

56/08; [2008] NSWSC 1292

SUPREME COURT OF NEW SOUTH WALES

McEWEN v SIMMONS & ANOR

Adams J

13 November, 8 December 2008

(2008) 222 FLR 111; (2008) 73 NSWLR 10; (2008) 191 A Crim R 390

CRIMINAL LAW – CHILD PORNOGRAPHY – CARTOON FIGURES MODELLED ON *THE SIMPSONS* – WHETHER THEY DEPICT "A PERSON" – FINDING THAT CHARGES PROVED – WHETHER MAGISTRATE IN ERROR: CRIMINAL CODE ACT 1995 (CTH), S474.19(1)(a)(i); CRIMES ACT 1900 (NSW), S91H(3).

McE. was convicted of offences of possessing child pornography and using his computer to access child pornography material. The Commonwealth legislation related to "material that depicts a person, or representation of a person..." and the NSW State legislation referred to "material that depicts or describes ...". The alleged pornography comprised a series of cartoons depicting figures modelled on members of the TV animated series *The Simpsons*. Sexual acts were depicted as being performed, in particular by the "children" of the family and the male figures had genitalia which was evidently human. The Magistrate rejected the submission made by McE. that the cartoon depictions or representations of fictional characters such as *The Simpsons* were not of "persons". Upon appeal—

HELD: Appeal dismissed.

1. The question was whether a fictional cartoon character was a "person" within the meaning of the statutory offences or to be more precise, was a depiction or representation of such a "person".

2. As with literary works, it is notorious that drawings and other pictorial representations may be and often are of fictional or imaginary characters. Although the primary purpose of the legislation is to combat the direct sexual exploitation and abuse of children that occurs where offensive images of real children in various sexual or sexually suggestive situations are made, it also is calculated to deter production of other material – including cartoons – that, as the explanatory memorandum puts it, can fuel demand for material that does involve the abuse of children. There is no reason to limit the meaning of "person" to mean an actual person. Its full and usual meaning is entirely explicable. The depictions and representations of persons to which the definition refers include a drawing (or, for that matter, a model or sculpture) and, hence a cartoon, of a fictional character.

Holland v R [2005] WASCA 140; (2005) 30 WAR 231; (2005) 222 ALR 694; (2005) 193 FLR 140; (2005) 154 A Crim R 376, considered.

2. A cartoon of fictional figures is capable of depicting a "representation" of a person and hence capable of grounding an offence under the Commonwealth law. There must be at least some semblance of human form: a mere symbol would not be a "representation".

3. In relation to the NSW offence, the Act referred to material which "depicts or describes ... a person...". "Describes" does not comprehend a pictorial representation. The question is whether a cartoon figure can be said to "depict" a "person" and this is a question of fact and degree. A fictional cartoon character, even one which departs from recognizable human forms in some significant respects, may be the depiction of a person within the meaning of the State Act.

4. The Magistrate was correct in determining that, in respect of both the Commonwealth and the New South Wales offences, the word "person" included fictional or imaginary characters and the mere fact that the figure depicted departed from a realistic representation in some respects of a human being did not mean that such a figure was not a "person". The Magistrate concluded that the figures in the relevant material were indeed depictions of persons within the meaning of the definitions. This decision was a question of fact and the Magistrate was not in error on this point.

ADAMS J:

Introduction

1. On 26 February 2008 the plaintiff was convicted in the Parramatta Local Court of the offences of possessing child pornography contrary to s91H(3) of the *Crimes Act* 1900 (the Act) and using his computer to access child pornography material contrary to s474.19(1)(a)(i) of the *Criminal Code Act* 1995 (the Code). The alleged pornography comprised a series of cartoons

