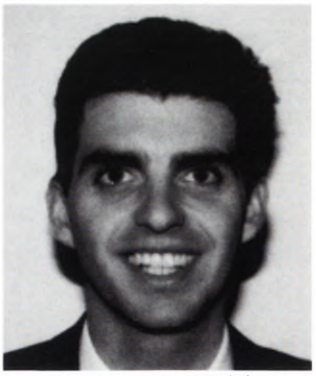
Charge first, investigate later, acknowledge fault ... never

a tale of malicious prosecution and abuse of process

Ryan v Qantas, State of Queensland and Lennon (unreported, Magistrates Court of Cairns, August 1998 and appeal to District Court of Brisbane)



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This sad tale begins in Cairns, tropical Queensland. Our tragic hero is one Robert Ryan. Employed as a counter clerk at Qantas, Mr Ryan could have been forgiven for thinking his life was uneventful and his job secure.

That was the case, at least until $400 went missing from the takings on 24 October 1993. As the person handling the money, Mr Ryan was the obvious suspect. The fact that Mr Ryan was, at the time, earning approximately $60,000.00 a year and that he had not made a clerical mistake during his 20 years in the airline industry was somehow overlooked.

At the first mention of money disappearing Qantas snapped into action. It immediately called its investigator (Brian Rudd) from Brisbane to assess the situation. Rudd had no first hand knowledge of the money handling system in Cairns. He relied solely on the system as described in the company documents. Human nature being what it is, the system looked great on paper, but did not accord with what actually went on. Perhaps someone could have checked with the clerks who handled the money there and then and this whole sorry saga would have been avoided.

Mr Ryan was of course given every chance to explain what had happened. He was asked by Rudd "What did you do with the money?" When Mr Ryan explained that he did not take the money, Qantas handed the matter over to the police. By the next day, Mr Ryan was invited for questioning at the local police station by Senior Constable Lennon, the Investigating Officer.

In the interim, Rudd gave Lennon the grand tour of the Cairns Qantas terminal and a run down of the money handling procedures. Lennon spoke to no one else at Qantas. The tour lasted about two hours. That completed the investigation.

The case seemed pretty obvious. At least that is what the investigating officers decided at that time (and maintain even today).

Lennon did not speak to the security guard who handled the money while in transit nor the bank teller who received it at the other end.

At the police interview, Mr Ryan was again asked what he did with the money. Mr Ryan took the opportunity to explain the money handling procedure, including its many faults and the fact that the money was handled by at least two persons other than himself. He maintained his innocence. Lennon disregarded what Mr Ryan was saying. Lennon's mind was made up - he did not want to be confused with facts. Lennon then gave Mr Ryan the option of getting legal representation. A solicitor duly arrived, gave advice and Mr Ryan said no more. Lennon then charged Mr Ryan with stealing as a servant.

In the next day or so, Lennon completed the necessary documents for the matter to proceed to first mention. Again, he did not speak to either the security guard or the bank teller. At the trial (of the civil claim), he maintained that the two could corroborate each other so there was no need to speak to them.

At the first mention on 10 November, 1993, Mr Ryan sought a full committal with a cross-examination of all witnesses.

Lennon having been forced to prepare a brief finally spoke to the bank teller. When Lennon asked for the documents regarding the missing money, the bank teller in turn asked "which set?" The penny dropped. Lennon contacted Qantas to advise of this "new development". An audit was carried out. It revealed that in a preceding two months there were at least eight other occasions when money went missing and on at least two of those occasions Mr Ryan was not even at work. Also, most of the other discrepancies involved takings other than Mr Ryan's.

Not surprisingly, by this stage the union became involved. It foreshadowed a strike, which was only avoided through the intervention of the Industrial Commissioner.

By 9 December, 1993 Lennon wrote to his superiors asking that the matter be withdrawn because the "new evidence" made a conviction unlikely.

Qantas was asked to withdraw its complaint but refused, not wanting to get involved.

Another mention took place on 14 December, 1993. The police sought an adjournment and it was granted. No prizes for guessing why the adjournment was sought.

