granted - in particular, convincing evidence that damages would not be an adequate remedy for the applicant if the broadcast were to proceed (the Casino's argument that the broadcast would deter potential patrons from visiting the casino was insufficiently strong). Nor is the fact that privacy may be threatened by the proposed broadcast a sufficient ground for the granting of an injunction unless, perhaps, the broadcast would breach a recognised duty of confidentiality owed by the broadcaster.

public interest

Also reminiscent of *Whiskisoda* was Seven's insistence that its proposed broadcast of the footage was in the public interest. According to at least one newspaper report of the hearing, French J accepted Seven's argument, saying that the broadcast was in the public interest because it would inform people of the improper use made of security cameras. Obviously, Justice French's written judgment will be eagerly awaited.

The definition of the term "in the public interest" is elusive. It does not mean merely "of interest to the public", but undoubtedly carries a connotation, however vague, that the public is entitled to read or see and will benefit from reading or seeing, the matters to be published or broadcast. Seven maintained that the public was entitled to know that the casino's security system had been abused and that it was in the public interest that this be exposed.

Maybe so. But, of course, it would have been possible to convey that information without beaming cleavages into the country's living rooms. Evidence was given that the footage obtained by *Real Life* was between four and eight years old. No doubt the footage was titillating to some, and may have had a certain historical fascination for students of voyeurism. It is difficult to see how its being broadcast would have benefited anyone else or added anything of value to the store of human knowledge. Seven's argument drew an inadequate distinction between a message which might be in the public interest and a medium - the casino footage - that arguably was not.

In similar cases, such as *Whiskisoda*, the issue of "public interest" has often been treated as irrelevant (except in defamation cases) in which a publisher who faces an injunction application will often need to show that it will be able to rely upon a defence containing an element of public interest.

comment

It is hoped that the judgment of French J will not encourage broadcasters to continue to argue that material with essentially prurient appeal should be broadcast in the public interest. *Real Life's* invocation of the public interest amounts to an argument that in order to show a piece that informs the public that someone has acted in a way that is degrading to women, it's necessary to show pictures of cleavage.

It might be less contorted, and more honest, simply to say that without the pictures, there's no entertainment. But that could imply that the only difference between *Real Life's* broadcast and the conduct of the casino camera operator is the difference between self-righteous indignation and a smirk.

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Recent ACT decisions

Noel Greenslade provides a round-up

criminal trespass - it's in the public interest!

Peter Wilkinson, an investigative reporter for the programme *A Current Affair*, was convicted by Magistrate Ward on a charge of contravening section 11(2)(c) of the *Public Order (Protection of Persons and Property) Act 1971 (Cth)*.

The relevant provision of the Act reads "A person who being in or on premises in a Territory, refuses or neglects, without reasonable excuse, to leave those premises on being directed to do so by the occupier or by a person acting with the authority of occupier; is guilty of an offence." Commonwealth premises are expressly excluded from the operation of this section.

On 3 October 1992 Mr Wilkinson confronted Mr Stephen Nimmo in the front garden of his property and attempted to interview him as part of *A Current Affair's* program on alleged maintenance dodgers entitled "Deadbeat Dads". Two weeks previously Mr Nimmo's solicitors had written to Mr Wilkinson's employer and that letter in part read: "We are instructed that Mr Nimmo does not wish to be interviewed by you ... we wish to make it clear that Mr Nimmo does not wish to speak to you".

After entering Mr Nimmo's front garden Mr Wilkinson said to Mr Nimmo: "We've been trying to find out why you refuse to do what the Family Court says"; and "Why did you transfer all your assets across to your wife?".

Magistrate Ward found that Mr Wilkinson was directed to leave the property on no less than nine occasions and yet did not leave the property after any of those directions. Mr Wilkinson's explanation as paraphrased by Magistrate Ward was that he felt he could convince Mr Nimmo to change his mind and speak to him, and that he believed interviewing Mr Nimmo was in the public interest. Magistrate Ward, apparently unimpressed by the public interest argument, commented:

"Another excuse is the hoary old perennial: it's in the public interest. It may well be in the interest of the TV station's ratings, to cater for the morons of this world who enjoy the spectacle of the discomfort of those branded by the TV executives as wrongdoers, and in the privacy of their own home to boot! It cannot be in the public interest that such gutter journalism be the means by which alleged wrongdoers are brought to justice. We might as well scrap the courts, repeal the laws and leave it to the television stations to control the country.