depicting figures modelled on members of the television animated series “The Simpsons”. Sexual acts are depicted as being performed, in particular, by the “children” of the family. The male figures have genitalia which is evidently human, as do the mother and the girl. It was accepted, I think, that there it is implied – from the television series – that, insofar as cartoon characters might have ages, the young male is about ten years old, the female about eight years old and a female toddler. Leaving such an implication aside, it would be difficult to assign ages to either the young male or the girl, though the latter appears to me to be pre-pubertal and the former less than eighteen (the Commonwealth offence) and possibly less than sixteen (the State offence). Since the issue in this respect is the *apparent* age, I am sceptical that proof, as it were, of age by reference to another document is relevant. However, this question was raised neither here or below. The question before me is whether a fictional cartoon character is a “person” within the meaning of the statutory offences or, to be more precise, is a depiction or representation of such a “person”. In the course of argument a gloss was placed on this question by Mr Craddock SC for the appellant, who also contended that, where a fictional cartoon figure was in a form that showed it was not or did not represent a human being, it could not be a “person” in the statutory sense. It is not enough that the figure symbolizes or stands for a human being. If I might put this argument in another way, although, in algebra, *n* might stand for any number, it is not a number. A stick figure might stand for or symbolize a person but it does not depict a person.

2. The learned Magistrate rejected the submission made on behalf of the plaintiff that cartoon depictions or representations of fictional characters such as the Simpsons were not of “persons”. In respect of the Commonwealth offence, the plaintiff was convicted and fined \$2000 and entered into a recognisance to be of good behaviour for a period of two years and, in relation to the State offence, he was convicted and fined \$1000 and required to enter into a good behaviour bond for a period of two years. (For all practical purposes, the elements of the offences were identical and, on the face of it, a double punishment was imposed: *Pearce v R* [1998] HCA 57; (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1; (1998) 194 CLR 610 at 623 per McHugh, Hayne and Cullinan JJ. However, this is not the subject of appeal and I say no more about it.)

3. In a number of respects the figures make no pretence of imitating any actual or, for that matter, fictional human beings. In particular, the hands bear only four digits and the faces have eyes, a nose and mouth markedly and deliberately different to those of any possible human being. It might readily be accepted that human personalities are attributed to the figures and that they are metaphors or analogies of human beings or “standing for” human beings. The question, however, is whether a “person” is depicted or represented or, more accurately, whether fictional cartoon characters of the kind here are images capable of being depictions or representations within the statutes. If the answer to that question is in the affirmative then, whether any particular images are such depictions or representations of persons is a matter of degree and thus, subject to the secondary contention to which I have referred, is I think a question of fact.

4. It might be worth stating that, of course, a cartoon is no more than a drawing or pictorial representation. I have used the word “cartoon” because it is the term in which the submissions are cast but I do not think that it has any particular sense different from “drawing”.

5. At the outset it is necessary to appreciate, as I think, that there is fundamental difference in kind between a depiction of an actual person being and the depiction of an imaginary person. The distinction is perhaps made clearer by considering the various depictions in video games and comics of imaginary persons involved in terrible violence, involving the infliction of torture and death. If the persons were real, such depictions could never be permitted. And their creation would constitute crimes at the very highest end of the criminal calendar. Imaginary depictions of that kind are largely (some may consider, unfortunately) taken for granted. They are widely advertised and marketed to young people without compunction or much disapproval. They are permitted only because they are merely imaginary constructions. I am not, of course, suggesting that the laws against child pornography are in any way inappropriate: they are obviously completely necessary. I am simply seeking by a stark example to point out the fundamental difference between depicting real people and imaginary constructions. Real people can, of course, be fictional, in the sense that they adopt or play the role of others than themselves or fictional characters but they are still real people. There was a tendency in the arguments before me to suggest that the distinction is merely one of degree. This is quite wrong. Such an approach would trivialise pornography that

utilised real children and make far too culpable the possession of representations that did not. Of course, the use of the imaginary material to groom children would make its possession more serious.

6. (In respect of the distinction made in the previous paragraph, it is troubling that the learned Magistrate, when sentencing the appellant thought it relevant to consider that, had the images involved real children, a term of imprisonment would have been necessarily imposed. The fact that no children were or could be involved meant that such a comparison, which expressed the difference as a mere matter of degree, it was capable of being seriously misleading. The difference is not a mere matter of degree: in point of culpability the offence is of an altogether different order. There was no evidence that the material was or might be used by the appellant for any criminal purpose.)

7. I would not wish to be misunderstood. I am not suggesting in any way that the Parliament cannot make possession of both kinds of images a criminal offence. However, whether it has done so must, to my mind, be considered in light of the profound distinction I have endeavoured to make.

