CASE notes

MARK THOMAS, QLD

Misfeasance by prosecutors

Tahche v Sammia Abboud & Ors [2002] VSC 42

The plaintiff had been convicted and imprisoned on a charge of rape, with the conviction subsequently quashed on appeal. He had brought an action against a range of defendants, alleging misfeasance in public office by the fifth and sixth defendants. These were, respectively, a solicitor employed in the Office of the Director of Public Prosecutions (Vic) (DPP) and a member of the private Bar of Victoria briefed to prosecute.

The particulars of the misfeasance were that both defendants had been aware of evidence favourable to the accused, but had failed to disclose its existence to the accused prior to trial, thereby inhibiting his defence, and occasioning a wrongful conviction.

The fifth and sixth defendants had sought to have the statement of claim struck out so far as it referred to them, arguing:

- they were not holders of public office;
- that while they owed duties related to the discharge of their functions, such duties were not owed to the plaintiff or the public, but to the court; and
- that they enjoyed the immunity conferred on practitioners where the alleged tortious conduct had an intimate connection to the carriage of a trial – *Gianarelli v Wraith*[1].

Mark Thomas is an Associate Lecturer at the Faculty of Law, Queensland University of Technology
PHONE 07 3864 5199
EMAIL m.thomas@qut.edu.au

The trial judge, Smith J, held that both defendants were holders of public office, owing duties capable of enlivening misfeasance, and were not covered by the immunity.

Holder of public office

The fifth and sixth defendants argued that the tort required that they occupy an identified office, to which specific powers attached, and that it was only in respect of those specific powers that misfeasance could apply. It was submitted that DPP staff and counsel appeared as agents of the Director, and were thus not exercising any powers of their own.

Smith J considered that the concept of pubic office was traditionally seen by the courts in broader terms (citing, for example, Best CJ in *Henly v Mayor of Lyme*[2]: 'if a man takes a reward for the discharge of a pubic duty ... that instant he becomes a public officer').

The appropriate test was to examine the nature of the powers exercised by the person (and whether a duty was owed to the public in their discharge), rather than the nature of any office held or the duties which attached specifically to it. It was, for example, no bar to the characterisation as a public office that a person was a member of the private bar – for the (limited) period a barrister was retained for the purposes of prosecution, he or she might readily hold a public office.

The nature of the duties owed by the defendants

The duty alleged was to disclose relevant information as a subset of the duty to ensure a fair trial. The position of prosecutors differed from that of adversaries in a civil action. While the breach of such duty could not, in itself, give rise to a cause of action, Smith J accepted that such breach could form the basis for an action in misfeasance, citing *Grimwade v Victoria*[3] and English decisions which bolstered the view that an action might lie for the malicious or knowing abuse of prosecutorial powers. The duty was owed to the community, and to the accused as a member of the community.

Immunity from suit

Smith J approached the question of immunity from a starting point in *Ginanarelli v Wraith*, locating the immunity in the protection of the administration of justice, rather than the barrister. His Honour referred to Mason CJ's observation (citing McTiernan J in *Cabassi v Vila*[4]) that the immunity was not confined to negligence or defamation, but considered that the policy arguments differed in their application to misfeasance, as opposed to negligence. Of considerable concern was the possibility that the court might be seen to condone deliberate or reckless failure to disclose relevant material by its own officers. PL

Footnotes:

1 [1988] 165 CLR 543.
2 [1828] 130 ER 995; [1828] 5 Bing 91.
3 [1997] Aust Torts Rep 81-422.
4 [1940] 64 CLR 130.