SHORT PARTICULARS OF CASES
APPEALS

HOBART CIRCUIT - MARCH 2006

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AUSTRALIAN BROADCASTING COMMISSION v O'NEILL (H1/2006)

Court Appealed from: Full Court of the Supreme Court of Tasmania

Date of Judgment: 29 August 2005

Date special leave granted: 16 December 2005

The respondent was convicted in 1975 of the murder of a young boy and was sentenced to life imprisonment. He was also charged in 1975 with the murder of a second child but he was not tried for that offence, as he was already serving a life sentence. In 1999, the respondent was befriended by a film maker, Gordon Davie, who, with his consent, filmed some of his prison activities and conducted interviews. The resulting film, "The Fisherman", was shown at a film festival in Hobart in January 2005. The film included material about other abductions and murders of young children alleged to have been committed by the respondent, including the disappearance of the Beaumont children. The appellant ("the ABC") intended to broadcast the film on national television on 28 April 2005.

The respondent issued a writ in the Supreme Court of Tasmania on 15 April 2005 seeking damages from the ABC and Davie for defamation. He also sought an interlocutory injunction restraining the ABC or its agents from publishing or broadcasting the film. The ABC argued that an interlocutory injunction should not be granted where it would restrain the discussion in the media of matters of public interest or concern. The primary judge (Crawford J) found it is in the public interest that allegations that a person has committed a crime should usually be made to the public only as a result of charges and subsequent conviction. It was not in the public interest that such allegations should be made in the media. He also found unpersuasive the argument that the plaintiff may already have been defamed by the public viewing of the film at the film festival in January and by articles published in the Mercury newspaper prior to the hearing. His Honour found the fact that the respondent may have been defamed before could not justify the continuation of defamatory statements, notwithstanding that his reputation may have suffered badly as a consequence of the earlier ones. He had demonstrated a prima facie case that the publication of the imputations would amount to actionable defamation and in the absence of any suggestion of inconvenience to the defendants, an interlocutory injunction was granted.

The Court of Appeal (Evans and Blow JJ, Slicer J dissenting) dismissed the ABC's appeal. The majority held that an exercise of a discretion to grant an interlocutory injunction should not be interfered with by an appellate court unless a clear case has been made out that the primary judge acted on some wrong principle, or made an order which works a substantial injustice to one of the parties. They did not believe that the interlocutory injunction in this case worked a substantial injustice to the ABC. It followed that the appeal should not succeed unless a clear case had been made out that the primary judge acted on some wrong principle. The Court examined the authorities as to the criteria to be applied by courts in determining applications for interlocutory injunctions in defamation cases, and considered whether the approach to be taken in applying such criteria should be rigid or flexible. They concluded that the authorities favoured the flexible approach. They found that the primary judge had taken into account the correct principles relating to the freedom of the press, taken into account separately the prospects of a successful defence

based upon truth and public benefit, and exercised his discretion in accordance with the appropriate principles. He did not apply a wrong principle. His decision to grant the injunction was therefore affirmed.

The grounds of appeal are:

- The Full Court erred in applying the principles governing applications for interlocutory injunctions to restrain the publication of defamatory matter.

- The Full Court, having held that the applicable approach to the granting of interlocutory injunctions to restrain publication of defamatory matter was that adopted in *National Mutual Life Association of Australia Ltd v GTV Corporation Pty Ltd* (1989) VR 747, *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 and *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440, erred in the application of that approach by not giving appropriate weight to the public interest in freedom of speech about matters of public interest and concern.

- The Full Court erred by equating the consideration a court gives, when having regard to the balance of convenience on an application for an interlocutory injunction, to whether the defences a defendant proposes to plead in the proceedings are arguable, with the consideration of whether the appellant has established a prima facie case.

- The Full Court erred in failing to having any or any sufficient regard to the onus of persuasion carried by an appellant in interlocutory injunctions to restrain publication of defamatory matter.

- The Full Court erred in approaching the question of whether damages was an adequate remedy in the present case on that basis that “prevention is better than cure”.

- The Full Court erred in holding that it was open to the learned primary judge to find that the appellant was motivated by a desire to improve its ratings and that such desire was relevant to the availability of an injunction against the Appellant.

STINGEL v CLARK (M153/2005)

Court Appealed from: Court of Appeal, Supreme Court of Victoria

Date of Judgment: 12 May 2005

Date special leave granted: 18 November 2005

This appeal concerns s 5 (1A) of the *Limitations of Actions Act* (Vic) 1958 (the Act), which, at the relevant time for this proceeding, reads as follows;

> "An action for damages for negligence, nuisance or breach of duty ..., where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries consisting of a disease or disorder contracted by any person may be brought not more than six years from, and the cause of action shall be taken to have accrued on, the date on which the person first knows (a) that he has suffered those personal injuries; and (b) that those personal injuries were caused by the act or omission of some person."