State Legislation

8. Section 91H(3) of the Act creates the offence of possessing child pornography, carrying a maximum penalty of imprisonment of five years. Child pornography is defined as follows –

“**child pornography** means material that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently under) the age of 16 years:

- (a) engaged in sexual activity, or
- (b) in a sexual context, or
- (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).”

9. Section 4 of the *Crimes Act* provides a definition of “person” as including any society, company or corporation, while s21 of the *Interpretation Act 1987* (NSW) provides –

“In any Act or instrument:

individual means a natural person

person includes an individual, a corporation and a body corporate or politic.”

Commonwealth legislation

10. Section 474.19 of the Code creates the offence, *inter alia*, of using “a carriage service to access [child pornography] material” and provides a maximum penalty of imprisonment for ten years. “Child pornography material” is defined in s473.1 (so far as is relevant) as follows –

“**child pornography material** means:

- (a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
 - (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person, who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;
- and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive ...”

11. Section 22(1) of the *Acts Interpretation Act* (1901) (Cth) provides –

“In any Act, unless the contrary intention appears:

- (a) expressions used to denote persons generally (such as ‘person’, ‘party’, ‘someone’, ‘anyone’, ‘no-one’, ‘one’, ‘another’ and ‘whoever’) include a body politic or corporate as well as an individual:
- (aa) **individual** means a natural person ...”

12. The explanatory memorandum which accompanied the *Crimes Legislation Amendment (Telecommunications Offences and other Measures) Bill* (No 2) 2004 which repealed the Telecommunications Offences in the *Crimes Act 1914* (Cth) and replaced them with new telecommunications offences in the Criminal Code stated as follows –

“Child pornography material is defined to cover a range of material including that which depicts or describes persons under eighteen engaged in the sexual pose or sexual activity, or in the presence of a person who is engaged in a sexual pose or sexual activity. The definition also covers material the dominant characteristic of which depicts for a sexual purpose the sexual organs, the anal region or the breasts (in the case of a female) of a person who is under eighteen. Paragraphs (a) and (b) of the definition deal with ‘depictions’ and are intended to cover all visual images, both still and motion, including representations of children, such as cartoons or animation ...”

13. Section 15AA of the *Acts Interpretation Act* requires that, in interpreting the provision of an Act “a construction that would promote the purpose or object underlying the Act...shall be preferred to a construction that would not promote that purpose or object”. Section 15AB provides that, when the meaning of a provision is “ambiguous or obscure” the court may consider any explanatory memorandum relating to the Bill.

Previous decisions

14. In *Holland v R* [2005] WASCA 140; (2005) 30 WAR 231; (2005) 222 ALR 694; (2005) 193 FLR 140; (2005) 154 A Crim R 376 the Court of Appeal of Western Australia considered the meaning of the words “depict” and “person” used in the *Customs Act* 1901 in s233BAB and defining whether an item is to be taken to be an item of child pornography. It will be such an item “if it is a document...that depicts a person...who is or who appears to be, under sixteen years of age...involved in a sexual pose or in sexual activity...”

15. Malcolm CJ referred to the policy behind the legislation as including “shielding the community from injury and children from exploitation and the prevention of harm” (154 A Crim R at 380). It is clear that the same purpose applies to the Act and the Code. The appellant had imported a book titled “Street Boy Dreams” which was plainly a work of fiction and centred on an adult aged about 35 and his relationship with a fourteen year old boy, another child aged thirteen years and other “boys”, described generally by the Chief Justice as “depicting a boy who is under sixteen years of age and who is involved in sexual activity in a way which is likely to cause offence to a reasonable adult ...”. It was submitted that “person” in s233BAB meant a real person and not a fictitious person or a person who was a character in literary work. Malcolm CJ said (154 A Crim R at 381) –

“In my opinion, it is a notorious fact of which judicial notice could be taken that the word ‘person’ as it is commonly used in everyday speech and language, extends to both real and fictitious persons. As the *New Shorter Oxford Dictionary* itself makes clear, the word ‘person’ includes a person who plays a part in a drama or a character in a play or story. It is clear that the word extends to real, imaginary and fictitious persons.”

