No. 31 of 1985

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT
OF NEW SOUTH WALES COURT OF APPEAL
IN PROCEEDINGS 102 OF 1983

BETWEEN:

REGINALD AUSTIN
Appellant (Plaintiff)

AND:

MIRROR NEWSPAPERS LIMITED
Respondent (Defendant)

CASE FOR THE APPELLANT

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Respondent (Defendant)

CASE FOR THE APPELLANT

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1. This is an appeal as of right from a judgment of the Supreme Court of New South Wales [Court of Appeal Division] given on 23 August 1984. By that judgment the Court dismissed with costs an appeal by the Plaintiff, Reginald Austin ["the Appellant"] in a defamation action in which he sued Mirror Newspapers Limited ["the Respondent"] for damages in respect of the publication of an article ["the article"] in
p. 317 "The Daily Mirror" newspaper of 27 April 1982. The newspaper had a circulation of about 353,000 copies.

2. Mr. Justice Lusher and a jury tried the action during seven days in March 1983. The jury rejected all the defences left for their consideration and
p. 271 assessed damages at $60,000. However, the Appellant did not obtain judgment: Lusher J. upheld a defence of qualified privilege based on section 22 of the Defamation Act, 1974 "the Act" [copies of which are

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provided with this Case]. His Honour entered judgment for the Respondent and ordered the Appellant to pay the costs of the action.

3. In the Court of Appeal, Glass JA delivered the leading judgment. Samuels JA concurred in it; Mahoney JA merely expressed his agreement with the orders proposed, neither giving any reasons of his own nor expressing his concurrence with the reasons of Glass JA.

4. The Appellant was responsible for the physical training of the Manly-Warringah 1st grade Rugby League football team. The article appeared in a prominent position in a "lift out" or self-contained section of the newspaper dealing with Rugby League. Its author, with the exception of the three headlines "Our Stale Stars", "Coaches pushing too hard" and "Fault", was Ronald Arthur Casey, who was an employee of, and testified for, the Respondent at the trial.

p.156.39 p.318.12 The three headlines were composed by a sub-editor. The article, in photostat and typescript forms, is

pp.312-314 set out in Vol. II of the Record.

5. In New South Wales, the Act operates to qualify or abrogate some of the common law principles in this field of law: see sub-section 4(2).

6. One of the relevant qualifications is that the cause of action for damages arises in respect of the defamatory imputations conveyed by the publication of the matter complained of: see section 9. The Act, however, does not alter the common law concept of what is defamatory.

p.7 7. In compliance with Part 67 Rule 11(2) of the Rules of the Supreme Court, the Appellant's statement of claim, in its finally amended form, alleged that the article in its natural and ordinary meaning made defamatory imputations of him, as follows:-

"(i) That the Plaintiff directed physical conditioning and preparation of the Manly Rugby League Team in such a wrong and incompetent manner that he was unfit to hold the position of trainer.

(ii) That the Plaintiff was an incompetent conditioner of the Manly Rugby League Team."

p.11 8. In its amended defence, the Respondent denied that the article was capable of conveying, or that it did in fact convey, either of the imputations pleaded; it further denied that either of such imputations was capable of being, or was in fact, defamatory of the Appellant.

p.270 9. The jury, in answer to specific questions put to them by the trial judge, found that the article conveyed each of the imputations pleaded by the Appellant and that each of them was defamatory of the Appellant.

10. The Respondent did not seek to justify specifically either of the imputations pleaded by the Appellant.

pp.11-13 It chose instead to raise a defence of "contextual justification" founded upon section 16 of the Act. This defence, which contains several elements, bears a degree of resemblance to the defence provided by section 5 of the Defamation Act, 1952 [U.K.]. In this case it involved [inter alia] the assertion by the Respondent of the substantial truth of an

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imputation [the contextual imputation] inherent in the matter complained of, but different from any imputation(s) pleaded by the Appellant. The contextual imputation pleaded was that the Appellant "directed physical conditioning and preparation of the Manly Rugby League Team in a wrong or incompetent manner". Except to the extent mentioned in para. 21 [infra] it is unnecessary further to consider this

pp. 270-271

defence, because the jury, in answer to a question, negated the substantial truth of the contextual imputation.

p.13.27

11. The Respondent raised a defence of "comment upon proper material for comment" under Division 7 of Part III of the Act, alleging that the comment was the comment of a servant or agent of the Respondent. There was no dispute that Casey was such. The particulars given with respect to this defence specified that the "proper material" for comment consisted of the facts stated in the article.

p.18.20

p.270.36

12. The jury rejected this defence by giving a negative answer to the following question (No. 7):

> "Has the defendant satisfied you that any comment was based on proper material for comment and was the comment of a servant or agent of the defendant?"

