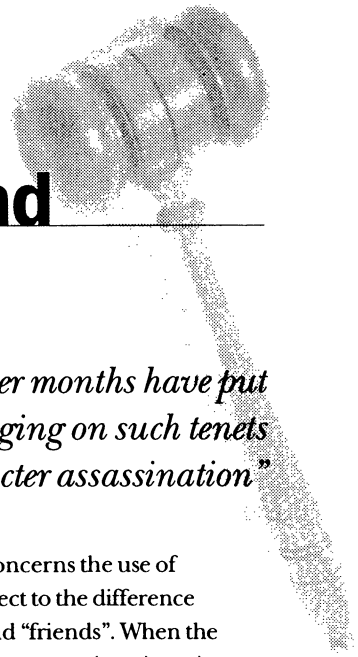

Understanding defamation and contempt

Some key defamation and contempt cases heard during the summer months have put police and the media on the back foot, with decisions against them hanging on such tenets as the capacity to defame, ambiguous use of language and "character assassination"

The couple once accused of being at the centre of the "Mr Bubbles" child abuse allegations, Tony and Dawn Deren, were recently awarded $350,000 and $450,000 respectively (plus interest) for several defamations by police to the media. The Derens successfully argued that police comments to the media implied that they were guilty of sexually assaulting children at the Seabeach Kindergarten in NSW which they ran. In his February 20, 1998 decision, Justice Abadee of the New South Wales Supreme Court did not accept that the police had a defence of common law qualified privilege. The NSW Police Service is expected to appeal.

Homosexuality as defamation

Two other interesting defamation decisions of recent months focus on the *capacity* to defame. In *Horner and Usher v Goulburn City Council and Harold Rosevear* (unreported, Supreme Court NSW, December 5, 1997), Justice Levine was asked to determine whether or not an imputation of homosexuality *could* be defamatory.

In the past, to call someone a homosexual was clearly defamatory. Liberace recovered substantial damages in England in 1959 for an article which described him as "the summit of sex – the pinnacle of Masculine, Feminine and Neuter. Everything that He, She or It can ever want" and a "winking, sniggering, snuggling, chromium plated, scent impregnated, luminous, quivering, giggling, fruit flavoured, mincing, ice-covered heap of mother-love".

Jason Donovan took a different course in his early 1990s case against *The Face* magazine in England where he complained of an imputation of "hypocrisy" (ie pretending not to be gay) rather than homosexuality. While the decision to plead his case that way was probably strategic rather than legal, it left open the question of whether, by modern standards, calling someone homosexual damages their reputation in the eyes of the community.

In *Horner,* the defendants argued, among other things, that the existence of anti-vilification legislation reflected community attitudes that homosexuality should not be the basis for denigrating someone. But in deciding to leave the question to the jury Justice Levine said that community attitudes about a homosexual relationship "may range from sympathetic tolerance and understanding to an irrational abhorrence". For this reason he was unable to conclusively say that "even towards the end of this century's last decade, to ordinary members of the community, a comment that a person is in a homosexual relationship is *not* disparaging or is *not* likely to lower that person in the estimation of such people". The jury will now decide the issue when the case goes to trial.

The second case concerns the use of language with respect to the difference between friends and "friends". When the ambiguous use of language is an issue in a defamation case, context is everything. In *Ison v John Fairfax* (unreported, Supreme Court NSW, December 11, 1997) Justice Levine found that the use of quotation marks around the word friend ("friend") was *capable* of suggesting a sexual relationship. A *Sydney Morning Herald* report of events arising from the Wood Royal Commission mentioned the plaintiff in passing as the partner of a policeman who had been investigated. A prostitute and drug user was referred to in the article as a "friend" of Ison.

"the summit of sex – the pinnacle of Masculine, Feminine and Neuter. Everything that He, She or It can ever want" and a "winking, sniggering, snuggling, chromium plated, scent impregnated, luminous, quivering, giggling, fruit flavoured, mincing, ice-covered heap of mother-love"

Fairfax argued that the context made it clear it was a quote from direct speech attributable to the woman and readers would interpret it this way. But Justice Levine accepted Ison's argument that because the word appeared 35 paragraphs into an article describing lurid events, putting the word in quotation marks gave it the "nudge" necessary to suggest something more than a friend. It is now up to the jury to decide if the word in that context carries that meaning.

