Contempt injunctions: the "Mr Bubbles" case

Alec Leopold and Alister Henskens report on this important new decision on contempt

In June of this year TCN Channel Nine Pty Limited (Channel Nine) broadcast throughout Australia on the 60 Minutes program a story concerning alleged child abuse by a man widely known as "Mr Bubbles". On the last business day prior to the broadcast of the program the Attorney-General for New South Wales, Mr Dowd, sought an injunction preventing the program from being aired.

In November 1988 Mr Anthony Deren (and others) had been charged with alleged acts of indecency with, and indecent assault of, children who attended a kindergarten in Sydney. During the subsequent committal proceedings in July 1989 the magistrate concluded that the evidence of the children should not be admitted in support of the charges laid. Following this ruling the prosecution was withdrawn.

The defamation proceedings

The committal proceedings and the dropping of the charges gave rise to a considerable amount of publicity. Further, on the night that the charges were withdrawn the Hinch program broadcast an interview with Mr Deren. During the course of that interview Mr Deren admitted to an earlier incident concerning two girls between the ages of 10 and 13 in Papua New Guinea. Mr Deren said during the interview "I seem to have this need to touch young girls in the private parts, and on one occasion I was apprehended by the police."

After the withdrawal of charges against Mr Deren, he and his wife commenced a number of defamation proceedings. Which would be heard by a jury. It was these proceedings which were the subject of the injunction application by the Attorney-General but the hearing before Justice Hunt focused only upon the defamation action brought by Mr Deren against the publisher of New Idea magazine.

During the six days prior to the Attorney-General's application for an injunction to restrain broadcast of the 60 Minutes program, Channel Nine had broadcast a number of excerpts from it by way of promotion. It was said that the promotional material indicated that the program would be an analysis of whether Mr Deren was in truth guilty of the charges which had been dropped.

When the hearing commenced before Justice Hunt Mr and Mrs Deren were, at their request, joined as plaintiffs in the Attorney-General's application for an injunction. This was, as the Judge said in his judgment, a rather unusual course. Normally an aggrieved plaintiff only institutes proceedings for contempt of court where the Attorney-General declines to do so.

Legal reasons

The plaintiffs did not contend that an injunction ought to be granted on the basis that the program was defamatory - see generally the *Greg Chappell* case (1988). Their only contention was that the broadcast should be restrained as being a contempt.

Justice Hunt applied a two-step analysis in determining whether the injunction should be granted. He asked:

- did the program amount to a contempt (in effect treating the test at this interlocutory hearing as being the same as it would have been for a final hearing); and if so
- would the likely effects of such a contempt outweigh the inconvenience or injury to Channel Nine if an interlocutory injunction were granted (ie the "balance of convenience" test)?

The judge applied the civil onus of proof notwithstanding the criminal nature of a contempt. But he did so subject to the *Briginshaw* v *Briginshaw* (1938) criteria and took into account the seriousness of the allegation of contempt being made as well as the grave consequence of an order, namely prior restraint of a media publication.

There were two bases for the plaintiffs' application:

- that the program had a tendency as a matter of practical reality to interfere with the trial of the New Idea proceedings as it had a tendency to influence the minds of potential jurors - a "jury contempt"; and
- that the program so exposed Mr Deren to the prejudice of prejudgment of the issues or of the merits of the New Idea proceedings as to apply pressure upon him to settle them on terms to which he would not otherwise have agreed - a "prejudgment contempt".

Jury contempt

Justice Hunt accepted that the defamation action would, in all likelihood, take place about 10 to 12 months after the program.

In determining whether the program had a tendency as a matter of practical reality to interfere with the New Idea proceedings, the judge adopted a realistic and flexible approach. The cases on this type of contempt make it clear that the appropriate test to be applied is whether the program has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case. However, although there purports to be an element of practicality within the test, it is typically applied in such a way that the court will not speculate on post-publication events including events at the very trial which is allegedly prejudiced. This means, in practice, that courts will not usually consider the admissibility or non-admissibility of evidence at the ultimate hearing (for example, the admissibility of a confession in a criminal trial in circumstances where a publication has disclosed the fact that a confession has been made).

Justice Hunt was prepared to consider what evidence would be admissible at the New Idea hearing. He adopted the practical approach that only evidence in the program complained of which would not be heard at the ultimate hearing could have a tendency to prejudice the outcome of the New Idea hearing. In summary, the Judge concluded that the inadmissible and prejudicial material contained within the program would not have added very much to the material which would have been admissible as evidence of the truth of the imputations pleaded by Mr Deren in the New Idea proceedings. He therefore concluded that the program did not, as a matter of practical reality, have the appropriate tendency to prejudice the New Idea hearing.

In making this determination, the Judge noted that the imputations drafted by Mr Deren in the New Idea proceedings were broad and on the basis of the decision in *Maisel* v *Financial Times Limited* (1915) the broad imputations would allow New Idea magazine to call a wide range of evidence. This would include evidence such as evidence of Mr Deren's activities in Papua New Guinea.

In addition, Justice Hunt thought that there was a very real possibility that the evidence of the children would be admissible.

