CASE NOTE

DUGAN v. MIRROR NEWSPAPERS LTD[1]

The gradual recognition[2] that persons convicted of criminal offences should not be denied their basic civil rights in the absence of cogent grounds for the retention of specific collateral disabilities, has suffered an apparently major setback in New South Wales[3] through the decision of Yeldham J. in the recently reported case of *Dugan* v. *Mirror Newspapers Ltd.*[4]

Upon an action for defamation being brought by the plaintiff, Darcy Ezekial Dugan, against the publisher of the "Daily Mirror", there arose for determination a preliminary issue as to whether certain facts pleaded in the statement of defence constituted either a permanent or temporary bar to the action.

The plaintiff had been convicted in 1951 on a charge of feloniously wounding with intent to murder, and had been sentenced to death.[5] This sentence had subsequently been commuted to penal servitude for life. In May 1970, whilst on release upon licence, the plaintiff was convicted for armed robbery in company and was sentenced to an additional fourteen years imprisonment. He was, therefore, undergoing sentence at the time of the alleged defamations in 1971 and 1974, and all actions were instituted whilst the plaintiff was incarcerated.

In pleading the fact of such convictions, the defendant sought to place reliance upon two related principles of law which, it was submitted, were translated to the colony of New South Wales at its foundation and which

1 [1976] 1 N.S.W.L.R. 403; upheld on appeal; 9 August 1977 (unreported).

2 See e.g. Victoria, *Report of the Board of Inquiry into Several Matters Concerning H.M. Prison Pentridge and the Maintenance of Discipline in Prisons* (1973-74) Victorian Government Printer, esp. pp. 13-34.

For an excellent exposition of the general ambit of civil disabilities consequent upon a criminal conviction, see W. M. Grant et al., "Special Project: The Collateral Consequences of a Criminal Conviction" (1970) 23 *Vanderbilt Law Review* 929.

3 Note in Victoria, however, the reform of the prisoner's position pursuant to the *Crimes Amendment Act* (1973) s. 5(1) which repealed s. 549 of the *Crimes Act* 1958, thereby allowing rights to sue for the recovery of any property, debt or damage; to execute any contract; or to alienate or charge any property. Further, it is perhaps interesting to note that s. 543 of the *Crimes Act* 1958 recites the provisions of the *Forfeiture Act* 1870 (Imp.) so as to remove the more odious provisions of civil death, viz. attainder, corruption of blood, forfeiture or escheat. As Yeldham J. sought to uphold the defendant's submissions upon alternate grounds, and in the face of similar repealing provisions in ss. 416-7 of the *Criminal Law Amendment Act* 1883, the applicability of the decision in the Victorian jurisdiction is perhaps not altogether excluded.

4 [1976] 1 N.S.W.L.R. 403.

5 Pursuant to s. 27 of the *Crimes Act* 1900 (N.S.W.), the death penalty having only been abolished by the *Crimes (Amendment) Act* 1955.

would, if still in force, preclude the plaintiff from bringing suit in respect of the alleged causes of action—either throughout the duration of his sentence, or—should he be pardoned—at all.

The first such principle was that which flowed as a consequence of the ancient device of attainer or "attinctus". A felon under sentence of death was said to be "attainted" and was thereby deprived of the ordinary rights pertaining to citizenship including, inter alia, the capacity to institute private litigation. As forfeiture of the offender's property to the Crown was a primary consequence of attainder, it seemed consistent that prisoners no longer possessed any real rights upon which a cause of action could be seen to arise. Thus, the defendant submitted that the status of the plaintiff—as a felon *civiliter mortuus*—deprived him of a cause of action for unliquidated damages for defamation—that right having been forfeited upon date of sentence in 1951.

