



The National Interest: 14 December 2003 - Hindmarsh Island Defamation*

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Terry Lane: Last year, the Conservation Council of South Australia lost a defamation action brought against the Council and some of its individual members. Now the action was brought by Tom and Wendy Chapman, the developers of the Hindmarsh Island Marina and the associated controversial bridge. Judge Williams, in the Supreme Court found that the defendants had indeed defamed Mr and Mrs Chapman in various publications and in his judgement he made much of the fact that Mr and Mrs Chapman are upstanding and esteemed citizens of Adelaide, while the defendants were malicious in their crusade against the Chapmans and the building of the marina and of course of the bridge. The Judge awarded the Chapmans \$130,000 in damages and he ruled that they had been defamed in three different publications. Well last week, again in the Supreme Court of South Australia, three judges overturned two of the judgments of Judge Williams and they were split 2-1 on the third matter. So the damages, payable to the Chapmans were reduced to \$50,000. At the time of the original judgment I spoke about it with environment lawyer and as it happens, former Head of the ABC's Legal Department, Bruce Donald and we promised ourselves that we would reconvene to discuss the appeal. And here, we are. Bruce, good afternoon.

Bruce Donald: Nice to be back, Terry.

Terry Lane: Give us a precis of the appeal judgement.

Bruce Donald: Yes, there were – bear in mind, this case started in 1994 from eleven publications, from which 40 defamatory imputations were alleged by the Chapmans. They got up on three before the trial judge in an extraordinarily wide-ranging case. Of those three, the judge was knocked out on two of them by the appeal judges, so one remains in the ninth year of these proceedings and that was an imputation from a publication complaining about the use by the Chapmans of legal proceedings in the Federal Court under Section 45D of the Trade Practices Act and subsequent threatening letters that were sent to the various opponents. And in the newsletter of the Conservation Council, the Conservation Council had basically said that ‘the people of Goolwa have been intimidated by this action and have been prevented from speaking freely on issues of concern. Whilst the Chapmans seek compensation, who compensates ordinary residents of Goolwa who have suffered greatly under the boot of Binalong?’ (Binalong being their company). And that was said to give rise to the defamatory meaning that with respect to the right of freedom of speech upon the bridge issue, the Chapmans are oppressing the ordinary citizens of Goolwa. Now that was held to be defamatory of them in a 2-1 decision and then a whole range of issues arises from that. So that's how the case ends up after nine years of running through the legal process.

Terry Lane: What did the dissenting judge say? Because one of the judges hearing the appeal was for overturning all of the earlier judgments.

Bruce Donald: Yes, well he didn't actually make a formal finding on whether that was

defamatory or not but he said that his view would be that subject to him having other views on the defences to that publication, he said, 'Look, it isn't defamatory to say of people using the legal process that they are using those processes and that oppresses ordinary citizens, that in the context of robust political debate where ordinary levels of hyperbole ought to be permitted in the public interest, that's not defamatory.' The other two judges said, 'No, it's defamatory to say of people that they are using the legal process to oppress people', because it's tantamount, they would say, to saying that's an abuse of the legal process. So that's how the defamation sting finally rests in this case, subject to what might happen if it's appealed.

Terry Lane: Just as an aside Bruce, if this case had been heard in New South Wales, rather than in South Australia and under the new defamation law in New South Wales, where the words are written quite explicitly into the intention of the new law in New South Wales, that defamation actions may not be used to stifle public debate on issues of public importance. What would have been the outcome?

Bruce Donald: Oh well look, the law's been wrestling with this certainly in New South Wales for 30 years. The Defamation Act of '74 had the well-known Section 22 to give right of reasonable comment in matters of public interest but that's been very confined. It wouldn't have been different on this particular issue in New South Wales, whether those words have a defamatory meaning. There would have been different issues in New South Wales, depending on the defences available and the very most recent change in New South Wales has been to say that corporations can't sue but in this case the Chapmans, being personally identified along with their company, say that they were personally defamed. So it would have been pretty much the same analysis here.