The Respondent filed a notice of cross-appeal against this finding but did not pursue the point in the Court of Appeal.

13. The jury also rejected a defence based on section 13 of the Act.

14. Thus the only defence remaining for consideration was one of statutory qualified privilege under

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section 22 of the Act. Lusher J. found in favour of the Respondent on this issue, but did so on a basis which Glass and Samuels JJA held to be wrong. The error consisted in a refusal to be bound by the jury's answer to question No. 7. Contrary to that answer, Lusher J. found that "the greater part of the article consisted of comment ... upon facts which were ... substantially true." Glass and Samuels JJA correctly concluded that the trial judge was not entitled to contradict the jury's verdict in that way. Because his Honour's decision on the defence under section 22 was dependent on the erroneous rejection of the jury's finding, the Court of Appeal had to look at the matter afresh. It is submitted that in doing so their Honours fell into errors which were errors of law because subject to the resolution by the jury of disputed questions of fact, the question whether an occasion is privileged in accordance with section 22 is a question for the Court: see section 23 of the Act.

p.272 et seq.

pp.297-298

15. Section 22 of the Act creates a new defence which had no counterpart in the common law. It relates to the publication of "information", a word for which there is no statutory definition. Here, the article was cast largely in the form of comment; the defamatory imputations found by the jury were expressions of opinion. The trial judge correctly stated that "the greater part of the article consisted of comment". His mistake consisted in his refusal to be bound by the jury's finding, which, as a matter of necessary inference, negated the truth of the

allegations of fact relied upon as supporting the comment. The judgment of the Court of Appeal ignores a submission expressly put during the course of the argument: if the reference in section 22 to "information" includes comment - an assumption that the Appellant disputes - it cannot as a matter of law be "reasonable conduct" within the meaning of paragraph (c) of sub-section 22(1) ("paragraph (c)") to publish defamatory comment which is not defensible as such under Division 7 of Part III of the Act. If the position were otherwise, the various statutory defences of comment would be otiose. By parity of reasoning one would also submit that to publish a report as defined in sub-section 24(1) which is not a "fair" report (see sub-section 24(2)) cannot be "reasonable conduct" within sub-section 22(1). Otherwise the statutory provision dealing with the publication of "fair protected reports" would be unnecessary. A long-standing decision of the Full Court of the Supreme Court of New South Wales in Thom v. Associated Newspapers Limited ((1964) 64 S.R. N.S.W. 376) supports this general approach. This case was cited during the course of argument in the Court of Appeal but is not dealt with in the judgments.

16. It is submitted that the defence based on section 22 fails for other reasons. First, readers of the Respondent's newspaper had no "interest" in any relevant sense in receiving comment on the subject of the Appellant's training methods which is not defensible as such under Division 7 of Part III of

the Act. Insofar as the article contained statements of fact, many of those statements were untrue, and insofar as the Court of Appeal adverted to them, were accepted by that Court as being untrue. These mis-statements will be dealt with later in further submissions relating to paragraph (c). The defamatory imputations relied upon by the parties were also untrue. The article did not satisfy the requirements of paragraph (a) of the sub-section, because to do so, "the interest of the recipient must be an interest in knowing a particular fact, and in knowing it not simply as a matter of curiosity, but as a matter of substance apart from its mere quality as news": Barbaro v. John Fairfax & Sons Limited ((1985) 1 NSWLR 30 at p.40). The article does not meet that test.

