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ART AND THE LAW: THE ARCHBISHOP AND THE ART WORK

Pell v Council of Trustees of the National Gallery of Victoria [1998] 2 VR
391

SIOBHÁN RYAN

Twenty years before his own trial for alleged sexual offences, Dr George Pell, the then Catholic Archbishop of Melbourne, was the applicant in *Pell v Council of the Trustees of the National Gallery of Victoria*.¹

In stark contrast to the criminal proceedings which ran for several years over two trials, sentencing and an appeal before resolution in the High Court of Australia,² *Pell v NGV* is a small case. It was an urgent injunction application heard and decided over two days in October 1997 by Justice David Harper in the Supreme Court of Victoria. The Catholic Archdiocese, as usual in those days, was represented by Corrs Chambers Westgarth.³ The Trustees' solicitors were Howie & Maher. Cliff Pannam QC and Jonathan Davis were briefed for the Archbishop. Julian Burnside QC and Laurence Maher were for the Trustees.

The urgency was that the following day the National Gallery of Victoria (NGV) was to open an exhibition of the work of American artist, Andres Serrano, as part of Melbourne's International Festival of the Arts. At issue was a photograph which the presiding judge, Harper J described as showing 'the crucified Christ as if enveloped in a mist which is infused with the colours of a red and gold sunset'. The photograph was titled *Piss Christ*, but the title alone did not prompt the Archbishop's application. Rather, it was

¹ *Pell v Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391 (*Pell v NGV*).

² *DPP v Pell* [2019] VCC 260; *Pell v The Queen* [2019] VSCA 186; *Pell v The Queen* (2020) 268 CLR 123.

³ The Catholic Church was a client of Corr and Corr, later Corrs Chambers Westgarth (Corrs) since the 1960s. In 2022, Corrs dropped the Catholic Church as a client in abuse cases.

the combination of the title and the means of the artwork's creation, which involved photographing a plastic crucifix submerged in the artist's urine.

Dr Pell claimed that *Piss Christ* was 'indecent and obscene' and, as such, its public display would contravene s 17(1)(b) of the *Summary Offences Act 1966* (Vic).⁴ Further, *Piss Christ* was so 'offensive, scurrilous and insulting to the Christian religion that it is beyond the decent limits of legitimate difference of opinion'. Its publication would amount to the common law offence of blasphemous libel. Dr Pell's standing to bring the action rested on his pastoral responsibility for the teaching and guidance of Catholics in the Archdiocese on matters of faith and morals.

For their part, the Trustees defended NGV's right to exhibit *Piss Christ* with evidence from the gallery's director, Dr Timothy Potts, that Serrano's work investigated contemporary spirituality; that *Piss Christ* had already been reproduced in a work by the eminent scholar and art critic Robert Hughes; and that NGV was an institution of the highest standards. The Trustees did not contest that the photograph was offensive, scurrilous and insulting to Christians, but argued that their outrage at the exhibition could be accommodated by staying away.

Justice Harper's evocation of a sunset to describe urine hinted at an aesthete's sensibility, but he eschewed the role of art critic:

It would not merely be presumptuous, but quite wrong, of me to attempt any such thing. It is not relevant to my task, and it would take the court into places in which it has no business to be.⁵

The focus would be on a strict and complete legalism, expressly evoked in Dixonian terms. As to which, there were three issues. First, whether the offence of blasphemous libel was still (or was ever) a part of the laws of Victoria? Secondly, whether the photograph was 'indecent or obscene' as required by s 17(1)(b) of the *Summary Offences Act*? Thirdly, even if the alleged criminal offences were made out, was the civil remedy sought by the Archbishop appropriate?

⁴ Section 17(1)(b) provided that 'Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon ... writes or draws exhibits or displays an indecent or obscene word figure or representation ... shall be guilty of an offence.'

⁵ *Pell v NGV* (1998) 2 VR 391, 392. A similar position was later taken by the Court of Appeal in *Gant v The Queen* [2017] VSCA 104, 29 [116] (Weinberg, Priest and McLeish JJA) which concerned the alleged forgery of works by Brett Whiteley. Finding that the jury verdict was unreasonable and quashing the convictions on the basis of the prosecution's *Browne v Dunne* (1893) 6 R 67 error, the Court of Appeal stressed 'It will be seen that our reasoning in no way depends upon this Court making any affirmative finding that the paintings offered for sale were painted by Brett Whiteley. To be clear, we make no such finding. Nor are we equipped to do so.' On rare occasions, the course of a case requires the Court to come to more definitive views about an artwork: another case involving Mr Peter Gant resulted in the Court declaring that certain works, that he had sold as by Charles Blackman or Robert Dickerson, were 'not works by the hand of those artists and are fakes': *Blackman v Gant* (2010) 27 VR 29.