The plain fact is that the defendant had no right to be where he was. He knew he was committing a civil trespass at least. Once he was told to leave, and declined to do so he committed a criminal trespass. He had no excuse for remaining - no reasonable excuse, that is".

There may be some people in the media who will be less than satisfied with this decision and will argue that it is against the public interest. However, from the point of view of the writer it is difficult to see a logical basis for excepting journalists from the consequences of laws relating to trespass.

defamation - Evans v Fairfax appeal

In August 1993 the Federal Court heard an appeal by the plaintiff in the matter of *Graham Charles Evans v John Fairfax & Sons Limited and Allan Ramsey and John Alexander.*

The appeal was from the decision of Justice Higgins of the ACT Supreme Court delivered on 12 February 1993 (discussed in Vol. 13 No. 3 of the CLB). In the Supreme Court the plaintiff had argued his case on the basis that the defamatory imputations alleged to have been conveyed by an article titled "Cosy in the Corridors of Power" appearing in the *Sydney Morning Herald* on 14 April 1990 were conveyed from the

natural and ordinary meaning of the words used and chose not to rely on true innuendo meanings.

The plaintiff who had been Principal Private Secretary to Prime Minister Hawke following the 1983 Election, and later Secretary of the Department of Primary Industry and Energy alleged that the article conveyed imputations that:

- the plaintiff's career advancement in the Commonwealth Public Service was only the result of the patronage from the Prime Minister;
- the plaintiff, in his capacity as Secretary of the Department of Primary Industry and Energy, lacked the confidence of his Minister, Mr John Kerin;
- the plaintiff was a person whose successful career in the public service was due more to his enjoyment of a nasty system of patronage than to anything else;
- the plaintiff was prepared to advance his career through cronyism rather than on the merits of the performance of his duties.

In his reasons for decision of 12 February 1993 Justice Higgins found that none of the imputations pleaded arose from the article in its natural and ordinary meaning as they were not imputations that would have been conveyed to the ordinary reasonable reader. However, Justice Higgins found that defamatory imputations may have been conveyed to public servants, and that the article had lessened the plaintiff's reputation amongst his colleagues.

His Honour held that had any of the pleaded defamatory imputations been made out he would have awarded $25,000 for hurt to feelings, $30,000 for damage to reputation within the Public Service, and $15,000 for aggravated damages. Justice Higgins ordered that there should be no order as to costs because of the defendant's failure to respond reasonably to the plaintiff's letter of demand and complaint by not publishing a timely correction.

The plaintiff appealed from the decision and by reasons for judgment dated 27 May 1994 the Federal Court constituted by Neaves, Miles and French JJ dismissed the appeal but overturned the order of Higgins J that there should be no order as to the costs of the proceedings in the Supreme Court, and ordered the plaintiff to pay the defendants' costs of the Supreme Court proceedings and the Federal Court appeal.

The Court discussed the need, when deciding whether an imputation arises from the matter complained of in its natural and ordinary meaning, to approach the question from the stand point of the ordinary reader and cited with approval statements of Mason J in *Mirror Newspapers Limited v Harrison* that:

"A distinction needs to be drawn between the reader's understanding of what the newspaper is saying and judgments or conclusions which he may reach as a result of his own beliefs and prejudices. It is one thing to say that a statement is capable of bearing an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense, drawing on his own knowledge and experience of human affairs in order to reach that result. It is quite another thing to say that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff. The defamatory quality of the published material is to be determined by the first, not by the second, proposition. Its importance for present purposes is that it focuses attention on what is conveyed by the published material in the mind of the ordinary reasonable reader."