On 11 January 1994 the prosecutor presented an indemnity (against civil liability) for Mr Ryan to sign, in exchange for the matter being dropped. Mr Ryan refused. The prosecutor said that the case would therefore proceed. The matter was then adjourned further and set down for a committal for 8 February 1994. On that day, the police again asked for what turned out to be the last adjournment to 22 March 1994. Again, that was to be a full committal. Mr Ryan and his legal team arrived in court expecting just that. Instead, they

were greeted by a fresh prosecutor who knew nothing of the case except that the Crown was not presenting any evidence. The complaint was dismissed.

Throughout all this, Mr Ryan was suspended on full pay. After the charge was dismissed, he was re-instated. Due to the trauma of the past months he developed an adjustment disorder with mixed anxiety and depressed mood. He only commenced a gradual return to work in August, 1994 but did not return to work full time until 28 June, 1995.

The Claim

Mr Ryan instituted proceedings against Qantas, the State of Queensland and Lennon as the first, second and third defendants respectively. The claim against Qantas was for breach of contract and negligence. The claim against Lennon and the State of Queensland was for malicious prosecution and abuse of process.

The Relevant Law

Malicious prosecution has five elements. They are as follows:-

1. **A prosecutor**, a party that is instrumental in the instigation and the continuation of criminal proceedings.
2. **Criminal proceedings** which are determined in the plaintiff's favour.
3. An **absence of reasonable and probable cause** in either instituting or continuing the prosecution. This is an objective test.
4. **Malice**, actual and implied.
5. **Damage**, which is presumed in criminal cases.

The only dispute was regarding elements 3 and 4.

By contrast abuse, of process is found where there is a use of the legal process for any ulterior or collateral purpose [see *Kozenbes v Kronhill* (1956) 95 CLR 407 at 417-8].

Discovered Documents

The police documents contain some gems, such as the report from the Chief Superintendent which stated, in part, that *"the prosecution has offered not to place Mr Ryan in jeopardy any further, but this is not a course dictated by law or legislative procedure, merely a discretionary practice conforming to the spirit of Westminster Justice. The Police Service has a right to protect itself against litigation ... and indemnification against litigation where withdrawals of prosecution are sought is appropriate"*.

In addition, the prosecutor's report (the very same prosecutor who tendered the indemnity for signing) suggested *"it is not in the interest of justice or the public to proceed against Ryan where the reasonable doubt as to his guilt is so apparent"*.

The acting Senior Sergeant prepared a report justifying the police actions including this: *"...as Ryan was not willing to accept this offer* (ie. sign the indemnity), *the decision was made to proceed with the prosecution case at that stage, to vindicate the investigating police officer's action"* (explanation added).

It appeared that at least some of the passages from the prosecutor's report, particularly the comment quoted above (which incidentally wasn't in all the drafts of the report) was provided to the union at one stage.

This is what the Senior Sergeant had to say about that *"... if this was the letter (prosecutor's report) which was forwarded to Mr O'Donnell* (the union representative), *he could quite properly accuse this department of not acting in good faith or in the interest of justice, but solely in the department's interest ..."* (explanation added).

All of these documents were tendered at trial, by consent!

The Proceedings

The proceedings started in the Brisbane Magistrates Court. Only weeks out from trial, the plaintiff discontinued against Qantas. The other defendants then applied to abort the trial, join Qantas as a third party and transfer the matter to Cairns. They were successful in all three and didn't even have to pay the costs of the application, as the presiding Magistrate considered that there were no costs thrown away by the application.

The Trial

The matter eventually came to trial in March 1998. After four days of evidence, the Magistrate sought written submissions from the parties. Fitzsimon SM subsequently handed down his decision on 13 August 1998.

The Magistrate's Decision

The plaintiff lost his case at first instance. The Magistrate found no actual malice by Lennon. His Worship was likewise not prepared to infer malice onto the police department as it was an entity and not an actual person.

The Magistrate conceded that *"Mr Dan Kelly's skillful cross-examination revealed loopholes in the police investigation,"* but this was not enough.

