A Scandal in Tasmania: The Tort That Never Was

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The Problem

The law of defamation can provide a remedy when an untrue statement is intentionally or even unintentionally published about someone. What should be the attitude of the law of torts with respect to the intentional publication of a true statement that can foreseeably result in harm to the person about whom it is made? That issue arose in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (*Lenah*).[1] The resolution of this issue by the High Court of Australia suggests that there is a serious gap in the law of Australia, and probably also in the law of Canada and England.

If such a publication were made as a result of some negligence, it is possible that a party harmed would be able to make the publisher liable. In a recent decision of the Court of Appeal of Ontario, *Haskett v Equifax Canada Inc*,[2] the plaintiff had been discharged unconditionally from bankruptcy and was earning more than $75,000 per year. Notwithstanding this, the plaintiff was denied credit, allegedly because two credit reporting agencies included in a credit report on the plaintiff information about the plaintiff's pre-bankruptcy debts, released as a result of the discharge from bankruptcy under the terms of the relevant legislation which also prohibited the reporting of such debts. The plaintiff sued the agencies in negligence. A motion to strike out the claim on the ground that it disclosed no cause of action was successfully made by the agencies, but this was overruled by the Court of Appeal for various reasons. In an *obiter dictum* in the course of the judgment[3] it was suggested that, even though the information was 'true', there might be liability in negligence if a report on creditworthiness carelessly and mistakenly included information that a statute prohibited from publication.

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1 (2001) 208 CLR 199.

2 (2003) 63 OR (3d) 577.

3 Ibid, 596.

The matter remains unresolved since the case was concerned with the preliminary pleading issue whether an action would lie, not with the more definitive question of whether in law it did lie. However, the indication contained in the judgment of the Ontario court seems clear. The publication, by negligence, of true but harmful information may be actionable if the publisher owes the person who is the subject of the publication a duty of care. The *Lenah* case involved neither negligent conduct nor a duty of care. Rather, it arose from intentional, criminal behaviour.

The Facts

At the Lenah Company's Tasmanian place of business, possums are killed and their meat processed for export. The business is conducted strictly in accordance with licences from the Tasmanian government. Unknown and unidentified persons trespassed on the company's property, installed a hidden video camera, and took footage of possums being stunned and having their throats cut. The video was passed to Animal Liberation Ltd, which, in turn, passed it on for television broadcasting to the Australian Broadcasting Corporation (ABC). The ABC was ignorant of the way in which the video had been obtained. The company, fearful that publication of the video might cause it significant economic harm, applied for interlocutory injunctions against the ABC and Animal Liberation Ltd. At the first hearing an injunction was granted against Animal Liberation Ltd to prevent it from distributing, publishing or copying the video, and the ABC undertook not to broadcast or distribute any video or videos until further hearing of the application for interlocutory relief. Animal Liberation Ltd took no further part in the litigation and never applied for discharge of the order made against it. At the subsequent full hearing, Underwood J dismissed the application.[4] The decision of Underwood J was reversed by a majority of the Full Court of the Supreme Court of Tasmania.[5] The High Court of Australia, by a majority, reversed that decision and dismissed the Lenah Company's application for interlocutory relief. Thus the ABC was free to televise any or all of the illegally obtained video.

Three major issues arose for determination. These were:

4 Unreported, Supreme Court of Tasmania, Underwood J, 3 May 1999.

5 *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* (1999) 9 Tas R 355.

(1) Could an application for an interlocutory injunction be made when the applicant for such injunction disclosed no separate cause of action in respect of which, ultimately, a trial would be held?

(2) If the answer to that question was in the negative, was there a cause of action available to the Lenah Company on the facts of this case?

(3) Was there some constitutional doctrine related to freedom of speech by reason of which an injunction should not have been granted?

The ten judges who decided this case at various levels did not all deal at length and in detail with all three issues. Nor did they agree on how those issues were to be resolved. Their differences in reasoning make the case both interesting and frustrating, since they leave a number of important matters far from settled.

