38/85

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)

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# C A S E  F O R  T H E  R E S P O N D E N T

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1. This is an appeal from the judgment of the Supreme Court of New South Wales (Court of Appeal Division) given on 23rd August 1984 ([1984] 2 NSWLR 383). By that judgment the Court dismissed an appeal by the Plaintiff, Mr. Reginald Austin, from the verdict for the Defendant in a defamation action. The verdict appealed from was that of the trial judge (Lusher, J.).

2. The action was tried before Mr. Justice Lusher and a jury of 4 in the Common Law Division of the Supreme Court of New South Wales between 14th March and 22nd March 1983.

3. The Appellant's claim arose from an article published by the Respondent in the edition of its newspaper "The Daily Mirror" of 27th April 1981, the text of which is set out hereunder :

DAILY MIRROR LEAGUE LIFTOUT ... Vol II
LEAGUE LIFTOUT ... 313
314

OUR STALE STARS CASEY'S CORNER

COACHES PUSHING TOO HARD

IT HASN'T been a good year for the big names of rugby league. In fact it has been something of a minor catastrophe the way Parramatta and Manly, along with Balmain, have flopped so badly.

North Sydney's three-try spree to snatch a win over Parramatta and Newtown's steamrollering of Manly emphasises that something is radically wrong with the preparation of major teams with undeniably talented players.

It's easy to blame Ray Ritchie and Jack Gibson or even Frank Stanton, but that would blame only those coaches while perhaps others will suffer the same fate later in the season.

I believe Sydney's top teams are being trained into the ground by over-zealous conditioners who have somehow hoodwinked coaches into believing that on top of a gruelling 80-minute match three nights of tortuous conditioning are also needed.

This means, in effect, Sydney footballers are pressing their bodies to the limit four nights a week.

While that might be acceptable in the boudoir, it is a short cut to physical staleness on the football field.

I've always believed once a man becomes an international he doesn't need to be guided all the time with his preparation for matches.

FAULT

Manly has persisted for the past three years with the physical regimentation of its players by a fitness fanatic named Reg Austin.

From the little I know of Reg he is a magnificient man, and his persecution of his own body has made him the fastest runner in the world for his advanced age.

But since Austin has 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.

Now this has not altogether been Austin's fault.

A certain lack of concentration and over-confidence on the part of players has contributed as much as some unimaginative coaching from Frank Stanton, Allan Thomson and Ray Ritchie.

I question the wisdom of Austin when he tells an international footballer to do another six 400m sprints as some kind of penance.

League stars train very hard before the season starts.

But once they start playing - sometimes once and twice a week - is there a need for such a grinding training program under these whip-driving coaches?

The problem is Reg Austin and company think they are doing the right thing. My advice is to sack them.

4. The author of the article was Mr. Ron Casey. The article was contained in a lift-out section of the newspaper entitled "Daily Mirror League Liftout". The newspaper had a circulation of 348,000 copies. Vol I 156.40 Vol II 317.44

5. The applicable legal principles in New South Wales are those of the common law subject to the qualifications imposed by the Defamation Act 1974 (hereinafter referred to as "the Act"): see section 4(2) of the Act.

6. On 21st March 1983 at the trial the jury gave the following

answers to the specific questions asked of them :

Vol I 270-271 & 294-295

1. Has the plaintiff proved that the matter complained of conveyed the imputations (or any imputations not substantially different from)

(a) 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.

A. Yes.

(b) The plaintiff was an incompetent conditioner of the Manly Rugby League Team.

A. Yes.

2.(a) Was imputation 1(a) defamatory of the plaintiff?

A. Yes.

(b) Was imputation 1(b) defamatory of the plaintiff?

A. Yes.

3. Has the defendant satisfied you that the matter complained of conveyed the imputation (or any imputation not substantially different from)

"That the plaintiff directed physical conditioning and preparation of the Manly Rugby League Team in a wrong or incompetent manner."

A. Yes.

4. Has the defendant satisfied you that the imputation in question 3 is substantially true?

A. No.

5. Has the defendant satisfied you that the plaintiff's reputation was not further injured by:

- imputation 1(a) if you found it to be defamatory in question 2 and/or

- imputation 1(b) if you have found it to be defamatory in question 2 by reason of the imputation found to be true in question 4?