16. The other judges, in substance, agreed with the approach of Malcolm CJ on this point, Roberts-Smith JA relying also on the decision of the Supreme Court of Canada in *R v Sharpe* [2001] 1 SCR 45; [2001] SCC 2, to which I will refer shortly.

17. Although Malcolm CJ referred to s22(1) of the *Acts Interpretation Act* (154 A Crim R at 380), his Honour did not discuss its possible impact, concluding, I think, that the meaning of “person” in the context is so notorious that it was unnecessary to refer to the interpretive provision. It seems to me that, implicitly, Malcolm CJ was of the view that a “natural person” includes a fictitious or imaginary person who is intended to be taken for a human being. If I may respectfully say so, this is the conclusion to which I would come for the purposes of considering the meaning of “person” in respect of written material. But this meaning is not derived from the *Interpretation Act*.

18. Aside from the obvious distinction between *Holland* and the situation here that the former deals with a literary work and this case with an image, the characters in *Holland*, it is clear, were fictional *human beings* in every sense. There was no suggestion, as I understand the extracts and the descriptions of the material set out in the judgments, that the characters were not intended to be taken for human beings, albeit not actual human beings. To use the language of the Code, they were depictions of (fictional or imaginary) persons.

19. It is submitted on behalf of the appellant that *Holland* is distinguishable on the grounds that it deals with different legislation and, more significantly, with written and not pictorial representations. As I have foreshadowed, it is also argued that, as distinct from the fictional

characters in *Holland*, the cartoon characters here were plainly not intended to be taken as human beings; rather they comprise a commentary on what human beings are or may be like.

20. I think there is a fundamental difference between the depiction of a person in a written work on the one hand and the depiction of a person in an image. In the former case, if an “image” is produced – and it might not, at least with any clarity – it is produced in the mind. It will make no difference to that image if the writer is attempting to describe a real person or not. The process does not at all require the presence or even the existence of any real person. In that sense, all persons depicted in written works are necessarily imaginary. No person is displayed. They – whether fictional or not – are described in words.

21. There is no equivalent at all between such a description and an image of a particular kind which can be possessed. The very character of a written description is fundamentally different from the character of an image. The former never presents to the eye of the observer the real-life person: it can only present a description. The latter, however, can present a real-life person, even one of course that is playing a role or adopting a character. Of course, a depiction of a “person” can be that of an actual person or a non-person or, as has been said, an imaginary person. As I see it, however, whether “person” can mean an imaginary person in this sense for the purpose of considering an image is a very different question from that asked in respect of a description in a written work. In short, it does not make sense to distinguish, in respect of a written work, between a real and a fictional or imaginary person but, in respect of an image, the distinction is real and fundamental. Whether, of course, the legislation makes the distinction is quite another question.

22. In *Sharpe* the Supreme Court of Canada considered whether banning the possession of child pornography was constitutional or unjustifiably intruded on the constitutional right of Canadians to free expression. The Canadian *Criminal Code* defined child pornography as meaning “a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means...that shows a person who is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity...or...any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act”.

23. So far as “person” is concerned, McLachlin CJC said –

[37] In order to constitute child pornography, a visual representation must show, depict, advocate or counsel sexual activity with a ‘person’. Two issues arise here: (1) does ‘person’ apply only to actual, as opposed to imaginary person; and (2) does it include the person who possesses the material?

[38] The first issue is important because it governs whether the prohibition on possession is confined to representations of actual persons, or whether it extends to drawings from the imagination, cartoons, or computer generated composites. The available evidence suggests that explicit sexual materials can be harmful whether or not they depict actual children. Moreover, with the quality of temporary technology, it can be very difficult to distinguish a ‘real’ person from a computer creation or composite. Interpreting ‘person’ in accordance with Parliament’s purpose of criminalising possession of material that poses a reasoned risk of harm to children, it seems that it should include visual works of the imagination as well as depictions of actual people ...[‘Person’] includes both actual and imaginary human beings.

[39] This definition of ‘child pornography’ catches depictions of imaginary human beings privately created and kept by the creator. Thus, the prohibition extends to visual expressions of thought and imagination, even in the exceedingly private realm of solitary creation and enjoyment...”.