As to the first issue, Harper J noted that blasphemous libel was a crime in England, citing *Taylor's Case* (1676):

[B]lasphemous words [are] not only an offense to God and religion but a crime against the law, State and government.⁶

and contemporary recognition, by Lord Scarman in *Whitehouse v Lemon* (1979):

The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom.⁷

The difference between English law and Victorian law in this respect will be readily apparent — the separation of Church and State. The colony of Victoria never recognised an established church and s 116 of the *Constitution* forbids the Commonwealth from making any 'law for establishing any religion'. Nonetheless, the possibility of a common law blasphemous libel being prosecuted is explicit in s 469AA of the *Crimes Act 1958* (Vic) and has been acknowledged by Australian courts; for example, in *Ogle v Strickland*⁸, a film censorship case concerning Jean Luc Godard's interpretation of the virgin birth in *Hail Mary*.

As to the second issue, dictionary definitions of the words 'indecent' and 'obscene' suggested lewdness rather than blasphemy. The exercise was further complicated by the fact that any indecency or obscenity was a product of the photograph's title and the viewer's knowledge of its background, rather than the image itself.

In the end, the Court did not make findings on the existence or otherwise of the offence of blasphemous libel, or whether *Piss Christ* was 'indecent or obscene'. Instead, treating the risk of a disturbance of the peace as a matter which the plaintiff had to show, at least to obtain an injunction,⁹ Harper J found that there was no evidence before him that the Serrano exhibition risked breaching the peace or causing civil unrest, so he could not say that a crime would be committed if it went ahead with *Piss Christ* in it. He characterised this as a Catch-22:

If, in these circumstances, I were to grant the relief sought by the plaintiff, I might thereby use the force of the law to prevent that which by the same law is lawful.

⁶ *Taylor's Case* (1679) 1 Vent 293; 86 ER 189.

⁷ *Whitehouse v Lemon* (also known as *R v Lemon*) [1979] AC 617, 658. In that respect, it may be grouped with the common law offence of outraging public decency: *Pusey v The King* (2024) 72 VR 505.

⁸ *Ogle v Strickland* (1987) 13 FCR 306, 317 (Lockhart J). Cf *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 151 [264] (Kirby J).

⁹ There is a fascinating, if unexplored, contrast between this and the rejection in *R v Hardy* [1951] VLR 454 of a not dissimilar argument regarding what the prosecution has to prove to establish a criminal libel: see ch 20 above.

The third issue, by now redundant, followed *Peek v New South Wales Egg Corporation*.¹⁰ The remedy sought was inappropriate because the courts should restrain from granting injunctive relief where the criminal sanctions have not been exhausted.

The Archbishop's application was therefore dismissed.

The next day, on Friday 10 October 1997, *A History of Andres Serrano* opened at the NGV as a pay-to-view exhibition restricted to adults only. On the Saturday, *Piss Christ* was pulled from the wall and kicked in by a 51-year-old man. On the Sunday, it was destroyed altogether by two teenagers wielding a hammer. On the Monday, Dr Potts closed *A History of Andres Serrano* in the interests of staff and public safety.¹¹

The parties to *Pell v NGV* must have watched with astonishment at how the 'breach of the peace' element, which was missing from the evidence earlier in the week, manifested in real life over the weekend. In assessing the prospect of the artwork causing a breach of the peace, the strict and complete legalism applied by the Court had given rise to a detachment from the real world, which was starkly illustrated by the less reasoned responses that followed.

Robert Hughes' writing in *American Visions: The Epic History of Art in America*¹² (the scholarly work referred to in Dr Potts' evidence) and could have served as a warning that trouble follows *Piss Christ*. In the chapter entitled 'The Age of Anxiety', Hughes recounts how in the previous year, the American Congress in Washington had voted to cancel funding for the United States National Endowment of Arts in reaction to its role in the grant that had enabled Andres Serrano to produce *Piss Christ*.¹³

Given the disastrous outcome of the Serrano exhibition, Dr Potts and the Trustees might privately have wished for a different result in Dr Pell's application. In 1997, the NGV's recent history had included a bullet being fired through the Keith Haring mural on the Waterwall in 1984 and the theft of Picasso's *Weeping Woman* in 1986. In the years since, prints of *Piss Christ*, which is a limited-edition photograph, have continued to be exhibited with mixed reception: including at Avignon in France in 2011, where again it was destroyed by a protester taking a hammer to it.