17. Second, the article did not satisfy requirements of paragraph (b) of sub-section 22(1). Here, "matter" refers to the defamatory imputations conveyed by the article. They must be relevant to the information given by the publisher on the subject in which the recipients have an interest as above defined: Barbaro ((supra) at p.41). Otherwise they are not published "in the course of giving to them information on that subject". Notwithstanding what Hunt J. there said as to the immateriality of the falsity of the imputations to the issue arising under paragraph (b), it is submitted that such falsity may affect the issue in some cases. If one assumes that some readers had the requisite interest in receiving information about the training methods of the Appellant,

the particular defamatory imputations found by the jury are not relevant information, either because of their falsity or because of their source or for both reasons. The section is primarily intended to protect reportage, i.e. the presentation of news: it is not designed to protect the publication in a newspaper of defamatory comments by that newspaper's employees when that comment is indefensible as such.

18. It is not a consequence of the submissions made in paragraphs 16 and 17 that section 22 can never provide a defence for the publication of untrue defamatory imputations. It is submitted that there would be many situations in which one could invoke the section in defence of such publications. For example, the general public might well have a legitimate interest within the meaning of paragraph (a) in knowing that a prominent political figure had publicly made a charge of grave misconduct against a leading political opponent in a context not covered by either a "fair report" defence under section 24 of the Act, or the defences of justification under sections 15 and 16 or the comment defences under Division 7 of Part III. An example would be a statement of that kind made by a Prime Minister in a television interview or press statement. The public would have a legitimate interest in being informed of what the Prime Minister has to say about such an opponent; the information is relevant to that topic, namely, the opponent and his alleged conduct; and it would be reasonable for the publisher to impart the information to the public. In such a case, the status of the alleger and

of the person about whom the allegation is made may attract the operation of the section notwithstanding the objective falsity of the allegations. The position is quite different where an employee of a newspaper makes defamatory comments unsupported by actual facts, either truly stated or sufficiently referred to. Such an employee occupies no public position such as to give rise to a legitimate interest in the widespread dissemination of defamatory imputations emanating from his misinformed mind.

19. To return to the condition imposed by paragraph (c) of sub-section 22(1) ("paragraph (c)"), it is submitted that the question is whether the Respondent's conduct in publishing the defamatory imputations which the jury found the article conveyed was reasonable in the circumstances: Wright v. Australian Broadcasting Commission ((1977) 1 NSWLR 697 per Moffitt P. at pp.700 and 705 and per Reynolds JA at p.711); Morosi v. Mirror Newspapers Ltd. ((1977) 2 NSWLR 748 at p.795). As was pointed out by Moffitt P. in Wright (at p.705), it does not follow, just because it was reasonable to deal with a "broad topic" (here the training methods of conditioners) that it was reasonable to publish the defamatory and false imputations found by the jury. The inquiry as to reasonableness is a purely objective one, subject to the qualification that the conduct of the publisher may generally be held to be unreasonable if his belief in the truth of the defamatory imputations is not established. This qualification, however, is not an inflexible rule: Morosi ((supra) at

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pp.796-797); Barbaro ((supra) at pp.43-45). In this case the trial judge found, and the Court of Appeal accepted, that the writer of the article had an honest belief in the substantial truth of the allegations of fact in it and in the fairness of the comment he had made. This finding was wrong, because there was evidence of the lack of any such belief, and such evidence should have been left to the jury to evaluate: see paras. 26 and 27 [infra]. In any event, the finding does not dispose of the issue arising under paragraph (c). Assuming that the argument advanced in paragraph 15 [supra] does not find favour, it is necessary to examine other relevant circumstances.

20. At this point, it is necessary to return to Morosi for the purpose of gathering from it what the Court of Appeal, in the course of a joint judgment in which it reviewed and applied its earlier decision in Wright, regarded as circumstances relevant to the application of paragraph (c). It is submitted that the following relevant propositions are established by those two cases:-

(i) In the case of a newspaper disseminated to the public at large, the conduct of a publisher in publishing defamatory matter must be reasonable having regard, inter alia, to the width of circulation (Morosi at p. 797).

(ii) Any person publishing defamatory matter should be careful to ensure that it is proper to make the publication (Morosi at p.797).

