

The investigative journalists who trespass against us

Anthony Mrsnik reports on a recent unsuccessful attempt to injunct The Investigators

from broadcasting a program

A recent decision of the Supreme Court of New South Wales looked at what restrictions the law will place upon the publication of material gained during the course of a trespass.

In *Heritage Real Estate Pty Ltd & Michael Tzouvaras v. Australian Broadcasting Corporation*, Supreme Court of New South Wales (21 July 1992), Justice Sharpe stated that:

"It is almost the rule rather than the exception in this day of exposé television media programs, that in one manner or another there is a trespass or otherwise invasion of the privacy of the broadcaster's target".

The facts of *Heritage* were determined as follows. Over a period of approximately 16 days, the defendant made repeated requests to the second plaintiff to accede to a recorded interview with respect to a story proposed by *The Investigators*. The requests were both oral and in writing and contained a list of proposed questions. The second plaintiff ultimately declined to appear on camera owing to a concern over the nature of the story and the failure of *The Investigators* to provide him with a synopsis.

Trespass

On the seventeenth day, the defendant's reporter and a 2 person crew entered the reception area of the plaintiff's premises and moved, as Justice Sharpe described "in a somewhat aggressive fashion", towards the open door of the second plaintiff's private office. The reporter then placed a bag against the open door and proceeded to question the second plaintiff whilst placing himself in a position which did not allow for the door to be closed. The interview continued for approximately 5 minutes.

From the start, the second plaintiff indicated that he had no wish to continue the interview. The second plaintiff answered some questions and refused to answer others. It was not until some two thirds of the way through the interview that the second plaintiff requested the reporter to leave the premises and thereby confirmed that he was trespassing.

Injunctive relief

By way of summons issued at 4pm on the day of the scheduled 8pm broadcast of *The Investigators* program, the plaintiffs attempted to restrain (amongst other things) the broadcast of material involving the second plaintiff. The plaintiffs argued that they feared that the publication of unfavourable and probably defamatory material would cause both irreparable damage to their business and prejudice a pending defamation action against a newspaper proprietor.



His Honour, finding that a trespass had been committed, made it clear that trespass *per se* is no absolute prohibition to the right to publish material obtained in the course of a trespass. Justice Sharpe adopted dicta of Justice Young in *Lincoln Hunt Australia Pty Ltd v. Willesee & Ors* which required that the plaintiffs establish both a strong prima facie case that a trespass has occurred and that the case is the sort where the court may grant an injunction. Further, it must be shown that the damage likely to occur if an injunction is not granted would be irreparable and that the balance of convenience favours the granting of an injunction.

Damage to plaintiff

During the course of evidence, the second plaintiff conceded that the earlier publication by a newspaper, which was the subject of current defamation proceedings, had been the cause of a serious downturn in his company's business. Justice Sharpe, after considering the proposed story by the *The Investigators* in its entirety, was not satisfied on the question of irreparable damage.

His Honour added that the plaintiffs had sufficient notice of the tenor of the defendant's publication. This gave the plaintiffs adequate opportunity to approach the Court at an earlier date seeking interlocutory relief and subsequent discovery. This, in turn, would have provided the defendants with ample opportunity to reschedule its broadcast. Justice Sharpe made it quite clear, however, that particular facts may override an argument which sought to preclude the grant of eleventh hour interlocutory relief.

Unconscionable conduct

The notion of "unconscionable conduct" has featured regularly in the language of earlier cases in this line of authority. It is interesting to note that neither the plaintiffs in their submissions nor Justice Sharpe in his judgment make direct reference to the issue.

While *Heritage* did not directly concern itself with arguments based on unconscionable conduct, it is a relevant submission to be made by lawyers seeking to restrain publication of material. Judicial reasoning indicates that unconscionable conduct falls into the "balancing of convenience" through the court's reluctance to condone a tort which cannot be adequately compensated through damages.

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