24. The width of potential application of the legislation was relevant to determining whether it might constitute an unjustifiable interference with the right of free expression. Indeed, in this respect, the majority of the Canadian Supreme Court concluded (150 CCC at 370-371) that the prohibition of self-created works of the imagination and self-depictions, intended solely for private use by the creator, “trenches heavily on freedom of expression while adding little to the protection the law provides children” is was not therefore justifiable under the Charter of Rights. This context limits to some extent the applicability of the reasoning to considering the interpretation of Australian legislation, given our rather different legal context.

25. It will be seen, also, that the conclusion about the meaning of “person” did not start from

the view that, in ordinary speech, it comprehended real as well as fictional human beings. Rather, the term was given that wide meaning because of what was perceived as the legislative purpose, this approach being necessary because of the need to consider whether the entrenchment on free expression was justified. Although the legislative purpose is important in the interpretation of Australian legislation, it does not have the same primacy. At the same time, I would accept that the purpose here of the legislation is the same as that in Canada. The Court of Appeal in Western Australia in *Holland* expressed the same view, but their Honours relied, on the more direct approach of considering the ordinary meaning of the word “person” in the context, of course, of written and not pictorial material. Mr Craddock SC submitted that I should not adopt the majority reasoning in *Sharpe* upon the same grounds he relied on to distinguish *Holland* with the additional point that it is a Canadian decision and comity was irrelevant.

“Person” in the Code

26. As with literary works, it is notorious that drawings and other pictorial representations may be and often are of fictional or imaginary characters. Although the primary purpose of the legislation is to combat the direct sexual exploitation and abuse of children that occurs where offensive images of real children in various sexual or sexually suggestive situations are made, it also is calculated to deter production of other material – including cartoons – that, as the explanatory memorandum puts it, can fuel demand for material that does involve the abuse of children. There is no reason, as it seems to me, to limit the meaning of “person” to mean an actual person. Its full and usual meaning is entirely explicable. If it were necessary to do so, I would call in aid the explanatory memorandum but, since I do not consider that the provision is obscure or ambiguous, I have not done so. The depictions and representations of persons to which the definition refers include a drawing (or, for that matter, a model or sculpture) and, hence a cartoon, of a fictional character.

27. This, however, does not entirely dispose of the matter in the present case. Although it is conceded by Mr Craddock SC for the appellant that, for example, a digitally created figure of a human being, even a fictional or imaginary one, would be a “representation...of a person”, he contends that this would not cover a depiction, as here, of cartoon figures which were drawn quite deliberately to demonstrate that they were not human beings, though (as I mentioned) they were obviously intended to be metaphors for or analogies of human beings; to put the argument in another way, the mere fact that the cartoon is *about* human beings (and, hence persons) does not mean that it is a depiction *of* a person or a depiction *of* a representation of a person. In this respect, I am doubtful that any characterisation derived from the television series is relevant. The question is whether what is depicted in the impugned cartoons gives rise to the offences. Whether any particular drawing is a representation of a person must be a question of fact and degree. The representation of human genitalia might, in some cases (such as, I rather think, the present), be decisive. However, as the figure departs from the form of a recognisable human being it may become less like a person and, at some point, not depict or represent a person at all. Merely giving some human traits to say, a rabbit or a duck, may well still leave the image outside the requirement that a “person” be represented, even though the “rabbit” or the “duck” has character traits that are distinctly human and not at all rabbit or duck like. On the other hand, many cartoon characters, though by no means all, are drawn to closely resemble real human beings.

28. Mr Craddock SC submitted that where figures such as pictured here so plainly and deliberately departed from the human form they cannot be persons within the statutory definition. Certainly, he contended, they could not be “natural persons” within the meaning of the definition of “person” in the *Acts Interpretation Act* 1901, accepting that a fictional character could be. However, the distinction sought to be clarified in the *Interpretation Act* is not that between fictional and real persons but between the different kinds of legal entities – namely natural persons on the one hand and bodies corporate of various kinds on the other – who are in law regard as legal persons. The Act is not intended, I think, to define the meaning of “person” for the purpose of s473.1 and cognate provisions of the Code.