(iii) Commonly, the satisfaction of the onus that

lies upon a defendant under paragraph (c) would require the publisher to call evidence to establish what care he had taken to establish the truth of the defamatory imputations (Morosi at p. 797).

(iv) The section does not give carte blanche to newspapers to publish defamatory matter because the public has an interest in receiving information on the relevant subject (Morosi at pp. 797 and 798).

(v) Although checking with a source may, in appropriate cases, afford evidence of reasonableness, it will certainly not necessarily establish it (Morosi at p. 798).

(vi) The circumstances that untrue facts were published is material to the question of reasonableness (Morosi at p. 798).

(vii) The closeness or tenuousness, as the case may be, of the connexion between the subject as defined in paragraph (a) and the defamatory imputations is also material to that question (Morosi at p. 796).

(viii) If what was published includes comment, it is relevant to consider whether it was fair and whether it followed logically from facts known or stated (Morosi at p. 796).

p.108.14, p.108.30, p.123.10-14, p.125.23 p.139.38 p.146.37

21. The evidence in this case established the falsity of the two imputations pleaded by the Appellant. The jury's finding negated the truth of the Respondent's contextual imputation, which, while it encapsulated most of the substance of the Appellant's imputations,

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stopped short of asserting that the Appellant was "unfit" to hold the position of trainer: cf. para. 7(i) (supra).

22. The evidence established (and in some instances Mr. Casey conceded in his testimony, as will be indicated by reference to the record) the objective falsity of the following specific allegations in the article:

p.58.13, pp.105.39-106.9, pp.117.44-118.9, p.123.23-30, p.140.10-13

(i) That there was "something radically wrong" with the preparation by the Appellant of the Manly team.

p.59.34, p.103.45, p.106.10-16, p.118.10-13, p.123.31-33, p.137.31-34, p.140.14-19

(ii) That the Appellant had trained the Manly team "into the ground" so as to make its members physically stale.

pp.58.40-59.10

(iii) That the Appellant was "over zealous" and that he had "hoodwinked" the coach [Stanton] as alleged in the article.

p.59.24, p.106.40, p.118.17-25, p.123.34-40, p.140.20-25

(iv) That the Appellant subjected the players to "tortuous conditioning".

p.59.34

(v) That the Appellant had caused the team "to press their bodies to the limit four nights a week".

p.160.27

Mr. Casey admitted that this allegation was incorrect.

p.107.12, p.118.37-41, p.123.41-44, p.146.22-26

(vi) That Manly had "persisted for the past three years with the physical regimentation of its players" by the Appellant.

p.173.20-45

Mr. Casey admitted under cross-examination that he had made an "unreasonable" mistake in asserting that the Appellant had trained the

p.164.24 Manly team during "the past three years" i.e. the 1978, 1979 and 1980 seasons. The

p.49.19-20 p.54.18-20 Appellant had no part in the training of the team during the 1980 season.

p.124.11-12 p.140.39-40 (vii) That since the Appellant had "taken over the conditioning of Manly the records show it has gone from being a great side to being a tattered band of former champions".

p.64.8-11 p.94.10-37 p.107.26-42 p.124.22-26 p.140.43 p.141.22 (viii) That the Appellant had told "an international footballer to do another six 400m. sprints as some kind of penance".

p.165.23 Mr. Casey said in his evidence that he got this statement from an article written in the "Sun Herald" of 26 April 1981 by Dorothy Goodwin. This article was tendered as Exhibit 1: see Record p.320. The Appellant agreed that he was correctly quoted in the article;

p.320 p.94.10-37

p.188.30-45 but as quoted he simply did not say what Mr. Casey attributed to him. It appears that Mr. Casey "assumed" from the article that the Appellant had imposed an extra six 400 metre runs on the players as a penance. The Goodwin article provided no basis for such an assumption.

p.303.28 p.304.1 23. In the Court of Appeal, Glass JA seems to have accepted in substance that all the allegations itemised above were untrue, although his words on that point are not in all respects unequivocal. If he did not, he should have, because the evidence as to untruth was strongly preponderant - indeed all one

