27/02; [2002] VSC 377

SUPREME COURT OF VICTORIA

BERLYN v BROUSKOS

Nettle J

30 August, 9 September 2002 — (2002) 134 A Crim R 111

CRIMINAL LAW – STALKING – COURSE OF CONDUCT – MEANING OF – WHETHER CONDUCT MUST BE PROTRACTED OR OCCUR ON MORE THAN ONE SEPARATE OCCASION – EVIDENCE OF VICTIM THAT DOORBELL RUNG THREE TIMES IN SHORT SPACE OF TIME – DENIAL BY DEFENDANT THAT HE RANG DOORBELL ON FIRST TWO OCCASIONS – INFERENCE TO BE DRAWN – REASONABLE ALTERNATIVE HYPOTHESIS CONSISTENT WITH INNOCENCE – STALKING CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S21A.

After consuming a quantity of intoxicating liquor and smoking a marijuana cigarette, B. wrote out a note with amorous intent addressed to a lady who lived about 100 metres from B., placed the letter in the lady's screen door and rang the doorbell two or three times before returning to his house. B. was apprehended and charged with stalking, wilful and obscene exposure and using cannabis. At the hearing, the victim gave evidence that she heard her doorbell ring at 5.25am again at 5.28am and again at about 6.03am. On the third occasion she looked through her bedroom window and saw a naked man with an erect penis wearing only a hat. She noticed some time later that the letter written by B. had been left on her front door. In his defence, B. denied that he rang the doorbell on the first two occasions but admitted the third occasion. The magistrate found the stalking charge proved. Upon appeal—

HELD: Appeal allowed.

1. The proper construction of the statutory definition of "stalking" is a question of law. The essence of stalking as defined by s21A of the *Crimes Act* 1958 involves a pattern of conduct evidencing a continuity of purpose. It is readily conceivable that conduct on two separate occasions may not always constitute a pattern of conduct evidencing a continuity of purpose. There must be something more in that the conduct must be engaged in on more than one occasion or it must be protracted.

***Gunes v Pearson* (1996) 89 A Crim R 297, followed.**

2. If B. rang the lady's doorbell on the three occasions and left the letter in the door, it could just possibly be said that the conduct amounted to a pattern of conduct which was either protracted or occurred on more than one occasion and evidenced a continuity of purpose. However, the question is whether it was open to the magistrate to exclude as a reasonable hypothesis the possibility that someone else rang the bell on the first and second occasion. Whilst it was more likely than not that it was B. who rang the doorbell on those two occasions, the possibility that it was someone else was not so unlikely as to be fanciful. Accordingly, it was not possible for the magistrate acting reasonably to exclude as a rational inference the possibility that it was someone other than B. who rang the doorbell on the two earlier occasions.

NETTLE J:

1. This is an appeal pursuant to s92 of the *Magistrates' Court Act* 1989 from a final order of the Magistrates' Court at Broadmeadows made on 4 February 2002.

2. The appeal arises out of events which occurred early in 2001 in respect of which the plaintiff was charged on summons with stalking contrary to s21A of the *Crimes Act* 1958, wilful and obscene exposure contrary to s7(1)(c) of the *Vagrancy Act* 1966, behaving in an indecent manner contrary to s17(1)(d) of the *Summary Offences Act* 1966, using cannabis contrary to s75 of the *Drugs, Poisons and Controlled Substances Act* 1981, and being found in the precincts of a building without lawful excuse contrary to s7(1)(i) of the *Vagrancy Act* 1966.

3. The Magistrate held that he was satisfied that there was sufficient evidence to prove the stalking charge and the charge of behaving in an indecent manner but insufficient evidence to prove the wilful and indecent exposure charge. In his Worship's view there was no evidence that the plaintiff knew that he was being observed on the occasion in question. The charge of smoking cannabis was admitted. The other charge was withdrawn. The Magistrate adjourned the charges of stalking, behaving in an indecent manner and using cannabis until 6 February 2003 without

conviction upon an undertaking on the part of the plaintiff to be of good behaviour during the period of adjournment. This appeal is brought in respect of the stalking charge, because the plaintiff is concerned about the effect which the Magistrate's finding of stalking may have upon the plaintiff's career in future.

