"Horses for Courses"

Waterhouse v Gilmore & Ors

A rare criminal libel prosecution recently involved the ABC's television current affairs programme, Four Corners. Robert Kaye of the Sydney Bar surveys the decision on January 12, 1988 of Mr Justice Hunt.

The principles expounded in the recent decision of **Waterhouse v Gilmore** (Hunt J) emphasise not merely the difficulties which are likely to be encountered by a Plaintiff in seeking to prosecute a defamation by way of criminal proceedings, but also the substantial distinctions to be drawn between criminal and civil libel suits. Notwithstanding the marked lack of success in criminal libel prosecutions in recent times (viz **Gibbs v Spautz; Gypsy Fire v Truth Newspapers Pty Ltd**) Robert Waterhouse (the Plaintiff in the suit before Hunt J) and his father, William Waterhouse, laid informations alleging that an executive producer and a reporter employed by the ABC had each committed the indictable misdemeanour of criminal defamation by their publication of a "Four Corners" television programme entitled "Horses for Courses" telecast by the ABC.

The programme dealt with the Plaintiff's alleged involvement in a greyhound doping case, his persuasion of witnesses to lie to stewards on his behalf, his management of an illegal casino and his association with an underworld crime figure. The Magistrate upheld the Defendants' submission that there was no case for them to answer in relation to the informations laid by Robert Waterhouse, and they were discharged. The Magistrate found, however, that the Defendants had a case to answer in relation to the informations laid by the Plaintiff's father.

In the present proceedings before Hunt J the Plaintiff sought orders that the Defendants be committed for trial and alternative orders for declaratory relief, prohibition, certiorari and mandamus.

After emphasising the restricted nature of the Court's jurisdiction to review a Magistrate's decision in committal proceedings, His Honour pointed out that a Magistrate's decision in such circumstances was "not within that category of executive acts accessible to correction by this Court by way of prohibition or certiorari". In relation to mandamus, His Honour held that the Magistrate had not misunderstood the nature of the jurisdiction which he purported to exercise and that, in any event, such relief should be refused on discretionary grounds.

Insofar as a declaratory relief was concerned His Honour was of the view that this would constitute an unwarranted interference with the Magistrate's exclusive jurisdiction. Furthermore, a declaration would be of no practical utility where the Defendant had already been discharged and, indeed, the DPP was the relevant decision-maker in respect to the filing of an indictment.

In relation to the application for mandamus the Plaintiff argued, firstly, that the Magistrate had erred in ruling that, once the issue of lawful excuse is raised in the committal proceedings the informant does not establish a prima facie case unless he leads evidence which, if accepted, would tend to negate any such lawful excuse; and secondly, in ruling that such an issue of lawful excuse had been raised. In relation to the former point, it was conceded that whilst the ruling would have been correct at a trial, the onus upon an informant is quite different in a committal. After citing **Spautz v Williams** (1983) 2 NSWLR 506 His Honour rejected the proposition primarily on the basis of "the golden thread" (viz the Crown bearing the onus of proof) which ought apply equally to criminal defamation.

The Plaintiff relied upon s.417 and s.3 of the Crimes Act, 1900 (NSW) in support of his position that the onus lay upon the Defendant to establish the existence of lawful excuse at the committal. His Honour described such approach as an "affront to commonsense". In response to the argument that s.51(3) of the Defamation Act, 1974 (NSW) (which places the onus of proof upon the prosecution to negate lawful excuse once raised) incorporates the words, "at the trial of the person..." and therefore doesn't apply in the context of a committal, His Honour pointed out that it was the common law which prevented s.417 of the Crimes Act from being made applicable by s.3; if that were not the correct position the onus in respect to an issue such as self-defence would lie on the accused.

His Honour did find, however, that the Magistrate had made a mistake of law by giving weight to the Defendants' belief as to the truth of the allegations in the course of deciding whether the issue of truth had been raised. The mere fact that the Defendant so believed was no evidence of actual truth. Furthermore, the tender of the video-tape was insufficient in that there were no statements by either Defendant suggesting the truth of the imputations. However, this error of law was described by His Honour as "simply an error in the application of the ordinary rules of evidence...", and did not amount to a misunderstanding on the Magistrate's part as to the nature of his jurisdiction.

Even if an error of law warranting mandamus had been established, His Honour indicated that he would have refused such relief on the following discretionary grounds:

i) The availability of the lawful excuse of qualified privilege pursuant to s.22 of the Defamation Act;

ii) The inability of the Plaintiff to obtain an injunction to restrain publication, and the Plaintiff's failure before Young J to injunct on the basis of contempt (insofar as publication would prejudice criminal charges arising out of the "Fine Cotton" affair);

iii) The fact that civil proceedings had been instituted in the ACT in respect to the same programme and the availability of punitive damages to the Plaintiff if he were to succeed in those proceedings;

iv) The significant differences between criminal and civil defamation proceedings;

"A private prosecution for criminal defama-

tion is justified only where the subject of the prosecution is such as to affect the community; it has nothing to do with vindicating or with protecting the reputation of the person defamed."

These principles had earlier been expounded by His Honour in **Spautz v Williams** when applying **Wood v Cox**, and **Stevens v Midland Countries Railway Co.**

/) It is ultimately the decision of the Attorney-General or the DPP to determine whether an indictment should be filed.