29. If I might return to the stick figure analogy. Although it may be that such a figure does not “depict” a person (a matter which I come to later) I think that it can “represent” a person. To use the language of the offence, a picture that uses a stick figure “depicts...a representation of a person” though, for obvious reasons, it will have or is unlikely to have, any indicia of age and thus may be excluded for other reasons. Even a stick figure can depart from a representation of

a human, of course. That then would leave the question whether the departure was such that a person was no longer represented. Accordingly, a cartoon of fictional figures is capable of being depicting a representation of a person and, hence, capable of grounding the offence. I am not using the term “representation” in the algebraic sense that n stands for any number. Thus, I would not accept that a sphere, even if labelled “man” in proximity with another but smaller sphere, labelled “child” could be a “representation” of a “persons” within the meaning of the offence. There must be at least some semblance of human form: a mere symbol would not be a representation.

30. So far as the matter here is concerned, it seems to me that whether it actually “depicts...a representation of a person” is a question of fact and, though there is much to be said for the appellant’s secondary submission, this does not demonstrate that the learned Magistrate erred in law in concluding that the matter was within the offence in the Code.

“Person” in the Act

31. I now come to the State offence. It will be seen that the definition of child pornography as material that “depicts or describes ... a person under (or apparently under) the age of 16 years” is markedly different from the definition in the *Criminal Code* which refers, in addition, to the depiction of a representation of a “person”. “Describes” in its ordinary sense – and I think it must be so interpreted – does not comprehend a pictorial representation. The question, therefore, is whether a cartoon figure can be said to “depict” a “person”, where the image is that of a fictional character that departs intentionally from that of a human being, that is to say, it depicts that which is not a human being. I will not repeat again the arguments earlier summarised that depend upon this distinction but they obviously apply with greater force with respect to this offence than the Code offence.

32. The *New Shorter Oxford English Dictionary* defines “depict” as “portray or represent...” The depiction of a human being by, for example, a drawing is, I think, a depiction within the ordinary meaning of the word and the mere fact that the human being depicted is imaginary or fictional is immaterial. The case made here by the appellant is that fictional cartoon characters either as such or that, in significant respects depart in obvious and intentional ways from realistic representations of human beings in order to distinguish them from even fictional human beings cannot be a “persons”, even though they might “stand for” or symbolize persons and that the Magistrate erred in concluding otherwise.

33. It is submitted by Mr Craddock SC on behalf of the plaintiff, that the definition of “person” in the *Interpretation Act* 1987 as including “an individual, a corporation and a body corporate or politic” effectively excludes, at least, a depiction of a figure that is not intended to be that of a “natural person” or, put another way, a fictional character is not a “natural person” or, where the depiction so far departs from what a natural person looks like (so that it is designed not to depict a natural person), then it is not a depiction of a “natural person” and hence outside the offence. The definition of “person” in the *Interpretation Act*, however, is inclusive and not exclusive. Furthermore, as with the Commonwealth *Interpretation Act*, the distinction to which the definition is directed is not that between actual and fictional persons or depictions intended to show human beings and those which are not, but between the different kinds of legal entities. Insofar as the argument depends on the *Interpretation Act*, it fails.

34. When the State legislation was introduced, the Minister referred to the fact that “those who possess child pornography, though they may not directly harm any child, provide a market for those who produce and disseminate this material”. He referred to the need to provide effective deterrence to eliminate the market “and the impetus to produce child pornography, and to *abuse children in its production...* (italics added)”. He went on to say –

“A depiction or description of a child in a sexual context is a broad category that would cover, for example, situations where a child is depicted in an indecent pose or watching another person engaged in sexual activity. The requirement that the material must, in all the circumstances, be offensive to reasonable persons ensures that innocent family photographs of naked children, for example, will not be captured. The inclusion of material in which a child is a victim of torture, cruelty or physical abuse ensures that abuse which is not purely sexual, but is still offensive, is covered.”

35. This rather suggests that actual children must be the subjects of the depiction. Unlike the explanatory memorandum applicable to the Code, no mention is made of cartoons. The mere

fact that the dictionary definition shows that “depict” in ordinary parlance includes a portrayal or representation, does not answer the question whether the “person” depicted must be an actual as distinct from a fictional person.