¹⁰ *Peek v New South Wales Egg Corporation* (1986) 6 NSWLR 1, 3 (Kirby P): Courts should restrain from granting injunctive relief where criminal sanctions have not been exhausted (a) because of the special nature and integrity of the criminal process and the desirability of avoiding interference in that process by other courts; (b) if the legislature had intended to provide the facility of injunctive relief it would have done so; and (c) it risks undermining the careful protections, developed over centuries, for the accused in a criminal trial.

¹¹ Rachel Kent, 'The (in)delicate business of art vandalism' *RealTime* 22 December 1997–98, archived at <https://nla.gov.au/tarkine/nla.obj-765658311>

¹² Robert Hughes, *American Visions: The Epic History of Art in America* (Alfred A Knopf, New York, 1997).

¹³ *Ibid* 618–19.

In 2022, Serrano re-created *Piss Christ* as a dynamic video non fungible token or 'NFT'. One of the edition-of-five NFTs sold through Christies auction house that year for US\$52,826.¹⁴ In June 2023, Pope Francis invited Andreas Serrano along with other 200 artists to an event in the Sistine Chapel to celebrate the 50th anniversary of the Vatican's Contemporary Art Collection. Serrano reported that the Pope gave him a 'great, mischievous smile'.¹⁵

Dr Pell was also invited to the Vatican. In 2003, he was appointed by Pope John Paul II to the College of Cardinals.

The Victoria Police investigation known as 'Operation Tethering' was set up in March 2013 to investigate into 'possible unreported crimes committed by Cardinal George Pell'.¹⁶ In May 2018, Cardinal Pell was committed for trial on eight charges relating to child sexual offences allegedly perpetrated on choristers at St Patrick's Cathedral in late 1996 and early 1997 and on children at the Eureka Swimming Pool in Ballarat in the 1970s. The charges were historical and one of the alleged victims had died years earlier.

The Eureka Swimming Pool charges fell away due to evidence issues.¹⁷ The St Patrick's Cathedral charges proceeded to trial in the County Court in August 2018. The prosecution case was that the offending had occurred in the sacristy and in a corridor near the sacristy 'fairly soon' after Sunday solemn Masses. Against this, the defence argued that the alleged offending was impossible because the practices and routines of the Cathedral and the Catholic Church meant that at those times the Archbishop would still have been robed and in the company of, at least, the master of ceremonies and usually other assistants such as priests and altar servers. Cardinal Pell pleaded not guilty. The jury deliberated for five days, was unable to reach a verdict and was discharged. A retrial began in November that year. In December 2018, Cardinal Pell was found guilty of each of the charges. In February 2019, he was remanded in custody, then sentenced on March 13, 2019, to six years' imprisonment with a non-parole period of three years and eight months.

¹⁴ 'It's a piece of history': Andres Serrano transfigures his legendary photograph *Piss Christ* into a new NFT'. *Christie's*, 29 November 2022, <https://www.christies.com/en/stories/andres-serrano-transfigures-piss-christ-into-nft-206ace81c7284ec58cb7b8978f2ec53c>.

¹⁵ Hannah Brockhaus 'Pope Francis addresses artists, including creator of blasphemous crucifix photo' *Catholic Newsagency* 23 June 2023, <https://www.catholicnewsagency.com/news/254648/pope-francis-addresses-artists-including-creator-of-blasphemous-crucifix-photo>; Brian Boucher 'Pope Francis Welcomes Artists — Including Andres Serrano of 'Piss Christ' Fame — in a Ceremony Celebrating the Vatican's Contemporary Art Collection' *Artnet* 27 June 2023, <https://news.artnet.com/art-world/pope-francis-artists-andres-serrano-vatican-2328251>.

¹⁶ Frank Brennan 'Cardinal Pell at the Hands of the Victorian Justice System' *Quadrant* Online, 30 June 2023, <https://quadrant.org.au/magazine/uncategorized/cardinal-pell-at-the-hands-of-the-victorian-justice-system/>.

¹⁷ *Director of Public Prosecutions v George Pell (Evidential Ruling No 1)* [2019] VCC 149.

