420 of 1985

40/85

IN THE PRIVY COUNCIL No. of 198

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
IN PROCEEDINGS 181 OF 1984

PREVIOUSLY FROM THE COMMON LAW DIVISION
OF THE SUPREME COURT OF NEW SOUTH WALES
IN PROCEEDINGS 9702 OF 1982

BETWEEN:

CLIVE HUBERT LLOYD

Appellant (Plaintiff)

AND:

DAVID SYME & COMPANY LIMITED

Respondent (Defendant)

TRANSCRIPT RECORD OF PROCEEDINGS

PART I

Volume I

SOLICITORS FOR THE APPELLANT

Allen Allen & Hemsley,
Level 58, MLC Centre,
19-29 Martin Place,
SYDNEY.

By their Agents:

Linklaters & Paines,
Barrington House,
59-67 Gresham Street,
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Telephone: (01) 606 7080

SOLICITORS FOR THE RESPONDENT

Ebsworth & Ebsworth,
2 Castlereagh Street,
SYDNEY.

By their Agents:

Peter Carter-Ruck & Partners,
Essex House,
Essex Street,
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LONDON. WC2R 3AH

Telephone: (01) 379 3456

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IN THE PRIVY COUNCIL No. of 198

ON APPEAL

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IN PROCEEDINGS 181 OF 1984

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COURT OF NEW SOUTH WALES IN PROCEEDINGS 9702 OF 1982

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TRANSCRIPT RECORD OF PROCEEDINGS

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2.	Notice of Motion	3 May, 1984	
3.	Notice of Motion for an Order granting conditional leave to Clive Hubert Lloyd to appeal to Her Majesty in Council	24 December, 1984	
4.	Affidavit of Bernard Patrick JONES in support of Motion for leave to appeal to Her Majesty in Council	24 December, 1984	
5.	Notice of Motion for an Order granting leave to David Syme & Co Ltd to appeal to Her Majesty in Council	3 January, 1985	
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15.	Affidavit of Bernard Patrick JONES in support of Motion for final leave to appeal to Her Majesty in Council	6 June, 1985	
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IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION
SYDNEY REGISTRY
DEFAMATION LIST

9702 of 1982

CLIVE HUBERT LLOYD

Plaintiff

DAVID SYME & COMPANY LIMITED

Defendant

STATEMENT OF CLAIM

Allen Allen & Hemsley,
Solicitors & Notaries,
Level 46, M.L.C. Centre,
19-29 Martin Place,
Sydney, N.S.W. 2000

Tel: 230:3777
Ref: FPL:48684

1. The Plaintiff is and was at all material times a ~~well known~~ cricketer ~~and a Captain of the West Indies Team.~~ Pursuant to Order Made 11.6.82

2. The Defendant is and was at all material times a company duly incorporated and the publisher of a newspaper known as "The Age" which has and had at all material times a wide and extensive circulation, distribution and sale in New South Wales and each of the other States and Territories of Australia.

3. In the edition of "The Age" dated Thursday, 21st ~~Friday, 22nd~~ January, 1982 the Defendant published of and concerning the Plaintiff the following matter: Pursuant to Order made 17.9.82

1. COME ON DOLLAR, COME ON

2. "I remembered, of course, that the World's Series had been fixed in 1919 ... it never occurred to me that one man could start to play with the faith of 50 million people - with the single mindedness of a burglar blowing a safe." — The Great Gatsby by F. Scott Fitzgerald.

3. The only crises of conscience America has suffered this century have concerned President Nixon's blatant indiscretions, the Vietnam war and the fixing of the World Series baseball championship in 1919. All three events, to borrow Scott Fitzgerald's thought, played with the faith of the people.

4. In Australia, it is an article of faith that while the lower echelons of sport may be tainted with the "taking the dive" concept of the prize-fighting booth, our main gladiatorial contests are conducted on the principle that the participants, be they teams or individuals, compete in good faith, i.e., they are both trying to win.

5. On this premise of good faith, no contestant wants to lose, but there are degrees of wanting to win that must be considered. A football team assured of top place on the ladder playing a lowly placed team in the last home and home game of the year is missing a vital cog in its incentive machine.

6. On the other hand, its opponents may well have its incentive machine supercharged by the underdog's desire to topple the champion, a recurrent theme not confined to sport. Often that missing cog makes the champion team malfunction.

7. For the same reasons in criket, the team that has already lost the Test series often reverses form to win the last match. In both of these cases, the precepts of sporting honesty are being strictly observed. Nobody is playing with the faith of the people.

8. Let us consider the delicate, unfathomable mechanism that gives one team a moral edge over another in the context of the current Benson and Hedges World Cup series.

9. In last Tuesday's game, the West Indies, certain of a berth in the finals, lost to the underdogs, Australia, thus making it a West Indies-Australia finals series.

10. If my argument is correct, the West Indians were missing the vital cog in the incentive machine. Unfortunately the argument becomes muddied by material and commercial factors.

11. Had the West Indians won on Tuesday they would have played a best-of-five finals series against Pakistan. It is estimated that the West Indies-Australia finals will draw three times the crowds a West Indies-Pakistan series would have.

12. These figures will be reflected in television audiences, with a corresponding difference in advertising revenue (rival stations

would counter-attack had Channel 9's flanks been so exposed). So while cricket-loving Australians were barracking for their country out of normal sporting patriotism, Mr. Kerry Packer's cheers had a strident dollar-desperation note about them. Come one dollars, come on.

13. One wonders about the collective state of mind of the West Indians. Was it sportingly honest, this incentive to win? Or did the factors just mentioned - commercial pressures of crowds, gate money, sponsorship - bring about an unstated thought: "It doesn't matter if we lose"?

14. This thought edges perilously close to the concept of taking a dive.

15. It is conceivable that the same pressures will influence the thinking of both teams in the imminent finals series. Mr. Packer would prefer a thrilling fifth match decider to a three-nil whitewash, for commercial reasons. So would the crowds, for obvious reasons.

16. But if both sides want a five-game series (intrinsically not a bad thing to watch) for Mr. Packer's reasons or any other reasons, then the game of cricket is not being made as a contest but as a contrived spectacle with unsavory commercial connotations.

17. Two opposing teams with a common goal cannot be said to be competing in good faith to win each game as it comes, but rather indulging in a mutely arranged and prolonged charade in which money has replaced that vital cog and is running the incentive machine.

18. Somebody is playing with the faith of the people - with the single mindedness of a burglar blowing a safe.

PARTICULARS OF IDENTIFICATION

A. The Plaintiff is and was at all material times a cricketer and the Captain of the West Indies Cricket Team.

B. The Plaintiff was from time to time the Captain of and played in the West Indies Team in the Benson and Hedges World Cup series.

4. By means of the publication of the matter set out in the preceding paragraph the Defendant made the following imputations each of which is defamatory of the Plaintiff:

1. That the Plaintiff had committed a fraud on the public for financial gain in pre-arranging in concert with other persons the result of a World Cup cricket match.

2. That the Plaintiff was suspected of having committed a fraud on the public for financial gain by pre-arranging in concert with other persons the result of a World Cup cricket match.

3. That the Plaintiff was prepared in the future to commit frauds on the public for financial gain by pre-arranging in concert with other persons the results of cricket matches.

4. That the Plaintiff was suspected of being prepared in the future to commit frauds on the public for financial gain by pre-arranging in concert with other persons the results of cricket matches.

5. Those imputations arise from the natural and ordinary meaning of the matter complained of.

6. ~~Alternatively to the preceding paragraph, if any of those imputations~~ does not arise from the natural and ordinary meaning of the matter complained of, then it arises by reason of the following facts and matters:

Pursuant to Part 20 Rule 2

1. The Plaintiff is and was at all ~~material~~ times a cricketer in and the Captain of the West Indies Cricket ~~Team~~.

2. The Plaintiff was from time to time the Captain of and a player in the West Indies Team in the Benson and Hedges World Cup series.

3. In the Benson and Hedges World Cup series the members of the ~~teams played in each match for financial reward.~~

7. By means of the publication of the matter complained of and the making of each of the imputations specified above, the Plaintiff has been brought into hatred, ridicule and contempt and has been gravely injured in his character, profession and reputation and has suffered considerable embarrassment and distress and has suffered and will continue to suffer considerable loss and damage.

PARTICULARS UNDER PART 67 RULE 12(d)

A. The Defendant published in "The Age" newspaper of 22nd January, 1982 the following material:

One-day Match

"The Age" yesterday carried on the features page a story headed "Come On, Dollar, Come On" concerning the current one-day Benson and Hedges World Cup Series.

"The Age" did not intend to impugn the integrity of any cricketers participating in the series or the integrity of Mr. Kerry Packer, or any person or organisation concerned in the series, or to suggest that financial considerations have affected or might affect the result of any match in the series.

The Plaintiff relies upon the inadequacy of this disclaimer and upon the relative insignificance and obscurity of its positioning in the newspaper as aggravating the damage suffered by the Plaintiff.

B. The Defendant further published in "The Age" newspaper of 27th January, 1982 the following material:

Mr. Packer, players, and the Cup cricket

"The Age", on 21 January, 1982, published an article in the "Age" feature section under the heading "Come on, dollar, come on".

It has been suggested that some persons may have read the article as carrying the meaning that the outcome of the West Indies and Australia match on Tuesday 19 January at the SCG was dishonestly pre-arranged by Mr. Kerry Packer, or by anyone else, for profit, and that the Australian and West Indies teams had or would allow commercial considerations to affect the result of matches. Such a suggestion would, of course, be completely and utterly false, and would have no foundation in fact whatsoever.

Furthermore, "The Age" readily acknowledges that the World Cup series has been, and will be, played by all participating teams with one aim only - to win every possible match. Mr. Packer is not involved in the conduct of the series in any way, and could not and would not influence the result of any match. The series is conducted by the Australian Cricket Board.

If the article was read by any person as suggested, then "The Age" sincerely regrets that, and apologises to Mr. Packer and the members of the two teams.

The Plaintiff relies on the facts:

(i) that this material failed to make a full and frank concession as to the defamatory and harmful nature of the matter complained of; and

(ii) that the Defendant failed to apologise unconditionally to the Plaintiff for having published the matter complained of.

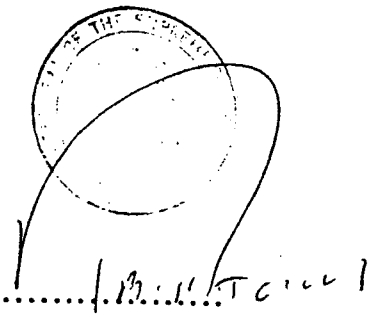
AND THE PLAINTIFF CLAIMS DAMAGES FOR DEFAMATION

TO: The Defendant,
David Syme & Company Limited,
50 Margaret Street,
SYDNEY.

You are liable to suffer judgment or an order against you unless the prescribed form of Notice of your appearance is received in the Registry on or before the date of hearing fixed by the Notice of Motion which is served upon you with this Statement of Claim and you comply with the Rules of Court relating to your defence.

Plaintiff:	Clive Hubert Lloyd
Solicitor:	Allen Allen & Hemsley, Level 46, MLC Centre, 19-29 Martin Place, SYDNEY. N.S.W. 2000
Plaintiff's Address for Service:	C/- Allen Allen & Hemsley, DX 105, SYDNEY.
Address of Registry:	Common Law Office, Supreme Court, Queens Square, SYDNEY. N.S.W. 2000.

7.



.....

Solicitor for the Plaintiff.

FILED: 8th February, 1982.

In the Supreme Court, Common Law Division,
No. 2 - Reasons for Judgment of Maxwell J. 1 June, 1982

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COMMON LAW DIVISION)
DEFAMATION LIST)

No. 9702 of 1982.

CORAM: MAXWELL, J.

TUESDAY, 1st June, 1982.

LLOYD v. DAVID SYME & CO., LIMITED.

JUDGMENT.

(Re Imputations)

HIS HONOUR: The Defendant in this action for Defamation claims that the matter complained of is incapable of bearing the imputations pleaded by the Plaintiff. The defendant applies pursuant to the Supreme Court Rules, 1970, Pt.31 for the seperate trial of the question of whether the matter complained of is capable of bearing these imputations. The imputations are based upon the natural and ordinary meaning of the matter complained of.

Pt. 31.

There is no dispute as to the manner and occasion of the matter complained of, nor are there any facts required to be assumed for the purposes of the decision.

Following the guidelines discussed by Hunt J. in Love v. Mirror Newspapers Ltd., (1980) 2 N.S.W.L.R. 112 I entertained the seperate decision of the question raised in the application pursuant to r2 of Pt.31 of the Supreme Court Rules.

Before setting out the matter complained of it is relevant to bear in mind the following facts: At all material times the plaintiff was a Cricketer and the Captain of the West Indies Cricket Team and was from time to time the Captain of and played in the West Indies Team in the Benson and Hedges World Cup Series.

On 22nd January, 1982, the defendant published in its Newspaper the "Age" the matter complained of which is in the following terms:

"1. COME ON DOLLAR, COME ON

2. "I remembered, of course, that the World's Series had been fixed in 1919 ... it never occurred to me that one man could start to play with the faith of 50 million people - with the single mindedness of a burglar blowing a safe." -- The Great Gatsby by F. Scott Fitzgerald.

3. The only crises of conscience America has suffered this century have concerned President Nixon's blatant indiscretions, the Vietnam War and the fixing of the World Series baseball championship in 1919. All three events, to borrow Scott Fitzgerald's thought, played with the faith of the people.

4. In Australia, it is an article of faith that while the lower echelons of sport may be tainted with the "Taking the dive" concept of the prize-fighting booth, our main gladiatorial contests are conducted on the principle that the participants, be they teams or individuals, compete in good faith, i.e., they are both trying to win.

5. On this premise of good faith, no contestant wants to lose, but there are degrees of wanting to win that must be considered. A football team assured of top place on the ladder playing a lowly placed team in the last home and home game of the year is missing a vital cog in its incentive machine.

6. On the other hand, its opponents may well have its incentive machine supercharged by the underdog's desire to topple the champion, a recurrent theme not confined to sport. Often that missing cog makes the champion team malfunction.

7. For the same reasons in cricket, the team that has already lost the Test series often reverses form to win the last match. In both of these cases, the precepts of sporting honesty are being strictly observed. Nobody is playing with the faith of the people.

8. Let us consider the delicate, unfathomable mechanism that gives one team a moral edge over another in the context of the current Benson and Hedges World Cup Series.

9. In last Tuesday's game, the West Indies, certain of a berth in the finals, lost to the underdogs, Australia, thus making it a West Indies-Australia finals series.

10. If my argument is correct, the West Indians were missing the vital cog in the incentive machine. Unfortunately the argument becomes muddied by material and commercial factors.

11. Had the West Indians won on Tuesday they would have played a best-of-five finals series against Pakistan. It is estimated that the West Indies-Australia finals will draw three times the crowds a West Indies-Pakistan series would have.

12. These figures will be reflected in television audiences, with a corresponding difference in advertising revenue (rival stations would counter-attack had Channel 9's flanks been so exposed). So while cricket-loving Australians were barracking for their country out of normal sporting patriotism, Mr. Kerry Packer's cheers had a strident dollar-desperation note about them. Come on dollars, come on.

13. One wonders about the collective state of mind of the West Indians. Was it sportingly honest, this incentive to win ? Or did the factors just mentioned - commercial pressures of crowds, gate money, sponsorship - bring about an unstated thought: "It doesn't matter if we lose"?

14. This thought edges perilously close to the concept of taking a dive.

15. It is conceivable that the same pressures will influence the thinking of both teams in the imminent finals series. Mr. Packer would prefer a thrilling fifth match decider to a three-nil whitewash, for commercial reasons. So would the crowds, for obvious reasons.

16. But if both sides want a five-game series (intrinsically not a bad thing to watch) for Mr. Packer's reasons or any other reasons, then the game of cricket is not being made as a contest but as a contrived spectacle with unsavory commercial connotations.

17. Two opposing teams with a common goal cannot be said to be competing in good faith to win each game as it comes, but rather indulging in a mutely arranged and prolonged charade in which money has replaced that vital cog and is running the incentive machine.

18. Somebody is playing with the faith of the people - with the single mindedness of a burglar blowing a safe."

The plaintiff alleges that the matter complained of in its natural and ordinary meaning conveyed the following imputations:

"1. That the plaintiff had committed a fraud on the public for financial gain in pre-arranging in concert with other persons the result of a World Cup cricket match.

2. That the plaintiff was suspected of having committed a fraud on the public for financial gain by pre-arranging in concert with other persons the result of a World Cup cricket match.

3. That the plaintiff was prepared in the future to commit frauds on the public for financial gain by pre-arranging in concert with other persons the results of cricket matches.

4. That the plaintiff was suspected of being prepared in the future to commit frauds on the public for financial gain by pre-arranging in concert with other persons the results of cricket matches.