The Injunction Issue

Whether the injunction sought by the Lenah Company could be granted depended on the relevant Tasmanian statute,[6] which was based on English legislation,[7] and the judicial interpretation of the latter by English courts.[8] However, four members of the High Court, Gleeson CJ, Gaudron, Gummow and Hayne JJ, like Underwood J at first instance and Slicer J on appeal, read and understood the language of those decisions as requiring that there was an independent cause of action to be determined; the injunction merely preserving the *status quo* until such determination. Kirby J, who agreed with their disposition of the case for different reasons, and Calllinan J, who dissented from the ultimate decision, both took a more expansive view of the effect of the legislation as giving the Tasmanian court the power to issue injunctions. In this they agreed with the majority of the Full Court of the State Supreme Court.

Despite the fact that 'anti-suit' injunctions, 'Mareva' injunctions and 'Anton Piller' orders[9] were, in the words of Kirby J, 'radical and generally

6 *Supreme Court Civil Procedure Act 1932* (Tas) s 11(12).

7 *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66, s 25(8).

8 *Siskina (Cargo Owners) v Distos SA* [1979] AC 210, 256 per Lord Diplock; *Mercedes Benz v Leiduck* [1996] 1 AC 284, 308, 311 per Lord Mustill; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 362 per Lord Mustill.

9 On which see, for example, *South Carolina Insurance Co v Assurantie Maatschappij* 'De Zeven Provincien' NV [1987] AC 24; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *British Airways Board v Laker Airways Ltd* [1985] AC 58; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209; *Patrick*

beneficial judicial inventions'[10] created by courts in the post-Judicature Act era, and were granted without the necessity to establish a cause of action, the majority of the High Court considered that they were exceptional. Their existence did not undermine the need for someone seeking an interlocutory injunction to establish what Gleeson CJ termed 'a sufficient colour of right'.[11] The majority denied that there could be a 'free-standing right'[12] to such interim relief, what Callinan J, who would have allowed the injunction, referred to as a 'stand-alone injunction'.[13]

This conservative attitude did not appeal to Kirby J. He gave a number of reasons why the law should be expanded so as to permit the issuance of an injunction without the existence of a cause of action underlying the claim for such relief.[14] Two of these referred to the interpretation of statutory powers. In this respect it was a question of looking at the same legislation from a different perspective. The other reasons, however, reveal (i) the desire of Kirby J to give effect to the equitable character of injunctions in contrast with the way common law remedies are understood and applied, and (ii) his preference for what he called[15] 'interlocutory realities', by which he meant that justice and convenience called for the issuance of the requested injunction (invoking an analogy with the attitude of a court refusing to strike out pleadings where a cause of action might subsequently appear to exist).

Callinan J came to the same conclusion by postulating that the correct test of an interlocutory injunction was either the existence of a reasonably arguable case or, which amounted to the same thing, a serious question to be tried.[16] Like Kirby J, his Honour was unwilling to follow *dicta* in English and Australian cases that purported to limit the scope of the court's powers with respect to such injunctions. As he discussed at the outset of his judgment,[17] there already existed many situations where injunctions were issuable even though there was no cause of action – as the majority said was necessary. Callinan J then explained how the situation in the instant case complied with the tests he had enunciated. The crucial facts

Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

10 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 265.