Terry Lane: Does this mean that it's always defamatory to say that a person is using a legal action to stifle debate? Let's imagine a hypothetical case, absolutely nothing to do with the Chapmans or the Conservation Council of South Australia. But supposing the defendants in a case like this had got their hands on a letter from Party A to their lawyers, saying 'Let's issue a writ and see if we can stop the public discussion'. If you had that sort of smoking gun in your hand, would that be a defence?

Bruce Donald: Well that might be a defence because it might go to the question of truth. Bear in mind that there are elements of a defamation action which are quite complex. First, is it defamatory to say of people that they are using the legal process to stifle debate? Certainly in this case 2 to 1 it was held, yes it is defamatory, the trial judge said it was defamatory. In other cases it's been held to be defamatory of a person to say that they abused the legal process. Secondly, is it defensible? Do one of the three normal defences, that's truth, or protected report of proceedings of parliament, or fair comment, or more recently, the extended qualified privileges, the free speech constitutional defences that have been developed in the Lange case - do one of those defences apply to entitle you to make a defamatory publication? But to come back to the question: it will, depending upon the judge, be defamatory to say of a person in certain circumstances, that they've abused the processes of the court.

Terry Lane: Did the judges in their findings in the appeal make any comment on the way that Judge Williams had characterised the people involved in the case? As I said in the introduction, he praised the Chapmans as citizens of high standing in the city of Adelaide but he found and we commented on this before, he found that the defendants were malicious because they had a long history of involvement in environmental matters.

Bruce Donald: Yes, well that was really – there were two central points in the Court of Appeal decision and this issue of their malice, the malice of the conservationists, was a very important issue. And importantly and I think very sensibly, the Appeal Court has said: look, these people, yes, they were motivated to oppose this development, they thought it was wrong, they used strident language, they used robust language, they were engaged in a campaign, they were targeting this development to try and stop it. Many of those factors were relied on by Horton Williams, the trial judge, to say that was part of proving that they had improper purposes, they weren't properly using political debate, they were acting maliciously. The Appeal Court unanimously held that there was no malice here, albeit that this was robust and intensive debate and albeit that these people were campaigning. Remember that was a word that the trial judge hadn't liked, he didn't like the notion of a 'campaign' directed against the developers. Anyway the Appeal Court said, following other precedents, that campaigning of itself is not evidence of malice. So I think this is quite a good development from that point of view. The other really significant part of the case and the difficult part of it, is the way in which the so-called freedom of speech defence is being applied post the High Court decision in the Lange case. And in all of these publications the defendants, the conservationists, said: we are engaged in a discussion of a highly political matter involving the planning process and the processes of government. As you recall Terry, this is perhaps the most litigated development in Australian history. It went to the Federal Court twice, there were two Royal Commissions of Inquiry into it. There were numerous proceedings in the South Australian Court, governments changed, Acts were passed, Robert Tickner lost his job over it, Cheryl Saunders was criticised, the Ngarrindjerri women were called liars and ultimately proved not to be, you couldn't imagine a more political debate. But yet the majority judges said here that in the context of that debate, to say of the developers that they were using the processes of the court to stop free speech, that wasn't a governmental and political matter protected by the constitutional protection. Now that, you must say - I'm sorry, you may agree, you may not agree - that I must say is a very fine legal distinction on the basis of which people can speak freely or not speak freely.

Terry Lane: You refer to the Lange case as establishing the precedents in this particular type of issue. We should perhaps make it clear that the Lange case was a case involving David Lange, former Prime Minister of New Zealand, suing the ABC for defamation and in that case, one of the rulings was that a media organisation like the ABC is obliged to give the maligned person an opportunity to respond to what is said about them. Now there was some suggestion that that arose in the South Australian case and that there was some obligation on the Conservation Council of South Australia to allow the Chapmans to reply in their publications.