36. Mr Craddock SC contends, as I understand him, that whether person in ordinary parlance comprehends a real as well as an imaginary person depends on the context. If I may say so, this is plainly correct. He then argues that the purpose of the legislative prohibition would be served by interpreting “person” as meaning “actual person”. He points out that this is plainly what the Second Reading speech focussed on, with no suggestion that a wider meaning was intended. He relies on the fact that it would have been relatively simple, if it were intended to criminalize the possession of depictions of imaginary persons, to have specifically so provided. It is submitted that, as the word is ambiguous, the presumption against attributing the wider meaning should apply, citing as a recent restatement of the rule, *Einfeld v R* [2008] NSWCCA 215; (2008) 252 ALR 375; (2008) 71 NSWLR 31; (2008) 51 MVR 200; (2008) 189 A Crim R 192.

37. Accepting that the word gains its meaning from its context, that context is the protection of children from sexual exploitation and abuse. “Person” is capable, in its ordinary meaning, of denoting real as well as fictional persons. There is no reason for attributing to it any limited or artificial limit to its usual range, where that range is explicable in the context. Accordingly, although the word has more than one meaning, I do not think that it is ambiguous in its application and thus there is no call for the application of the interpretive presumption relied on.

38. Once it is accepted that the “person” may be fictional or imaginary and may be depicted by a drawing, it follows that a cartoon character might well constitute the depiction of such a person such a “person”. This has the consequence, as I have endeavoured to show that the phrase “depicts a person” covers two fundamentally different situations. However, I have concluded that both of them fall within the statutory definition.

39. As I have said in connection with the Code offence, the drawing must be that of a human being and recognisable as such but no particular human being needs to be depicted and even a substantial departure from realism will not necessarily mean that the depiction is not that of a person in this sense. This is not quite the point made in this regard by Mr Craddock SC, who relies, not merely on the departure from human form, but also on the obvious fact that the departure is intended to distinguish the figures from any possible human being and that any reasonable person would understand this to be so. It is argued, in effect, that the depictions here are not a mere caricatures of persons, but drawings of non-persons. However, this is but to beg the question. Of course, a non-person is not a person but to pose the problem in this way is simply to raise the question, what is a non-person, and the argument is no further advanced.

40. It seems to me that whether a person is indeed depicted by any particular semblance or simulacrum of a human being must be a question of fact and degree. Merely to give human characteristics to, say, a rabbit, a duck or a flower, to use some other familiar images, would not suffice if it were fair to say that the subject of the depiction remained a rabbit, a duck or a flower. A stick figure could not, I think, depict a person – though *vide* the Commonwealth offence – it might well depict a representation of a person. No bright line of inclusion or exclusion can be sensibly described. Of course, because the depiction of a person is an essential element of the offence, it must be proved beyond reasonable doubt. Accordingly, if it were reasonably possible that the depiction is not that of a person, the offence is not proved. It follows that a fictional cartoon character, even one which departs from recognizable human forms in some significant respects, may nevertheless be the depiction of a person within the meaning of the Act.

Conclusion

41. In my view, the Magistrate was correct in determining that, in respect of both the Commonwealth and the New South Wales offences, the word “person” included fictional or imaginary characters and the mere fact that the figure depicted departed from a realistic representation in some respects of a human being did not mean that such a figure was not a “person”. As it happened, the Magistrate concluded that the figures in the relevant material were indeed depictions of persons within the meaning of the definitions. As I have said, this decision was a question of fact and, accordingly, not one for me to consider. However, in light of the arguments pressed on me on behalf of the appellant, I think it is appropriate to say that I do not perceive any error in the reasoning or conclusion of the Magistrate on this point.

42. Accordingly, the appeal must be dismissed. As this is the first case dealing with a difficult

issue, each party will pay its own costs.

APPEARANCES: For the appellant McEwen: Mr G Craddock SC and M Avenell, counsel. Marina Voncina, solicitors. For the respondents Simmons & Anor: C O'Donnell, counsel. M Lagana, Commonwealth DPP.