11 Ibid 218.

12 The phrase is used by Gleeson CJ, ibid 218.

13 Ibid 309.

14 Ibid 264-271.

15 Ibid 267.

16 Ibid 296.

17 Ibid 288-290.

were: (a) the unlawful entry; (b) the absence of permission to film; (c) the illegal method by which the information was obtained; and (d) that the ABC either knew or ought reasonably to have known that the information had been obtained through illegality.[18] He stressed that the circumstances prevailing today, namely the modern idea of free speech, the impact of the media and the harm capable of being done by improper publication by the media, all combined to make the granting of an injunction appropriate.[19]

In the light of what was said, notably by Kirby J, about freedom of speech and communication, of which more will be said later, it is interesting to observe how, for Callinan J, that freedom required curtailment when its exercise might be improper because it was harmful. It is worthy of note that the majority of the High Court approached the fact-situation in this case in a very conservative manner, relying on precedent that was strictly interpreted and applied. In contrast, Kirby and Callinan JJ appear to have adopted the attitude that since it was an equitable remedy that was being sought, the court should approach the matter in a more equitable attitude, even if, at least on this point (given that Kirby J would not have granted the injunction for reasons considered later) it entailed giving a remedy of some sort although *apparently* no tort had been committed by the ABC.

The Cause of Action Issue

The second issue concerned what, if any, cause of action could have been alleged by the Lenah Company against the ABC, so as to permit the court to issue an injunction to prevent the publication of the video prior to the determination of the action.

Since the truth of what was intended to be published precluded an action for defamation, several other possibilities were considered in the various judgments, and were thought by Callinan J[20] to have been available to the

[18] In this respect there are Australian decisions in which a party who was guilty of wrongdoing in obtaining information has been restrained by injunction from publication: *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457; *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] Qd R 169; *Rinsale Pty Ltd v Australian Broadcasting Corporation* [1993] Aust Torts Reports, paras 81-231. See also *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 where an injunction was issued against a third party, not the original trespasser, where such third party was aware of the illegality or abuse of power committed by the party who provided the film. This case was distinguished by Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, ibid 247, chiefly on the ground that in *Lenah* the ABC were unaware of how the film had been obtained.

[19] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 271-276.

[20] Ibid 312-320; cf Kirby J, 376.

company. However, they were rejected by the majority of the court. These included (a) unconscionable conduct on the part of the ABC, and (b) breach of confidence by making public information acquired in confidence.

The first seems to have been dismissed as inappropriate because it could not support a right to interlocutory relief when there was no right to final relief, as Gleeson CJ held.[21] Moreover, to accede to the plea of the Lenah Company it would have been necessary to invoke the civil law in order to enforce the criminal law (which was involved in view of the criminal acts performed to acquire the video); this was not acceptable.[22] Nor could a bridge be constructed between the original trespassers' tort and the conscience of the ABC.[23] For Gummow and Hayne JJ an allegation of unconscionable conduct could not succeed in this instance because 'the notion of unconscionable behaviour does not operate wholly at large as Lenah would appear to have it'.[24]

The second, breach or confidence, was not applicable for various reasons. There was no relationship of trust and confidence between the company and the ABC.[25] The information was not acquired or imparted in confidence.[26] No trade secrets were involved, nor any breach of copyright.[27]

The more radical suggestion that was given considerable attention by Gummow and Hayne JJ for the majority and by Callinan J in dissent was that the company might have been able to claim that publication of the video by the ABC was an invasion of privacy. This required their Honours to re-examine the notorious decision of the High Court in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (*Victoria Park*).[28]

That case has always been regarded as closing the door in Australia to any action for invasion of privacy. At the time it was decided in the common law world there was no judicial acceptance of the concept of privacy or of the notion that an 'invasion' of privacy might be actionable. But, as Gummow and Hayne JJ point out in *Lenah*,[29] the litigation in *Victoria Park* concerned the opposition of the plaintiff to the turning to commer-

21 Ibid 218-219.

22 Ibid 227-229 per Gleeson CJ.

23 Ibid 229-231 per Gleeson CJ.

24 Ibid 245 et seq.

25 Ibid 224 per Gleeson CJ.

26 Ibid.

27 Ibid 222 per Gleeson CJ, 246-247 per Gummow and Hayne JJ.

28 (1937) 58 CLR 479.