Cardinal Pell's appeal to the Court of Appeal of the Victorian Supreme Court was dismissed in August 2019.¹⁸ In short, the majority (Ferguson CJ and Maxwell P) found the complainant to be a compelling witness and doubted that the practices and routines of the Archbishop and his assistants at the conclusion of solemn Mass were as unvarying as described by the sacristan and the Cathedral's master of ceremonies (the 'opportunity witnesses'). The dissenting judge (Weinberg JA) expressed significant reservations about the complainant's evidence and found the opportunity witnesses' evidence to be cogent and sufficient to raise reasonable doubt, which the jury ought to have entertained.

Special Leave was sought and granted to appeal to the High Court of Australia. On 7 April 2020, finding that there was 'a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof',¹⁹ the High Court unanimously allowed the appeal and ordered the convictions to be quashed and verdicts of acquittal to be entered in their place.

Cardinal Pell was released from prison and eventually returned to the Vatican. He died at the Salvator Mundi hospital in Rome on 10 January 2023, aged 81 years.

At the time of writing, Andres Serrano remains alive, living in New York, aged 74 years.



¹⁸ *Pell v The Queen* [2019] VSCA 186.

¹⁹ *Pell v The Queen* (2020) 268 CLR 123, 137 [9] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

Selected Case Materials

PELL v COUNCIL OF TRUSTEES OF THE NATIONAL GALLERY OF VICTORIA [1998] 2 VR 391

HARPER J

8, 9 October 1997

Criminal law — Blasphemous libel — Indecent or obscene figure — Photograph — Injunction — Whether art gallery should be restrained from exhibiting photograph — Summary Offences Act 1966 (Vic) s 17(1)(b).

The National Gallery of Victoria intended to open a public exhibition of the work of international artist, Andres Serrano, on 10 October 1997. The exhibition was to include a controversial photograph entitled 'Piss Christ' which depicted a crucifix immersed in urine. The Catholic Archbishop of Melbourne sought an injunction restraining the gallery from publicly exhibiting the photograph.

The Archbishop claimed that the public display of the work would constitute:

- (a) the exhibiting or display of an indecent or obscene figure or representation contrary to the provisions of s 17(1)(b) of the *Summary Offences Act 1966*; and
- (b) the common law misdemeanour of publishing a blasphemous libel.

Held, dismissing the application:

- (1) In the absence of evidence of civil unrest following or likely to follow the showing of the photograph, it could not be concluded that its exhibition would constitute a blasphemous libel, if that crime still existed in Victoria.
- (2) Nor could it be concluded with certainty that the photograph was indecent or obscene, and that its exhibition would contravene s 17(1)(b) of the *Summary Offences Act 1966*.
- (3) Injunctive relief was not appropriate in circumstances where the legislature or common law provided criminal sanctions which had not been exhausted.

Peek v New South Wales Egg Corporation (1986) 6 NSWLR 1 referred to.

Application

This was an application for an injunction restraining the defendant from publicly exhibiting a photograph.

C L Pannam QC and *J B Davis* for the applicant.

J W K Burnside QC and *L W Maher* for the respondent.

Harper J.

Andres Serrano is an artist of international significance. A public exhibition of his work is to open tomorrow, Friday, 10 October 1997, in the National Gallery of Victoria, as part of the Melbourne Festival. The gallery proposes to include in the exhibition a photograph created by the artist in 1987. It depicts a crucifix. A reproduction is in evidence in the proceeding before me. It shows the crucified Christ as if enveloped in a mist which is infused with the colours of a red and gold sunset. Of itself, it is not only inoffensive, but might be thought to be a reverent treatment of a sacred symbol of the Christian Church, membership of which is claimed by the artist himself.

The work has nevertheless created much controversy. This is entirely understandable. The title 'Piss Christ' provides one reason why. The account

of its creation provides another. The crucifix was, according to the artist, immersed in urine when the photograph was taken. In other words, the person who for Christians is the son of God and the founder of their church, is shown immersed in excrement. Mr Serrano is quoted in an article exhibited in the present proceeding as saying, 'It dawned on me that piss would give a nice yellow'. He is also quoted in the same article as saying: 'Urine symbolises waste, but is also a necessary bodily function; and perhaps the urine humanized Christ.'

It is against this background that the Archbishop of the Catholic Archdiocese of Melbourne, the Most Reverend Dr George Pell, has initiated proceedings in this court. He seeks an injunction restraining the Council of Trustees of the gallery from publicly exhibiting the photograph. He claims a particular interest in the matter because he is the chief teacher of, and has pastoral responsibility for the guidance of, all Catholics in the Archdiocese on matters of faith and morals.