In saying that there are no facts required to be assumed, I am not unmindful of Para.6 of the Statement of Claim which states that if any of the imputations pleaded does not arise from the natural and ordinary meaning of the matter complained of, then it arises "by reasons of the following facts and matters":

1. The plaintiff is and was at all material times a cricketer in and the Captain of the West Indies Cricket Team.

2. The plaintiff was from time to time the Captain of and a player in the West Indies Team in the Benson and Hedges World Cup series.

3. In the Benson and Hedges World Cup series the members of the teams played in each match for financial reward.

I can only assume that Para. 6 is intended to raise an innuendo in the strict sense of that term - that is, as a secondary or extended meaning relying upon extrinsic facts not stated in the matter complained of. However, sub-paras. 1 and 2 of Para. 6 of the Statement of Claim go only to identification and are elsewhere so catergorised in the Statement of Claim whilst sub-para. 3 of Para. 6 is published in the matter complained of. Therefore, I can regard any question of "true innuendoes" as being irrelevant. I adhere to this view despite the late written submissions on this aspect made by Mr. Garnsey after the conclusion of the proceedings.

Before dealing with the submissions of Mr. Stitt on behalf of the defendant I must remind myself of the relevant

principles applicable to the task in hand.

I am required to read the matter complained of as a whole; Morosi v. Broadcasting Station 2GB Pty., Ltd., (1978) (1980) 2 N.S.W.L.R. 418 at 419. I must reject any strained or forced or utterly unreasonable interpretation: Jones v. Skelton (1963) S.R. (N.S.W.) 408 at 650. I must proceed upon the basis that the ordinary reasonable reader is a person of fair average intelligence: Slater v. Daily Telegraph Newspaper Co., Ltd., (1908) 6 C.L.R. 1 at 7; who is neither perverse; ibid; nor morbid or suspicious of mind; Keogh v. Incorporated Dental Hospital of Ireland (1910) 2 Ir. 577 at 586; nor avid for scandal; Lewis v. Daily Telegraph Limited (1963) 1 Q.B. 340. It is to be borne in mind that the ordinary reasonable reader is a layman, not a lawyer, and that his capacity for implication is much greater than that of a lawyer; Lewis v. Daily Telegraph Limited; ibid. See also Farquhar v. Bottom (1980) 2 N.S.W.L.R. 380 in which the relevant tests or principles were collected by Hunt, J. At p.386 Hunt,J. refers to what might be described as "Newspaper" cases and he had this to say:

> "In what might be described as "newspaper" cases ....., further questions may arise as to the care with which the ordinary reasonable reader would have read a sensational article, and as to the degree of analytical attention he would apply to it; Morgan's case (16b); and as to the degree of accuracy he might have expected of that article (16c); Steele v. Mirror Newspapers Ltd. (27a). The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking: Morgan's case (16a), following Lewis v. Daily Telegraph Ltd. (11e); Steele's case (27a); Mirror Newspapers Ltd. v. World Hosts Pty., Ltd. (14a); Parker v. John Fairfax & Sons Ltd. (21)."

He also refers again to Lewis v. Daily Telegraph

Limited; ibid., at 374 as indicating the wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful and unusual.

I now turn to consider the matter complained of and the submissions of the defendant in the light of these principles.

Under the heading "COME ON DOLLAR, COME ON" the first two paragraphs of the matter complained of - numbered 2 and 3 in Para. 3 of the Statement of Claim - refer to the "fixing" in 1919 of the World Series and the playing with the faith of 50 million people by one man with the "single mindedness of a burglar blowing a safe". Para. 3 refers to three crises of conscience suffered this century by America. They relate to President Nixon's blatant indiscretions, the Vietnam War and the "fixing" of the World Series Baseball Championship in 1919. All these events it is said "played with the faith of the people". Then in Para.4 it is asserted that in Australia whilst the lower echelons of sport may be tainted with the "taking the dive" concept of the prize-fighting booth the main gladiatorial contests are conducted on the principle that the participants be they teams or individuals, compete in good faith, i.e., "they are trying to win". Paras. 5, 6 and 7 dilate upon the part played by a football and cricket team's "incentive machine". The publisher then proceeds to discuss the then current Benson and Hedges World Cup Series and West Indies loss to Australia which resulted in there being a West Indies-Australia Finals Series and states that if the author's argument is correct the West Indians were missing the vital cog in the incentive

machine. However, para. numbered 10 concludes with the following: "Unfortunately, the argument becomes muddied by material and commercial factors". Then follows reference to the pecuniary advantages and the like to flow from the result of the finals being between the West Indies and Australia. Then there is a rhetorical musing as to the collective state of mind of the West Indians: "Was it sportingly honest, this incentive to win?"or did the factors just mentioned - commercial pressures of crowds, gate money, sponsorship - bring about an unstated thought: "It doesn't matter if we lose?". Then appears the statement "This thought edges perilously close to the concept of a dive", followed by the statement that it is conceivable that both teams will be influenced in the finals series by the same pressures. If, it is said, both teams want a five game series then the game of cricket is not being made as a contest but as contrived spectacle with unsavory commercial connotations. Such a common goal would be an indulging in a "mutely prolonged charade in which money has replaced that vital cog and is running the incentive machine". Finally, the author goes back to the opening with this ending "Somebody is playing with the faith of the people - with the single mindedness of a burglar blowing a safe".

Mr. Stitt argues that the imputation that the plaintiff had committed a fraud could not be drawn from the matter complained of. Such an offence involved the concept of criminality. On the other hand it was clear, he submitted, that all the article was talking about was incentive and in support he bespoke of those parts of the matter complained which related to "commercial reasons or benefits" which may have motivated the members of both teams to bring about the result in question. Mr. Stitt summarised his submissions in these terms:

> "It was well-established that in order to perform the exercise which the court was presently embarking upon, namely to see whether the imputations are capable of arising it looks at the article as a whole and the impression conveyed by the whole of the article. The impression to be gained from this article was that there were obvious commercial advantages which flowed from a particular sporting result but the statement of those obvious commercial advantages was not capable of being a statement of criminality in obtaining financial gain by fraud which carried its own perjorative context."

I am unable to agree with these submissions on behalf of the defendant. The very composition of the matter complained of with the initial reference to the "fixing" of a sporting fixture followed by the lead into the Australian scene and the presence of incentive machines are titillating and provide the lead into the discussion of the Benson and Hedges World Cup Series and the participation therein by the West Indians and the Australians. There is not only the introductory reference to "single mindedness of a burglar blowing a safe" but there are the concluding references to a contrived spectacle with unsavory commercial connotations, a mutely arranged and prolonged charade in which money has replaced that vital cog and is running the incentive machine. These and the statement that the argument about the West Indians missing the vital cog and becoming muddied by material and commercial factors are rounded off by the final sentence; "Somebody is playing with the faith of the people - with the single mindedness of a burglar blowing a safe".

Although proof of the facts stated in the matter complained of might not in law establish a conspiracy, that situation does not prevent a reader from drawing the inference that such a conspiracy exists. See Lewis v. Daily Telegraph Limited; ibid., at 277 and Jackson v. John Fairfax & Sons Ltd., (1981) 1 N.S.W.L.R. 36 at 41.

Mr. Stitt then turned to the form of the pleading and submitted that there was a real distinction to be drawn between the first imputation being an assertion of the commission of a substantive offence and the second imputation being an assertion of suspicion of the commission of the offence. As I understand his argument, Mr. Stitt contends that the second and fourth imputations should, if they are to stand, be pleaded in the alternative to the first and third respectively. I do not regard the pleading to be a fault in this regard. No doubt the jury would be directed that if there were to be verdicts in favour of the plaintiff on the first and third imputations they would not be entitled to find in favour of the plaintiff on the second and fourth imputations.

I am satisfied that the matter complained of when read as a whole is capable of conveying the imputations pleaded. Whether or not the jury will find that the imputations have been conveyed to the ordinary reasonable reader is, of course, a different question. I am unable to say that a verdict in the plaintiff's favour would be set aside as unreasonable or perverse Shirt v. Wyong Shire Council (1978) 1 N.S.W.L.R. 631 at 648.

The defendant's application, in effect, for judgment is refused. I order the defendant to pay the plaintiff's costs.

Beverley Gallop

1st June, 1982.

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COMMON LAW DIVISION
DEFAMATION LIST

No. S9702 of 1982

CLIVE HUBERT LLOYD

Plaintiff

DAVID SYME & COMPANY LIMITED

Defendant

The Statement of Claim was amended on 21 June, 1982 pursuant to Part 20, Rule 2 by:-

(a) amending paragraph 1 to read "the Plaintiff is and was at all material times a cricketer";

(b) omitting paragraph 6.

10

.....
Solicitor for the Plaintiff

FILED: 21.6.82

NOTICE OF AMENDMENTS

ALLEN ALLEN & HEMSLEY,
Solicitors & Notaries,
Level 46, M.L.C Centre,
19-29 Martin Place,
SYDNEY, N.S.W 2000.

Tel: (02) 230 3777
Ref: BPJ:20253:IRW

IN THE SUPREME COURT
OF NEW SOUTH WALES
SYDNEY REGISTRY
COMMON LAW DIVISION
DEFAMATION LIST

9702 of 1982

CLIVE HERBERT LLOYD

Plaintiff

DAVID SYME & COMPANY

Defendant

D E F E N C E

EBSWORTH & EBSWORTH
SOLICITORS
2 CASTLEREAGH ST.,
SYDNEY. N.S.W. 2000

DX 103 SYDNEY

TEL: 221 2366

(REF: NDL)

1. The defendant does not admit the allegations contained in paragraphs 1, 3, 4, 5, 6 and 7 of the Statement of Claim herein.

2. The defendant admits that "The Age" newspaper is published throughout the States of Australia and in the Australian Capital Territory. The defendant does not admit otherwise the allegations in paragraph 2 of the Statement of Claim.

3. The defendant denies that either the matter complained of in paragraph 3 in its natural and ordinary meaning or the imputations pleaded in paragraph 4 thereof was or were or was or were understood to be or is or are capable of being defamatory of the plaintiff.

4. Alternatively the defendant says that insofar as and to the extent that it may be found that the matter complained of was published of and concerning the plaintiff (which is not admitted) and to be defamatory of him (which is denied) the said matter:

(i) was published under qualified privilege;

(ii) related to matters of public interest and amounted to comment based on proper material for comment and upon no other material, and was the comment of the servant or agent of the defendant;

(iii) related to matters of public interest and amounted to comment based to some extent on proper material for comment and represented opinion which might reasonably be based on

that material to the extent to which it was proper material for comment and was the comment of the servant or agent of the defendant;

(iv) was published under circumstances that the plaintiff was not likely to suffer harm.

5. Further, and in the alternative, the defendant says that insofar as and to the extent that it may be found that the matter complained of was published in the Australian Capital Territory, Victoria, South Australia, Western Australia and the Northern Territory of and concerning the plaintiff and to be defamatory of him (which is denied) in addition to the foregoing the same was published upon an occasion of qualified privilege.

6. Alternatively, the defendant says that insofar as and to the extent that it may be found that the matter complained of was published in the State of Queensland of and concerning the plaintiff and to be defamatory of him (which is denied) in addition to the foregoing the same

(i) was published upon an occasion of qualified privilege;

(ii) was published for the purpose of giving information to the persons to whom the publication was made with respect to subjects as to which those persons were believed on reasonable grounds by the defendant to have had such an interest in knowing the truth as to make its conduct in making the publication reasonable in the circumstances;

(iii) was published for the public good;

(iv) was published in the course of the discussion of subjects of public interest, the public discussion of which was for the public benefit and, so far as the defamatory matter consists of comment, the comment is fair;

(v) was published for the purpose of the discussion of subjects of public interest, the public discussion of which was for the public benefit, and so far as the defamatory matter consists of comment, the comment is fair.

7. Alternatively, the defendant says that insofar as and to the extent that it may be found that the said matter complained of was published in the State of Tasmania of and concerning the plaintiff and to be defamatory of him (which is denied) in addition to the foregoing, the same:

(i) was published upon an occasion of qualified privilege;

(ii) was published for the purpose of giving information to the persons to whom the publication was made with respect to subjects as to which those persons had such an interest in knowing the truth as to make the conduct of the defendant in making the publication reasonable under the circumstances;

(iii) was published for the purpose of giving information to the persons to whom the publication was made with respect to subjects as to which those persons were believed on reasonable grounds by the defendant to have had such an interest in knowing the truth as to make its conduct in making the publication reasonable in the circumstances;

(iv) was published for the public good;

(v) was published in the course of the discussion of subjects of public interest, the public discussion of which was for the public benefit;

(vi) was published for the purpose of the discussion of subjects of public interest, the public discussion of which was for the public benefit.

PARTICULARS - S.C.R. PART 67

PURSUANT TO RULE 17(3) - BASIS FOR COMMENT

The material upon which the comment was made consisted of:

(i) The Benson & Hedges World Series Cricket Competition.

(ii) The results of the games between the contestants to the Benson & Hedges World Series Cricket Competition.

(iii) The incentives operating on the minds of sporting teams in general and cricket teams in particular.

(iv) The final game of cricket between the West Indies Cricket Team and the Australian Cricket Team in the Benson & Hedges World Series Cricket Contest.

(v) The television ratings of audiences watching games of cricket between contestants to the Benson & Hedges World Cup Cricket Series.

(vi) The advertising revenue earned by television stations during the course of the Benson & Hedges World Cup Cricket Series.

PURSUANT TO RULE 18(1)(a) - PUBLIC INTEREST

(i) The organisation of professional cricket matches in which international teams compete.

(ii) The administration of cricket matches in which international teams compete.

(iii) The results of cricket matches in which international teams compete.

(iv) The television audience ratings of sporting events.

PURSUANT TO RULE 18(1)(b) - QUALIFIED PRIVILEGE

The matter complained of was published in the course of giving information to the persons to whom it was published on the subjects of public interest of which particulars have been supplied pursuant to Rule 18(1)(a) as to which subjects they had an interest or an apparent interest in having information and the conduct of the defendant was reasonable in the circumstances.

PURSUANT TO RULE 18(2)

The circumstances in which it is proved by the plaintiff that the publication of the matter complained of was made.

H. D. Bingell

Solicitor for the Defendant

FILED: The 23rd day of July 1982.

ALLEN ALLEN & HEMSLEY

SOLICITORS & NOTARIES

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RESIDENT SENIOR ASSOCIATE
PETER CHARLES ALLERDICE

BPJ:20253:JBB

12th April, 1984

Messrs. Ebsworth & Ebsworth,
Solicitors,
DX 103 SYDNEY

Dear Sirs,

RE: CLIVE LLOYD v. DAVID SYME & COMPANY

We refer to previous correspondence.

Take notice that at the hearing of this matter, the Plaintiff will seek to amend the Particulars of Identification contained in paragraph 3 of the Statement of Claim by adding the following further particulars: 10

"C. The Plaintiff, as captain of the West Indies cricket team touring Australia during the cricket season of 1981/1982, was one of the persons responsible for the management of the said team and was the person principally and ultimately responsible for the said team on the field of play."

Yours faithfully,

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

SYDNEY REGISTRY

DEFAMATION LIST

No. 9702 of 1982

CLIVE HERBERT LLOYD
Plaintiff

DAVID SYME & COMPANY
Defendant

AMENDED DEFENCE

1. The Defendant does not admit the allegation contained in paragraphs 1, 3, 4, 5, 6 and 7 of the Statement of Claim herein.

2. The Defendant admits that "The Age" newspaper is published throughout the States of Australia and in the Australian Capital Territory. The Defendant does not admit otherwise the allegations in paragraph 2 of the Statement of Claim.

3. The Defendant denies that either the matter complained of in paragraph 3 in its natural and ordinary meaning or the imputations pleaded in paragraph 4 thereof was or were or was or were understood to be or is or are capable of being defamatory of the Plaintiff.

4. Alternatively the Defendant says that insofar as and to the extent that it may be found that the matter complained of was published of and concerning the Plaintiff (which is not admitted) and to be defamatory of him (which is denied) the said matter:

(i) related to matters of public interest and amounted to comment based upon proper material for comment and upon no other material, and was the comment of the servant or agent of the Defendant;

(ii) related to matters of public interest and amounted to comment based to some extent on proper material for comment and represented opinion which might reasonably be based on that material to the extent to which it was proper material for comment and was the comment of the servant or agent of the Defendant;

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Tel: 221 2366
Ref: NDL/ADF:R:2340b

(iii)was published under circumstances that the Plaintiff was not likely to suffer harm.

PARTICULARS - SCR PART 67
PURSUANT TO RULE 17(3) - BASIS FOR COMMENT

The material upon which the comment was made consisted of:

(i) The Benson & Hedges World Series Cricket Competition.

(ii) The results of the games between the contestants to the Benson & Hedges World Series Cricket Competition.

(iii)The incentives operating on the minds of sporting teams in general and cricket teams in particular.

(iv) The final game of cricket between the West Indies Cricket Team and the Australian Cricket Team in the Benson & Hedges World Series Cricket Contest.

(v) The television ratings of audiences watching games of cricket between contestants to the Benson & Hedges World Cup Cricket Series.

(vi) The advertising revenue earned by television stations during the course of the Benson & Hedges World Cup Cricket Series.