Moreover, the judge also adopted a more practical approach when considering the effect of the program in the context of other

prejudicial but legitimate publicity and did not confine himself to prior publications. He held that:

"There will undoubtedly be throughout the year leading up to the hearing of Mr Deren's claim against the New Idea magazine a continuing public discussion of a subject of intense public interest - namely, the adequacy of the methods of investigation adopted by the police into allegations of child sexual abuse where very young children are concerned ... [I]n the course of that inevitable (and much needed) public discussion during the next year, it is also inevitable that the problems which arose in the 'Mr Bubbles' case will be referred to ..."

The courts have always been prepared to consider the effect of subsequent publicity but only in respect of events that are strictly inevitable, such as committal proceedings. The udge's conclusion that future media coverage would be inevitable represents a significant relaxation of a hitherto unrealistic judicial approach.

Prejudgment contempt

In considering whether the program prejudged the defamation proceedings and would exert pressure on Mr Deren to settle, Justice Hunt considered a number of factors.

Firstly, Justice Hunt noted that in the two leading cases on this form of contempt - the 1974 *Sunday Times (Thalidomide)* case and *Commercial Bank of Australia* v *Preston* (1981) - the litigation alleged to be prejudged was not only the subject matter of the publication but was largely its inspiration. Indeed, in the *Sunday Times* case, the newspaper expressly stated that its intention was to bring pressure to bear upon the drug manufacturer.

Secondly, Justice Hunt noted that not only was the thrust of the program directed to the aborted committal proceedings but that it did not even mention the defamation proceedings being brought against New Idea. He drew a distinction between different types of contempt: the jury contempt may arise irrespective of the publisher's ignorance of the proceedings in question, whereas a publisher who is ignorant of the fact that proceedings are on foot cannot be guilty of prejudgment contempt. On this basis Justice Hunt held that there was no prejudgment contempt and the *Sunday Times and CBA* v *Preston* cases were distinguishable.

Thirdly, Justice Hunt held that in any event (as he had found in holding that there was no jury contempt) the weight of previous publications was not materially added to by the program so as to put any significant additional pressure upon Mr Deren to settle as alleged.

As the court found that no contempt existed, there was no need to look at the question of the balance of convenience.

The practical implications

1. The case highlights the risk that publishers run when they seek to promote in advance matters which are potentially contentious.
2. The case is also a reminder to the media to have an eye not only to the risks of defamation and contempt of criminal proceedings but also to contempt of civil proceedings, and even then to prejudgment contempt as well as to jury contempt.

'the jury contempt and the prejudgment contempt will often stand or fall together'

3. It is often assumed by lawyers and journalists alike that a publication will be safe from proceedings for contempt of court if it contains material which has already been placed in the public domain by previous publications which are themselves legitimate and not in contempt. In this case a novel proposition was put by the Attorney-General and accepted in principle (but not on the facts) by Justice Hunt: where for the first time a publication gathers together material previously published separately then (particularly, if coupled with a sensational presentation) the overall effect may be sufficiently prejudicial as to constitute contempt.
4. The acceptance by Justice Hunt of the proposition that ignorance of pending legal proceedings is sufficient to avoid liability for prejudgment contempt raises a difficult practical issue for the media: should the journalist make inquiries of court registries to ascertain what relevant proceedings might be on foot? Although such a search may arm the journalist with useful information to prevent any potential jury contempt, the information may deprive him or her of the excuse of ignorance in relation to a prejudgment contempt. Query if mere knowledge of the existence of the litigation deprives him or her of that excuse or whether, as Justice Hunt seems to suggest, the excuse is only open to someone who is ignorant of both the existence of proceedings and the nature of [the] issues. The latter approach on its face encourages the journalist who knows merely that X has sued Y to turn a blind eye to the issues.
5. In considering the argument that the program prejudged Mr Deren's proceedings, the judge was prepared to attach some weight to the inclusion in the program of the Hinch interview with Mr and Mrs Deren in which they denied the allegations made against them. This led the judge to "reject a description of the program as a whole as amounting to a prejudgment of the issues or merits of the defamation claim ..." However, the judge was careful not to attach too much weight to the inclusion or omission of such a rebuttal in case it was abused in future by a plaintiff who uses the simple expedient of refusing to respond or to refute allegations to increase his or her chances of obtaining an injunction on the basis that the program prejudges the issues in a one-sided manner. The clear signal to journalists - if ever it were needed - is that the subject of a contentious program which risks being in contempt should be invited to present his or her side of the argument.
6. The case demonstrates that the jury contempt and the prejudgment contempt will often stand or fall together where a jury case is concerned. It was ultimately similar reasoning which led Justice Hunt to the conclusions that the jurors would not have been unduly influenced and that Mr Deren would not have been unfairly pressured. It is, however, possible to imagine at least two types of jury cases in which there could be a prejudgment contempt on the basis of the publication putting unfair pressure on a party to settle the litigation, without there being a jury contempt:
   (a) where there is a sufficient delay between publication and trial so as not to risk influencing the jurors as a matter of practical reality; or
   (b) where the recipients of the publication are sufficiently limited to avoid the risk of a jury contempt but nevertheless the publication is influential in the pressure which it brings to bear on a party.

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