The facts

4. At the time of the offences alleged the plaintiff was a young man of 19 years of age who had been working as a waiter in a city hotel, although with aspirations of returning to university to study, and had been living with other young people in a house in Brunswick for a period of some two months. On the night of 27 April 2001, he was emotionally upset due to a strained relationship with his family, and because he had recently broken up with his girlfriend, and perhaps too because he had recently had wisdom teeth extracted and was taking medication related to that procedure. Between dinner time on 27 April 2001 and approximately 2.30am the next morning the plaintiff drank some three-quarters of a bottle of Johnnie Walker Red and smoked at least one and possibly more than one marijuana cigarette. As a consequence he experienced sensations of profound intoxication. As he described the sensations when later interviewed by police, he felt "pretty gone... spastic, pissed. I was off my rocker...".

5. Having reduced himself to that condition, and after all other members of the household had retired to bed, he sat alone in his bedroom in a state of what he described as boredom and with thoughts about everything that had been happening to him. Then, in what he later told police was intended to be a practical joke designed to make himself feel better, he wrote out in hand a letter to the 65 year old lady who he knew lived in a house about 100 metres from his house, but whom he had never met. The letter read as follows:

> "Secret love toy boy. Dear Mrs X, I'm sorry about not addressing you properly. I think it was about 2 months ago I first met you, but as it is, I have forgotten your name and I'm - and I'm quite sure that you have forgotten mine too. (Ha ha.) I have seen you around a couple of times and you have seen me too. I just don't know if what I'm thinking is what you're thinking. Hence the letter. Okay, that's it. I have decided that I'm going to finally put these feelings out in the open so here we go. To put it in the most simplistic terms, you are an incredible hot lady. I can't exactly say what it is about you, but you have this incredible sex appeal and it just gets me going like no other in the past, and it gets stronger and stronger every time I see you. That is one of the main reasons I am writing this because number 1, I need to know if we can very low key start seeing (no strings, sex attached) and see where it goes or number 2, you can just say no and I'll only wave to you sometimes as if nothing happened. For number 1, flick front light 1 and show who I am. For number 2, flick front light twice. You will never be disappointed if you don't create standards to others. Love always, XXX, please turn over. Please call phone[1]. I'll be your toy boy any time, just flick once. If you need to talk to me, I'm not far."

6. According to the interview the plaintiff later gave to police, and according to the evidence which he gave before the Magistrate, at about 6.00am he rose from the bed on which he had been lying and clothed only in white Thai pants and a beanie, and perhaps also slippers, he ran to the lady's home, placed the letter in the screen door and rang the bell two or three times before turning and running back immediately to his own house, without either seeing or hearing the lady.

7. According to the interview which the lady later gave to police, and according to the evidence which she gave before the Magistrate, at approximately 5.25am she heard her doorbell ring, but she did not answer because she assumed that somebody had come to the wrong address. About three minutes later she heard the doorbell ring again, several times, and on that occasion she got up and went to the door, but did not open it, and called out: "Who is it, who is it". But nobody answered. Then, at about 6.03am the lady looked through her bedroom window and saw a naked man with an erect penis wearing only a beret or beanie-type hat. He was standing in front of the garage and then walked to her front door and rang the doorbell. She said that she was very scared and telephoned a friend to come over, and when the friend arrived (which was within a few minutes) the man had gone, but she noticed that the letter had been left on her front door.

The questions for appeal

8. By order of this Court made on 17 May 2002, it was decided that the question of law shown to be raised by the appeal is whether the conduct of the plaintiff found by the Magistrate was capable in law of constituting the offence of stalking under s21A of the *Crimes Act* 1958.

9. By consent, the appeal is taken also to include a question of whether it was open to the Magistrate to find that the plaintiff rang the lady's doorbell at 5.25 and 5.28 as well as on the occasion at around 6.00am to which he admitted.

The offence of stalking

10. Sections 21A(2) and (3) of the *Crimes Act* 1958 define the offence of stalking in the following terms:

> "21A(2) A person (the offender) stalks another person (the victim) if the offender engages in a *course of conduct* which includes any of the following—
> (a) following the victim or any other person;
> (b) telephoning, sending electronic messages to, or otherwise contacting, the victim or any other person;
> (c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;
> (d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);
> (e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
> (f) keeping the victim or any other person under surveillance;
> (g) acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her safety or that of any other person—
> with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person and the course of conduct engaged in actually did have that result.
>
> 21A(3) For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if that offender knows, or in all the particular circumstances that offender ought to have understood, that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result." (Emphasis added.)