PURSUANT TO RULE 18(1)(a) - PUBLIC INTEREST

(i) The organisation of professional cricket matches in which international teams compete.

(ii) The administration of cricket matches in which international teams compete.

(iii)The results of cricket matches in which international teams compete.

(iv) The television audience ratings of sporting events.

3.

PURSUANT TO RULE 18(2)

The circumstances in which it is proved by the Plaintiff that the publication of the matter complained of was made.

.....
Solicitor for the Defendant

FILED: 16th April 1984

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 9702 of 1982
COMMON LAW DIVISION)

IN THE SUPREME COURT

NO. 7

(Hughes)

CORAM: BEGG C.J. at C.L.
And a Jury of Four

MONDAY 16th APRIL 1984

LLOYD v. SYME

MR. T. HUGHES Q.C. with MR. A. BANNON appeared for the plaintiff
MR. M. McHUGH Q.C. appeared with MR. STITT Q.C. and Ms McCOLL for the defendant

(Jury empanelled)

(Amended defence, by leave, filed in court)

(Additional particular added to the plaintiff's particulars)

MR. HUGHES : Members of the jury, you have been summoned and sworn to try a case brought by Mr. Clive Hubert Lloyd against the publisher of the Age newspaper, David Syme & Co Limited. The Age is a newspaper which has a circulation mainly in the State of Victoria, a circulation exceeding, for the issue in question, a quarter of a million sales. Mr. Clive Lloyd, who sits in court behind me, is a man of whom it would be fair to say that his name is a household name amongst every family following cricket in the cricketing world. He is a man with an international reputation as a cricketer. Since the 1974-75 cricket season he has been captain of successive West Indies teams. In the summer of 1981-82 he was here in Australia as captain of the West Indies team playing matches against teams from Australia and from Pakistan.

This case is concerned with a very serious piece of defamation published in the Age newspaper on Thursday 21st January 1982. I have just said that this is an action brought by Mr. Lloyd for defamation. He seeks to recover at your hands a

(NOTE: The numbers appearing in the square brackets [ ] refer to pages in the Record.)

proper award of damages for the defamatory article to which I shall take you in a few minutes. However, let me first explain to you what is involved in the concept of defamation. It is simply this: It is unlawful for anyone to publish of another in writing or by word - by mouth - words that have a probable tendency to lower that other person in the eyes of decent folk in the community. In essence, that is what defamation is. The publication of defamation strikes a blow at the reputation of the person about whom the defamatory material is published. Unless there is a lawful excuse for the publication of defamatory matter it is a subject for damages. That is the essence of the case that we bring.

I said to you a moment ago that Mr. Lloyd was in Australia leading the West Indies team in the summer of 1981-82. On 19th January 1982 a one-day cricket match was played partly in daylight and partly at night time under those big lights at the Cricket Ground between Australia and the West Indies. That one day match was part of a series of one-day matches in which the three teams

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competed against each other, the three teams being the West Indies, Australia and Pakistan. In this competition, which was a competition for the Benson & Hedges World Series Cup, the three teams vied against each other. Each team had to play ten matches. For instance, Australia would play five matches against Pakistan and five matches against the West Indies, and so on. A points score was kept; two points for a win, one point for a draw or a tie, and no points for a loss. It was rather the basic system of scoring as in rugby league.

As at 19th January 1982 the score in this round of matches which I have described was the West Indies were leading by a wide margin. They had 14 points representing 7 wins. Pakistan had 8 points and Australia, regrettably, was running last; it had 6 points on the board. That was

the state of affairs when this match, which was the final in the preliminary series of matches in the Benson & Hedges World Series Cup, was played between Australia and the West Indies at the Sydney Cricket Ground.

The position was that unless Australia were to beat the West Indies in this match at the Cricket Ground to be played on 19th January Australia would be eliminated from the final series of five matches - the final - and that final series of five matches would be fought out between the West Indies and Pakistan. The match on 19th January had to be won by Australia against the West Indies if Australia were to get into the final series. The West Indies team was there anyway because it was so far ahead in the point score. The question was whether the final five matches to determine the ultimate result of the competition would be fought out between the West Indies and Pakistan or the West Indies and Australia. Those were the circumstances in which the match came to be played. The match resulted in what might be described as an upset win for Australia. You will be told in the evidence how that win came about.

The West Indies batted first, and after 43 overs the team had amassed a score of 189 runs. That was their innings. Australia had to go in and try to beat that score. I made a slight error; the West Indies score was 189 runs after the 50 allotted overs of play - a 50 over a side match. At the end of the 50 overs the West Indies score was 189 runs. Australia then had to go in and try to beat that score. What happened was this: The course of play will be described by the people who give evidence. After the game had been played for some time it started to drizzle. The drizzle became a downpour and play had to be abandoned because of the heaviness of the rain. At the stage when play had to be abandoned, the Australian team, led by Mr. Greg Chappell, had scored 143 runs for 7 wickets. It was 7 for 143.

That was after 43 overs and one ball of play; as they call it in the cricket score books, 43.1 overs. Australia had scored less and it had not been able to play for its allotted 50 overs of batting.

In those circumstances, under the rules of the game the result of the match fell to be decided by determining which of the two teams had the highest scoring rate per over for the first 43.1 overs that each team had played. Australia had played only 43.1 overs as the batting side so it became a matter of comparing, over that duration of play in the case of each team, the scoring rate per over. Under the rules the team with the highest scoring rate was the winner. That was a rule designed to deal with the situation in which there could not be a complete match because of the intervention of

the weather.

On the scoring rate, Australia won, so Australia qualified to go into the final series of five matches to be played against the West Indies. That final series was played very soon afterwards - a series of one day matches, and the West Indies won three matches to one. It was after the playing of that match which I have described that the article that I have described came to be published on the feature page of "the Age". That is the article of which Mr. Lloyd complains as being defamatory of him.

(Age newspaper containing article in question on page 11 tendered without objection and marked Ex.A)

(Photocopies of Ex.A handed to the jury)

HIS HONOUR: Members of the jury, the original document will be Ex.A and will be before you in the jury room in due course. For convenience sake, to enable you to read that article with counsel, a photocopy has been provided for you.

MR. HUGHES: Members of the Jury, I ask you now to read this article with me. It is headed "Come on, dollar, come on". There is, of course, a song which has become associated with cricket; "Come on Aussie, come on". This headline is what some might regard as an allusion to that song, "Come on, dollar, come on". You will see that the article under the headline starts off with a quotation from a book written by F. Scott Fitzgerald many years ago, "The Great Gatsby". The quotation is this:

> "I remembered, of course, that the World's Series had been fixed in 1919 ... it never occurred to me that one man could start to play with the faith of 50 million people - with the single mindedness of a burglar blowing a safe."
>
> ...
>
> "The only crises of conscience America has suffered this century have concerned President Nixon's blatent indiscretions, the Vietnam war and the fixing of the World Series baseball championship in 1919. All three events, to borrow Scott Fitzgerald's thought, played with the faith of the people.
>
> In Australia, it is an article of faith that while the lower echelons of sport may be tainted with the 'taking the dive' concept of the prize-fighting booth, our main gladiatorial contests are conducted on the principle that the participants, be they teams or individuals, compete in good faith, i.e. they are both trying to win.
>
> On this premise of good faith, no contestant wants to lose, but there are degrees of wanting to win that must be considered. A football team assured of top place on the ladder playing a lowly placed

team in the last home and home game of the year is missing a vital cog in its incentive machine.

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On the other hand, its opponents may well have its incentive machine supercharged by the underdog's desire to topple the champion, a recurrent theme not confined to sport. Often that missing cog makes the champion team malfunction.

For the same reasons in cricket, the team that has already lost the Test series often reverses form to win the last match. In both of these cases, the preceipts of sporting honesty are being strictly observed. Nobody is playing with the faith of the people.

Let us consider the delicate, unfathomable mechanism that gives one team a moral edge over another in the context of the current Benson & Hedges World Cup series.

In last Tuesday's game, the West Indies, certain of a berth in the finals, lost to the underdogs, Australia, thus making it a West Indies-Australia finals series.

If my argument is correct, the West Indians were missing the vital cog in the incentive machine. Unfortunately the argument becomes muddled by material and commercial factors.

Had the West Indians won on Tuesday they would have played a best-of-five finals series against Pakistan. It is estimated that the West Indies-Australia finals will draw three times the crowds a West Indies-Pakistan series would have.

These figures will be reflected in television audiences, with a corresponding

difference in advertising revenue (rival stations would counter-attack had Channel 9's flanks been so exposed.) So while cricket-loving Australians were barracking for their country out of normal sporting patriotism, Mr. Kerry Packer's cheers had a strident dollar'desparation note about them. Come on dollars, come on.

One wonders about the collective state of mind of the West Indians. Was it sportingly honest, this incentive to win? Or did the factors just mentioned - commercial pressures of crowds, gate money, sponsership - bring about an unstated thought: "It doesn't matter if we lose"?

This thought edges perilously close to the concept of taking a dive.

It is conceivable that the same pressure will influence the thinking of both teams in the imminent finals series. Mr. Packer would prefer a thrilling fifth match decider to a three-nil whitewash, for commercial reasons. So would the crowds, for obvious reasons.

But if both sides want a five-game series (intrinsically not a bad thing to watch) for Mr. Packer's reasons or any other reasons, then the game of cricket is not being made as a contest but as a contrived spectacle with unsavoury commercial connotations.

4.

Two opposing teams with a common goal cannot be said to be competing in good faith to win each game as it comes, but rather indulging in a mutely arranged and prolonged charade in which money has replaced that vital cog and is running the incentive machine.

Somebody is playing with the faith of the people - with the single mindedness of a burglar blowing a safe."

Members of the Jury, that is the article on which we sue. You will see it starts with a sneering allusion to a well known song, followed by this quotation from a book referring to the World's Series baseball in America in 1919, a reference to the fixer playing with the faith of the people with the single mindedness of a burglar blowing a safe, and the theme of the article is to suggest quite clearly that that is what is happening and will continue to happen in Australia in 1981-82 in relation to the Benson & Hedges World Cup Series of cricket matches. Nothing could be plainer, we suggest that than message.

You will have observed that while there is a reference to the West Indies team and their motivation there is no express reference to Mr. Clive Lloyd. Everybody who read that article would be likely to know that Clive Lloyd was the leader of the West Indies team, about which team the article was written. Any reader of the Age would have known that because the Age had publicised these matches in the series with the names of the individual members of the team illustrated from time to time. Mr. Lloyd's name and position as captain of the West Indies cricket team would be so well known that any reader of the article would know that a reference to the team would be a reference to him. So in fact, although he is not referred to by name he is referred to in this article.

It stands to reason that a cricket match cannot be rigged without the participation and approval of the members of the team that is going to take the dive, to use a colloquial expression, and in particular without the connivance of the captain - the leader - of the team. It is very difficult to see how any cricket match involving two teams of eleven players could be rigged in the sense in

which this article suggests without Mr. Lloyd's participation.

As it happened, Mr. Lloyd did not play in the match at the Sydney Cricket Ground on the 19th January 1982 because he was struck down by flu and had to stay in his bed at the hotel. But this article clearly strikes at each individual of the touring team and in particular, you may think, at the person who is well known and widely known to be its captain. In colloquial terms, to put it as succinctly as I can, this article imputes that the game played on 19th January at the Sydney Cricket Ground was fixed so that the West Indies, to use a colloquial expression, took a dive with the view to having the final five matches between Australia and the West Indies. Nothing, I suggest to you, would be plainer than that meaning.

You will notice when you read the article that this theme of playing with the faith of the people with the single mindedness of a burglar blowing a safe is repeated at the beginning of the article and at the end. The implication is clear. In determining whether written material is defamatory it is your task to look at it from the viewpoint of the ordinary reasonable reader who would pick up

that article and read it. What is the natural meaning of "ordinary person"? Not a person whose mind is overcome by suspicion, not a person at the other end of the scale who is filled to overflowing with the milk of human kindness, but the average reaction of the ordinary reasonable reader is what concerns you. Under the law and practice of this State it is necessary for a plaintiff in Mr. Lloyd's position to specify in his statement of claim, which is the document by means of which an action for damages is commenced, what are the meanings or imputations that he claims the words carry. What are the meanings which would be conveyed by those words in the article to the ordinary reasonable reader? They are set out in the statement of

claim. For the sake of convenience, so that you will have them in front of you for your consideration as the evidence unfolds in this case, I have had them reduced to typescript form.

(Copies of above mentioned document handed to jury)

These are the meanings that we submit clearly emerge from the article. There are four meanings, and I will go through them with you. Numbers 1 and 2 are alternatives and numbers 3 and 4 are alternatives, as you will see. The first is that the plaintiff had committed a fraud on the public for financial gain in pre-arranging in concert with other persons the result of a World Cup cricket match. The second is that the plaintiff was suspected of having committed a fraud on the public for financial gain by pre-arranging in concert with other persons the result of a World Cup cricket match. That meaning is slightly less serious than the first one. We suggest that at the end of the day your minds will be left in no doubt that it is the day your minds will be left in no doubt that it is the more serious imputation - number 1 - that is conveyed by these words: "Playing with the faith of the people" - the reference to the burglar. The reference to the burglar in the context of this article is a plain reference to criminal or fraudulent conduct.

Imputation number 3 is that the plaintiff was prepared in the future to commit frauds on the public for financial gain by pre-arranging in concert with other persons the results of cricket matches. This article, on a fair reading, we suggest, speaks of the likely future conduct by these cricketers. The fourth, the alternative to 3, is that the plaintiff was suspected of being prepared in the future to commit frauds on the public for financial gain by prearranging in concert with other persons the results of cricket matches.

So much for the time being as to the meaning of the words, except that I should say this to you: What I have said to you about the essential concept of what defamation is is said by me because it is necessary in this opening address that I should give you some idea of what the relevant principle of law happens to be. Anything that I say about the law, you will readily understand and I readily concede, is subject at all times to correction by his Honour, however, the position is that if after due deliberation you come to the conclusion that the article complained of bears one or more of the meanings or imputations set out in this document the plaintiff will be entitled to a verdict for damages at your hands unless the defendant is able to make out one or more of the defences that it has pleaded.

I must make some reference to the defences that have been pleaded so that you can view this case from the outset in the round, as it were. First of all, the defendant denies that the article refers to

the plaintiff. That is the first defence. We will call evidence to establish that the article was read by persons who knew the plaintiff and knew what his position in cricket was. Such evidence, if you accept it, will dispose of the defence that I have just mentioned.

Another piece of evidence that in due course you may think disposes of this evidence is an answer to an interrogatory which we will tender. An interrogatory is a question asked of the other side in litigation. One asks interrogatories or questions designed to obtain relevant information that can be used for the purpose of evidence.

MR. McHUGH: I ask my friend not to open on this because it may lead to a particular course.

MR. HUGHES: I will leave it and we can argue the matter when the tender is made. I will pass by

that in deference to what my friend has just said.

The next matter of defence raised by the defendant is that the article is not defamatory to the plaintiff. You will consider that in due course. I have already said enough about that for the purposes of opening the case to you. The third defence is that the article was published in circumstances in which the plaintiff was not likely to suffer harm. In this branch of the law damage or harm is presumed to flow from the publication of defamatory matter.

If I publish defamatory words of any one of you to a large audience, somebody out there will think the less of you. That is a very sensible presumption that the law makes. It is not incumbent on a plaintiff to prove, by calling witnesses, damage to reputation by having those witnesses say, "I thought less of the plaintiff because of what I read." It is presumed that if defamatory matter is broadcast, for instance in a national newspaper, some people - perhaps many people - will think the less of the plaintiff when they read it. This defence - I will not endeavour to describe it or its lack of substance in colourful language or anything like that; that must wait until a later stage of this case - has nothing in it that the plaintiff was not likely to suffer harm from the publication of what we venture to suggest was a disgraceful piece of journalism. I am only flagging the defence at this point so that you will see what the issues between the parties are.

The other defence - I have mentioned three - is to this effect: The article was the honest opinion of the writer of facts truly stated in the article which were matters of public interest. It is a defence of comment. The essence of the defence is that it would be a matter of public interest and the deramatory matter is the expression of an honest opinion.

Members of the jury, there will be evidence before you which will indicate with the utmost clarity that the reporting in the Age newspaper of this match played on the 19th at the Cricket Ground and was won by Australia in the circumstances I have described on the 20th January, the very day after the match and the day before this article was written which described Australia's win as a 'gift from the heavens', as the ultimate gift from the gods - unexpected rain squalls. "A gift from the heavens", the god of rain coming to Australia's aid. That is how the Age on 20th January

7.

reported Australia's unexpected win. You may think, therefore, that the defendant will have some difficulty, against the background of that statement published to the world, in persuading you that this article "Come on, dollar, come on" repeated an honest opinion that the West Indies team, and the captain of the touring side in particular, had thrown the match.