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way. His Honour characterised as irrelevant to the determination of the issue arising under paragraph (c) the falsity of the allegations itemised as (ii), (iii), (vi) and (vii). It is submitted that his Honour erred in so doing. Each of these allegations formed part of the ostensibly factual matrix upon which the defamatory imputations were based. Contrary to what his Honour said, they "required to be defended under the section" inasmuch as a decision to the reasonableness of the Respondent's conduct in publishing the defamatory imputations must necessarily depend upon the accuracy or otherwise of the "facts" offered as a basis for those imputations. That those facts may not in themselves be defamatory is beside the point. His Honour accepted that the residue of the allegations itemised above, namely, Nos. (i), (iv), (v) and (viii), had been found by the jury to be untrue and that he was bound by that finding. The eight itemised allegations will be seen on analysis to be the totality of the supposedly factual substratum of the defamatory imputations in the article.

24. Glass JA in his judgment erroneously overlooked the fact, established by the evidence, that no one connected with the Respondent got in touch with the Appellant, or with Dorothy Goodwin, before publishing the article, in order to check the facts. Given the significance of the publisher's duty of care, as emphasised in Morosi (supra), this error serves to vitiate his Honour's conclusion. The evidence disclosed a clear failure to discharge the relevant

p.57.28
p.191.18
p.188.30

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duty of care. In this connexion, the Appellant submits that Wright and Morosi have been regarded as defining the main principles relating to Section 22. In the present case Glass JA recognized the authority of those earlier decisions but failed to apply them adequately. In particular he ignored propositions (i), (ii), (iii), (iv), (v), (vii) and (viii) as set out in paragraph 20 (supra).

p.306.2 25. Glass JA erred in taking into consideration in favour of the Respondent on the issue arising under paragraph (c) the fact that Mr. Casey "was an experienced writer in whom the publisher could repose some confidence". First, there was no evidence that such confidence was reposed. Second, the Respondent is liable for any carelessness (or worse) of the writer of the article and of the sub-editor who contrived the arresting and colourful headlines. The writer's experience is simply an irrelevant factor.

p.318.21-30 26. Another criticism of the judgment of Glass JA is that his Honour overlooked the significance of the Respondent's denial in answer to an interrogatory of any intention to convey the imputation that the Appellant was unfit to hold the position of trainer. This denial has a twofold significance. First, the suggestion in the last paragraph of the article that the Appellant should be "sacked" is as clear an allegation of his unfitness as a trainer as it would be possible to imagine. If one accepts this denial - and the Respondent can hardly contend that it should not be accepted - it must follow that the publication of the article, containing as it did

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such a plain imputation of unfitness, can only be regarded as grossly careless to the point of recklessness and therefore unreasonable conduct for the purposes of paragraph (c). Such a recklessness would also be evidence of malice capable of defeating the defence of qualified privilege.

27. The other aspect of the denial is that it affords evidence of a lack of honest belief by the Defendant in the defamatory imputations asserting unfitness. This is so because the comment in the article was congruent with that imputation and in such a case an established absence of intention to convey the imputation proves that the publisher did not have the opinion expressed in the comment: Illawarra Newspapers Ltd. v. Butler ((1981) 2 NSWLR 502 at p.506); Bickel v. John Fairfax & Sons Ltd. ((1981) 2 NSWLR 474). There was therefore additional evidence of malice fit to be submitted to the jury in rebuttal of the defence under section 22. It was put to the trial judge and to the Court of Appeal that the issue of malice should have been so submitted.

p.306.26

28. It is submitted that this appeal should be allowed, and that judgment should be entered in favour of the Appellant on the jury's findings, for the following

REASONS

A. That the decision of the Court of Appeal on the issue of qualified privilege was wrong.

B. The several reasons submitted in the numbered paragraphs above.

C. That contrary to the argument put by the Respondent to, but not dealt with by, the Court of Appeal, the damages awarded by the jury were not excessive.

29. Alternatively to paragraph 28, it is submitted that if it be held that the publication of the defamatory imputations contained in the article fell within the provisions of section 22 of the Act, there should be a new trial on the ground that the trial judge and the Court of Appeal erred in holding that there was no evidence of malice.

(T.E.F. HUGHES) T.E.F. Hughes

(M.J. NEIL) M.J. Neil