The policy behind the defence is that people should be allowed to discharge their duties freely and without fear of civil action for anything said by them during the course of litigation. Where civil liability to attach it is conventional wisdom that this would impede enquiry as to the truth of the matter and jeopardise the safe administration of justice.

Justice Beach's judgment

Justice Beach acknowledged that the application of the principle of absolute privilege to the specific facts of this case (ie a written communication made by a solicitor to a potential witness during the course of litigation) had not been the subject of authority in Australia. In this respect, the Australian cases dealing with the third category of absolute privilege mainly concerned statements made by witnesses to solicitors.

His Honour considered the English authorities[2] and noted that the English courts have accepted that absolute privilege applies to letters written by solicitors to witnesses or potential witnesses for the purpose of, and during the course of, litigation.

[2] Including *Taylor v Director of the Serious Fraud Office & Ors* [1998] UK HL39

His Honour concluded that absolute privilege applies to a witness, or potential witness, in relation to out of court statements, and that the same privilege applies in reverse to solicitors (ie an out of court statement made by a solicitor to a potential witness). If that were not the case, statements made by a witness or potential witness in a conversation with a solicitor would be protected, but any statements made by a solicitor in the conversation would not. This would result in an inconsistent and absurd application of the law.

Other defences

Justice Beach considered that the defence of qualified privilege had also been made out.[3] However, the defence of triviality failed as His Honour was not persuaded that the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.

Observations

Whilst it is well established that communications made within the courtroom are privileged from suit (and that is an important element of our justice system), the reach of absolute privilege outside the court door, with respect to communications in connection with what occurs in court, has been significantly less certain.

This judgement not only represents the first occasion on which an Australian Court has determined the application of absolute privilege to a solicitor's out of court communication, but it also provides clarity as to the relevant principles as to when the privilege will apply.

The judgment is particularly relevant to investigatory communications by legal practitioners in connection with proceedings. It acknowledges the nature of adversarial litigation which requires practitioners to gather and test evidence. It recognises that in some cases it is appropriate and necessary to explain to witnesses or potential witnesses the reasons for the investigation and in doing so, those explanations may be defamatory to others.

Whilst the 'properly incidental and necessary test' applied by the court is arguably broad, and informed by the facts of each case, care should be taken with communications of this nature so as to:

- comply with the professional conduct requirements governing legal representatives' communications (from which the privilege does not protect); and
- to avoid a claimant seeking to test the application of the privilege in the particular circumstances of the case.

In conclusion, the judgement provides further certainty for legal practitioners involved in communications of this nature. It does not necessarily mean that a legal practitioner can write anything in a communication of this nature and still obtain the benefit of the privilege. In other words, care should always be taken in preparing these types of communications (particularly if they are or could be interpreted critical of third parties). The author should always consider carefully 'Should I put that in a letter?'.

August 2012

This article was prepared by Robert Finnigan and Timothy Price who acted for the defendant in this matter.

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[3] Justice Beach applied the principles set out in *Szanto v Melville* [2011] VSC 574 (a case concerning a defamatory letter published by a solicitor in the context of an unlitigated matter).

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