There is, however, more to this part of the case than what I have just said to you. Again I refer to some interrogatories which will be put into evidence. We will call evidence to establish that the writer of the article did not mean to say the things that we distilled in those four imputations, or any of those things. That being so, it would be a matter of great difficulty - amounting to impossibility, you may think - for the defendant to satisfy you that this article represented honest opinion because if the article expressed an opinion it was an opinion and can only have been an opinion consistent with those imputations congruent with those imputations. If the writer of the article did not intend to convey those imputations, what he wrote could not be his honest opinion. That will be the argument.

Let me come to another feature of this case. I have indicated to you how we will meet the defences that have been pleaded. The article of which we complain was published, as you will have

seen, on 21st January. Mr. Lloyd will tell you that nobody from the Age got in touch with him before this article was written. Nobody from the Age got in touch with him after it was written. However, on 22nd January, the next day, without any instigation from Mr. Lloyd, there was a two paragraph item published on the sporting page of the Age. That is the sporting age of the issue of Friday 22nd January. It was headed "One-day match". If I may use the expression, it is buried low down, as you will see when the newspaper is tendered, on the left hand side of the sporting page. The article on which Mr. Lloyd is suing is on the feature page, page 24 of the issue of 21st January. You will see a big article on it, "Curator bars MCG". There is an article about cricket on the right hand side of that page which is headed "The One-day wonder still faces test". It is an article about cricket. If you look at the bottom of the article of this issue of 21st January you will see there is a reference to page 11, "Come on, dollar, come on".

So you will see the Age not only published the article about which we complain on the feature page, the page for the reflective reader, the page upon which, presumably, the newspaper would wish it to be thought that serious matter for reflective reading is published, but also pointed a reader of the sporting page who is interested in cricket to the article on the feature page. Mr. Greg Chappell, the former Australian captain, will give evidence before you. He will tell you that that is how he came to read the article. He read it because he saw the reference to it on the sporting page. By contrast, the small item published on 22nd January does not appear to have been flagged in that way at all. This is what the article headed "One-day match" states:

> "'The Age' yesterday carried in the features pages a story headed 'Come on, dollar, come on" concerning the current one-day Benson & Hedges World Series Cup matches.

'The Age' did not intend to impugn the integrity of any cricketers participating in the series or the integrity of Mr. Kerry Packer, or any person or organisation concerned in the series, or to suggest that financial considerations have affected or might affect the result of any match in the series."

The effect of that little disclaimer is to say, "We didn't mean it. We didn't mean to impugn the integrity of any of the people about whom we were writing." It is not a defence to an action to defamation for a defendant to say "I didn't mean it. I published the words but I didn't mean them in the sense complained of by the plaintiff. The defendant newspaper's liability falls to be determined by reference to the actual meaning of the words irrespective of the publisher's intention. You may think that this rather faint statement tucked away on the sporting page - "I didn't mean it; we didn't mean it" - carries the defendant no distance at all. Sometimes a forthcoming unequivocal, unqualified apology containing a frank admission of error and a sincere expression of regret may serve to mitigate the damages that a plaintiff would otherwise be entitled to receive.

An apology can only be a matter of mitigation or reduction; it can never be a defence and is not relied upon. This little item that I read to you was not an apology at all - no expression or regret or contrition. All they say in effect is, "We didn't mean to impugn the integrity of whom we wrote." That disclosure was not drawn to Mr. Lloyd's attention. He has now seen it and he will describe, if he is allowed to, his reaction to it. That disclaimer - it is not an apology - can do nothing to mitigate the damages in this case.

Six days after the publication of the defamatory article about which we complain the Age published

another article - it will be before you - headed "Mr. Packer, players and the cup cricket". Nobody from the Age talked to Mr. Lloyd about this article before it was written and published. It stated:

> "'The Age', on 21 January 1982, published an article in the 'Age' feature section under the heading 'Come on, dollar, come on'.
>
> It has been suggested that some persons may have read the article as carrying the meaning that the outcome of the West Indies and Australia match on Tuesday 19 January at the SCG was dishonestly pre-arranged by Mr. Kerry Packer, or by anyone else, for profit, and that the Australian and West Indies teams had or would allow commercial considerations to affect the result of matches. Such a suggestion would, of course, be completely and utterly false, and would have no foundation in fact whatsoever.
>
> Furthermore, 'The Age' readily acknowledges that the World Cup series has been, and will be, played by all participating teams with one aim only - to win every possible match. Mr. Packer is not involved in the conduct of the series in any way, and could not and would not influence the result of any match. The series is conducted by the Australian Cricket Board.
>
> 9.
>
> If the article was read by any person as suggested, then, 'The Age' sincerely regrets that, and apologises to Mr. Packer and the members of the two teams."

Six days later that was published without any reference to Mr. Lloyd. You will notice that it is no better than a conditional apology. If the article was read that way the Age sincerely

regrets it. It has been suggested that some persons may have read the article as carrying a meaning of dishonesty. It will be a matter for you in due course to consider that article published a week later. We suggest that goes to the qualified way in which it is expressed. It goes no distance towards undoing the harm done by the original article.'

You may think that the position is rather like this, if I may give you an example. Suppose that in public, in a fit of pique or petulance, I stamped on somebody's toes and everybody could see that I did just that. Would anybody think that an apology which merely said "If I did that, I am sorry" was worthwhile, would be thought to be grudging and, perhaps, lacking in sincerity? We will suggest to you in due course, after the matter has been gone into in some detail, that that apology, if it could be called such, does not go any distance towards mitigating the harm done to Mr. Lloyd by the publication of the article complained of.

Of course, another thing that would have to be considered in due course is whether this apology can sit with the defences that have been raised, but more about that at another time. I have said that this is a claim for damages, and before I complete my opening I should say something to you about the question of damages, which is a question to which you will come when you have decided that the defendant is liable.

There are several elements proper to be considered in assessing damages for defamation. First and foremost, of course, is the likelihood of injury to reputation - that is essential - and the extent of the injury. Defamatory words published to two or three people over the dining room table on a social occasion may be a matter for small damages because the range of publication is limited. Defamatory matter published in a newspaper with the circulation of

the Age is obviously a very different matter indeed. The circulation figures will be before you. The figures are in excess of a quarter of a million. You will bear in mind, I suggest, that readership of a paper is always larger than the circulation. If I get a newspaper delivered to my home every morning not only I read it but also the members of my family read the same newspaper. You can assume that a circulation or sales figure of a quarter of a million means a large readership figure. That is the area of publication which you have to consider in this case in assessing damages. There are other factors involved in the assessment of damages in the first head under which damages are claimed - injury to reputation.

The next matter, you may think, would be the status of the newspaper that published the defamatory matter. If I am defamed in some scandal sheet of no reputation at all, and there have been such scandal sheets circulating in recent times, that is one thing. The fact that the scandal sheet belongs to the yellow press or the gutter press obviously reduces the seriousness of the defamation. It is a very different matter, you may think, when a person is defamed by a newspaper that is a quality publication - a quality newspaper. To take an example, it is much more damaging to be defamed

by the Sydney Morning Herald than by some publication put out by the Communist Party. Here, if our argument is right, Mr. Lloyd has been defamed by a newspaper that would certainly wish to be regarded as a newspaper of quality and reputation. That increases, from the view-point of assessing damages, the seriousness of the matter complained of.

In assessing damages you are entitled, under this heading of injury to reputation, to consider the plaintiff's own reputation. Everybody is entitled to the presumption that he or she is of good reputation until the contrary be shown. In

this case evidence will be called for you as to the plaintiff's excellent reputation hitherto as an international cricketer of many years experience. The relevance of that evidence is that it is more serious to defame a reputable public figure, as Mr. Lloyd was, than it is to defame a person with no reputation at all. The old rule applies, you may think: The taller you are the harder you fall when your integrity is attacked. When you come to assess damages you are entitled to take into account the effect of the article on the plaintiff's personal feelings; that he was hurt by it, if he was hurt; that he was made angry by it, if that was his reaction.

But perhaps as important, some may think more important, than any of the factors that I have mentioned that go to assessing damages then an award for damages for defamation is this factor: The bringing of an action of this kind by Mr. Lloyd is the means that is permitted to him by the law of vindicating himself. It is said that damages in an action for defamation are at large. Perhaps one of the reasons why they are at large is that one cannot run a rule over such an intangible but very important item such as a person's reputation. One can perhaps never fully track down the scandal caused by the publication of the defamatory material. It may be impossible fully to track down a scandal. Maybe years afterwards the scandal will be revived. One of the functions of an award of damages for defamation is vindication so that if the scandal dies down but is later revived the plaintiff can say, "Look, I received an award of damages for the scandal and for the damage to my reputation. That award of damages is my proof that there was nothing in what was written."

The plaintiff, it has been said, as a result of damages awarded to him in a case of this kind if he is entitled to a verdict, is able to point to that verdict and say, "That is my vindication. Let the scandalmongers hold their tongues."

After, I imagine, a short adjournment I will be in a position to call my first witnesses. Because some of those witnesses are short witnesses and come from other States I propose to call them first, after which I will call the plaintiff, Mr. Lloyd, to give his evidence before you.

(Short adjournment)

11.

P.R. Thorpe

Examination

PETER ROYCE THORPE
Sworn and examined

MR HUGHES Q: Is your name Peter Royce Thorpe? A. That is correct.

Q. Do you live at 72 Victoria Crescent, Mont Albert, Melbourne, Victoria? A. That is correct.

Q. Is your occupation that of managing director of a company known as Active Leisure (Aust.) Pty Limited? A. That is correct.

Q. Is that an office you have held for some years? A. Three years, three and a half years.

Q. In January 1982, just two years ago, were you a resident of Victoria? A. That is correct.

Q. At that time - and I am talking now about 21st January 1982 - had you previously met Mr. Clive Lloyd, the plaintiff in this case? A. I had met Mr. Lloyd quite some years prior to that, yes.

Q. As at 21st January 1982 did you know what Mr. Lloyd's position, if any, was in the world of cricket? A. Well, Mr. Lloyd was, of course, captain of the West Indies cricket team.

Q. Have you yourself had any experience of playing cricket? A. Yes. At a different level, of course.

Q. By virtue of your experience of cricket, did you have some knowledge of the functions of a captain of a cricket team, in particular, an international touring team? (Objected to; rejected)

Q. Did you have any knowledge of the functions of the captain of a cricket team? A. The overall responsibility for the control and performance of the team on and off the field.

Q. I want to show you a newspaper article on p.11 of The Age of 21st January 1982. It is headed, "Come on, dollar, come on". Have you ever seen that article before? A. Yes, I read it a couple of years ago.

Q. When in relation to the date of its publication did you read it? A. Well, it would have been within the same week and possibly that day or the day after.

Q. At that itme what was Mr. Lloyd's reputation? (Objected to; pressed; rejected)

Q. At this time, January 1982, did you follow at all the cricket matches that were being played in Australia between the Australians, the West Indies and the Pakistan team? A. Yes.

Q. In what sense did you follow them? A. As an Australian, as an interested cricketer and as a person interested in sport in general.

Q. What can you say as at January 1982, prior to the publication of the article, about Mr. Lloyd's reputation as a cricketer? (Objected to; rejected).

12.

Q. How long had you known Mr. Lloyd in the sense of having met him? A. Well, Mr. Lloyd had played district cricket in Victoria some years prior to that and I was connected with the Puma sporting company in Melbourne and we were looking at

whether we had any opportunities where we could avail ourselves of Mr. Lloyd's sporting involvement in the wearability of the product and such things in the association.

Q. In the course of those activities did you come to know anything of Mr. Lloyd's reputation, that is what other people thought of him? A. Well, we sought to engage him because of, really, his image and sporting prowess and the type of person he is.

(No cross-examination)

Witness retired and excused

(G.S. Chappell)

GREGORY STEVEN CHAPPELL
Sworn and examined

Examination

MR. HUGHES Q: Is your name Gregory Steven Chappell and do you live at 51 Kenmore Road, Kenmore, a suburb of Brisbane? A. Yes.

Q. Do you know Mr. Clive Lloyd, the plaintiff in this case? A. I do know Clive, yes.

Q. How long have you known him? A. I have known Clive for about 15, 16 years.

Q. In what circumstances have you come to know him? A. I have come to know him from playing cricket with and against him and having known him socially through our involvement with cricket.

Q. Have you captained the Australian team at some time? A. I have.

Q. For how long? A. On and off for a period of eight years.

Q. When did you start playing test cricket? A. In December 1970.

Q. I think your test career ceased for the time being a little time ago? A. Ceased, I don't know whether it is for the time being though.

Q. Do you remember where you were on 21st January 1982 when you saw a newspaper article? A. I was at the Melbourne Hilton Hotel. When I woke up in the morning the Melbourne Age was outside the door as it was most mornings delivered to the room.

Q. (Witness shown Ex.A) Did you read the article headed, "Come on, dollar, come on" on the morning of 21st January when you were at the Hilton Hotel at Melbourne? A. I did. I read the back page, as I usually did, and on the back page was advertised the particular article that attracted my attention and I turned to that page and read that article on that morning.

Q. Can you go to the back page and indicate to his Honour and the jury what attracted your attention to the article? A. There was the article about the one day game by Peter McFarlane and then on the back page there was mention about the article headed, "Come on dollar, come on" and that more than attracted my attention.

13.

Q. At that time - and I am talking about 21st January 1982, - you were - captaining the Australian team? A. I was, yes.

Q. Had the Australian team engaged in a series that summer, 1981/82, of one day matches against the Pakistani team and the West Indies team? A. Yes.

Q. At that time what was your knowledge of Mr. Clive Lloyd's position in the West Indies team? A. Clive was the current captain of the West Indian team.

Q. Would you tell his Honour and the members of the jury what, if any, was your knowledge of the

functions of Clive Lloyd as the captain of the West Indies touring team? A. Well, as captain of the team obviously Clive's role was to lead the side on the field and also off the field he played a very important role in selection, helping with the training of the team, generally assisting the West Indian team both on and off the field, and of course he was a very good and senior player in that side.

Q. What do you say as to Clive Lloyd's reputation as a cricketer prior to the publication of this article in The Age? (Objected to)

MR. HUGHES: If my friend is preparing to say before the jury that his client recognises that, prior to the publication of the article complained of, Mr. Lloyd had an excellent reputation for honesty in cricket, I can save some time.

MR. McHUGH: There is no problem about that; I will say that.

MR. HUGHES Q: Would you not answer this question until my friend has had an opportunity of objecting to it: can you, speaking as an international cricketer of experience, say whether or not an allegation that an international cricket captain dishonestly pre-arranged the result of a cricket match would be regarded as serious or otherwise. (Objected to; pressed; rejected)

Q. Did you play in the match at the Sydney Cricket Ground against the West Indies on 19th January 1982? A. I did, I was captain of the Australian side.

Q. What do you say as to the performance of the West Indies team in that match? (Objected to; pressed)

(Witness stood down)

IN THE ABSENCE OF THE JURY:

(Counsel addressed on admissibility of above question)

HIS HONOUR: Although I will reject the question in its present form, I will admit the evidence and I will publish my detailed reasons later.

IN THE PRESENCE OF THE JURY:

GREGORY STEVEN CHAPPELL
Recalled on former oath

MR. HUGHES Q: Do you have a recollection of the course of play during the match at the Sydney Cricket Ground between Australia

and the West Indies on 19th January 1982? A. Yes, I do.

Q. Would you tell his Honour, first of all, which side batted first? A. The West Indies batted first. I won the toss and asked that the West Indies bat first.

Q. Do you remember the score that they made? A. I believe they scored 189 for around about 9 wickets which meant that we had to get 190 in the allotted overs.

Q. At the end of 50 overs in which they were 9 for 189 your side went in to bat. Is that right? A. yes, it did.

Q. What was the course of play from then on? A. Well, as I remember, we got away to a reasonable start and then lost two or three wickets and were struggling to maintain the run rate required to overtake the West Indian score. I think Rick Dowling and John Dyson both played reasonably well, but Andy Roberts, one of the West Indian bowlers, bowled a very good spell in the early part of the innings and took two or three quick wickets which set us back on our heels. We had a slight recovery, but then lost a few more wickets

which left Alan Border, one of our lesser recognised batsmen, and Rodney Marsh who is one that you could only partially recognise as a batsman and the rest, who were definite tailenders, Jeff Thomson and Len Pascoe and Mick Malone.

Q. You were left with Alan Border? A. Yes. As I recollect they got out just before the rain came.

Q. Did the rain start as a downpour or did it start to rain lightly and then develop into a heavy pattern? A. It rained lightly initially and then became a downpour which brought about the end of the game rather abruptly. As I recall it, Alan Border took, I would say, six or seven runs from Joel Garner's, I think, and took a quick single run before the rain and I believe that run got us in front of the target and that was the only stage at which we were in front.

Q. What over was that? A. That was 44 or 43 overs into the innings. Alan Border was taking definite risks against the West Indian bowling, the sort of risks which you wouldn't consider he would be able to continue to take and get away with, having been forced into that position being the only recognised batsman, with the rain coming and the overs running out we didn't know whether we were able to get to the end at that stage or not, and I am sure Alan wouldn't have known, so it was just panic stations for us.