11. Mr Colin Lovitt QC has submitted on behalf of the plaintiff that, even if one accepts all of the Magistrate's findings, and thus accepts that it was the plaintiff who rang the lady's doorbell at 5.25 and 5.28 as well as at 6.03am, there was no stalking; for the plaintiff's acts cannot be said to have constituted a course of conduct within the meaning of s21A.

12. "Course of conduct" is not defined in the Act, but it is the subject of some authority. In *Gunes v Pearson*[2] McDonald J held that:

> "...in order for conduct which is 'engaged in' to be a `'course of conduct', the relevant conduct must be conduct which is protracted or which is engaged in on more than one separate occasion."

13. Mr Lovitt prays in aid that formulation and submits that on any reasonable view the acts alleged against the plaintiff, which extended only from 5.25 to 6.03am, did not constitute protracted conduct and were not engaged in on more than one separate occasion. In Mr Lovitt's submission the three times of 5.25, 5.28 and 6.03am would constitute but one occasion, because of the minimal separation between them.

14. Mr Trapnell, who appeared for the defendant, submits otherwise. He contends that, contrary to what was said in *Gunes*, conduct need not be protracted or occur on more than one occasion in order to constitute stalking. In his submission any sequence of events, no matter how close in point of time each event is to the other, may be capable of constituting a course of conduct if the events are made to occur with the intention which is proscribed by s21A(2) or occur in the circumstances prescribed by s21A(3). Thus in Mr Trapnell's submission, the events of 5.25, 5.28 and 6.03am are well able to be conceived of as constituting a course of conduct, even if they together comprise but one occasion. The inference is plain, he says, that each was made to occur with the relevant intent or in circumstances which attract the operation of s21A(3).

15. At one level there is something to be said for Mr Trapnell's proposition that one occasion may suffice. The Victorian stalking legislation was enacted after and with an eye to stalking legislation already enacted in Queensland, Northern Territory, South Australia and New South Wales[3] and, whereas most of those other States and Territories defined stalking in terms of conduct on at least two separate occasions, textual differences between the Victorian legislation

and the other States' and Territories' legislation may suggest an intention in Victoria to eschew the requirement of more than one occasion.

16. Section 359A of the Queensland Criminal Code as first enacted defined stalking in terms of a "course of conduct involving doing a concerning act *on at least 2 separate occasions*". Section 189 of the Northern Territory Criminal Code defined stalking in terms of a person who "*on at least 2 separate occasions*" did any of a number of prescribed things with a prescribed intent. Section 19AA of the South Australia Criminal Code was in substantially identical terms to the Northern Territory legislation. Section 562A(1) of the *Crimes Act* 1900 (NSW) defined stalking simply as "the following of a person about or the watching or frequenting of the vicinity of or an approach to a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity".

17. The fact that the Victorian legislation refers only to a "course of conduct", rather than to "two separate occasions", as in Northern Territory and South Australia, or to "a course of conduct... involving at least 2 separate occasions", as in Queensland, may suggest an intention on the part of the Victorian Parliament to avoid the requirement of two separate occasions and, like New South Wales, to make any prescribed act be enough to amount to stalking (if committed with the requisite intent or effect)[4].

18. At one level there is also something to be said for Mr Trapnell's proposition that conduct need not be protracted. For just as the Victorian stalking legislation was enacted after and with a view to other States' and Territories' stalking legislation, that other legislation had in turn been enacted after and with a view to stalking legislation enacted in various States of the United States of America, beginning with California in 1990, which conceived of a course of conduct as including a series of acts over a period of time, *however short*, evidencing a continuity of purpose[5].

19. That is not to say that the American model of stalking created an offence of stalking capable of being committed by acts on only one occasion. Under the American model it was an essential element of the offence that the accused have wilfully, maliciously and *repeatedly* followed or harassed the victim. It is to say, however, that in defining the concept of harassment, each of the American States employed the idea of a "course of conduct" and defined it in terms of a series of acts over a period of time *however short*; and then provided separately for the requirement of repetition (a little like s359A of the Queensland Criminal Code).

20. Thus in the California Penal Code, which apparently served as the model for other American States' legislation[6], "Course of conduct" was defined as:

> "a pattern of conduct composed of a series of acts over a period of time however short, evidencing a continuity of purpose and the essential elements of the offence were separately defined as wilful, malicious and repeated harassment (which in turn was defined in terms of a knowing and wilful course of conduct)."