He claims, at para 6 of the indorsement on the writ, that:

The public display of the work would constitute:

- (a) the exhibiting or display of an indecent or obscene figure or representation contrary to the provisions of section 17(1)(b) of the *Summary Offences Act 1966*; and
- (b) the common law misdemeanour of publishing a blasphemous libel by reason of the fact that the photograph is so offensive, scurrilous and insulting to the Christian religion that it is beyond the decent limits of legitimate difference of opinion and is calculated to outrage the feelings of sympathisers with or believers in the Christian religion.

The Archbishop's standing to bring this proceeding has not been challenged by the defendant. Nor has the Council of Trustees cast serious doubt on the proposition that the photograph is offensive, scurrilous and insulting at least to a very large number of Christians, including a very large number of Catholics, and has outraged their feelings. It has been argued that this outrage can be accommodated by refusing to attend the exhibition; but that is at best a merely partial answer. The outrage is generated as much by the knowledge that this work is being exhibited, in public, within the Archdiocese, and in a gallery of which this State is very proud, as it is by viewing the picture itself. Affidavits have been sworn by the plaintiff and, in opposition, by the director of the gallery (Dr Timothy Potts). Dr Potts deposes to his belief that Mr Serrano intends in his work to investigate contemporary spirituality. He also deposes to the fact that the photograph is reproduced in (among other publications) a book of undoubted scholarship by an art critic of undoubted eminence: Robert Hughes, *American Visions: The Epic History of Art in America* (1997). In addition to this, the gallery is itself an institution of very high standard.

These observations are relevant. It is necessary to say at once, however, that their relevance is not attributable to any assumption by me of the role of art critic. It would not merely be presumptuous, but quite wrong, of me to attempt any such thing. It is not relevant to my task, and it would take the court into places in which it has no business to be. There is much wisdom, in this context, in the words of Landau J, the Israeli judge who presided over the trial of Adolf Eichmann. The courts, he said, speak with an authority whose very weight depends upon its limitations. No one has made us judges of matters outside

the realm of law. And here the well-known (among lawyers) observation of Sir Owen Dixon, made at his welcome as Chief Justice of the High Court, is particularly apt ((1952) 85 CLR at xiv):

There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.

It is entirely consistent with this that the court treat with the greatest respect the views both of the Archbishop and of the director of the gallery — and of those who speak with sincerity on either side. The court should do no less were the symbol in question sacred to an indigenous, or some other, faith. Indeed, it is arguably desirable that those who organise exhibitions of this kind adopt the same approach.

There can be no doubt that Mr Serrano's work is deeply offensive to many Christians, as well as to many non-Christians who are offended at the offence given to others. The question is whether the court should intervene.

It was submitted on behalf of the Archbishop that it should. The public display of this photograph would, it was submitted, constitute the common law misdemeanour of publishing a blasphemous libel. The court should issue an injunction restraining the Council of Trustees from committing this offence.

In reply, the Council of Trustees argued that blasphemous libel is not now, if it ever was, an offence known to the law of this jurisdiction; and even if such an offence presently exists, it is inappropriate to restrain a threatened breach by use of the civil remedies which the plaintiff seeks to invoke.

It seems clear that the law of England recognises the publication of a blasphemous libel as a crime: *Whitehouse v Lemon* (also known as *R v Lemon*) [1979] AC 617. In his speech in that case, Lord Scarman, at 658, quoted with approval portion of the article by Professor Kenny in (1922) 1 CLJ at 127 where the professor said:

The common law does not interfere with the free expression of bona fide opinion. But it prohibits, and renders punishable as a misdemeanour, the use of coarse and scurrilous ridicule on subjects which are sacred to most people in this country.

At the beginning of his speech in *Lemon's* case, Lord Scarman, after stating that he did not subscribe to the view that the common law offence of blasphemous libel serves no modern purpose, continued at 658:

On the contrary, I think that there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom.

In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt.

To this I add the observation that a plural society such as contemporary Australia operates best where the law need not bother with blasphemous libel because respect across religions and cultures is such that, coupled with an appropriate capacity to absorb the criticisms or even jibes of others, deep offence is neither intended nor taken.

The law in England does not necessarily coincide with the law in Victoria. Blasphemous libel was originally part of the machinery by which the State

protected itself; or rather (since the State saw itself as a secular manifestation of the church, with which it formed one indivisible entity) the law which made blasphemous libel a criminal offence protected the State in protecting the church: *Taylor's Case* (1676) 1 Vent. 293; 86 E.R. 189.