Q. You said the rain came down heavily. Was play abandoned? A. It was called off and the players left the field. They took a four off the second ball of the over and then took a single and we were in front on the runs at that stage and we were quite happy with the rain coming - (Objected to; struck out at his Honour's direction)

Q. Was play resumed after the rain? A. No, it wasn't. I think we had to wait a period of twenty minutes or half an hour or so before it

was obvious that there would be no further play. The rain fell quite heavily, it was quite a severe storm. There was a bit of rain in the morning, but I think that was the only time that the rain fell during the match.

15.

Q. The result was announced by whom? A. Well, the referee for the game would have been the one to make the final decisions. We would have been informed through the umpires or directly by the referee that we won the game on a better run rate on reduced overs.

Q. Do not answer this question until my friend has had the opportunity of objecting: as you observed the match, as captain, did you see anything in the conduct of the West Indies players on the field which indicated to you that they were not trying to win? (Objected to; rejected)

Q. Towards the end of the match when the rain started to fall did you observe from where you were - you had at this stage, I think, completed your innings, is that right? A. I had done, yes.

Q. Had you observed anything in the conduct of the West Indies players? (Objected to; pressed; rejected)

CROSS-EXAMINATION

Cross-Examination

MR. McHUGH Q: Australia had played the West Indies two days previously to this game, had they not? A. Yes.

Q. On that occasion Australia batted first. That was in Brisbane, do you remember? A. Yes, I remember the game, yes.

Q. Australia closed after 9 wickets with 185. Do you remember that? A. I don't remember the score.

Q. Do you remember the West Indies got 186 to win the match with 5 wickets in hand? A. Yes, I remember they won quite comfortably.

Q. You have brought an action in respect of this same article, have you not? A. Yes.

Q. In fact the whole of the Australian and West Indian teams have brought an action in respect of this article, have they not? (Objected to; allowed)

Q. Is it the case to your knowledge that the whole of the Australian and West Indian teams have brought an action in respect of this article? A. I believe so, yes.

Q. Before bringing this action did you discuss it with Mr. Kerry Packer? (Objected to; rejected)

(No re-examination)

(Witness retired and excused)

(His Honour gave the usual warning to the jury).

(Luncheon adjournment)

UPON RESUMPTION:

TIM CHARLES JOHN CALDWELL
Sworn and examined

T.C.J. Caldwell

Examination

MR. HUGHES Q: Is your name Tim Charles John Caldwell? A. Correct.

Q. Do you live at Lisleen, Berrilee Road, Springside via Orange, New South Wales? A. Correct.

Q. Are you a retired assistant general manager and state manager for New South Wales of the ANZ Banking Group? A. That is so.

Q. I think you retired from employment by that group in 1984? A. Correct.

Q. You are a director of a public company? A. I am.

Q. Were you the referee of the one-day cricket match that was played at the Sydney Cricket Ground on 19th January 1982 between Australia and the West Indies? A. I was.

Q. As referee, what were your functions in relation to that match? Can you just describe what you had to do. A. Well, the main thing I had to do, of course, was to watch the match all the way through because one day cricket matches -- (Objected to)

Q. You had to watch the match all the way through? A. Correct.

Q. Did you do so on this occasion? A. I did.

Q. From what position did you watch this match? A. I was seated in the executive room of the New South Wales Cricket Association which is in the old members' stand immediately above the Australian players' dressing room.

Q. How long have you been associated with the administration of cricket in this State and in this country, Australia? A. I must be approximate only, but I would guess about 30 years.

Q. Were you yourself a cricketer in years gone by? A. I was.

Q. What was the degree of your participation in the game of cricket? A. On leaving school I played with the Northern District Cricket Club and during my time with them I was selected to play two seasons in New South Wales with Sheffield Shield.

Q. What seasons were they? A. 1935/36 and 1936/7.

Q. What has been your participation in the administration of cricket in this country? A. Well, first of all, I was appointed as a delegate from the Northern District Cricket Club to the New South Wales Cricket Association and whilst a member of that association I was appointed firstly to the grade committee, then I became a member of the executive committee and was subsequently appointed by the cricket Association in full to be a representative of New South Wales on the Australian Cricket Board.

Q. During what years did you have that representative position on the Australian Cricket Board? A. I think - and I say "I think" because I am remembering back a bit now - from 1966 to 1968 when I was appointed by my bank to Queensland, so I was required to relinquish my post until I returned to New South Wales in 1970 when I went back on the board and remained there until 1982.

17.

Q. What is the function of the Australian Cricket Board? A. The Australian Cricket Board is in charge of all cricket in Australia where the cricket goes beyond the boundaries of any one State.

Q. Is it, therefore, in charge of the administration of international matches? A. Where Australia is concerned, yes.

Q. Whether played in Australia or overseas? A. Whether played in Australia or overseas.

Q. Had you had experience of watching international one-day cricket matches before you refereed the match at the Sydney Cricket Ground played on 19th January? A. Yes I had.

Q. Was that game played partly in daylight and

partly under lights? A. It commenced at 2:30 in the afternoon and continued or was scheduled to continue to 10:15 in the evening.

Q. Would you give your description of that match as you saw it as referee? (Objected to; allowed)

HIS HONOUR Q: How did the match proceed? A. Australia won the toss and asked the West Indies to bat. The West Indies did so and I think they scored 180-something. Australia then batted and with a score of about 30 runs still to go and 3 wickets still in hand it started to rain and it rained extremely heavily. The players left the field on the instruction from the umpires and the umpires then came to me as referee and we did our sums under the rules which apply to one-day international matches to determine what the situation was at that stage and it was realised that Australia had a slight lead based on an over rate. It continued to rain until the scheduled time for finishing and that was the end of the match.

MR. HUGHES: Q. Were you the person responsible for deciding which team was the winner? A. The umpires decide which team is the winner and I am either to agree or disagree with them, so I am really an arbitrator.

Q. What was the situation? A. The position was that Australia had won and then I proceeded to the Australian dressing room where I informed Greg Chappell that that was the result and then I went to the West Indies dressing room where I informed Mr. Richards of the result.

Q. Did you notice anything as to the vigour or otherwise with which the match was played? (Objected to; pressed; rejected)

Q. For how long had you known the plaintiff, Mr Clive Lloyd? A. I think I probably met him first when he played with the World Eleven which

substituted for the South African tour of Australia and, again, I am only guessing, I think that was about 1970, 1971 or somewhere in that period.

Q. You mentioned the rules for playing these one-day international matches. Are you able to identify a copy of the then current rules? A. I am sure I would be, yes. (Witness shown document) They would be the playing conditions for the one-day internationals for the season 1981/82 as turned out by the Australian Cricket Board.

(Playing conditions for 1981/82 tendered; objected to on the ground of relevance; MFI 1)

Q. You mentioned that Australia won because it had a superior over rate? A. Run rate.

Q. I thought you said over rate? A. I may have, but I would be mistaken if I did.

Q. Run rate per over? A. Yes, run rate per over.

CROSS-EXAMINATION

MR. McHUGH Q: Have you checked your recollection of the scores of this match on 19th January in recent days? A. Yes, I have.

Q. The West Indians were out for 189 runs, were they not? A. I think that was approximately, I wouldn't be sure of the very number of runs.

Q. 189 runs was the total that the team got? A. I believe so, yes.

Q. The Australian team had lost 7 wickets for 168 runs at the time the match was called off? A. Again I would say approximately it was so. It was something like 30 runs.

Q. Assuming the West Indians got 189, 30 runs

would be 159? A. So it would be 20 runs.

Q. had you been closely following the one-day matches? A. I had seen those that were played in Sydney, but I had certainly read the details of the other games.

Q. Is it your recollection that two days before the match at the SCG on the 19th the West Indians had beaten Australia at Brisbane? A. I don't recall, but I wouldn't be at all surprised if that had occurred.

Q. Do you remember that the West Indians won with 5 wickets in hand? A. I don't remember, but again I have the same views.

Q. Are you still on the Australian Cricket Board? A. No, I am not.

Q. But you were in 1981? A. I was in 1981, yes.

Q. The Australian Cricket Board has controlled test match cricket in Australia for a very long period of time, has it not? A. Yes, and its successor, the Board for Control of International Cricket.

Q. It is the case that Mr Kerry Packer introduced some years ago what was then a different form of cricket to the traditional cricket games that had been played in Australia and England? A. I don't know that it differed from the one-day games that were played in England. I am not too sure whether we played much one-day cricket before Kerry Packer in Australia, but they had certainly been played in England before that.

Q. In any event, what Mr Packer did in Australia was quite different from what had been done previously? A. Yes.

Q. It was a matter of great controversy among the followers of the sport? A. Indeed.

Q. The Australian Cricket Board had a particular view about the matter? A. Yes.

Q. It was a matter which attracted widespread discussion in the Australian community, was it not? A. Yes, it did.

Q. Indeed there was even considerable litigation between -- (Objected to; pressed; rejected)

Q. As a result of some events, in effect a truce was called, was it not, between Mr Packer's association and the Australian Cricket Board? (Objected to; not pressed)

Q. Was an agreement reached between Mr Packer's organisation and the Australian Cricket Board? A. There was indeed.

Q. As the result of that agreement a company known as P.B.L. Marketing Pty Limited, which was a Packer company, got the promotion but the Australian Cricket Board continued to administer the game, did it not? A. Correct.

Q. P.B.L. Marketing entered into an arrangement with Channel 9 for the televising of the games of cricket, including the one-day matches. A. Correct.

Q. Of course, Benson & Hedges has long been a sponsor of the Australian cricket team and Australian cricket? A. Yes.

Q. One of the arrangements that the Cricket Board insisted upon was that Benson & Hedges should still have the sponsorship of the Australian cricket team? A. Quite correct.

Q. Channel 9, certainly in the 1981/82 season, was the television station which televised these games? A. I am trying to recollect, your Honour, when the ABC came back into the fold of television and I believe it was probably before

that season, but I can't be sure.

Q. In any event, Channel 9 was televising as at this particular time? A. It was indeed.

Q. The Cricket Board is very much dependent, among other things, on the gate receipts from matches? A. Yes.

Q. Together with the money that it is paid for the televising or the game? A. Yes.

Q. The Cricket Board seeks to oversee the whole of cricket in the country, does it not? A. Yes.

Q. Part of its interests is to develop junior cricket as well as test and Sheffield Shield games? A. Quite right.

Q. The amount of money that the Cricket Board can put into cricket depends, to a very large extent, on the gate receipts and the receipts from the televising of cricket? A. And sponsorship, yes.

Q. Also the amount that the Australian Cricket Board can guarantee players - whether Australian players or visiting players - depends very much on the size of the gates which the Australian Cricket Board thinks could be obtained? A. And all the other income, yes.

Q. All the other income? A. Yes.

Q. There is a very direct relationship, is there not, between players' earnings and gate receipts and television and sponsorship receipts? A. I don't think I could call it a direct relationship, there must be some influence but I don't think there was any direct relationship as far as percentage or anything is concerned.

Q. In relation to coming to Australia, the West Indies team was given a guarantee, was it not? A. To come to this country to play a particular

programme, yes.

Q. In terms of working out that guarantee, no doubt the Board was influenced by its anticipation of the likely receipts from the various sources about which we have spoken? A. Yes, that would be so, yes.

Q. Do you recall what the points situation was concerning this series in 1981/82 immediately prior to the game at the Sydney Cricket Ground? A. I can't quote the points, but I think I am right in saying that if Australia beat the West Indies they were then level in points with Pakistan, but as they had a superior run rate this would take them into the final.

Q. That is a superior run rate over Pakistan? A. A superior run rate over Pakistan.

Q. Coming to the 19th, the situation was that the West Indies were clear on the field and were regarded as finalists? A. Yes.

Q. Pakistan were leading by two points? A. Prior to this match, yes.

Q. They needed two points to win? A. Yes.

Q. Australia had to win this match to get into the finals? A. Yes.

Q. And by winning this match they came into the finals over the Pakistanis? A. Yes.

Q. The statistics show clearly, do they not, that a West Indian/Australian game attracts far more spectators than a West Indian/Pakistan game? A. I think that would have been the pattern for some years, yes.

Q. From the Cricket Board's point of view an Australian/West Indies final meant more money for the Board than a West Indies/Pakistan final did

it not? A. That would be the assumption of the Board, yes.

(No re-examination)

(Witness retired and excused)

21.

LINTON GORDON TAYLOR
Sworn and examined

MR. HUGHES Q: What is your full name? A. Linton Gordon Taylor.

Q. Where do you live? A. 24, Mandolong Road, Mosman Sydney.

Q. What is your occupation? A. I am Managing Director of PBL Marketing Pty Ltd.

Q. (Witness shown Ex. A) That is a copy of The Age newspaper of 21st January 1982 which is opened at p.11. Do you see the article on the right hand side of that page, "Come on dollar, come on"? A. Yes, I do.

Q. Was there an occasion on or about 21st January 1982 when you read that article? A. yes, there was. I can't quite remember whether it was the day of the 21st or the following day.

Q. At that time was Mr Clive Lloyd, the plaintiff in this case, known to you? A. Yes, he was.

Q. Was he known to you as having some connection with cricket? A. Yes, he was. He was known to me as the captain of the touring West Indian cricket team and a selector of that touring party.

Q. What was your knowledge, if any, as to the function of Mr Clive Lloyd as captain and selector in that team? A. Well, in that role he was responsible for the behaviour of the team off the field and the behaviour and performance of the team on the field.

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IN THE SUPREME COURT

NO. 7

L.G. Taylor

Examination

MR HUGHES: Q. Was there, in the 1981/82 cricket season, a song that was used in connection with the Australian or any other cricket team? A. Yes, there was, under the title "Come On Aussie, Come On" the song that had been used for a number of years with different words.

Q. What was the title of the song? A. "Come On Aussie, Come On".

CROSS-EXAMINATION

MR McHUGH: Q. Mr Taylor, did you attend the match at the Sydney Cricket Ground on January 19th? A. Yes I did.

Q. Had you attended the match two days earlier in Brisbane between Australia and the West Indies? A. I can't remember whether I went to Brisbane on that particular weekend or not.

Q. As part of your duties with P.B.L. would you keep yourself apprised of the scores of the respective sides? A. Under normal circumstances, yes.

Q. Do you recall that the West Indies had beaten Australia with five wickets in hand in the Brisbane game? A. No, that particular detail I don't remember.

Q. Do you remember that the West Indies had won seven out of their 10 matches? A. I knew they had won the majority of their matches.

Q. The company of which you are a director - are you a director of C.P.H? A. Yes I am.

Q. Is that a subsidiary of another company? A. It is a subsidiary of P.B.L.

Q. And P.B.L. is the company which owns all the shares in the company which controls Channel 9, is it not? A. At that time, I would have to

take advice on that, I can't quite remember the position at that time.

Q. The holding company of what I will call the Packer Group is Publishing and Broadcasting Limited, is it not? A. No, it is one of the subsidiary company of the holding companies which is C.P.H.

Q. That is Consolidated Press Holdings? A. Right.

Q. Is there a connection between P.B.L. and Channel 9? A. Yes there is.

Q. What is that connection? A. Well, P.B.L. is a shareholder in T.C.N. Channel 9.

Q. In fact it is the principal shareholder, is it not? A. It is.

Q. The only shareholder? A. At that time, I can't give you advice as to that.

24.

Q. MR HUGHES (By leave) Where were you when you read that article in The Age on 21st January? A. I would have been in Sydney.

(Witness retired and excused)

PLAINTIFF
Sworn and examined

C.H. Lloyd

Examination

MR HUGHES: Q. Mr Lloyd, is your full name Clive Hubert Lloyd? A. Yes.

Q. Is your permanent home at 22 Lindslow Road, Heald Green, Cheadle, Cheshire, England? A. 220

Q. 220, I'm sorry? A. Yes.

Q. How long have you lived in England? A. For the best part of 13 years.

Q. By occupation are you a professional cricketer? A. Yes.

Q. Mr Lloyd, how old are you? A. Thirty nine.

Q. When will you be 40? A. on 31st August this year.

Q. Are you a married man having a wife and three children of the marriage? A. Yes.

Q. When did your cricketing career commence? A. In 1964.

Q. Were you born in Guyana? A. Yes, Georgetown, Guyana.

Q. Did your cricketing career begin there? A. Yes it did.

Q. What was your first representative position as a player? A. I was batsman and it was against Jamaica.

Q. In a competition known as the Shell Shield? A. Yes.

Q. And you were representing your country, Guyana? A. Yes.

Q. I think in the early years of your cricketing career you were an allrounder but over the years you have become a specialist batsman? A. Yes.

Q. When were you first selected to play for the West Indies in test cricket? A. It was in 1966 against India in India.

Q. Was that a tour by the West Indies of India by a team Captained by Gary Sobers? A. Yes it was.

Q. Since that time have you played for the West Indies in test matches subject only to being unable to play particular matches through injury? A. Yes, I have played from 1966 to now, I have played in 99 test matches.

Q. And does that number include three test matches in which you have played in the current series between the West Indies and Australia in the West Indies? A. Yes.

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Q. And you left the West Indies just after the fourth test to come here to give evidence in this case? A. Yes.

