Eatock v Bolt [2011] FCA 1103

1. Reference Details

Jurisdiction: Federal Court of Australia
Date of decision: 28th September 2011
Link to full court judgment: http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

2. Facts

Ms Eatock brought proceedings against Mr Andrew Bolt and the Herald Sun Newspaper (HWT) in relation to articles written by Mr Bolt and published by HWT in print and on the Herald Sun website.

In these articles Mr Bolt describes and criticises a "trend" of people choosing to identify as Aboriginal. He specifically refers to 18 individuals who are represented as exemplifying this trend, making extensive reference to the fair colour of their skin and their mixed heritage and using these factors to question their self-identification as Aboriginal persons. The tone of the articles is exemplified by the following quotations:

- "…eager to proclaim their Aboriginality…";
- "..but chose Aboriginal, insisting on a racial identity…She also chose, incidentally, the one identity open to her that has political and career clout";
- "…even if full-blood Aborigines may wonder how such fair people can claim to be one of them…";
- "...people, who, out of their multi-stranded but largely European genealogy, decide to identify with the thinnest of all those strands...";
- "I've never before seen so many Australian-born people identify themselves by their ethnicity...";
- "What's an Aboriginal artist from the bush to think when he or she sees yet another white man lope off with a prize originally meant to inspire blacks?";
- "Hear that scuffling at the trough? That's the sound of black people being elbowed out by white people shouting 'but I'm Aboriginal, too'".

In the articles Mr Bolt criticises this "trend" for three reasons; firstly, that this choice is not sufficiently justified by the ancestry and cultural upbringing of the people concerned; secondly, the choice is criticised with reference to the motivation for it (e.g. career advancement; political clout); and thirdly, that such a choice emphasises racial differences rather than a common humanity.

The facts agreed upon by both parties are as follows:

- The individuals referenced in the article are of Aboriginal descent;
- The individuals at present, and since childhood, have genuinely self-identified as Aboriginal persons and have communal recognition as such; and
- The individuals have fairer, rather than darker, skin colour.

3. Law

- Sections 18B-18E Racial Discrimination Act 1975.

4. Legal Arguments

Ms Eatock's Arguments

Ms Eatock argued that the articles conveyed offensive messages about Aboriginal persons who have fairer, rather than darker skin, by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so they could access benefits that are available to Aboriginal people.

Ms Eatock argued that Mr Bolt's articles were published in contravention of section 18C of the Racial Discrimination Act 1975 (RDA), which states:

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour, or national or ethnic origin of the other person or of some or all of the people in the group.

Mr Bolt and HWT's Arguments

Mr Bolt and HWT disputed that the message Ms Eatock claimed were conveyed by the articles were, in fact, conveyed. They further denied that offence was reasonably likely to be caused by the articles and that race, colour or ethnic origin had caused the writing and publication of the articles.

However, in the event that the Court found that the articles did satisfy the test in section 18C, they argued that the articles fell under the exceptions in sections 18D(b) and (c) of the RDA, which state:

> *Section 18C does not render unlawful anything said or done reasonably and in good faith:*
> *[...]*
>
> *(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*
>
> *(c) in making or publishing*
> *[...]*
> *(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*

5. Decision

The Court held that the messages that were conveyed by the articles in question were reasonably likely to offend, insult, humiliate or intimidate the people who were the subject of those articles and that they were written or published by Mr Bolt and HWT because of the race, colour or ethnic origin of those people.

Justice Bromberg determined that the imputations conveyed by the articles were as follows:

> *There are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the identified individuals are example, who are not*

sufficiently Aboriginal to be genuinely identifying as Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to identify as Aboriginal; and,

Fair skin colour indicates a person who is unlikely to be sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

The Court rejected the argument that it should apply "community standards" in determining whether those imputations were reasonably likely to cause offence. Instead the Court considered their likely impact upon "reasonable", yet tolerant, members of the group who were the subject of the articles. The Court's approach was based upon the view that "to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice". Furthermore, the Court emphasised that "[t]he emotions upon which section 18C(1)(a) turns are those of a victim and not of an aggressor [...] [H]urt or offence may be the product of a benevolent intent".