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Contempt by "character assassination"

Most recently, business writer Mark Westfield and the publisher of *The Australian* were found guilty of contempt and fined a total of $85,000 (unreported, Justice Gillard, Supreme Court of Victoria, December 22, 1997 and February 18, 1998). The paper's printer was found guilty but not fined as he had no control over the paper's content. In a column published during the trial of former Coles Myer executive Brian Quinn, Westfield commented that Quinn "may be looking for some sympathy" in the proceedings and continued:

> *"He has nothing to lose either by dredging up some scapegoats from the past. He is unlikely to gain much pity, however, or do any good for his credibility by blaming his predecessor, Bevan Bradbury, for initiating the alleged policy of buying homes for senior Coles Myer executives from which Quinn appeared to benefit so grandly.*
>
> *Bradbury died several years ago and cannot give his side of the story. He is fair game.*
>
> *Two directors who served with Bradbury on companies after his retirement from the retailer were deeply distressed by Quinn's allegations in the court last week. They had no hesitation describing him as a scrupulously honest and hardworking person."*

The test for contempt is always whether the publication has "as a matter of practical reality, a real tendency to interfere with the due course of justice" – in this case, the possibility of interfering with Quinn's fair trial. The case serves as a reminder of the sorts of things that courts commonly regard as contempt:

- You can commit contempt without intention to interfere with a trial, as was the case here. This is always a genuine concern for newspaper publishers and writers, because unintended or not, the outcome is a criminal conviction.
- Material that goes beyond a bare report of the trial is generally a problem. Justice Gillard commented that once criminal proceedings are commenced, to comment on the case is fraught with danger. "Once the trial actually commences, to do so is to walk through a mine field. The risk of disaster is ever present".
- A contempt can occur whether or not a jury is discharged and it is not necessary that actual prejudice to the trial be proved. In this case, the judge continued with the trial after giving the jury a direction to disregard media coverage. *The Australian* was not able to convince the court that the potential prejudice was lessened by the article's position on page 24 in the business section under a heading which did not refer to the trial. In the judge's view, the fact that the article appeared in a well known authoritative serious newspaper added to its tendency to prejudice.
- Material which reflects on an accused is generally likely to prejudice jurors. In the judge's view, Westfield's statements imputed that Quinn was a "despicable person" and would lie about others, including a dead person who could not refute evidence given at trial.

The judge found the article's effect was not slight, as had been argued, but was a "character assassination on a grand scale". He took into account the fact that jurors are undertaking a difficult and unfamiliar role, a task which is "foreign to them and daunting". The article may have caused them to question "what does this responsible authoritative newspaper know that we do not?"

Fining Westfield and the paper, the judge also expressed concern that a journalist with 27 years experience was unaware of what he regarded as "obvious contempt".

Julie Eisenberg

Kroger

...continued from page 17

member of the party's federal executive between 1987 and 1992, Mr Kroger has direct links to the current government and is a close friend of the Treasurer, Peter Costello. His right-of-centre political affiliations contradict what are generally perceived as the ABC's more left-of-centre views.

Then there is the question of Mr Kroger's loyalties. He backed the Packer horse during the federal government's abortive attempt last year to change the cross-media ownership laws. He lobbied on Publishing & Broadcasting Ltd's behalf to have the rules changed in order to allow its takeover of John Fairfax Holdings.

Since his appointment to the ABC board, the accusations have raged that the government is on a vendetta against the broadcaster, stacking its board with right-wing appointees who will interfere with programming. Critics have also pointed to the fact that while in opposition, the Liberal Party made a clear promise that there would be no more political hacks appointed to the ABC board. The comment in 1995 followed several years of Labor appointees including former Labor pollster Rod Cameron and a former South Australian Labor Premier, John Bannon. There was also a seat reserved for a trade unionist on the ABC board during Labor's tenure.

It is difficult to know how sinister Mr Kroger's appointment will prove to be. Perhaps the crucial difference is that in stacking its board, the Labor Party wanted influence the political stance taken by the ABC. The present government, having already savagely cut the broadcaster's budgets – another broken electoral promise – may want nothing less than its demise.

Karen Winton