Their Honours commented that: "Although the ordinary reader is not suspicious of mind by nature, nor avid for scandal, the language of the publication as a whole may excite suspicion in the mind of that reader. Where that is so, the reader is the more likely to read between the lines and take the matter complained of to convey a meaning which causes the reader to think less of the plaintiff."

Further, the Court approved a statement from Mason J in *Mirror Newspapers Ltd v Harrison* to the effect that where a person publishes words that are imprecise, ambiguous, loose, or unusual and there is room for a wide variation of reasonable opinion on what the words mean, then they cannot complain if they are reasonably understood as having said something that they did not mean.

Their Honours found that the title of the article brought to it a degree of imprecision, ambiguity or looseness of the kind to which Mason J was referring and found that:

- "The ordinary reasonable reader was invited to draw the conclusion the Prime Minister did not treat merit as the sole criterion for the bestowal of praise,;
- The reader is invited to conclude that an element in the selection (of ex-members of the Prime Minister's Staff to senior public service positions) was the influence of the Prime Minister or of the successive holders, identified in the article, of the office of the Secretary to the Department of the Prime Minister and Cabinet.;
- The article would convey to the ordinary reasonable reader that the relevant procedures had been manipulated in an undesirable, even in an improper though unidentified, manner so as to ensure that the careers of officers who had served on the Prime Minister's personal staff were advanced.";
- The appellant was identified in the article as one of the group who had been beneficiaries of the system, and that he was said to have benefited on three occasions by his appointment to senior public service positions;
- That the statement in the article that the appellant and Mr Kerin did not 'get on' implied that there were personal differences between them which led to difficulties and stresses within their relationship, but that blame for this situation was not attributed to one man or another and that no reasonable reader was likely to think less of the appellant in this regard.

However, their Honours also found:

- That whilst the article did convey the imputation that the appellant did not get on with his Minister the ordinary and reasonable reader "....would not take the further step of inferring that the stress in the relationship, the failure to 'get on', was due to the Minister lacking confidence in the appellant's ability to perform the duties of the office or in the appellant's integrity."; and
- That whilst "There is little difficulty in seeing that the reader would have read the article to mean that the appellant had achieved success in his Public Service career and that patronage had occurred with respect to appointments at a senior level within the Public Service during the time of his career. There is not much difficulty in seeing further that the article meant to the reader that this element of patronage had been 'enjoyed' by the appellant, to the extent that he was the recipient of its benefits", and that the imputation that the system of patronage was "nasty" was made out.

However, the ultimate question relating to this imputation was whether the reader would take the article to mean

IN THE NEXT ISSUE

Multimedia – what's all the racket

that the enjoyment of this type of patronage had contributed more than anything else to the appellant's success in his public service career.

The court held "...it is a considerable leap from an acknowledgment that the appellant served in the Prime Minister's Department and was well known to the Prime Minister to a conclusion that the appellant's success in his career was not justified by his experience and capacity. His service in the Prime Minister's Department would, in the expectation of the ordinary reader of this article, be as likely to give him positive and legitimate qualities for advancement as to make him the object of unjustified favours. His association with the Prime Minister would be seen as no less likely to lead to the Prime Minister recognising the appellant's capacity than it would be to entice the Prime Minister or others under his influence to arrange unmerited promotion of the appellant."

Accordingly none of the imputations pleaded were found to be made out.

The Court then considered the order of Higgins J that there should be no order as to costs because of the failure of the respondents to reply to a letter written on the appellant's behalf demanding an apology, and Justice Higgin's view that the statement in the publication that the appellant Mr Kerin "did not get on" was a lie and that it was necessary for the appellant to commence litigation in order to "nail the lie".

Their Honours held: "It is difficult to see why the possibility that a defendant might have taken a course which would have avoided the litigation (the offering of an apology) should necessarily deprive the defendant of costs where the defendant is successful following a hearing on the merits as in the present case."