21. The textual differences between the American model and the various Australian States' provisions are significant. But the similarities are striking. To take s359A of the Queensland Criminal Code as an example, being the first Australian provision and from which most of s21A of the *Crimes Act* appears to have been copied, it seems likely that the expression "course of conduct" in the Queensland Code was intended to have a meaning similar to that given to it in the Californian Code, and it may also be supposed that the Queensland requirement of acts "on at least 2 separate occasions" was intended to correspond with the Californian requirement of repeated acts of harassment.

22. So, in the form in which the Queensland provision first appeared[7], it prohibited a person engaging in a pattern of conduct composed of a series of proscribed acts over a period of time, however short, provided they occurred on at least two separate occasions, if they evidenced a continuity of purpose and were committed with proscribed intent (or in other specified circumstances)[8]. That is to be contrasted with the position under s21A of the *Crimes Act* 1958, assuming that "course of conduct" in s21A was intended to have the same meaning as it had in s359A of the Queensland Criminal Code, and assuming that the absence from s21A of an express requirement of "2 separate occasions" was intended to mean that at least one occasion would suffice. Making those assumptions, s21A would prohibit a person engaging in a pattern of

conduct composed of a series of proscribed acts over a period of time, however short, and whether constituted of one or more occasion, if the acts committed evidenced a continuity of purpose and were committed with proscribed intent (or in specified circumstances).

23. Some further support for that view may perhaps be found in the law relating to industrial relations where it has been held that a "course of conduct" within the meaning of s119(1A) of the *Conciliation and Arbitration Act* 1904 (Cth) may consist of acts occurring very closely in point of time and even contemporaneously[9] (although the context and purpose of s119(1A) is very different to s21A of the *Crimes Act*).

24. All that having been said, however, I consider that *Gunes* was correctly decided. The essence of stalking under the American model, and thus I think an essential element of stalking as defined by s21A of the *Crimes Act*, is a course of conduct of the kind prescribed in the California Penal Code[10]. And for the reasons already given that means that there must be a pattern of conduct evidencing a continuity of purpose[11]. Indeed, for those reasons, s21A is in some respects more limited than the legislation in other Australian States, which speaks only in terms of proscribed conduct on at least two occasions, or on one, as in New South Wales, without the requirement of a course of conduct evidencing a continuity of purpose. It is readily conceivable that conduct on two separate occasions may not always constitute a pattern of conduct evidencing a continuity of purpose and it is unlikely that conduct on only one occasion could constitute a pattern of conduct evidencing a continuity of purpose, unless the conduct were protracted. In order to constitute a pattern of conduct there must be something more, and I think with respect that McDonald J was correct when his Honour said in *Gunes*, in effect, that the something more is that the conduct must be engaged in on more than one occasion, or it must be protracted.

25. That is not to suggest that proscribed conduct which is engaged in on more than one occasion or which is protracted will necessarily constitute a course of conduct evidencing a continuity of purpose. It may not, and I do not take McDonald J to have suggested otherwise. Something additional about the conduct or the surrounding circumstances will need to be shown before it can be said of the conduct that it amounts to a pattern of conduct evidencing a continuity of purpose. But I think that for all intents and purposes, it will not be open to say of conduct that it amounts to a course of conduct unless it is engaged in on more than one occasion or unless it is protracted; whatever else may need to be shown.

Did the plaintiff's conduct (as found) amount to stalking?

26. The proper construction of the statutory definition of "stalking" is a question of law. But once having construed the definition, the question of whether conduct comes within the definition of stalking is a question of fact: cf. *S v Crimes Compensation Tribunal*[12]. If it were for me to decide that question of fact in this case, I would be inclined to hold that the plaintiff's conduct did not amount to "stalking". I have great difficulty in seeing that the plaintiff's conduct constituted a pattern of conduct of the type which I think is proscribed by s21A of the *Crimes Act*, whatever other offences it may have amounted to. And given his apparent degree of intoxication, I have difficulty in seeing that he was capable of forming the necessary intent (although I recognise that s21A(3) may be the answer to that). But the question on this appeal is not how I would decide. The question is whether it was open to the Magistrate to decide the question of fact as he did. And on the facts as found, I think that it may have been open to him to do so.