Alternatively, the defendant sought to rely upon a more general (and modern) principle which provided that a "person *convicted* of *any* felony became incapable of suing at law or in equity . . . until either he obtained a pardon or his term of punishment expired".[6]

In so far as the plaintiff was undergoing sentence of penal servitude for life, and in the absence of an executive pardon being obtained, the practical effect of the judicial acceptance of either submission was identical—both denied Dugan access to the courts in respect of civil matters for the remainder of his natural life. Neither release upon licence nor parole operated to confer upon the plaintiff those rights extinguished by operation of either principle. However, the distinction assumes far greater relevance in circumstances where capital punishment has been abolished and the effective period of life imprisonment is significantly reduced.[7] The real difficulty of the decision that was reached by Yeldham J. is that it seeks to apply principles which have their rationale in a penological theory which is no longer acceptable in modern society, and which takes no account of the realities of contemporary punishment theory.

1 *Attainder in the 1970s*

In seeking to rely upon the rules arising out of the device of attainder, the defendant invoked principles of law which had been the subject of critical attention in the time of Queen Anne,[8] George II[9] and Blackstone,[10] and which were finally laid to rest in the United Kingdom with the passing of the *Forfeiture Act* 1870 (Imp.).[11]

Put simply, upon judgment of death or outlawry consequent upon conviction for treason or felony, a criminal was said to be attainted and thereby, in anticipation of his forthcoming execution, already dead in the eyes of the law. Blackstone described the operation of the device thus:

[6] [1976] 1 N.S.W.L.R. 403, 407 (emphasis added).
[7] See, for example, A. Freiberg and D. Biles, "Time Served by Life Sentence Prisoners in Australia" (1976) 9 *Aust & N.Z. J. of Criminology* 77.
[8] 7 Anne C. 21.
[9] 17 George II C. 39.
[10] 4 *Blackstone Commentaries* 381.
[11] 33 and 34 Vict. C. 23; see also *Corruption of Blood Act* 54 Geo. II C. 145.

> "For when it is . . . clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed."[12]

Though corporeal demise often hastily followed its legal anticipation, the twofold consequences of attainder—forfeiture and corruption of blood—had significant ramifications for both the felon under sentence and his family who would survive him. One such consequence was the denial of the basic right of access to the courts to institute civil proceedings.[13] As already indicated, such a disability was founded upon the twofold notion that the prisoner no longer possessed any rights requiring judicial recognition whilst his status as *civiliter mortuus* denied his capacity as a potential litigant.

After making reference to a number of historical treatises, Yeldham J. concluded that it was unclear whether, upon attainder, a cause of action for unliquidated damages for defamation arising at any stage of the proceedings would be forfeited altogether, or merely held in abeyance pending the felon's pardon or expiry of a commuted sentence.[14] However, in so far as lesser penalties came to be prescribed for many felonies, and apparently did not involve forfeiture of all causes of action, His Honour favoured the latter view that by virtue of the doctrine of corruption of blood, the felon was unable to sustain any suit in any court of justice until pardoned or until the expiration of his sentence.[15] As such, the defendant to an action brought prior to such events having occurred could be protected from judgment by a plea in abatement, rather than a plea in bar.[16] In circumstances such as the instant case, the practical effects of the disability attaching to Dugan were the same irrespective of the varying interpretation of the effect of corruption of blood deriving from attainder for judgment in a capital case.

Though the relevance of Mr Justice Yeldham's decision with respect to the device of attainder obviously will become increasingly academic with the abolition of capital punishment and the resultant decrease in the numbers of persons originally sentenced to death and undergoing sentence, it is perhaps not so remote that the defence will not be raised in future cases for a time to come. Moreover, it is perhaps regrettable that the doctrine of corruption of blood has been revitalized by a modern court in *any* form—irrespective of its increasingly narrow ambit.