(Question 5 not answered)

6. Has the defendant satisfied you that the circumstances of the publication of the matter complained of were such that the plaintiff defamed was not likely to suffer harm?

A. No.

7. Has the defendant satisfied you that any comment was based upon proper material for such comment and was the comment of a servant or agent of the defendant?

A. No.

8. If you find none of the defences established what damages do you find:

A. $60,000.

Vol I 272-287

7. On 22nd March 1983 the trial judge dealt with the question of qualified privilege pursuant to s. 22 of the Act, found that the defence thereof had been established, and directed the entry of judgment for the Respondent.

8. Before the Court of Appeal, the Appellant contended to the effect of the following :

Vol I 301.22-302.13

(i) That the trial judge was in error in holding that the defence of qualified privilege under ss. 22 and 23 of the Act had been established in that the requisite interest under s.22(1)(a) was lacking, and that the Respondent had failed to establish that its conduct in publishing the matter was reasonable in the circumstances as required by S. 22(1)(c).

Vol I 306.27-306.34

(ii) The trial judge was in error in holding that there was no evidence capable of being considered by the jury on the question of malice.

9. No disputed questions of facts were submitted for determination by the jury with specific reference to the section 22 defence. At the trial, counsel elected to have the judge determine all primary facts, disputed or not, relevant to the several elements of s.22(1).

Vol I 273.19 275.8 280.8

10. Furthermore, on the appeal

"counsel for the parties were in agreement that the defence should not be sent back for trial either as a separate issue or together with other issues. They preferred to have this Court determine whether the defence had been established paying due regard to the jury's findings but deciding all other primary facts for itself as a prelude to determining the ultimate questions raised by S.22".

Vol I 299.25-299.31

11. The subject of qualified privilege is dealt with in Division 4 of the Act. It provides that an occasion is one of qualified privilege if, but only if, it is an occasion of qualified privilege at common law, or the circumstances of the publication afford a defence of qualified privilege under s. 21 or s. 22 (s. 20(1)(c)). The question whether there is such a defence is to be determined by the court and not by the jury (s.23). Furthermore, where (as in this case) a publisher makes a multiple publication of the matter (s.20(1)(a)) the defence is available as regards all the recipients of the information although not all have the requisite interest (S.20(3)).

12. As Glass, JA correctly observed, S.22 provides an occasion of qualified privilege which has no counterpart at common law. If the several elements of S.22(1) are made out, a complete defence for the publication is established. The section was designed to enlarge the protection afforded by the common law principles of

Vol I 300.21

qualified privilege to defamatory publications generally, including newspapers. It substitutes reasonableness in the circumstances for the duty or interest which a defendant must show on its part in order to establish qualified privilege at common law (Morosi v. Mirror Newspapers Ltd. (1977) 2 NSWLR 749 at 797).

13. Information is neither defined nor qualified. Both the trial judge, and Glass, JA, were correct in holding that it includes comment as well as fact. In so finding they followed the decisions of the Court of Appeal in Wright v. Australian Broadcasting Commission (1977) 1 NSWLR 697 at 712 and Morosi v. Mirror Newspapers Ltd. (supra at 796); Gatley: "Libel and Slander" 8th edn. paras 441-446, 694. It follows that for the purposes of this defence whether the information be either in whole or in part fact or comment is irrelevant except to the extent that the manner of expression may be one of a number of circumstances for consideration under S.22(1)(c).

Vol I
274.21
281.15
300.23

14. The matter referred to in s. 22(1)(b) and (c) is the means by which the imputations defamatory of the plaintiff was made. As at common law, the defence under the section assumes that what was published was defamatory and in many cases it will be false s.9(1) of the Act, Wright v. Australian Broadcasting Commission (supra at p.711); Morosi v. Mirror Newspapers Ltd. (supra at p. 796-797); Barbaro v. Amalgamated Television

Services Pty. Ltd. 1985 1 NSWLR 30 at p 41 ).