Q. Now approximately how many runs have you scored in test cricket as representative of the West Indies? A. Just about 100-off from 7,000 test runs.

Q. Did you become captain of the West Indies test team in the 1974/75 cricket season? A. Yes, that was against India.

Q. In how many test matches have you been captain of the West Indies? A. So far 65, I think.

Q. Can you tell us how many test match series you have played in as captain of the West Indies team? A. Sorry, how many test matches?

Q. Series. Perhaps I can give it another way. Against what countries have you played as captain in the course of your career as captain in 1960/65 test matches? A. I have played against every cricketing nation that is a member of the I.C.C.

Q. The I.C.C. is the ---? A. International Cricket Congress.

Q. In all of the test series in which you have

played as captain of the West Indies, how many series has your team lost? A. We have lost - I think we have won 27 test matches, we have lost 11, and we have drawn the rest - we have lost two tests, once against Australia here in 1975/76 and once against New Zealand.

Q. In recent years have there been played, in conjunction with the test series, a number of one day matches? A. Well this only came about probably in the late seventies. It first started more or less in England, you would go in for a test series and then you would have a couple of one day games and then it was introduced in another way in Australia where you could have a test series and you would play a series of one day games with Australia, the West Indies and another team. I think that has happened, we have played in, I think it is three, three of those in Australia.

Q. Now before I come to the 1981/82 cricket season to ask you some questions about that season, would you tell his Honour and the members of the jury, please, what cricket you play in England apart from test cricket from time to time? A. Well I play in a county called Lancashire and I have played with them since 1968. I qualified for them in 1969 and I have been captain for Lancashire for three years and from 1968 on until last year I played for Lancashire.

Q. As an international cricketer, how much of a year do you spend playing cricket? A. Well it would be the best part of 10 months of the year.

Q. Can you illustrate that by reference to the cricket season which is run from September 1983 and will run through to October 1984? A. Yes, well, in 1982/83 we would have played county cricket in England which goes up to September and then we would have a tour, we have a tour here middle October which took us right to the end of

February, because we went to India - sorry, we went to India at the end of September or early October, came here at the end of January, played a one day series in Australia and Pakistan and then, after that was over, we had another series against Australia and the West Indies.

26.

Q. That is the current series? A. The current series.

Q. And in the current series in the West Indies, I think you have played in three out of the four tests. A. Yes.

Q. You were unable to play in one of the tests because of injury? A. Yes, I was injured in the second one.

Q. Then, after the current series of tests and one day cricket matches in the West Indies is played, what is your next commitment? (Objected to - allowed).

Q. Where are you going to after you have finished the series of tests and one day cricket matches? A. Two weeks after we are engaged in a series against England which starts 19th May and ends in the middle of August.

Q. I want to ask you some questions about the 1982/83 series of one day, series of cricket matches in Australia, the Benson and Hedges Cup. First of all, how many teams were competing for the Benson and Hedges Cup for that season in Australia? A. There were three teams, West Indies, Australia and Pakistan.

Q. Can you give a brief description of the playing programme? First of all how many matches did each team have to play? A. Each team had to play 10 matches.

Q. That made a total of 30 matches in the preliminary series, is that right? A. Yes.

Q. And the first two teams in that preliminary series qualified for the final series of five matches? A. Yes.

Q. Do you recall what was the point score as between the three teams in the preliminary series of matches immediately prior to the match that was played at the Sydney Cricket Ground on 19th January 1982? A. Yes, we had won seven games, we had 14 points. Pakistan had won four, they had eight points. Australia had won three, it had six points.

Q. Were you able to play in the match at the Sydney Cricket Ground which was played on 19th January 1982? A. No, I was unable to do so. I had a very severe bout of flu and I stayed in bed on the doctor's orders.

Q. Did you watch the match at all on television? A. Yes, I watched the first part of it because if you are playing in the same State they give you half an hour and then it would be cut off, and I watched the first part and in the evening I saw the highlights.

Q. Now on 21st January 1982, that is two days after the match between West Indies and Australia, the last match in the preliminary series leading up to the final, were you in Sydney? A. Yes.

Q. I want to show you a copy of The Age newspaper of 21st January 1982. Have you seen that article before? A. Yes I have, yes.

Q. When did you first see it? A. I was in Mr Packer's office because we had something to discuss with, I think it was Linton. I was invited into his room and I heard him speaking to David Syme & Company about this article and he

was very annoyed about it.

27.

Q. Did you read the article? A. Yes, I did, I read it at his office.

Q. When you had read the article how did you feel? A. Very incensed because, having read the article, there were parts there that I was very annoyed about and if I may just - (Objected to).

Q. What was it about the article that annoyed you, that incensed you? (Objected to - allowed)

Q. You said that you were very incensed? A. Yes, I was incensed at the part which said, "This thought edges perilously close to the concept of taking a dive.". I thought that our integrity and standing in the world of cricket was being threatened because we have come to enjoy - (Objected to: allowed)

Q. You said you were very incensed by the article, is that right? A. Yes.

Q. And that was after you had read it? A. Yes.

Q. And if my learned friend asks you why you were incensed you can tell him, is that right? (Objected to)

Q. Mr Lloyd, is there any truth in a suggestion that you were a party to pre-arranging in concert with other people the result of the match played between Australia and the West Indies at the Sydney Cricket Ground on 19th January? (Objected to in that form - question to be reframed)

Q. Is there any truth in the allegation, Mr Lloyd, that you committed a fraud on the public for financial gain in pre-arranging in concert with other persons the result of the world series cricket match played between West Indies and Australia at the Sydney Cricket Ground on 19th

January 1982. (Objected to - allowed)

Q. (Question read by court reporter) A. None whatsoever.)

Q. Is there any truth in the allegation that you were prepared in the future to commit frauds on the public for financial gain by pre-arranging in concert with other persons the results of cricket matches? (Objected to - allowed) A. No.

Q. Mr Lloyd, after the publication of that article did anyone from The Age get in touch with you? A. No, I never had any contact with anybody.

Q. I want to show you a copy of The Age newspaper of 22nd January 1982, an item down at the bottom of the page on the left-hand side headed "One day match". Did anyone from The Age get in touch with you before that item was apparently published on 22nd January 1982? A. No, nobody.

Q. When did you first read that item? A. I first read it two days ago.

(Issue of Age dated 22nd January 1982 admitted and marked Exhibit B.)

Q. Did anyone from The Age, Mr Lloyd, get in touch with you before the article "Come On Dollar, Come On" was published? A. No, no one.

Q. Next I want to show you a copy of The Age of 27th January 1982, page 11. It is the article on the feature page, page 11, headed "Mr Packer players and the Cup Cricket". Can you tell his Honour when did you first read that article? A. Again, I read this article two days ago too.

Q. Did anyone from The Age get in touch with you before that article was published? A. No.

Q. Or after it was published? A. No, no one.

(Issue of Age dated 27th January 1982 admitted and marked Exhibit C.)

HIS HONOUR: Again, the actual document will be before you. You will see a circle has been placed on the top right-hand corner, page 11.

MR HUGHES: When you saw that article, Exhibit C, two days ago what was your reaction to it in the sense of how did you feel when you read it? (Objected to - disallowed in that form)

Q. Did you regard that article when you saw it two days ago as a sufficient apology? (Objected to)

MR HUGHES: Q. Did that article do anything to diminish the feeling of being incensed that you said you had when you first read the article that was published, "Come On Dollar Come On? (Objected to - allowed).

Q. Did the article, Ex. C, which you have just looked at do anything to diminish the feeling of being incensed that you say you had when you read the article "Come On Dollar Come On"? A. No, not really, because a part in the article which says -- Can I read the part? (Handed to witness).

I've had a couple of apoligies in my time from newspapers and other people and I read the part which says, "It has been suggested that some persons may have read the article". It is quite obvious with the type of circulation that they have -- (Objected to; no further response pressed).

Q. Has it come to your notice, Mr Lloyd, that one of the defences relied upon by the defendant to your claim is that the article of 21st January,

"Come On Dollar Come On" was published in circumstances where you were not likely to suffer harm, has that come to your notice? A. Yes, I find that -- (Objected to answer beyond the word "Yes").

Q. Can you tell his Honour and the members of the jury what feeling, if any, you have about the fact that such a defence has been filed? (Objected to).

(Witness stood down and asked to remain outside Court)

IN THE ABSENCE OF THE JURY

(Mr Hughes referred his Honour to Andrew's case. He submitted that if a defence is improperly pleaded in the sense that it is not a defence that could be regarded as being bona fide in the case of a libel like this, if that increases the hurt to the plaintiff that is a matter for aggravation.

(Question disallowed).

(In the presence of the jury):

PLAINTIFF
on former oath:

HIS HONOUR: Members of the jury, I have disallowed that question.

MR HUGHES: Q. Before the match that was played at the Sydney Cricket Ground on 19th January was played, was there any meeting of the West Indies players at which you attended? A. Yes, prior to every game we always have a sort of pep talk about the game coming on, the usual discussion, tactics and things like that, which involves the whole team including manager, assistant manager and people like that.

Q. What was your desire as captain of the West Indies team as to the result of this Australia-West Indies match before it was played? A. It is quite obvious that we -- (Objected to).

Q. Just speak about yourself. What was your desire as to the result of this Australia-West Indies 1-day match in the terms of

its results before it was played, what did you want to happen? A. We wanted to win -- (Objected to; allowed) I wanted the team to win as usual because the more games you win -- (Objected to; pressed; disallowed) the more games --

HIS HONOUR: - disallow the second part, Mr Lloyd.

MR HUGHES: Q. Mr Lloyd, do you attach any importance to your reputation for honesty as a cricketer in Australia? (Objected to; rejected).

CROSS-EXAMINATION:

MR HcHUGH: Q. Mr Lloyd, as captain, of course, you would have followed every one of the matches in which your team played very closely. A. Yes, I might not remember most of the scores or things like that.

Q. I am not going to tax your memory too hard but I would like to ask you about a couple of games if you can recollect. First of all, do you recollect the game in Brisbane between Australia and the West Indies two days before the match at the Sydney Cricket Ground? A. Yes, you spoke about it today, yes, I can.

Q. On that occasion the West Indies won by five wickets, did they not? A. I think they did, yes.

Q. I want to suggest to you that most of your players, with the exception of Richards,

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NO. 7

C.H. Lloyd

Examination

Cross-Examination

performed worse in Sydney than they did in Brisbane. Let me put some figures to you. Do you remember, first of all, in the Sydney match Greenridge was bowled by the third ball? A. Yes, I think he was out quite early.

Q. In fact, Lillee took him in his third ball in the first over? A. I think so, yes.

Q. In Brisband Greenridge had scored sixteen, had he not? A. As I said, I can't remember the scores offhand.

Q. You would not dispute that, I take it? A. I am sure they would be facts.

Q. In Sydney Gomez was out for 3, was he not? A. He might have been.

Q. Do you remember that he was not out for 56 in Brisbane when your side hit the winning run? A. Probably.

Q. And Haynes, I want to suggest to you, made 11 in Brisbane and only 5 in Sydney, do you recollect that? A. I wouldn't know, I can't remember offhand, as I said.

Q. If the Australian team had made 185 in Brisbane and 19 in Sydney it would indicate they were playing round about the same, would it not? (Withdrawn).

Q. If the Australian team had made 185 in Brisbane for 9 wickets and they had made 7 for 168 when the game was called off in Sydney it would indicate the Australian team was not playing any better in Sydney than in Brisbane, would it? A. I think it would be difficult

to assess the situation like that. These are just 1-day games, anything could happen in them.

I don't think we can say -- tomorrow it might be the other way around.

Q. If they were 9 for 185 in Brisbane and 7 for 168 in Sydney two days later it would indicate at first glance that their performances were much the same in both places? A. There again, you have to take certain things in perspective. In Brisbane it is a 1-day game in the daytime when you have no lights, you are playing in very bright sunshine. It is quite obvious that if you are playing under lights at night -- for instance, if you start at 2 o'clock you could be in bright sunshine so that means if you bat first you will be playing quite well because the light is pretty good. Now, if it is your turn to bat at night it is very difficult to see, if a cloud is coming across at night, so that means a bowler like Greg Chappell would be quite easy to play early in the day but difficult at night where the atmosphere is a little bit heavier.

Q. I am not asking about the West Indies. A. No, I am just telling you about the situation, playing in the day and night.

Q. Would you not agree if Australia batted in the daylight in Brisbane and were for 185 and they were 7 for 168 batting under the lights, that they appeared to be playing much the same in both games? A. There isn't a great sort of difference really.

Q. The run rate is much the same, the run rate per over? A. It could be, yes.

Q. In Brisbane the West Indies batted last, did they not? A. On my memory I presume they did.

Q. In Sydney the West Indies batted first, did they not? A. Yes.

Q. So they batted in the daylight, didn't they? A. Yes.

Q. I want to suggest to you that the whole of the West Indies team was out in Sydney for 189 when five of the West Indies wickets had fallen for 186 in Brisbane when they won the match, do you remember that, do you agree with that? A. I think I would have to.

Q. You have just arrived back in Australia in the last couple of days, have you, Mr Lloyd? A. Yes.

Q. Until quite recently you were under the impression, were you not, that this article had been written by Peter McFarlane? A. No, I think other people probably thought so.

Q. Did you not indicate as recently as last week that the article had been written by Peter McFarlane when you were asked about it? A. Indicate?

Q. Yes, did you not say -- Were you at the Casino Hels an Hotel in Antigua last week? A. Yes, we stayed there.

Q. Did you not say then to Mr Bob Radford and to Mr Camacho, the Secretary of the West Indies Board, that Peter McFarlane had written this article? A. I can't remember speaking to him about that.

32.

Q. Do you remember speaking about your forthcoming trip to Australia? A. A lot of people knew about it actually.

Q. I am not being critical of you but it is a couple of years since this matter blew up, is it not? A. Yes.

Q. Your attention to it was drawn by Mr Kerry Packer, was it? A. Yes.

Q. Indeed, Mr Kerry Packer was talking to David

Syme, the company which owns The Age at the very time -- A. I think he was.

Q. You concede, do you not, that the West Indies was expected to win this match at the Sydney Cricket Ground? A. It is very difficult to say in 1-day games. You know that if you backed your side -- Still, anything could happen in a 1-day game. We had never really done well against Australia under the lights.

Q. Do you remember swearing some interrogatories? A. Yes.

Q. Do you remember being asked whether or not the West Indies was expected to win that match against Australia and do you remember answering yes? A. I can't remember, it must be there I think.

Q. Let me ask you, quite apart from that, it was your view, was it not, having regard to the form of the respective teams that you thought the West Indies would beat Australia at the Sydney Cricket Ground? A. Yes, because -- May I explain why I thought so?

Q. You were obviously the superior team, were you not, in the series? A. I would say so, yes. The point is that we had never really -- Till then we had never beaten Australia under the lights. The point is that I had to emphasise to my players that we weren't really doing anything wrong when we had lost. We were losing by 2 runs or 1 wicket. We were very close so that meant we had to put in a little bit extra just in case Australia might have gone through to the finals. Once we had beaten them --

Q. I suppose, Mr Lloyd, you are a great believer in a theory about motivation in sportsmen? A. Yes.

Q. Motivation is a very important matter so far

as sportsmen are concerned, is it not? A. Yes.

Q. And cricketers as well as other sportsmen? A. I would presume so.

Q. There is no doubt, is there, Mr Lloyd, that matches between the West Indies and Australia attracted far greater crowds than matches between the West Indies and Pakistan. A. I would presume so.

Q. In fact, do you remember in December at the Sydney Cricket Ground playing Pakistan and getting a crowd of 11,000? A. Where was this?

Q. At the Sydney Cricket Ground on 17th December? A. I am not au fait, I'm not bothered really about crowds, I really don't remember them.

Q. Do you remember that was 78,000 to see Australia play West Indies at the Melbourne Cricket Ground on 10th January? A. I know we have always had big crowds in Melbourne, this is going back a long time.

Q. There was a very big crowd at the Sydney Cricket Ground on the 19th, 52,000? A. Yes, I think I remember that.

Q. The crowds that watched the Pakistan-West Indies games right around Australia, I suggest to you, were comparatively very small crowds? A. They probably might have been.

Q. Mr Lloyd, you said in your evidence, did you, that you had not seen either Ex. B or Ex. C, that is those two subsequent articles, until a couple of days ago? A. Yes.

IN THE SUPREME COURT

NO. 7

C.H. Lloyd

Cross-Examination

Q. May we take it that you did not give your solicitors any instructions to make any complaint about those two articles in your statement? A. No, it's not the articles, I'm talking about the apology, not the articles.

Q. May we take it you gave your solicitors no instructions to complain about these two apologies, as you call them? (Objected to; disallowed).

Q. How long did you remain in Australia after the game at the Sydney Cricket Ground in weeks approximately, was it a matter of weeks? A. After the game that was -- The game in question?

Q. Yes. A. We still had to play the finals. As soon as the finals were over we left the next day, I think.

Q. You would have left somewhere round the end of January? A. There again the date, you know.

Q. Did you yourself give any personal instructions to the solicitors to bring this action, Mr Lloyd? A. It was -- we had some discussion before with Kerry, yes.