Neither corruption of blood nor the broader device of attainder can be properly viewed outside of the penological context in which they arose. The desire of a community to attaint or besmirch the character of a criminal who was sentenced to death for crimes of treason or felony is consistent with a retributive philosophy characterized by the maxim *carcer*

12 Op. cit. 373.
13 Though it appears that a convicted felon will obviously retain the right to sue for habeas corpus. See H. D. Saunders, "Civil Death—a New Look at an Ancient Doctrine" (1970) 11 *William and Mary Law Review* 988, 994.
14 [1976] 1 N.S.W.L.R. 403, 410.
15 Ibid.
16 Ibid. 411.

enim ad continendos homines non ad puniendos haberi debe.[17] The relative novelty of a prison system designed both to punish and rehabilitate, rather than as a mere "holding forum" for persons under sentence of death, introduces an entirely new perspective to the continued utility of traditional modes of social control. The devices of corruption of blood, forefeiture and escheat were essentially founded upon the existence of a close time correllation between civil and corporeal death. As H. D. Saunders has remarked

> "civil death was a practical way of settling the earthly affairs of a convicted felon soon to be executed."[18]

In circumstances where execution is no longer a necessary concomitant of a sentence of death, the coincidence of the various characteristics of the device of attainder with lesser punishments accords a substantive effect to such disabilities which were never contemplated by their original antecedents. As a life sentence is increasingly reduced so as to facilitate the return of a convicted person to society, so is the need more immediate to clearly delineate that individual's rights within the society in which it is hoped he will take a useful part. To the extent that judicial approbation continues to be accorded to devices which have their foundation in an entirely different punishment framework, such actions can only be justified by new policy grounds which are clearly in harmony with modern ideals and realities. In this regard, the desires of a court to avoid endless litigation by prisoners whose primary motivation may not be the ascertainment and enforcement of rights and liabilities, but rather the disruption of prison discipline and morale, may or may not be legitimate.[19] Certainly similar considerations may also influence the courts in their dealings with such persons as apply to the rules relating to vexatious litigants. However, to exclude the whole ambit of litigation in order to afford protection against a proportion of unjustifiable actions would appear to be violative of the very fundamental right of access to the courts to enforce valid rights. Moreover, the early release of many persons originally under sentence of death upon parole or licence clearly invalidates any rationale invoked to exclude all actions because they may be disruptive to the conduct of a total institution. As increasing inroads are made upon the traditional penal model, the need to accord full civil status to those undergoing conditional discharge renders any impediment to such status highly dysfunctional. In so far as total rehabilitation of the offender is the ideal, legal constraints upon such objectives will make their attainment far less likely. It is thus perhaps regrettable that Yeldham J. felt inclined to accord continued operation to a doctrine which has little or no relevance within modern society and which, by virtue of its broad ambit, deals with many situations which were never within its original contemplation.

17 "Prisons exist only in order to keep men, not to punish them", G. Rusche and O. Kirchenheimer, *Punishment and Social Structure* (1939) 62.

18 Op. cit. 990. See also Note: "Civil Death Statutes—Medieval Fiction in a Modern World" (1937) 50 *Harvard L.R.* 968.

19 Similar considerations in somewhat different circumstances may be seen to have motivated the decision of the Court of Appeal in *Goody* v. *Odhams Press Ltd* [1967] 1 Q.B. 333.

2 *Disabilities of Convicted Felons*

If the effluxion of time will serve to render much of the above discussion purely academic in that it relates only to those few persons originally under sentence of death who may wish to sue in the courts, the alternate basis for the decision in *Dugan's* case will continue to have application in a wide variety of situations and will produce a very real conflict with modern penological aims.

In accepting the defendant's submission that a person convicted of *any* felony becomes incapable of bringing suit at law or in equity until he is either pardoned or his term of sentence expires, Yeldham J. effectively excluded all such persons from access to the courts until long after many are returned to the community.[20] As the generic term "felony" now extends to the widest range of criminal activities of varying degrees of severity, it would appear that the class of persons denied access to the courts is similarly broad.[21] Thus, though it would have been sufficient for His Honour to deny Dugan's cause of action by application of the attainder device, the decision's alternate base casts the civil disability net far wider—especially within a penological scheme predicated upon conditional discharge in lieu of, or prior to, the expiry of the sentence of imprisonment.