In February 2002 the appellant issued proceedings in the County Court of Victoria for damages for psychological injuries she suffered when she was allegedly assaulted and raped by the respondent in March and April of 1971. The respondent filed a defence which pleaded, inter alia, that the appellant was precluded from bringing the proceedings because they were issued after the expiry of the limitation period. Judge Hanlon struck out that part of the defence, on the basis that the appellant had had first become aware that she had suffered post-traumatic stress disorder as a result of the rapes in 2000, when she made a statement to the police. Thus, pursuant to s 5 (1A) of the Act, her action was not statute-barred.

The respondent's appeal to the Court of Appeal of the Supreme Court (Winneke P, Eames JA and Charles JA; Warren CJ and Callaway JA dissenting), was successful.

The majority found that post traumatic stress disorder was not a disease or disorder contracted by the appellant within the meaning of s 5 (1A) of the Act. It was not a disorder of the insidious kind (such as mesothelioma or asbestosis) to which the section applied, and was suffered at a time later than the act or omission relied upon by the appellant as the negligent act or breach of duty constituting the cause of action in the case. In determining the legislative intention the Court found it was appropriate to have regard to extrinsic material because the terms of s 5 (1A) are not free from ambiguity.

The grounds of appeal are:

- The Court of Appeal erred:
  - (a) in its construction of S 5 (1A) of the Act ("the Section");
  - (b) in using extrinsic material to interpret the plain meaning of unambiguous words of the Section;
  - (c) in holding that as matter of law, a mental disease or disorder, and in particular "post traumatic stress disorder of delayed onset" was not capable of being a "disease or disorder contracted by" the appellant within the meaning of the section;
  - (d) in its interpretation of and use of the extrinsic material.

COOTE v FORESTRY TASMANIA (H3/2005)

Court Appealed from: Full Court of the Supreme Court of Tasmania

Date of Judgment: 23 March 2005

Date special leave granted: 18 November 2005

The appellant, an experienced tree feller, was injured, becoming a paraplegic, on 14 September 1998, in the course of logging sawlog trees (as per a timber harvesting plan) in a Tasmanian state forest. He was struck by a falling branch from a pulpwood tree damaged during while he was felling two adjacent sawlog trees.

The appellant claimed damages for breaches of statutory duty and negligence from four defendants. He settled his claim against two of the defendants (A.R & G.R Padgett Pty Ltd and Wesley Vale Engineering Pty Ltd), and discontinued against another (State of Tasmania). Forestry Tasmania (the respondent), denied liability and pleaded contributory negligence. Blow J, at first instance, found the respondent had breached its duty of care (pointing to the respondent's statutory powers in s.8 (1) (c) of the *Forestry Act* 1920), and it was reasonably foreseeable the appellant was at risk of injury in the absence of reasonable care. The respondent was liable for failing to instruct the appellant to fell any potentially dangerous trees and failing to provide adequate supervision to ensure he did so. The Court found contributory negligence on the part of the appellant for failing to take reasonable care for his own safety by walking under the tree shortly after it had been hit by two falling trees.

The respondent's appeal to the Full Court (Underwood CJ, Crawford and Evans JJ), was allowed. The Court found the respondent did not breach its duty of care by failing to instruct or supervise the appellant, and that on the totality of the evidence, he was aware he could have felled any dangerous trees and was an experienced feller. The accident was caused by an error of judgement on his part in failing to apply commonly accepted safe practices.

The grounds of appeal include:

- The Full Court erred in finding that it was common ground that the Appellant had the right to first fell any trees that "potentially" posed a danger when in fact the common ground was that the Appellant had the right to fell any tree that he considered too much of a danger and that the Full Court thereby erred in the conclusion consequential to that finding that the Respondent was not negligent in failing to instruct the Appellant to first fell any trees that potentially posed a danger and in failing, through supervision, to ensure that the Appellant did so.

- The Full Court erred in failing to give any or any adequate weight to the advantage enjoyed by the learned trial judge when hearing and viewing the evidence of the Appellant and Johnstone (of the Respondent) when it came to distilling the evidence bearing upon- (a) the directions given to the Appellant concerning the maximising of sawlog production and the minimising of pulpwood production; (b) the Appellant's understanding of those directions; (c) whether there was negligence in the system of work imposed on the Appellant and enforced and supervised by the Respondent.

- The Full Court erred in finding that the fact that the Appellant assessed that the danger posed by leaving standing the tree from which the branch fell was not sufficiently high to require him to fell it first -
  (a) was conclusive against the Appellant of the question whether the respondent had breached its duty of care to the Appellant; (b) made it unnecessary to consider any questions of apportionment.

- The Full Court erred in holding that the conduct of the Appellant in failing to fell the pulpwood tree discharged the duty of care owed to him by the Respondent without regard to any issue of apportionment.