(Mr Hughes objected to this line of cross-examination; allowed).

Q. Did you have a discussion with Mr Kerry Packer about bringing these actions, Mr Lloyd? A. Yes.

Q. Did Mr Kerry Packer encourage you to bring these actions (Objected to; pressed; disallowed).

Q. Before you left Australia did you go and see the solicitors yourself, Mr Lloyd? (Objected to; allowed).

Q. Did you go and see the solicitors yourself personally, Mr Lloyd? A. We left it in the hands of the cricket, the P.B.L., because we were leaving at that particular time and that meant we

wouldn't have been able -- We weren't here to continue with it more or less.

34.

RE-EXAMINATION:

MR HUGHES: Q. Mr Lloyd, Mr McHugh was asking you some questions about a comparison between the Brisbane game between Australia and the West Indies a few days before 19th January and the game between Australia and the West Indies at the Sydney Cricket Ground on 19th January. Were you playing in the Brisbane game? A. Yes, I played in the Brisbane game, I'm sure I did.

Q. You were asked by Mr McHugh some questions designed to establish why you expected the West Indies to win at the Sydney Cricket Ground and you were cut off in your answers. Would you explain fully why you expected the West Indies to win at the Sydney Cricket Ground on 19th January? A. Because by playing Australia in that game -- We lost all the other 1-day games against them under lights. So by playing Australia it meant that we wanted to win it badly in the sense that you never knew, something might have happened. If we had lost the game we would have run into that same problem again of having not won under the lights, so we really wanted to win that game badly.

I think to be quite frank I thought the team meeting lasted quite long in that we went into detail, really into detail on all aspects of the games before and why we had lost and how to rectify that.

(Witness retired)

35/36.

(Interrogatories Nos. 1 and 2 and the answers thereto tendered without objection and marked Ex. D)

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NO. 7

C.H. Lloyd

Re-Examination

(Interrogatory No. 4 and the answer thereto tendered; objected to; pressed; deferred)

(Interrogatory No. 5 and the answer thereto tendered; objected to; deferred)

(Interrogatory No. 6 and part of the answer thereto tendered; objected to; pressed; deferred)

(Interrogatory No. 7 and the answer thereto tendered; objected to; pressed; deferred)

(Mr. Hughes called for an article in The Age of 20 January 1982 headed "Rain enables Australia to qualify for finals at fractionally better run rate"; produced; tendered; objected to; deferred)

(Article published in The Age of 20 January 1982 headed "Come On, Aussie, the promotors' plea" called for)

IN THE ABSENCE OF THE JURY:

(Article headed "Australia slips into cup finals" published in The Age of 20 January 1982 called for; produced; objected to)

(Further hearing adjourned to Tuesday, 17th April 1984 at 10am)

37.

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NO. 7

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 9702 of 1982
COMMON LAW DIVISION)

IN THE SUPREME COURT

NO. 7

CORAM: BEGG C.J. at C.L.
And a Jury of Four

SECOND DAY: TUESDAY, 17TH APRIL, 1984

LLOYD v. SYME

(Appearances as before)

IN THE ABSENCE OF THE JURY:

(On 16th April, 1984 interrogatory number 4 and the answer thereto was marked exhibit E)

(Interrogatories numbers 5, 6, 7, 8 and 11 and the answers thereto marked exhibits F, G, H, J, and K respectively).

(Article published on 20th January, 1981 entitled "Rain enables Australia to qualify for finals" tendered without objection and marked exhibit L).

(Article of 19th January, 1982 entitled "Come on Aussie, the promoters' plea" tendered without objection and marked exhibit M).

(Counsel addressed his Honour).

(Article published in The Age of 19th January, setting out the names of the Australian and West Indies Squads produced; tendered; objected to and marked exhibit N).

IN THE PRESENCE OF THE JURY:

(Case for the plaintiff closed).

(Case for the defendant).

MR McHUGH: I rely on the evidence given, your Honour. I do not propose to call any further evidence.

MR HUGHES: I have some submissions of law to put to your Honour relating to the defences in light of the announcement my learned friend has just made.

HIS HONOUR: Are you pressing your comment defence?

MR McHUGH: Yes, your Honour.

IN THE ABSENCE OF THE JURY:

(Counsel addressed)

(Short adjournment)

ON RESUMPTION:

(Mr McHugh applied for a verdict by direction)

(Counsel addressed)

(Application refused)

(For his Honour's judgment on whether s.13(a) evidence should go to the jury see separate transcript)

(Counsel addressed)

(Luncheon adjournment)

ON RESUMPTION:

(Counsel addressed jury)

(Further hearing adjourned to Wednesday 18 April, 1984 at 10 a.m.)

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 9702 of 1982
COMMON LAW DIVISION)

IN THE SUPREME COURT

NO. 7

(Hughes)

CORAM: BEGG C.J. at C.L.
And a Jury of Four

SECOND DAY: TUESDAY, 17TH APRIL, 1984

LLOYD v. SYME

IN THE ABSENCE OF THE JURY:

HIS HONOUR: Dealing with the question of the tender of interrogatories 4, 5A and 5B, you are submitting that this is strictly in reply. Is it strictly in reply?

MR HUGHES: It is evidence that could be given in reply but one is entitled to meet the defence, as I said yesterday.

HIS HONOUR: You do not meet the defence until there is evidence to support the defence, as a rule.

MR HUGHES: I do not want to say too much. It would be open to the defendant to submit - the submission may not get past your Honour to the jury - but there is comment in this article. The proposition we contest - the comment is an opinion that an honest man could form.

HIS HONOUR: I have grave doubts about it but I feel disposed to admit it at the moment. I do not think these matters are likely to prejudice you, Mr McHugh. It is merely technical ground we are discussing at the moment, is it not? It will not prejudice you in front of the jury.

MR McHUGH: I do not know what my friend would be tendering them for if he was not going to prejudice me. The answer is of course it would prejudice me in the sense that it affects the

case against me.

(Interrogatories 5A and 5B, subject to reservations and rulings as to relevance, marked Ex. F.)

HIS HONOUR: On the face of it it does not prejudice the tender. In no way does it prejudice the defendant, in my view. The other ones relate to the same matter.

MR HUGHES: Could I explain the matter as to why we tender interrogatory 6 and part of the answer? The answer sets out the material to which the defendant says the writer of the article complained of had before him as his basic material for writing the article.

HIS HONOUR: Is that right? Is that what is intended?

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MR HUGHES: I am talking about the particulars in answer to the interrogatory. In order to determine this tender your Honour has to look at several interrogatories in conjunction. In answer to interrogatory number 6 the defendant says it had access to the material contained in the following articles and documents. There are 40 set out. The articles set out as items xxxvii and xxxviii the articles published in The Age of 20 January. That is the day before the publication of the article complained of. In each of those articles which I have tendered and which are the subject of an objection, if your Honour would be good enough to go briefly to them, The Age states: "When a gift from Heaven ... 43.1 overs". The other article is also published in The Age of 20 January. It is a shorter article and states: "A typical summer ...". This tender goes to the question of whether any comment in the article could have represented the honest belief.

HIS HONOUR: This is strictly in 5.

MR HUGHES: I do not know whether the defendant is going to call Mr Thorpe.

HIS HONOUR: You are in the process of tendering 6B and the answer.

MR HUGHES: Yes. I am also in the process of tendering 7 as the next interrogatory. All these documents are related to the same point indicating the possibility of anyone forming an honest belief or expressing an honest opinion that the match had been thrown. 7 states: "Before the publication ... numbered paragraphs". That refers to the numbered paragraphs in the statement of claim. Opposite "Paragraphs in the article complained of" the answer is: "The defendant's research ... above material". That is the material including the two articles in which The Age says Australia won through a fluke of the weather. That goes to indicate any possibility that Mr Thorpe - if it was Mr Thorpe who read the article complained of - could honestly have expressed the opinion that the match was pre-arranged.

Interrogatory 8 asks this question: "Before the publication ... if so". 8 is answered by saying "Apart from the above-metioned research" - that is research into those enumerated articles - "The defendant made ... were true". That interrogatory, coupled with the other one I will tender, if allowed into evidence, will give rise to the inference that the author of this article did not even watch the match. The comment is said to be a comment on the match. How can one express an honest opinion that the match had been thrown without watching the match and in the face of articles in the defendant's newspaper saying that Australia won through a fluke of weather is difficult to see.

The next one is: "As to the document ... number 6". That takes one back to the articles published in The Age of 20 January. "The author

obtained or read ... matter complained of". Here is the defendant saying, "Our journalist who wrote the article complained or relied upon two articles that said that Australia had won through the weather". That is the basis upon which we make the tender. Your Honour is quite right; it is anticipating the raising of the defence of comment. I have to do that because no indication has been given and no occasion has arisen to give any

indication as to whether the writer is to be called.

HIS HONOUR: I propose to admit all the interrogatories tendered. It may be that in the fullness of time I may have to instruct the jury that it has nothing to do with the case. At the moment I propose to admit them.

(Interrogatories 5, 6, 7, 8 and 11 and the answers therto marked Exs. F to K)

(Article of 21 January, 1982 marked Ex. L)

(Article of 19 January, 1982 marked Ex. M)

HIS HONOUR: Do you wish to repeat your argument of yesterday?

MR McHUGH: There are many other points. The first is that these interrogatories were directed to pleas of qualified privilege which were then on the record. Neither the questions nor the answers have anything to do with the defence of fair comment. Let me illustrate it. Question 5 depends on the Butler point, so I rely on Butler in respect of that. Paragraph 6 is "Before the publication ... matter complained of". The defence is a defence of comment, and naturally enough the defendant is entitled to rely on the facts outside the article so long as they are referred to by necessary implication. This is an interrogation about statements in the article.

It has nothing whatever to do with it.

Likewise in respect of 7 I make the point that the information that you have got is quite a different thing from the facts you rely upon. Question 7 is "Before the publication ... numbered paragraphs". The answer is "The defendant's research ... above material". The research relied on is quite a different thing from the facts relied on. On can rely on the facts without doing any research.

We make this final point in respect of par. 6: if my friend is going to put in interrogatory 6 he just cannot put in a reference to the various articles by description. He would have to put in the articles as well. After all, the answer is "The defendant had access ... and comments" and then they are specified. he would have to put in those articles because otherwise the interrogatory is totally meaningless. How can the jury assess the material if it does not see any?

In respect of par. 8 "Before publication of the matter ... were true" there are certain questions set out. Again none of it is relevant to the issue under s.32 of the comment defence. None of this material is relevant for any one and sometimes more than one of three independent grounds; namely, first, it is covered by Petritsis' case. Secondly, insofar as my friend would otherwise be entitled to get the interrogatories in, he would have to put in all the articles. Thirdly, these questions are directed to pleas of qualified privilege. Neither the questions nor the answers are relevant to the comment issues which concern honest belief.

(For his Honour's ruling see separate transcript.)

(Article published in The Age of 19th January setting out names of Australian and West Indies teams tendered; objected to; marked Ex. N)

IN THE PRESENCE OF THE JURY

(Case for the plaintiff closed)

MR McHUGH: I rely on the evidence given, your Honour. I do not propose to call any further evidence.

MR HUGHES: I have some submissions of law to put to your Honour relating to the defences in light of the announcement my learned friend has just made.

HIS HONOUR: Are you pressing your comment defence?

MR McHUGH: Yes, your Honour.

IN THE ABSENCE OF THE JURY

HIS HONOUR: Mr McHugh, what evidentiary material is there that the material published by your client represented the opinion of his servant or agent? What evidentiary material is there?

MR McHUGH: It is there in the material that is sued and in the terms of the interrogatories my friend has tendered. It is an objective test.

HIS HONOUR: The defendant raised the defence of fair comment. He undertakes to show to the jury that it represents the opinion of somebody; he said it was not the opinion of anybody. There is not the slightest evidence.

MR HUGHES: Perhaps I should indicate formally what my applications are and then my friend's argument would be put in its proper context. The comment defence should be taken away and also, I submit, the s.13 defence should be taken away.

That is a separate matter.

HIS HONOUR: Section 13 is a different matter. I will deal with that independently.

MR McHUGH: Is my friend relying on this point your Honour raised?

MR HUGHES: Yes, on that and on a number of other points.

MR McHUGH: The first question under the defence is whether the statement in question can be construed as an expression of opinion. That is determined by asking a number of questions. The first is whether the ordinary, reasonable reader would have understood the statement as having been intended by the author, Mr Thorpe, to be an expression of opinion upon sufficient material. The next question is whether - I am assuming the first question is answered in our favour - the opinion is one which an honest man might have held on that material. They are the only questions that we have to show at that stage provided the comment is based upon proper material for comment, which we submit in this case it is.

HIS HONOUR: You are now dealing with one of the steps in the process of proof, obviously, according to Bickel's case. Before

you get to that I am asking you to indicate what material evidence there is. Is it the opinion of the defendant or its servant or agent? Where is the evidence? Is it verbal evidence from witnesses or written evidence? If it is written evidence, where is it?

MR McHUGH: We rely on two things. We rely on the terms of the article itself together with the fact of what we are getting out of the

interrogatories and the answers that have been tendered. We are not relying on the defence of a stranger.

HIS HONOUR: You bear the onus of proving the defence, do you not?

MR McHUGH: We bear the onus of proving, but we prove that by simply showing that it is material which a jury could hold did constitute an expression of opinion and that it was an opinion which an honest man might have held on the material which is relied upon. They are objective tests. They do not depend upon calling anybody.

HIS HONOUR: As between that and the other type of defence under comment, namely the comment of a stranger, what is there to identify this gentleman as being the servant or agent of a defendant as opposed to a stranger who has professionally been asked to write a statement or an article.

MR McHUGH: That is something that we can rely on. We have not sought to rely upon it. It is just a further ground.

HIS HONOUR: I am talking from an evidentiary point of view.

MR McHUGH: It is published under the byline and all the questions in the interrogatories are directed to the defendant as to whether it relied upon it. The question had been asked whether the person who wrote it relied on it. The plaintiff accepted it was the defendant's comment and interrogated on that basis and tendered the interrogatories on that basis. The fact that it is published in the newspaper under a byline is itself prima facie evidence that it is published by a servant or agent of the defendant.

HIS HONOUR: Wat if it was by Kirby, J?

MR McHUGH: That might be an indication in the paper which would destroy what would otherwise be a prima facie inference. Likewise if it is published by R.J.L. Hawke. One might say there is no prima facie indication that it is published by a servant or agent of the defendant. If you have a publication with a by line and a particular individual in the paper and the defendant is then interrogated on the basis of what information it had in its possession and its answer on that basis, it can only be on the basis that the author was its servant or agent, otherwise it is irrelevant. The plaintiff cannot have it both ways. He cannot say, "I am going to rely on interrogatories 5 to 8 and 11" as indicating he knew the defendant's honest belief.

HIS HONOUR: You say he made a fatal error that provides you with some material?

MR McHUGH: That is so.

HIS HONOUR: You take this admission against the plaintiff by arguing these questions he accepted from an evidentiary point of view that this was a servant or agent?

MR McHUGH: Yes, your Honour. It is not the question being tendered, it is the fact that the answers are given and can be relied on.

HIS HONOUR: Is there one that says, "This is my opinion"? Is the word "opinion" used?

MR McHUGH: It does not have to be. The steps are simply these: objectively the jury can hold it is comment. The interrogatories show as well as the publication of the article that it is the defendant's comment. That is enough. One is entitled to rely on that without calling

somebody, just the same as in Hardy's case. Nobody was called in Hardy's case. The defendant did not go into evidence in that case. It went to the jury and, in our submission, it quite rightly went to the jury.

Your Honour will recall there is an article by Max Harris in Hardy's case. The defendant did not call any evidence. It is an objective test. The jury found it was comment. It was one of the many things it found in favour of the defendant. They found almost everything in favour of the defendant except one or two meanings, but the comment defence was one of them. There is material to go to the jury in respect of the defence of comment.

MR HUGHES: That just does not hold water. First of all, it is the issue that the matter was comment or the comment of the servant or agent of the defendant. There is no evidence as to the character in which whoever wrote the article wrote it. The interrogatories which are tendered go to establish the information that the defendant had. That information could have come to the defendant from any one of a number of sources. The information consisted in the defendant's own newspaper article. The fact that the defendant admits it had that information and asserts that it was the basis of the article complained of does nothing to stamp Mr Thorpe - if he wrote the article - with the character of a servant or agent.

My friend has paid the price of his reticence. He has overlooked a fundamental point in his defence. He had to prove that the article was written by a servant or agent of the defendant. One can go through every one of those interrogatories. I do not want to impose the tedious task upon your Honour; your Honour has looked at them. There is nothing in the questions and nothing in the answers that is capable of founding an inference that the writer

of the article was a servant or agent. All they say is that the defendant had certain information. That was the basis of the article by whomsoever wrote it. It leaves the question of the character up in the air.

HIS HONOUR: Has there not been some comment on this question in the appeal courts?