In an appendix to his judgement, His Honour elaborated upon the differences between s.50 of the Defamation Act and the tort of defamation. Separate causes of action in relation to each imputation do not arise from the statutory offence.

Furthermore, s.50(1)(b) requires that the probability that the publication would cause serious harm and the accused's knowledge thereof must exist at the time of publication.

Finally, His Honour appended an earlier passage of his judgement in **Spautz** concerning the need for reform of s.50 with a view to reinstating the leave provisions in respect to criminal defamation prosecutions (as applied prior to the 1974 Act). An applicant for leave was previously obliged to demonstrate that a matter of public welfare was involved, as distinct from a dispute between individuals. The notion of reforming the law so as to incorporate the requirement of leave prior to commencement of a criminal defamation prosecution had earlier been mooted by Viscount Dilhorne in **Gleaves v Deakin** & Ors 1980 AC 477 as follows (p.487-88):

> "It would, I think, be an improvement in our law if no prosecution for criminal libel could be instituted without leave. There are many precedents for the leave of the Attorney-General or the Director of Public Prosecutions being required for the institution of prosecutions. In considering whether or not to give his consent, the Attorney-General and the Director must have regard to the public interest. The leave of a judge must be obtained for the institution of a prosecution for criminal libel against a newspaper (Law of Libel Amendment Act 1888, s.8), and where such leave is sought, the judge must consider whether a prosecution is required in the public interest: see **Goldsmith v Pressdram Limited**. As I do not myself regard it as very desirable that judges should have any responsibility for the institution of prosecutions, I would like to see it made the law that no prosecution for criminal libel could be brought without the leave of the Attorney-General or of the Director of Public Prosecutions."

The House of Lords in the **Gleaves** decision also lent weight to the test of "seriousness" (as compared with "triviality") in establishing the existence of criminal libel, and shifted from the earlier requirement that it involve the public interest or the likelihood of disturbance of the peace.

It should be noted that shortly after this decision the New South Wales Director of Public Prosecutions determined that no bill of indictment should be filed in respect of the informations laid by William Waterhouse. In his statement of reasons for that determination the Director accorded significant weight to the judgement of Hunt J and accepted His Honour's assessment that lawful excuse of qualified privilege was a strong argument available to the two accused.

Whilst one can only speculate as to the outcome of the proceedings before the Magistrate had the Plaintiff chosen to give evidence, and whether, in that event, the DPP would have proceeded to file bills of indictment, the **Four Corners** case when read together with **Spautz** provides a useful analysis of the obstacles to be encountered by a prospective prosecutor in criminal defamation proceedings.

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Violence on television

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introduction to the booklet lays the decision making about violence firmly at the feet of the programme-maker:

"Decisions on whether to include violent material in any television programme are complicated and subtle. They change according to context, the time of transmission, the content of surrounding programmes and the current climate of the society in which we live. The most important element in making these decisions cannot be prescribed by these guidelines. They are the programme-maker's own common sense, human sensibilities, feeling for what is right, proper, decent, prudent and necessary to put before a general audience; an audience which may contain one's own and other people's children, one's own and other people's parents, the mentally disturbed and those who have experienced the very actions which are depicted on the screen."

The BBC also acknowledges the difficulty in providing a regulatory framework to control violence on television.

"There is a mass of confusing and inconclusive research into violence on television. Piecing together the findings, one is left with the impression that the relationship between violence on the screen and violence in real life is extremely complicated."

The BBC prefers to take the route of urging its programme-makers to take a reflective, "how would you feel?" approach to the use of violence in television programmes. They are urged to get advice from colleagues and to place themselves in the viewer's chair when deciding whether or not scenes are overtly violent.

This was a theme expressed in discussions at the recent Prix Jeunesse International in Munich. A Creed for Producers was suggested to cover children's television in particular. The maker of children's programmes should endeavour to develop a child's positive self-image, confidence and dignity and help his or her capacity for sharing and caring and getting on with others.

One of the social differences of opinion between the BBC and Australian television programmers is at what time of the evening the viewing pattern changes from the whole family to just adults. In Britain the BBC has a well established policy of making 9pm the pivotal point of the evening's television. Any programme before that time is considered suitable for viewing by children.

In Australia the pivotal point is 8.30pm and it is interesting that the latest industry code established by the Federation of Australian Commercial Television Stations (FACTS) to cover programme promotions allows for the following depictions of violence after 8.30pm.

1. Use of guns or other weapons in a threatening manner.
2. Heavy punches or other physical violence against humans or animals.
3. Violence to, or abuse of, children.
4. Generally frightening situations.
5. Actions involving loss of life.
6. Close-up views of dead bodies.
7. Close-up views of wounded bodies.
8. Nudity or partial nudity.
9. Depictions of, or discussion of, sexual activity.
10. Improper language.
11. Condoning references to illegal drug use.

Recent research, although fragmented and inconclusive, points to special concern by viewers over real violence as presented on news bulletins. Of course, all major television news bulletins are broadcast within the family viewing period before 8.30pm.

The BBC's view is that a sense of shock is part of a full understanding of certain news stories - terrorist outrages, wars, natural disasters. In instances like these the BBC feels