27. That is to say, if the plaintiff did write the letter to the lady at approximately 2.30am in the morning, as he said he did as a practical joke, and if the plaintiff did go and ring the lady's doorbell at 5.25 and 5.28am (which he denied), and if the plaintiff also went naked (except for a beanie) and rang the lady's doorbell again at 6.03am and left the letter in the screen door for the lady (which in essential respects other than the nakedness he admitted), I consider that it could just possibly be said of the conduct as described that it amounted to a pattern of conduct which was either protracted or occurred on more than one occasion and evidenced a continuity of purpose, including entering or loitering outside the lady's place of residence (s21A(2)(c)); leaving offensive material where it would be found by the lady (s21A(2)(e)); and acting otherwise (by reason of the plaintiff's nakedness) in a way that could reasonably be expected to arouse apprehension or fear in the lady (s21A(2)(g)), in circumstances where the plaintiff ought to have understood that engaging in a course of conduct of that kind would arouse apprehension or fear (as in fact it did) (s21A(3)).

Was it open to find that the plaintiff rang at 5.25 and 5.28?

28. The foregoing assumes the facts as found[13]. It is to be observed, however, that on the facts as presented there was no direct evidence of the purpose or intent with which the plaintiff was said to have gone to the lady's home and rung the lady's doorbell at 5.25 and 5.28am. That is significant because, if the plaintiff had gone and rung the bell at 5.25 and 5.28 am for an innocent purpose, divorced from the visit of 6.03am, I do not think that one could say that the plaintiff had engaged in a course of conduct of the kind proscribed.

29. If it is accepted that there was evidence that the plaintiff had gone and rung the bell at 5.25 and 5.28am, then, in the absence of any innocent explanation, it was open to infer from the other facts that the visits at 5.25 and 5.28am were informed by the same purpose as the visit of 6.03am. But if there were no evidence or evidence from which it could be inferred that the plaintiff went and rang the bell at 5.25 and 5.28am, there would equally be no evidence or evidence from which to infer the plaintiff's intent at those times.

30. The question of whether there is any evidence of facts and the question of whether a particular inference can be drawn from facts are both questions of law: *Australian Broadcasting Tribunal v Bond*[14]. To make a finding of fact or to draw an inference in the absence of evidence is equally an error of law: *Sinclair v Maryborough Mining Warden*[15]. There is, however, no error of law in making a wrong finding of fact or drawing an illogical inference, if the finding or inference is reasonably open: *Bond*, ibid. And "reasonably" in this context means no more than a rational tribunal of fact acting according to law as opposed to an irrational tribunal acting arbitrarily: *S v Crimes Compensation Tribunal*[16].

31. On the facts as found, the plaintiff is known to have written the letter at 2.30am and to have gone to the lady's house with amorous intent at 6.03am. Given the close proximity of the plaintiff's house to the lady's house, and the time of day at which the events occurred, it is a reasonable inference that it was the plaintiff who rang the lady's doorbell at 5.25 and 5.28am. Hence, if this were a civil matter, I do not consider that it would be possible to say that the Magistrate had erred in inferring that the plaintiff rang the doorbell on each of the three occasions in question.

32. To those observations, however, there must be added the consideration that whereas when satisfaction on the civil standard of proof depends on inference, it is enough that there is something more than mere conjecture, guesswork, or surmise to prefer one competing inference over another, under the criminal standard of proof the facts must be such as to exclude any reasonable hypothesis consistent with innocence: *Transport Industries Insurance Co Ltd v Longmuir*[17]. That is why it is that a jury may be directed to acquit if the circumstances in their view are susceptible of a reasonably possible explanation consistent with innocence: *Peacock v R*[18]*; Barca v R*[19]*; Cross on Evidence, Australian Edition*[20].

33. In the result, the question on this part of the appeal becomes one not so much of whether there was evidence from which to draw an inference that the plaintiff rang the doorbell at 5.25 and 5.28am, but whether it was open to the Magistrate to exclude as a reasonable hypothesis the possibility that someone else rang the bell on those occasions[21].

