

sary implication. Significantly, it went on to say that the words 'by necessary implication' proposed a vigorous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service.

In the courts below the Council successfully argued that a distinction should be drawn between functions such as planning, which a council has a duty to provide, with those such as providing a museum, a library or a public park, which it has power to provide. According to this distinction, the Council could not charge for the provision of a function which it had a duty to provide, whereas it could charge for a function which it had merely a power to provide at its discretion. In the course of overturning the decision of the Court of Appeal, this distinction was rejected by the House of Lords. The decision also makes it clear that it is for the person or body seeking to impose the charge to show that it has the right to do so.

The effect of the decision in *McCarthy* is that in the absence of express statutory authority or authority which arises by necessary implication from the statute, a charge cannot be imposed in respect of both a statutory duty or power. The test for drawing such an inference is a 'rigorous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service'. Moreover, any moneys paid to the government or a statutory authority in the absence of statutory authority would be recoverable as moneys had and received to its use.

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Reference

1. *Bailhache J* at first instance [1921] 37 TLR 296; Court of Appeal [1921] 37 TLR 884; House of Lords [1922] 38 TLR 781.

POLICE SHOOTINGS

Charges laid

Victoria's DPP has laid charges against 11 former and serving police officers over the shootings of Graeme Jensen and Gary Abdallah. JUDE McCULLOCH reports.

The charging of eight serving and two former police officers with murder and one other police officer with being an accessory to murder has caused a sensation. The charges and the police officers' appearance in the Supreme Court made front page headlines in Victoria's newspapers three days in succession following the issuing of a media release by Bernard Bongiorno, QC, Victoria's Director Of Public Prosecutions. On the day the officers appeared in court, passers-by at the Supreme Court were in danger of being run down by hordes of camera crews who stampeded up and down the streets bordering the court trying to anticipate the

arrival of the charged officers. When the court doors opened at 10.30 a.m., members of the legal profession, friends and family of the men shot by police, police officers, the media and the public competed for seats. Dozens of people were locked out as the public gallery filled to overflowing. As in the Chamberlain inquest lack of space meant that the media sat in the seats usually reserved for a jury. John Winneke, QC, who acted for Lindy Chamberlain, has been retained by the Crown to prosecute the Abdallah case. In a manner similar to the Lindy Chamberlain and Tim Anderson cases, the police shootings and the charging of the officers have provoked a great deal of public discussion and like the Anderson and Chamberlain cases the charging and trial of the officers will go down in legal history. It is likely that, in the wake of the trial, books will be published and films produced.

Unlike the Chamberlain and Anderson cases, where the media had a field day speculating about the guilt of the accused before their trials, it has been made clear by the Director of Public Prosecutions that any breach of the *sub judice* rule that prohibits any comment or publication that has a tendency to prejudice the fair trial of the accused will be prosecuted. The media release that announced the charges also warned media outlets about contempt prosecutions for any breach of the rule. A follow-up media release a few days later directed all media outlets to keep copies of all coverage of the charges and related matters. The Victorian Director of Public Prosecutions has a reputation for being vigilant in relation to *sub judice* and currently has five contempt proceedings pending in relation to breach of the *sub judice* rule in other matters.

Graeme Jensen was shot and killed by the Armed Robbery Squad at a Narre Warren shopping centre on 11 October 1988. Jensen had travelled to the shopping centre to buy a spark plug for a lawn mower. At the shopping centre eight Armed Robbery Squad members confronted Jensen who they claimed they wanted to question over an armed robbery and murder. The coroner heard that two members of the Armed Robbery Squad shot at Jensen seven times and that he was hit three times and died of a bullet wound to the back of the head. The Armed Robbery Squad members claim to have shot Graeme Jensen in self-defence after he produced a firearm and pointed it at them. All eight police officers at the scene of the shooting have been charged with murder. Five of the officers have also been charged with impeding the investigation into Jensen's death. In addition, the Homicide Squad detective whose responsibility it was to investigate the shooting has been charged with being an accessory after the fact to the murder for allegedly conducting the investigation in such a way as to impede the punishment of those responsible.

Thirteen hours after Graeme Jensen's fatal shooting, two Victorian police officers were shot and killed at Walsh Street, South Yarra. Four associates of Graeme Jensen were eventually charged with the murders but found not guilty by a Supreme Court jury.