Bruce Donald: To some degree. The test is whether in all of the circumstances where it is a debate on governmental and political matters, the person making the alleged defamatory statement has behaved reasonably and without malice. Now generally speaking, what the High Court said was that you have to give the other side the chance to respond to prove that you've behaved reasonably. In this particular case where we were involved in newsletters, it wasn't necessarily the case that they had to have been given the chance to respond. Reasonableness was able to be addressed and indeed the court found that the constitutional defence did apply to at least one of the publications, one talking about consultation with Aboriginal people, in circumstances where there hadn't been a specific offer of the right to reply. But certainly the High Court in Lange said that in the ordinary run-of-the-mill application of this defence, certainly media organisations need to explain why they weren't able to give notice before publication to the other side. Mind you, that's pretty inhibiting I

think, in the daily operation of the way media works if you're rushing to break stories and behave responsibly. I believe the courts should develop the law away from that. It's too restrictive of free speech, in my view.

Terry Lane: Just finally Bruce, there are a couple of things, two more things that we should comment on. One is, I think now the bridge has been built, hasn't it?

Bruce Donald: Oh yes.

Terry Lane: The marina has been developed. How much money has been pointlessly spent on legal actions?

Bruce Donald: Oh, you couldn't count it and this is the chilling effect of defamation proceedings in public interest matters and why really the Australian legal system has a lot to answer for, developing it into such an arcane and rocket science. Millions of dollars will have been spent, bearing in mind the Royal Commissions before Jacobs and then before Justice Matthews, that was truncated, cases up to the High Court. I mean there were in relation to these cases some 11 defamation actions, not just this one we're talking about here, but 10 other cases, some involving the ABC, involving 45 publications. Now the courts and legislatures have really got to wrestle with this problem. It's a really serious issue of free speech in a democratic society when the great beneficiaries of debate are the beach houses of the lawyers. Not mine, sadly.

Terry Lane: You're in the wrong part of the business, Bruce. All right, now the very final, which is to a person observing, a person who is not a lawyer or a judge, you stand back and you look at this - there have been four judges involved in this specific case and they have presumably been using the same law, the same constitution, the same precedents and they can come to such totally different opinions as to what is the correct outcome of the case. I don't find that - even though the outcome of the appeal may have been happier for the Conservation Council of South Australia - I do not find the whole thing reassuring.

Bruce Donald: Terry the legal process is replete with examples like that where the difference of opinion just cascades down the years. I think it would be interesting if this case went to the High Court. There may be an issue as whether the High Court would take it because as you say, the law is well set out now in the Lange High Court decision and other cases. They were applying the same law, they just came to different views on the way that law ought to be applied and the extent of the protection of the defences. Nevertheless, if it did go to the High Court, they could take the opportunity to start clarifying whether or not we're going to have these very fine distinctions to be applied day to day by working journalists and people engaged in public debate or whether there's going to be a broader, more flexible approach to public interest debate and developing the defence to enhance public interest debate. I don't have great confidence that that will happen. I've worked or been associated with this field of law for many years and the difference of legal interpretation and the potential for cost does indeed have a chilling effect on debate, which shouldn't be there in a free society.

Terry Lane: Well let's promise ourselves that we will get together again.

Bruce Donald: When the High Court pontificates, no I'd better not say pontificate, the honourable gentlemen and they're all gentlemen now of the High Court, might take offence.

Terry Lane: Yes, that's definitely contempt of court. We'll get together again and we'll discuss the High Court. What a pity we can't make an appointment even after the Privy Council has ruled on it.

Bruce Donald: Oh well, thank goodness for that.

Terry Lane: There we are. Bruce Donald, thank you very much.

Bruce Donald: Thank you, Terry.

Terry Lane: Bruce Donald, environmental lawyer, champion of free speech and former head of the ABC's Legal Department. We can relax and assume there was nothing said that would be actionable.

Guests on this program:

Bruce Donald

Senior Sydney lawyer (and many ago the ABC's chief lawyer) with a continuing interest in free speech law.

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