And further with words of encouragement to potential plaintiffs: "Since the decision in the Supreme Court, this Court has handed down its judgment in *Humphries v TWT Limited* (unreported, 3 December 1993). According to the judgment of the Court a correction of an error contained in a defamatory publication, or an apology, or a combination of both, does not vindicate the plaintiff's reputation in the same way or to the same extent as a judgment of a court in favour of a plaintiff. Hence a plaintiff does not have to rest content with a published apology, and an apology does not stand in the way of an award of substantial damages for injury to reputation or injury to feelings. The principle so stated runs contrary to the hypothesis presented in the present case that an apology may have avoided litigation." (*Ed.: cf Carson*)

The Court held that Justice Higgins' decision not to award costs against the plaintiff was based on erroneous grounds and that no reason had been demonstrated why the ordinary rule of practice should not be applied and costs follow the event. Accordingly, the appellant was ordered to pay the costs of both the Supreme Court proceedings and the costs of the Federal Court Appeal.

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Evidence from tapping beyond the pale OK

Grantly Brown examines the latest House of Lords case on telephone tapping and suggests the UK falls short of its international obligations

When can telecommunication signals in the UK be said to be transmitted on a "public telecommunication system"? If a signal is not being transmitted on a "public telecommunication system" can it be intercepted by police authorities? What use can be made by the authorities of those intercepted communications in subsequent criminal proceedings? These were just a few of the questions resolved in the House of Lords case of *R v Effik ("Effik")* in July 1994.

The legality of telephone tapping has become something of a fetish within the English legal system. Apart form numerous cases on the subject - including one before the European Court of Human Rights *(Malone v UK (1984))* - telephone tapping has been the subject of at least 5 governmental inquiries. Unfortunately, as we shall see, this latest case is unlikely to have brought an end to this inability of the English legal system and Government to come to grips with the UK's international human rights obligations in this area.

the facts

Put shortly, the facts are that two persons were convicted for conspiracy to supply heroin and cocaine. In the course of their investigations, the police recorded a number of telephone conversations made by one of them, Effik, on a Greemarc cordless telephone. The telephone consisted of a base unit connected to a telephone socket in a house and a wireless transmitter/receiver handset which could be used as a mobile phone within a limited range of the base unit.

When the handset was used by Effik, police observers, in an adjoining dwelling, were able to intercept the transmissions between the handset and base station with a radiocommunications receiver and record the conversations.

The House of Lords found evidence led at the trial of these conversations "was a material contributory factor in the appellants' convictions."

The substance of the appellant's case was that the *UK Interception of Communications Act 1985 ("the Act")* rendered evidence of the telephone conversations inadmissible.

Section 1 of the Act makes it an offence to intentionally intercept "a communication in the course of its transmission by ... means of a public telecommunications system" unless the Secretary of State has issued a warrant under section 2. Section 2 provides for the issue of a warrant where necessary for various purposes including the "preventing or detecting of serious crime". No warrant was obtained by the police in this case.

issues

In the earlier House of Lords case of *R v Preston and Ors (1993)* it was held that sections 2, 6 (which provides for the minimum possible disclosure of recorded conversations) and 9 (which prohibits the leading of evidence in a trial that "tends to suggest" an offence under s.1 has been committed or that a warrant under s. 2 has been issued) permitted use of telephone taps to *prevent* crime but did not permit use of taps for the *prosecution* of crime. Accordingly, material which was intercepted in the manner contemplated by *the Act* was inadmissible in criminal proceedings.

The crucial question in *Effik* was whether *the Act* applied to the tapping of these telephone conversations and this turned on whether the transmissions were by means of a "public telecommunications system". Section 10 of *the Act* provides that this expression has the same meaning as in the Telecommunications Act of 1984 (*"the Telecom Act"*).

Section 4(1) of the *Telecom Act* describes a "telecommunications system" as a system "for the conveyance ... of - [amongst other things] speech." Section 4(2) provides that an "apparatus connected to but not comprised in a telecommunications system shall be regarded as a telecommunciation system ..."

Subsection 4(4) provides that "a telecommunication system is connected to another telecommunication system ... if it is being used ... in conveying", amongst other