15. For the purposes of S.22(1)(a) and (b) it was submitted on the appeal on behalf of the Appellant that the subject of the publication could be taken to be the performance of teams in the Rugby League competition and the alleged training methods of conditioners. The submission was not objected to, and was accepted by the court. It is submitted that these subjects were of notoriety in the community at large and that the matters dealt with in the publication complained of were subjects of legitimate interest to the followers of the sport and of the personalities involved in it.

Vol I 301.23-301.29

16. Both the trial judge, and Glass, JA, found that the said subject was a matter of public interest, and that the readers of the information on that subject contained in the article complained of had the requisite interest in that subject. Having regard to the application of S.20(3), it was found that the respondent had established the elements prescribed in S.22(1)(a) and (b). It is submitted that the finding was correct.

Vol I 194.6 277.14 302.13-302.32

Vol I 281.24 302.33-303.5

17. Additionally, the Defendant is required to prove that its conduct in publishing the matter was reasonable in the circumstances (s.22(1)(c)). Relevant matters may include the reasonableness of the Defendant's assertion itself, the care taken by the Defendant before publishing it and the basis for its belief in

Vol I 303.5 305.5

the truth of the assertions, the extent of enquiry made, and the manner and extent of publication.
(Wright v. Australian Broadcasting Commission (supra at p.711-712); Morosi v. Mirror Newspapers Ltd. (supra at p.796-798).

Vol I 287.8

18. The trial judge found that the evidence established the matters relevant to S.22(1)(c). His detailed findings are set out in his judgment. All were open on the evidence. With the exception of the matter the subject of the jury's answer to Question 7, these findings were not challenged by the Appellant before the Court of Appeal. All were matters which the Court of Appeal has held to be relevant
(Wright v. Australian Broadcasting Commission; Morosi v. Mirror Newspapers Ltd.).
The approach of the trial judge was in accordance with the principles laid down by the Court of Appeal. The findings are sufficiently outlined in the next paragraph.

Vol I 305.5-306.9

19. On appeal, Glass, JA referred to the findings of fact relied upon by the Defendant which the trial judge found to be provided, namely :

> "Part of the information on which the article was based had been published in another newspaper the day before. It quoted the Plaintiff as saying in relation to his players "I gave them six 400 metre runs just to round off the session". The Plaintiff

agreed in evidence he had used those words in speaking to the writer of the earlier articles. The Plaintiff was a man in the public eye who had by making such a statement to the reporter voluntarily placed his training techniques into the public domain as a matter for discussion. The author of the article sued upon had an honest belief in the substantial truth of the allegations of fact in it and the fairness of the comment he had made. He was an experienced writer in whom the publisher could repose some confidence".

He correctly expressed the view that the trial judge who saw and heard the witnesses was well placed to make the findings, and he accepted them.

Vol I 306.9

20. In addition, Glass, JA took into account the relevant facts established by the jury, namely :

Vol I 304.13-305.20

(i) The matter published bore the imputation that the Plaintiff was incompetent as a conditioner and unfit to be a trainer;

(ii) The imputation as an allegation of fact was not justifiable as substantially true and as a comment was not based on substantially true facts;

(iii) Specific allegations of fact made in the article: viz

(a) that there was nothing wrong with the team's preparation;

(b) that players were subjected to three nights of tortuous

(sic) conditioning;

(c) that bodies were pressed to the limit four nights a week;

(d) that international players were given extra sprints as a penance

had been specifically shown to be substantially untrue.

21. Having regard to the primary facts established by the jury and those established to his satisfaction, Glass, JA found that the Defendant's conduct in publishing the defamatory matter was in all the circumstances reasonable, and that the defence was made out. His findings were well within the evidence and in accordance with the agreement referred to in paragraph 10 above.

Vol I 306.21-306.26

22. The matter, the publication of which may be defended under s. 22(1), may be an untrue statement of fact or of comment (indefensible as comment under Division 7 of the Act).

As a matter of construction of ss. 20 and 22, proof of the elements of s. 22(1) establish that the occasion of the publication is one to which qualified privilege attaches. It cannot be said that the failure of a defendant to establish an alternative defence of fair comment will necessarily deprive it of a defence of qualified privilege. This is so whether the matter be defended at common law on alternative grounds of qualified privilege and fair comment, or in New South Wales on alternative grounds

of qualified privilege (whether at common law and/or under s. 22) and comment.