29 (2001) 208 CLR 199, 250.

cial account by the defendants of the business operations of the plaintiff. 'Privacy' was not to the forefront of the plaintiff's arguments. Gummow and Hayne JJ were of the view that, because of this, *Victoria Park* was not a serious obstacle to recognition of an action for invasion of privacy. The tenor of their judgment appears to be favourably disposed to admitting the possibility that, despite *Victoria Park*, an invasion of privacy may be actionable.

Such acceptance, however, operated only in respect of the privacy of individuals; it did not extend to the privacy of corporate persons such as the Lenah Company. Development of a generalised tort of privacy protecting the commercial interests of corporations would be antagonistic to the reasoning of the High Court in *Moorgate Tobacco Co Ltd v Phillip Morris Ltd (No 2)*,[30] denying the existence of a generalised tort of unfair competition. Moreover, for more than a century courts in the United States, favourable though they may have been to actions for invasion of privacy on the part of private persons, had not extended such liability to protect corporations, which, while potentially liable to have their reputation or business damaged as a result of intrusive activity, are not capable of emotional suffering.[31] Hence the rationale for providing a remedy to private individuals is lacking in the case of corporations or juristic persons.

This reason for denying that a corporation can sue for invasion of privacy contrasts with Canadian decisions dealing with 'appropriation of personality'.[32] These cases are founded upon the fact that liability for the use of another's face, or other personal characteristics, in order to promote the business of the party guilty of such misuse, can result in some financial or economic loss by the victim of that misuse rather than upon any 'emotional suffering'.

Callinan J, after a lengthy discussion of *Victoria Park*, cases and commentators from the United States, New Zealand statutes, English decisions (including one which, although turning on the provisions of a

30 (1984) 156 CLR 414.

31 *NOC Inc v Schaefer* (1984) 484 A 2d 729, 730-731, quoted by Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 256.

32 See for eg, *Racine v CJRC Radio Capitale Ltee* (1977) 80 DLR (3d) 441; *Athans v Canadian Adventure Camps Ltd* (1977) 80 DLR (3d) 583; *Heath v West-Barron School of Television (Canada) Ltd* (1981) 18 CCLT 129; *Baron Philippe de Rothschild SA v Casa de Habana Inc* (1987) 19 CPR (3d) 114. Contrast with these instances *Dowell v Mengen Institution* (1983) 72 CPR (2d) 238; *Gould Estate v Stoddart Publishing Co* (1996) 30 OR (3d) 520, affirmed on other grounds (1998) 39 OR (3d) 545; *Shaw v Berman* (1997) 144 DLR (4th) 484, affirmed (1998) 167 DLR (4th) 576.

statute dealing with broadcasting, held that a corporation did enjoy a right to privacy[33]) and a reference to the Canadian situation, denied that in Australian common law there was a right to privacy.[34] However, he was prepared to admit that there were circumstances in which, in his words, 'a corporation might be able to enjoy the same or similar rights to privacy as a natural person, not inconsistent with its accountability, and obligations of disclosure, reporting and otherwise'.[35] His Honour was also of the view that it was time to consider whether a tort of invasion of privacy should be recognised in Australia.

The Constitutional Issue

Kirby J appealed to 'constitutional implications', as a result of which he concluded that an injunction should be denied.[36] The starting-point of his discussion was *Lange v Australian Broadcasting Corporation* (*Lange*).[37] In *Lange* the High Court found that a right to freedom of communication could be implied into the text of the Australian Constitution. The scope of this implication, which has been said[38] to cover political discussion in relation to all levels of government, was still to be decided. However, it certainly covered the broadcasting of ideas about government and politics relevant to the activities of the federal and State parliaments. This was important in the context of *Lenah* since animal welfare was a matter for State parliaments while the ABC was a corporation established under federal law. Any federal or State law inconsistent with the operation of the system of government created by the Australian Constitution could be invalidated on the ground that it infringed the implied constitutional prohibition of anything that interfered with freedom of communication.