Though Yeldham J. was content to acknowledge the existence of this apparently well established separate rule of common law which was translated to the colony of New South Wales at its foundation,[22] His Honour took no cognizance of the origins of such a rule or the implications deriving from its application in the 1970s. Clearly, it would appear to owe its existence separate from attainder to a continuing need to inhibit the free exercise of the civil rights of convicted felons who would not be executed for their crime. Equally, it would seem evident that the rule arose in a period when release from penal servitude coincided with the expiry of the sentence so imposed.

To the extent that an integral part of modern punishment theory is the existence of various alternatives either in substitution for, or in combination with, imprisonment, the ramifications of the decision in *Dugan's* case for the success of such programs are indeed significant. When combined with the various other statutory and socially imposed constraints upon offender reintegration, the denial of the fundamental prerogative of a citizen to bring suit for violation of private rights can only help to ensure that the desirable ideal of rehabilitation remains merely that, an ideal. As Kai Erikson has observed

> "deviant behaviour is most likely to occur when the sanctions governing conduct in any given social setting seem contradictory."[23]

To the extent that continuing civil disabilities, of which an inability to sue is perhaps foremost, preclude total participation in community life and

[20] And in the case of persons serving a life sentence, forever.
[21] Moreover, as the crime classification may not truly represent the severity of the offence, the anomalies are heightened.
[22] [1976] 1 N.S.W.L.R. 403, 407.
[23] "Notes on the Sociology of Deviance" in H. Becker (ed.) *The Other Side* (1964) 9.

in the exercise of individual rights with respect thereto, it is likely that the ex-offender will be unable to accept a scheme in which he remains in a prison without bars. It has been suggested that the denial of access to community norms necessarily deters full socialization, encourages feelings of resentment and rejection, and may lead directly to recidivist behaviour.[24] Clearly, where a cause of action legitimately resides with an ex-offender against a fellow citizen,[25] the ability of the latter to erect the barrier of the plaintiff's unrelated prior criminal convictions in order to preclude recovery until expiry of sentence would seem to be inequitable in the extreme. To the individual whose disrespect for the law has already been proven, it may be unbearable. Perhaps Dugan's own words give credence to such sentiments

> "N.S.W. has officially bestowed upon me the title of non-person. In effect, I am an animal . . . It also occurred to me that most of the high and mighty who sit on the Judiciary (Sic.) are fond of quoting the claim that they are proud to be administering British Justice. Makes you laugh, a sour laugh. Are they really proud?"[26]

One can perhaps only speculate upon the reaction of an individual upon conditional discharge whose future is perhaps not so "secured" as the plaintiff in the instant case.

3 *Conclusion*

The decision in *Dugan's* case highlights the legacies of the wholesale translation of English penological principles which no longer have relevance within modern society, which serve only to inhibit the attainment of contemporary sentencing objectives, and which must invariably downgrade the system of justice in the eyes of the individual with whom it has already come in conflict. Though Yeldham J. may have felt constrained by particular principles in question in the case before him, it would seem that there is no good reason for the legislature to allow such a situation to continue. Rather, a thorough review of the whole range of civil disabilities which continue to impose a double punishment upon various offender categories should take place having regard to modern realities and social expectations. It will only be then that the court system will be restored to a position where it can be seen to be dispensing even-handed justice between the parties who come before it.

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[24] E.g. J. M. Reinhardt, "The Discharged Prisoner and the Community" (1957) 21, 2 *Fed. Probation* 47. See also the judicial recognition of this fact in the United States, *Carafas* v. *La Vallee* 391 U.S. 234 (1968).

[25] For example, an action arising out of a motor traffic accident, contract or seemingly the whole range of civil suits.

[26] Reprinted in (1976) 1/4 *Alternative Criminology Journal* 4.

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