In the report of that case the following appears:

blasphemous words [are] not only an offence to God and religion but a crime against the law, State and government, and therefore punishable in this Court.

I interpolate to say the Court of Kings Bench. The quotation continues:

For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the Laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.

But this unity did not survive the journey to the Australian colonies. Not only has Victoria never recognised an established church, but now s 116 of the Australian Constitution forbids the Commonwealth making any law for establishing any religion.

It may be, as the defendant submits, that the offence of publication of a blasphemous libel has lapsed through desuetude. It does appear that only one prosecution has been instituted in Victoria this century, and that was withdrawn before trial: P Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia*, 2nd ed, (1974), pp 72–3. Nevertheless, if Lord Scarman is right, there may be a place in a pluralist society for retaining the offence — although if Lord Scarman is right, its rebirth as a law protecting much more than the Christian faith would be a necessary part of the new order.

Not only may there be a place in a multicultural society for the offence of blasphemous libel of any recognised faith, but the ancient misdemeanour of that name may have survived transportation to the colonies. Certainly, there is a body of judicial opinion to the effect that it has: see, for example, *Ogle v Strickland* (1987) 13 FCR 306, 317 per Lockhart J.

Moreover, by inserting s 469AA into the *Crimes Act 1958* the Parliament of Victoria recognised the existence, or at least the possibility of the existence, of the offence. That section was introduced by the *Imperial Law Re-enactment Act 1980*, which came into operation on 2 July that year.

There can be no doubt of the existence of the other offence upon which the submissions on behalf of the Archbishop were based. It is, by s 17(1)(b) of the *Summary Offences Act 1966*, forbidden to exhibit or display an indecent or obscene figure or representation in a public place and within the view of any person in that place. The gallery is a public place, and the Council of Trustees intends to exhibit or display the photograph in the gallery for the public (or at least those members of it who are over the age of 18 years) to view. The question, were a charge to be laid in relation to the work, would be whether it was indecent or obscene. These words convey one idea — a failure to meet recognised standards of propriety. Such a failure at the lower end of the scale would amount to an indecency; and at the upper end of the scale would amount to an obscenity: *R v Stanley* [1965] 2 QB 327, 333 per the Lord Chief Justice, Lord Parker.

Each of the words 'indecent' and 'obscene' is associated more with lewdness

than with blasphemy.

[The Court set out definitions from general and legal dictionaries and continued:]

The question whether this photograph is indecent or obscene is, given its religious context, and given that the court must have regard to contemporary standards in a multicultural, partly secular and largely tolerant, if not permissive, society, is not easy. The fact that the indecent or obscene quality of the photograph comes not from the image as such, but from its title and the viewer's knowledge of its background, does not make the task easier.

As Mr Burnside QC, senior counsel for the defendant, points out, difficulties apart from those already mentioned surround the offence of publication of a blasphemous libel. If the offence does exist, what are its ingredients? It is clear enough that in order to amount to a blasphemous libel the matter complained of must raise the risk of a breach of the peace, perhaps general civil unrest: see, for example, the report on Blasphemy of the New South Wales Law Reform Commission, para 2.22 where the following appears:

[B]lasphe my was perceived as a threat to social order and the 'bonds of civil society'. Consequently, under both s 574 [a section which I interpolate to say is of the *Crimes Act New South Wales*] and the common law, the publication also must have the tendency to cause a breach of the peace. There is some debate as to the precise meaning of a 'breach of the peace' in this context. One broad approach includes any public situation in which there is danger to person or property, without necessarily involving general disorder. There is also authority for a narrower concept of liability, however, which would limit blasphemy to publications which cause widespread social unrest.

There is no evidence before me of any unrest of any kind following or likely to follow the showing of the photograph in question.

In these circumstances, I am not in a position to say that a breach of the criminal law would be committed were the work to form part of the Serrano exhibition. If, in these circumstances, I were to grant the relief sought by the plaintiff, I might thereby use the force of the law to prevent that which, by the same law, is lawful. This consideration, it seems to me, is decisive against the plaintiff.

But I am also mindful of the reasons why the civil courts have thought it proper to exercise restraint in providing injunctive relief where the legislature or the common law provide criminal sanctions which have not been exhausted. Several of those reasons apply in the present circumstances. I adopt the words of Kirby P in *Peek v New South Wales Egg Corporation* (1986) 6 NSWLR 1, 3.

...

The application is therefore dismissed.

...

Solicitors for the applicant: *Corrs Chambers Westgarth*.

Solicitors for the respondent: *Howie & Maher*.

M H WHITTEN