This constitutional principle did not render invalid the Tasmanian statute[39] giving courts the power to grant interlocutory injunctions. The exercise of that power was not inconsistent with representative democracy. Furthermore, the principle derived from *Lange* did not conflict with the power to restrain by injunction the use of information obtained illegally, for example by trespass. However, before the power to grant such injunc-

33 *R v Broadcasting Standards Commission: ex parte BBC* [2001] QB 885.

34 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 330.

35 Ibid, 326.

36 Ibid, 279-288.

37 (1997) 189 CLR 520.

38 In *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232, 257. See however *Levy v Victoria* (1997) 189 CLR 579, 595-596, 626, 643-644.

39 *Supreme Court Civil Procedure Act 1932* (Tas), s 11(12).

tions is exercised, the principle derived from *Lange* must be taken into account. The power to issue injunctions, although not itself in conflict with constitutional implications, can only be exercised in conformity with the constitutional setting in which the court issuing such an injunction functions. Where a damaging publication was threatened, as in *Lenah*, this meant balancing the public interest in freedom of speech, which is the implied constitutional doctrine, against protection of the individual from damage or loss. Often, according to Kirby J, this resulted in the injured party being denied injunctive relief and being confined to a remedy in damages. However, the public interest in freedom of speech did not always trump individual interests.[40] Free speech was to be accorded its proper value, but other values were also to be respected.

Against this theoretical background it was necessary to look at the circumstances of the instant case. Kirby J's reasoning was as follows: The Australian Constitution envisages a representative democracy. Animal welfare and the export of animals and animal products are legitimate matters of public debate in that democracy, which operates effectively only when stimulated by debate promoted by community groups and obtaining media attention. Hence, the way the possums were killed and the export of their meat were proper subjects for public debate and concerned not only State law but also federal law. This was because the ABC, which intended to publish the video, was a national broadcaster with national functions and was established under federal law. Therefore, in this case, the injunction should and could be denied in accordance with the constitutional principle derived from *Lange*. Kirby J *might* have taken a different view had the publication of the video been likely to cause personal denigration and humiliation to, and an invasion of the privacy of, an individual. That was not the situation here however, where a corporation's actions were being publicised.

By invoking controversial and, as yet, unsettled constitutional doctrines, Kirby J was able to arrive at the same conclusion as the other members of the majority of the High Court even though he disagreed with them on the interpretation of the Tasmanian statute dealing with injunctions. The impression is given that Kirby J was trying to find an alternative rationale for denying the Lenah Company injunctive relief despite his belief that the statute did empower the court to grant it, as Wright and Evans JJ in the Tasmanian Supreme Court and Callinan J in the High Court agreed. With respect, there is something disquieting about Kirby J's reliance upon what some might consider a dubious constitutional doctrine in order to

[40] In the words of Lord Hoffman in *R v Central Independent Television plc* [1994] Fam 192, 203.

determine a civil law dispute that arose out of tortious, if not criminal behaviour on the part of somebody, albeit not the defendant. In effect what his Honour was deciding was that the ABC could intentionally spread potentially damaging information about the Lenah Company because (a) the company exported its products and (b) the ABC was a public, nationally created and nation-wide organisation.

In this regard it should be noted that the dissentient, Callinan J, was prepared to cast doubt upon the decision of what he called a very experienced High Court in *Lange*.[41] However, even if the decision in that case was correct it should not be expanded, and to apply it in *Lenah* would require a considerable expansion. The view of Callinan J was not only that an injunction could legitimately have been granted under the provisions of the Tasmanian statute, but also that no implied constitutional doctrine of freedom of speech should preclude such a grant in this instance, and that whatever judicially constructed constraints there might be upon issuing interlocutory injunctions to prevent publication of defamatory matter, they did not operate to prevent the issuance of an injunction in this case.

41 (2001) 208 CLR 199, 331.