23. The jury's answer to Question 7 was the finding that any comment was not based on substantially true facts. Its effect was that the Defendant had failed to establish its alternative defence of comment pursuant to s. 33(1) of the Act. It is wrong to suggest that such findings bound the trial judge, or Glass, JA to determine the question under s. 22(1)(c) against the Defendant.

24. The error of the trial judge lay in his rejection of the jury's answer to Question 7 as a circumstance to be considered in his task of assessment of the Defendant's conduct under the sub-section, and in his regard to his own finding that the publication was mainly comment based on substantially true facts. This error was recognised by Glass, JA. Vol I 299.15-299.23

25. However, pursuant to the agreement referred to in para. 10, Glass, JA proceeded to determine the question under s. 22(1)(c). He did so with due regard to the jury's finding. His process of assessment of the Defendant's conduct under this sub-section was completely correct. Vol I 299.25-299.31

26. In this case, it is submitted that there is nothing to be achieved by seeking to distinguish between a finding that the published statements were untrue defamatory allegations, and that they were

unfair comments. For the purposes of this defence, the nature of each statement is a matter for consideration (along with all others) in determining the overall reasonableness of the publisher's conduct. The defence, of course, protects the publication of all statements contained in the communication under consideration, irrespective of their nature. The protection afforded by the defence, whether at common law or under the section, would be illusory if it were otherwise. (e.g.: Horrocks v. Lowe (1975) AC 135).

27. As to Malice:

Vol I 306.27-307.7

The trial judge, and Glass, JA held that there was no evidence of malice fit for consideration by the jury which could destroy s. 22 privilege. Mr. Casey, the author of the matter complained of, gave evidence that he honestly held the views and beliefs expressed therein. There was no evidence to the contrary.

Vol I 156.39-160.31 163.7-167.11

The trial judge and the Court of Appeal correctly found against the Plaintiff on this issue having regard to the principles in Horrocks v. Lowe (1975) AC 135; Spautz v. Williams (1983) 2 NSWLR 506 at 520-521; Barbaro v. Amalgamated Television Services Pty. Ltd. (supra at p. 50-53 ff.); Gatley (supra) para 790ff.

28. Furthermore, the issues raised in this appeal involve no principle of general application throughout all jurisdictions based on the common law. The basis upon which the central

question was left to the determination of the Court of Appeal has been referred to. The verdict for the Defendant depended upon the construction of ss. 20, 22 and 23 of the Act and certain findings of fact by the trial judge and the judges of the Court of Appeal. The statutory defence is available only in the state of New South Wales.

It is submitted that in the circumstances of this case it is highly improbable that the Board would think it right to impose its own interpretation of s. 22 and apply it to the facts so as to contradict the conclusions of the trial judge and the unanimous conclusion of the Court of Appeal, it being a matter of local significance only. (cf: Bruce v. O'Connor (unreported: Privy Council Appeal No. 56 of 1984, delivered: 22 May, 1985 at p.9)).

29. An additional matter which may dissuade the Board from interfering with the judgment of the Court of Appeal is the nature of the task required of a court under s. 22(1), particularly sub-paragraphs (a) and (c). It is one of assessment and evaluation of the publisher's conduct in the circumstances. The circumstances are necessarily local. A court's awareness of, or sensitivity to, local community standards and conditions inevitably play a part in determination of this issue. It is submitted that the Board's lack of knowledge of the local standards and conditions in which the publication took place would render it less able to make an informed judgment as

to the reasonableness of the Defendant's conduct than either the trial judge or the members of the Court of Appeal. (cf. for example, the reluctance of the Board to interfere with assessment of damages in personal injury cases where local considerations were important: Paul v. Rendell (1981) 55 ALJR 371 at 376-377; Selvanayagam v. University of the West Indies (1983) 1 WLR 585 at 590).

30. The Respondent respectfully submits that for the above reasons Your Lordships will advise Her Majesty that this Appeal should be dismissed with costs.

HENRIC NICHOLAS Q.C. JOHN SACKAR

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