In carrying out its assessment against this standard, the Court relied heavily upon the historical context, reasoning that:

The manner in which Aboriginal people have identified, and have been identified, by others since the British settlement of Australia is a background matter of some significance to a number of issues in the case, including whether the Articles were reasonably likely to offend and the extent to which Mr Bolt should have realised that to be so. In the context of a challenge made to the legitimacy of a person's racial identification ... [t]he extent to which racial categorisation has been a matter of historical sensitivity for a particular race of people is also relevant to the likelihood of offence.

The Court found that despite widespread acceptance that biology is not a valid basis for the concept of race:

It is a notorious and regrettable fact of Australian history that the flawed biological characterisations of many Aboriginal people was the basis for mistreatment, including for policies of assimilation involving the removal of many Aboriginal children from their families until the 1970s.

On this basis the Court found:

It will be of no surprise that a race of people subjected to oppression by reason of oppressive racial categorisation will be sensitive to being racially categorised by others. I accept that to be the case in relation to Aboriginal Australians.

Taking into account the imputations derived from the articles, Justice Bromberg considered it to be reasonably likely that the group in question would have been offended and insulted by the challenges to their identity which the articles conveyed, thus satisfying the requirements of section 18C(1)(a) RDA. In reaching its conclusion on this point, the Court emphasised the likely impact of the conduct on human dignity.

In assessing whether the articles were written and published because of the racial or other characteristics of the persons concerned, the Court relied upon the content of the articles:

> *I am firmly of the view that a safer and more reliable source for discerning Mr Bolt's true motivation is to be found in the contents of the Newspaper Articles themselves rather than in the evidence that Mr Bolt gave, including the denials made by him as to his motivation.*

In finding that a "causal nexus" existed, Justice Bromberg reasoned that journalists can be expected to perceive the meaning conveyed by the articles that they write, and that given the content of the articles in question, Mr Bolt's intention was to convey a message about the Aboriginality of the people referred to in the articles. Mr Bolt therefore wrote the articles because of the race, ethnic origin and colour of the people who were the subject of them.

In respect of HWT, the Court found that the necessary motivation may be lacking on the part of a publisher which is "a mere passive conduit of information or comment". However, where the publisher is aware that an author's motivation includes the race, colour, national or ethnic origin of the people dealt with in the article, then the act of publication will also be done because of those attributes which motivated the author. In this case, the author's motivation was apparent from the articles which HWT published. In the absence of evidence to the contrary, the Court inferred that HWT knew of and understood the contents of the newspaper articles and was aware of the imputations conveyed by them.

Mr Bolt and HWT were held not to have satisfied the requirements of section 18D of the Racial Discrimination Act 1975 and thus were not exempted from unlawfulness by reason of fair comment or publication in the public interest. In finding, *inter alia*, that the acts complained of were not done reasonably and in good faith, the Court took into account the degree of harm that the conduct may have caused and the extent of the care and due diligence taken to minimise offence and to avoid reinforcing, encouraging or emboldening racial prejudice.

The Court did not make an order for relief, but directed the parties to confer with a view to agreeing on orders to give effect to the Court's reasons for judgment. It did, however, stress two points:

- Nothing in the order for relief should be taken to suggest that it is unlawful for a publication to deal with racial identification. Mr Bolt and HWT were not found to have contravened section 18C of the RDA simply because of subject matter of the articles, but rather because of the manner in which that subject matter was dealt with.

- Public vindication is important. It will go some way to redressing the hurt felt by those injured. It will serve to restore the esteem and social standing which has been lost as a consequence of the contravention. It will serve to inform those influenced by the contravening conduct of the wrongdoing involved. It may help to negate the dissemination of racial prejudice.