Gary Abdallah was shot and fatally wounded at his Carlton flat by City West Detective Clifford Lockwood on 9 April 1989. Also present at the scene of the shooting was Lockwood's partner, Dermot Avon. Both officers have been charged with murder. The coroner heard that Abdallah was shot at seven times and hit by up to six bullets. Police claim to have shot Abdallah after he allegedly produced an imitation

firearm. Gary Abdallah survived in a coma for 40 days before dying of complications arising from a bullet wound to the back of the head.

In the cases of both Gary Abdallah and Graeme Jensen, the coroner heard that within 24 hours of the shootings the Internal Investigation Department (IID) of the police force wrote reports that concluded that the officers were justified in their actions. These reports were written before any investigation of the shootings. The IID report written after Graeme Jensen was killed recommended 'that after the inquest has been finalised consideration be given to commending Senior Constables Saunders and Hill [the officers who fired at Jensen] for the professional manner in which they performed their duty in this instance'. After the shooting of Gary Abdallah, Assistant Commissioner Frank Green was quoted in newspapers as saying he 'was satisfied that the two detectives had acted appropriately in the circumstances'. At the time he made this comment, he was unaware that Gary Abdallah had sustained a gunshot wound to the back of the head or that the gun he allegedly pointed at police was an imitation. After the announcement of the murder charges, Leanne Abdallah, Gary Abdallah's sister, called on the Assistant Commissioner to resign.

Each of the accused pleaded not guilty to all the charges when they appeared at the Supreme Court as required on 23 July 1993 before Justice Hampel. Their legal counsel, Robert Richter, QC, foreshadowed that he would be making an application for a stay of proceedings on the grounds of abuse of process. Mr Richter said the accused were not given the opportunity of the normal procedure of appearing before a committal hearing in a Magistrates Court to establish the strength of the evidence against them. However, the judge said while it was not usual for the accused to appear directly before the Supreme Court, it was not extraordinary. Justice Hampel indicated that it was unlikely that any application alleging abuse of process could be heard before October of this year. Each of the accused applied for bail. When an accused is charged with murder, exceptional circumstances must exist in order for bail to be granted. In this case the defence argued, and the judge agreed, that there were exceptional circumstances and the accused were granted bail. Each of the accused charged with murder was required to enter a \$15,000 surety. The officer charged with being an accessory after the fact was required to enter into a \$5000 surety.

The nine serving officers charged have been suspended on full pay and the State Government and police have entered into negotiations over funding for the defence which it is estimated will cost in excess of \$1 million.

The Jensen and Abdallah families are investigating taking civil actions against police that may include the State of Victoria as employer of the officers involved in the shootings.

The timing of the charges came as a shock. It was expected that any charges would not be laid until the coroner had brought down his findings in the series of inquests commonly known as the police shootings inquests. After a number of controversial fatal police shootings, including the shootings of Gary Abdallah and Graeme Jensen, the coroner, Hal Hallenstein, undertook inquests into seven fatal shootings by the police that took place between 1988 and early 1989. The inquests commenced in July 1989 and were expected to last about eight months. In fact the coroner did not finish hearing

evidence until December 1991. The coroner was expected to hand down his findings in July 1992 but the time for the findings was extended on a number of occasions. Two days before the DPP's surprise announcement, it was reported in the *Age* newspaper that the coroner would not hand down his findings until December of this year. As a result of the pending murder trials it is possible that the coroner's findings will be further delayed as they could improperly influence the trials of the accused police which are not expected to commence until next year.

One interesting aspect of the coming trials will be the operation of the new Victorian laws relating to the giving of evidence by accused persons. After the acquittal, in March 1992, of four men charged with the murder of two police in October 1988, there were calls to abolish the accused's right to give unsworn evidence. The right to give unsworn evidence gave the accused the option to make a statement not on oath that could not be tested by cross-examination. Many members of the legal profession, civil libertarians, community legal centres and some church organisations argued against the change, while the police strongly supported the abolition of the accused's right. The Kennett Government, in the first session of Parliament after it was elected, changed the law that gave persons the right to give unsworn evidence. The accused police will have to give sworn evidence subject to cross-examination or remain silent at their coming trials.

In the meantime, the families of five other men shot and killed by the police await the findings of the coroner.

The Flemington/Kensington Community Legal Centre and the families of some of the men shot by police have written a book 'Police Shootings in Victoria - You Deserve to Know the Truth'. It costs \$10 plus \$2 postage and can be obtained from the legal centre by phoning 03 376 4355 or writing to PO Box 487, Flemington, Victoria, 3031.

JUDE McCULLOCH

Jude McCulloch was a project worker at the Flemington/Kensington Community Legal centre and worked with some of the families of men shot by the police for more than four years.