34. In my view it was not open to the Magistrate to exclude that as a reasonable hypothesis.

35. Given the other facts of the matter, I accept that it may be more likely than not that it was the plaintiff that rang the doorbell at 5.25 and 5.28am. But the possibility that it was someone else is not so unlikely as to be fanciful. Quite apart from logic and commonsense, the lady said in her examination in chief that she did not answer the bell on the first occasion, because she thought that someone had come to the wrong house by mistake. Plainly, the possibility that it was someone other than the plaintiff did not seem to strike her as remarkable. And her reaction was informed by first hand experience of the neighbourhood.

36. Moreover, and more importantly, in order to exclude the possibility that it was someone else it was necessary to be able to say that, according to the common course of human affairs, the degree of probability of the facts which were proved being accompanied by the plaintiff ringing the bell at 5.25 and 5.28am were such that the possibility that it was someone else could not reasonably be supposed: *Plomp v R*[22]*; Knight v R*[23]. It my view it must be capable of reasonable

supposition that someone other than the plaintiff rang the doorbell at 5.25 and 5.28am, and hence in my opinion it was not possible for the Magistrate acting reasonably to exclude as a rational inference the possibility that it was someone other than the plaintiff that rang the bell on the two earlier occasions.

Conclusion

37. For that reason, I consider that the appeal must be allowed. I will hear counsel on the form of orders to be made.

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[1] The telephone number given was the plaintiff's mobile telephone number.
[2] (1996) 89 A Crim R 297 at 306.
[3] See the Second Reading Speech, *Hansard* (Assembly) 20 October 1994, at p1384.
[4] Cf. the Western Australian Criminal Code, s338E and the Tasmanian Criminal Code, s192.
[5] The subject is dealt with in a learned and very helpful article entitled *Stalking: Crime of the Nineties?* by Mr Matthew Goode, in (1995) 19 CLJ 21, from which I have taken the information on the American system included in these reasons for judgment.
[6] See *Goode*, *supra* at p25.
[7] It was amended in 1999 to delete reference to a course of conduct and to define stalking in terms of protracted or repeated conduct.
[8] See *R v Hubbuck* [1999] 1 Qd R 314.
[9] See for example *Quinn v Martin* (1977) 31 FLR 35 at 31; *Industrial Relations Bureau v Hassan* [1982] FCA 145; (1982) 62 FLR 169 at 172; *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-7; (1985) 70 ALR 391; (1985) 13 IR 289.
[10] Cf. *DPP v Sutcliffe* [2001] VSC 43 esp. at [87]-[93], per Gillard J; and see Wiener, *Stalking, Criminal Responsibility and the infliction of harm* (1995) 69 LIJ 30 at 32.
[11] Assuming as suggested above the importation of a similar conception of course of conduct to that adopted in the American legislation.
[12] [1998] 1 VR 83, 88-90.
[13] Because of the way in which the Magistrate expressed his reasons, it is not certain that his Worship did find that the plaintiff rang the bell at 5.25 and 5.28am. But it is to be assumed that he did, because counsel for the plaintiff put the submission squarely to the Magistrate that the evidence did not establish that the plaintiff rang the bell at 5.25 and 5.28am and yet the Magistrate ruled that he was satisfied that there was sufficient evidence to prove the stalking charge.
[14] [1990] HCA 33; (1990) 170 CLR 321 at 355-6; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1, per Mason J.
[15] [1975] HCA 17; (1975) 132 CLR 473 at 481; (1975) 5 ALR 513; (1975) 49 ALJR 166; (1975) 34 LGRA 1.
[16] *Supra* at 91.
[17] [1997] 1 VR 125 at 141; (1996) 9 ANZ Insurance Cases 61-385.
[18] [1911] HCA 66; (1911) 13 CLR 619 at 637; 17 ALR 566.
[19] [1975] HCA 42; (1975) 133 CLR 82 at 104; 7 ALR 78; (1975) 50 ALJR 108.
[20] [9035], citing Glass (1981) 55 ALJ 42 at 852-3.
[21] Cf. *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19, *Gunes*, *supra* at 305.
[22] [1963] HCA 44; (1963) 110 CLR 234 at 243; [1964] ALR 267.
[23] [1992] HCA 56; (1992) 175 CLR 495 at 505; (1992) 109 ALR 225; (1992) 66 ALJR 860; 63 A Crim R 166.

APPEARANCES: For the plaintiff Berlyn: Mr CL Lovitt, QC, counsel. Andropoulos & Tabbaa, solicitors. For the defendant Brouskas: Mr DA Trapnell, counsel. Victorian Government Solicitor.