The plaintiff failed on his abuse of process argument because, according to the Magistrate, the request to sign the indemnity was analogous to an offer to settle being made by a party in civil litigation.

The plaintiff was ordered to pay the defendants' costs, and as the defendants had not led any evidence against Qantas at the trial, they were ordered to pay its costs.

Not surprisingly, the plaintiff appealed.

The Appeal

The matter was transferred to Brisbane District Court for an appeal hearing which took place on 5 March 1999. Botting DCJ delivered his decision on 9 July 1999. His Honour found both malicious prosecution and abuse of process on the facts.

His Honour considered that the Magistrate erred in finding that malice could only occur at the outset. The continuation of a case could also be motivated by malice and thereby amount to malicious prosecution.

His Honour referred to the Senior Sergeant's report as a futile attempt to set the record straight.

By 11 January, 1994, there was a decision made to withdraw the case as there was an absence of reasonable and probable cause.

The policy of requiring indemnities to be signed was strongly criticised. His Honour could only see two possible reasons for such "policy"; either the desire to protect police from litigation or for vindication of the prosecution. Both were improper.

In relation to the abuse of process, His Honour stated *"I trust it is abundantly clear from what I have said* [about malicious prosecution] *above...it is clear that the only reasonable inference that can be drawn...is that the continuation of the proceedings... amounted to an abuse of process of the court"*.

His Honour went on to say *"The pur-* ▶

pose was not that of securing the conviction of a thief - but rather an effort to protect the police service, or some of its officers, or to vindicate them".

The analogy between a civil case offer to settle and the indemnity was likewise rejected.

What Now

As the Magistrate had not assessed damages at first instance, the matter has now been remitted to Cairns Magistrates Court for an assessment of damages. That is where the matter currently rests.

Aftermath

The story doesn't end there. You're probably wondering what happened to some of our leading characters. Well, you may be surprised to hear that:-

- Lennon was charged and convicted of money handling offences and left the police force
- The Qantas security guard did not have his contract renewed
- Qantas changed their money handling procedures
- Queensland police no longer require defendants to sign indemnities
- Mr Ryan no longer works for Qantas

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Transmission of business: section 149 of the Workplace Relations Act (1996)

North Western Health Care Network v Health Services Union of Australia **[1999] FCA 897 (2 July, 1999)**

Philip Gardner and Val Gostencnik, Melbourne

The recent decision of the Full Court of the Federal Court in the North Western Health Care Network Case has attracted some media comment.

Leaving aside the political aspects of such comment, it appears that the decision has been characterised as concerning "contracting out". Caution should be exercised in assessing the impact of the decision.

Summary

Section 149

The matter before the Court involved a dispute as to whether a federal award applying to the State of Victoria applied to Health Care Networks who took over from the State the provision of mental health services. The union relied on Section 149 of the Act to argue that the award applied as there had been a transmission of business from the State to the Health Care Networks.

The decision deals with the meaning of "business" and "transmission" in the context of Section 149.

"Business"

The Full Court held that "business" referred to the activity of the employer that gave rise to the industrial dispute underpinning the award. Accordingly, the State of Victoria could be engaged in business.

"Transmission"

The Court decided that under Section 149 a transmission occurred if there was a substantial identity between the old activities and those carried on by the new employer which correspond with the old activities. The Court held that it was not necessary to identify a particular legal transaction constituting a formal transfer of property.

Caution

The decision does not apply in all cases of contracting out. Advice should be sought by unions before initiating any proceedings in reliance upon the decision. We would anticipate that the decision will be appealed to the High Court.

Discussion

Section 149

The decision concerned the proper construction of Section 149 of the Workplace Relations Act 1996. Relevantly, that Section provides:

"149(1) Subject to any order of the commission, an award determining an industrial dispute is binding on:

....

(e) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation who has acquired or taken over the business or part of the business of the employer; ..."

The Court's decision:

(a) deals with the meaning of "business" in Section 149 and whether the provision of mental health services by the Victorian Department of Health constituted "part of the business" of the State of Victoria; and