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MR HUGHES: No, your Honour. There was some discussion of it in a trial over which your Honour presided. In Bickel's case they called the author. He established the capacity in which he wrote the article. Your Honour held on those facts that the proper defence was servant or agent. Nothing in Bickel's case touches this problem.

It is indeed noteworthy that my learned friend has confined his submission on this basic point to a general statement that some admission comes out of the interrogatories and the answers. He has not pointed specifically to one line in any of those documents with a view to arguing that it provides the necessary inference.

HIS HONOUR: I thought he said that the article said by so-and-so.

MR HUGHES: The fact that the article purports to be written by so-and-so does nothing to demonstrate the capacity in which so-and-so if he did write the article, wrote it. It is not to be assumed that because an article is written under a byline the person named in the byline is a servant or agent. The inference could probably go the other way. It is quite neutral. It is a very different case from Bickel's where we put Dr. Roberts into the box to face my learned friend's fire.

HIS HONOUR: Are there any other grounds upon which you rely?

MR HUGHES: Yes, your Honour, several.

HIS HONOUR: This is your application to take the comment defence away?

MR HUGHES: It is convenient to use the judgment of Hunt, J. in Bickel. It is a convenient list of the matters to be considered when a defence of comment is raised. First, is the statement in question to be considered in fact as an expression of opinion? Of course a preliminary legal issue arises before one gets to that question. That preliminary legal issue is at the end of the judgment by Hunt, J. in 1981 vol. 2 N.S.W.L.R. at p.490. "Under that defence there is a ... as folows". We submit first that the material complained of is not capable of being construed as comment.

HIS HONOUR: That is a matter of law for the judge.

MR HUGHES: That is a matter of law for your Honour. It involves a comparison between any opinions expressed or any statements made in the article. That is to say, you have to look at the relationship between the opinion expressed and the material indicated as the basis of the comment. I can best illustrate the essential nature of the argument we seek to make on this preliminary legal point in this way: the article purports to state various matters which may be summarised for the purposes of this argument in this way: that there may be some commercial advantage in an Australian-West Indies final series for the Benson & Hedges cup.

If there is any expression of opinion in this article, which we dispute, but for the purposes of this argument one has to assume that there is an expression of opinion, the question is whether that

opinion is defensible as comment, it is an opinion that is coextensive, to use your Honour's convenient and apposite word yesterday, with the imputations. There can be no other opinion in this article but an opinion co-extensive with those very serious imputations.

HIS HONOUR: I am against you on the capability point. I do not think it arises. Prima facie I would be content to hold that the question of comment or statement of fact is a jury matter. I am against you on that submission. In other words, it is capable of being construed by the jury as comment. You were saying that this was not co-extensive even if it was comment.

MR HUGHES: No, your Honour, I was saying the opposite. I was saying that any opinion in this article is co-extensive with the imputations. That is a word that your Honour used yesterday, and it is a very convenient expression. It is clearer than "congruent". Therefore, one has to compare or consider the relationship between that opinion and the material, if any, indicated in the article as the basis for it. My simple point is this: none of the material in the article would be capable of supporting as comments the imputations which we have complained of.

HIS HONOUR: The court does not know what part of this article is said to be comment. I have not asked Mr. McHugh to tell the court.

MR HUGHES: They have given particulars.

HIS HONOUR: I do not have them.

(Letter dated 6th January, 1983 handed to his Honour.)

MR HUGHES: They say - of course we do not agree with this formulation, but it is convenient to start with their formulation - that what is in par.1 is a statement of fact. The headline is par.1, "Come on, dollar, come on".

HIS HONOUR: That is comment?

MR HUGHES: They say that is comment. We disagree. It is incapable of being regarded as comment. Paragraph 2 is said to be comment.

HIS HONOUR: Am I right in assuming that that is how those paragraphs run, Mr. McHugh?

MR McHUGH: Yes. They are numbered in the statement.

MR HUGHES: We should look next at the particularisation in the final defence of the material which is said to be proper material for comment. They itemise six matters. One of them is the final game of cricket.

HIS HONOUR: This was the type of comment that on the face of it where the whole lot of the facts were not set out in the article relied on, was known by the public.

MR HUGHES: That is what they say.

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HIS HONOUR: They rely on part of the material and part of the facts outside the article. They did in fact prove a lot of things under cross-examination.

MR HUGHES: I shall endeavour to examine what they did prove and what there is evidence about on that point. The purpose of the present submission is to demonstrate that an examination of the relationship between the facts, if any, stated in the article and the matter relied upon as proper material for comment could not possibly sustain the comment made in the article as being an expression of opinion. There are cases in which if you state a bare inference, even in the form of an expression of opinion, it cannot be defended as comment because it is a bare

inference with no supporting facts. my opinion X is a murderer". A bald sta ike that cannot be defended as a comment.

If what purports to be an expression of opinion is to be defended as comment there must be a sufficient basic relationship between that which is sought to be defended as comment and the material relied upon as its basis. My point is that even if you accept the defence formulation of what is fact and what is comment in this article, the comment which, as I said, is co-extensive with these imputations, the opinion that is co-extensive with these imputations is not an opinion which could reasonably be formed on the indicated facts.

The essence of the argument is this: let us asume that it is stated as a fact in the article that commercial advantage will accrue to Mr Packer and/or the West Indies team and/or the other team in the finals if the final series is to be played out between Australia and the West Indies. That fact and the other facts relied upon, if they are facts, are incapable of supporting the proposition that, to use a colloquial expression, Mr Lloyd as the captain of the West Indies team took a dive. It is like saying that a person has committed a crime simply because he has a motive for committing a crime. That cannot be right.

HIS HONOUR: You say they can go on and say Mr Lloyd dropped five matches or something like that?

MR HUGHES: Exactly. This is said to be a comment on the match and on the series. There are no facts stated in the article suggestive of any member of the West Indies team deliberately missing a chance or deliberately enabling Australia to get runs. If there is any opinion in this article it is not supportable by the stated or indicated facts.

HIS HONOUR: Except one qualification; that there was an extraordinary reversal of form, perhaps.

MR HUGHES: Yes, but the defendant has said in its own newspaper that Australia won the match only because the rain intervened.

HIS HONOUR: That goes to the weight.

MR HUGHES: It goes to more than that.

HIS HONOUR: You are asking me as a matter of law to make these rulings. There is no evidence on the matter you have put.

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MR HUGHES: With respect, your Honour, no. However, I may try to analyse that problem. That which is defended as comment is said to be a comment on the match. The opinion which is sought to be defended as comment is an opinion that the West Indies threw the match.

HIS HONOUR: It is not the only fact relied upon. A series of facts were relied on.

MR HUGHES: I can deal with them only one by one.

HIS HONOUR: You say that that one by itself does not support anything?

MR HUGHES: No. What I am saying is that the opinion, if there is an opinion, is that the West Indies threw the match and for commercial gain would do the same thing again if it led to a five match final.

HIS HONOUR: I made the note that the opinion is not supported by the facts stated.

MR HUGHES: Then that throws one to examining what other facts are stated or indicated.

HIS HONOUR: You say the mere fact of the game itself would not indicate anything?

MR HUGHES: No. The next matter is that the newspaper published those two articles of 19th and 20th January, particularly the two on the 20th. The smaller article states, "Australia seemed beaten ... rain ended play". The heading is, "Australia slips into Cup finals". The opening paragraph is, "A typical summer ... one day competition".

There the defendant is admitting as fact that Australia slipped into the finals not as a result of some action by the West Indies team to throw the match but because the weather intervened in Australia's favour and Border put on a brilliant display. The other article is to the same effect. It states, "Rain enables Australia ... victory over the West Indies". Those are the facts. That is their description of the match. The opinion sought to be defended as comment is relevantly said to be an opinion about the match.

HIS HONOUR: Suppose two articles in one paper say that the play was the greatest of all time and the other one states that it is nonsense. Sometimes in one paper there are events described in quite different ways. That does not mean that one should prefer one view of the facts to another. That is asking the judge to make that finding of fact.

MR HUGHES: No, your Honour. The question is whether anything stated in this article complained of is opinion and is capable of being supported as such. If one confines oneself for the purposes of this enquiry to the facts stated in the article - I am accepting for the purposes of this argument the defendant's formulation of what facts and what statements in the article are facts - the only relevant one stated is that commercial advantage would accrue from an

Australian-West Indies final series. In particular it is

alleged, and it is said to be alleged as a fact - this is the defendant's formulation - that in effect the profits - eleven and twelve - "Had the West Indies won ... would have". That is said to be a fact. I accept that proposition but only for the purposes of the argument.

The next alleged fact is, "These figures will be ... advertising revenue". There is no evidence to support those propositions as propositions of fact. Mr. Linton Taylor, the manager of P.B.L. Marketing Pty Limited was called. My friend had the opportunity to ask him whether it was a fact, and he did not ask a single question about it, it being his onus. My friend did not ask him a question on that point. In considering this first legal issue it all gets back to this: whether the facts proved - I have demonstrated some facts that have not been proved - and the facts indicated such basis for the alleged comment which are capable of supporting any opinion expressed as a defensible comment. The situation is just like the one I cited for the sake of example. "In my opinion the West Indies ... blowing a safe". The only fact indicated but not proved is that commercial advantage would accrue for Mr Packer and the West Indies if the series were prolonged and the final fought out between the two main teams. As I said earlier, it is like inputing to someone the commission of a crime on the basis solely of a motive, and that just will not do, particularly when a man from P.B.L. Marketing is called and not cross-examined on the point. The facts have not been proved.

HIS HONOUR: I think the inference can be drawn that the West Indies and Australia attract the greatest amount of interest in the community and

a fortiori they attract more viewers on television. The greater the viewing field the greater the commerical advantage to the one providing the television coverage.

MR HUGHES: It does not follow.

HIS HONOUR: It does not follow but -

MR HUGHES: It is a matter purely of speculation. No attempt has been made to investigate the commercial arrangements between advertisers and the television station. The evidence is quite consistent with all the advertising having been pre-sold, irrespective of who was in the final. It was for my learned friend to prove the facts he wanted. There is no fact alleged in the article or proved which would suggest that the West Indies would do better out of a final between themselves and Australia.

HIS HONOUR: In fact the contrary is established by the evidence. They are guaranteed that amount. There is no evidence of any bonus for winning any more or anything of that nature. The only evidence is that Mr Lloyd would not make a penny more.

MR HUGHES: There was no suggestion put to him in cross-examination that he was. They were on a guarantee apparently unrelated to takings. If the Age wants to apply the blowtorch to Mr Lloyd's belly it had better prove some facts that are capable of supporting the comment that he took a dive.

HIS HONOUR: You say there is no evidence of one of the alleged facts, and that alleged fact is basic to the innuendo alleged.

MR. HUGHES: Yes. The next point, going through Hunt, J.'s enumeration, is, "Is the statement in question to be construed in fact as an expression of opinion?" That is a jury question which arises if and only if your Honour decides the point I have just been arguing. "The next point is whether the opinion is one which an honest man might hold on the material". What is the material? for the purposes of argument we treat the material as being the facts alleged as facts in the article. For the purposes of argument I accept the defendant's formulation as a convenient way of doing the argument. I am bound to say this: one of the statements in the article which was categorised by the defendant as comment is the quotation from the Great Gatsby, the italicised quotation in par. 2 of the article.

How on earth that can be regarded as a comment by the writer of the article is something that may defeat the imagination. It is and can only be a statement of fact. It does not purport to express the opinion of the writer of the article. The quotation is plucked out of the book as an anecdote, and anecdote containing serious overtones that become part of the essential theme of the article upon which we sue.

HIS HONOUR: I suppose it means comment within a comment. Mr. Fitzgerald's comment was, "The single-mindedness of a burglar blowing a safe". That is not a fact, it is comment by Mr. Fitzgerald. He is quoting somebody else's comment.

MR. HUGHES: It is not a comment as reported.

HIS HONOUR: Mr. Fitzgerald wrote that. You say it is a fact?

MR. HUGHES: Yes. It is an historical anecdote. For the purposes of argument that paragraph should be regarded as fact. As I said, it is the

keynote of this article. It refers to a crisis of conscience. It refers to the fixing of the World Series Baseball Final in 1919 and playing with the faith of the people with the dedication of a burgular blowing a safe. If you read the article there is a further reference to crisis of conscience. These events about which the writer is writing are described as comparable with the crisis of conscience that faced the United States when the World Series was fixed and President Nixon committed what were described as blatant indiscretions when America went into the Vietnam War.

That sets a serious backdrop. Of course, the last lines of this article, said to be comment, state, "Two opposing teams ... blowing a safe". That is written for the purposes of this argument about Mr. Lloyd as the leader of the West Indies team, amongst other people. On this argument we assume identification as a fact. Nothing in the article or in the particular material indicated as the basis of the comment is capable of supporting as an honest opinion any opinion that is expressed in this article. The comment is to be treated as a bare comment. It is defensible only as a statement of fact.

There is no basis upon which a jury could rationally hold that the comment is based on proper material. What your Honour said earlier about the absence from the article of any statement of fact indicating that Mr. Lloyd stood to gain from a particular final contest, namely between Australia and the West Indies as opposed to

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between the West Indies and Pakistan, goes to the very heart of that question.

Assuming everthing is against me in the arguments I have put, the next argument is that the evidence is all one way in favour of the plaintiff as showing that any opinion expressed in this article could not have been an honest opinion.

HIS HONOUR: That was bound up in your last submission.

MR. HUGHES: But the particular application of that proposition is that we have proved that the material used by the writer as the basis of this article which is sought to be defended as comment included material published by the defendant itself which said loudly and clearly that the result of this match was not the result of a fix but as the result of a fluke of the weather. That destroys any rational basis for holding that there was, particularly when he did not even attend the match. That is the inference that arises from the particulars. If he did attend the match, my friend should have said so. The particulars say otherwise.

On all the available grounds this comment defence cannot go to the jury. Of course the first point is the simple point that the defendant has failed in an essential item of proof. The interrogatories and the answers that have been tendered do not, for the reasons I have indicated, get the defendant anywhere near an available inference that the writer of this article was a servant or agent of the defendant. I have separate submissions to make on 13.

MR. McHUGH: I will be asking for a verdict in this case because my friend has failed to prove a case at all. My friend has not called a single witness to say he identified the plaintiff with this article. That is quite fundamental.

HIS HONOUR: There is no authority, apart from oblique references to the minimum role that 13 can play; it is still set out in black and white

and invites consideration of the circumstances. Why do you say it is not available in this case as a jury matter?

MR. HUGHES: Because the defendant carries the onus of establishing circumstances where by the plaintiff would be unlikely to suffer harm. It is the defendant's onus. They are incapable of supporting an argument that the plaintiff is unlikely to suffer harm. We have to treat this part of the case on the basis that if the imputations are found in the plaintiff's favour they are imputations of grave dishonesty in relation to the playing of cricket, and published under no circumstances of mitigation at all. Look at the situation as at the date of publication. The only authoritative statement about the application of s. 13 is to be found in Morosi's case.

HIS HONOUR: I think some of my brother judges have let certain cases go which would extend the narrow s.13, but they have not been cases in which ther has been actual fraudulent conspiracy involved. They have been cases in which there has been nothing involving moral turpitude.

(Short adjournment)

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MR. McHUGH: My friend's submissions were based on the premise that the comments were on the match. That is one thing that the particulars do not say it was on. It says it was on the results of the games between the contestants. It says it was on the incentives and on the final game of cricket. It also refers to television ratings and advertising.

HIS HONOUR: What does that final game mean? This was the final of the series.

MR. McHUGH: My friend referred to it as though it was a commentary on the performances. It is a question of the subject matter of public interest. Various materials is specified in the particulars. I make this point which is quite fundamental and which my learned friend's submissions do not address at all: the defence of comment is required to meet such portions of the material sued upon which are defamatory of the plaintiff. You do not have, under the defence of comment, to meet such portions of the material which might be defamatory of, say, Mr. Kerry Packer. One goes to the comment which reflects on the plaintiff and asks whether it is justified. My friend was entitled to set out the whole of the article because he says the overall context of the article gives rise to certain imputations. But when one comes to the comment part - and the assumption is that this article refers to the plaintiff; that is the hypothesis upon which we are proceeding because we are dealing with a matter of defence - one gets to par. 8 of the statement of claim before one can go to that material.

Paragraph 8 states, "Let us consider ... incentive machine". That is hardly defamatory. Then par.12, "These figures ... about them". That deals with Mr. Kerry Packer; we do not have to worry about that. The next parts are crucial for the defence of comment. "One wonders about the collective ... unstated thought". My friend interpolates, in the minds of the West Indians, "It does not matter ... taking a dive". Insofar as there is defamatory material of the plaintiff which is comment, it is in those paragraphs there, and in particular 13 and 14 which give rise to the defamatory matter.

I shall deal with the facts we rely on in respect of that. The theory of the article is that players have commercial pressures on them. They specify it; crowds, gate money, sponsorship, etcetera. It is the new cricket which is

bringing this about. The commentator asks: "Did these factors bring about an unstated thought 'It does not matter if we lose'?. It is speculation, in effect. And then he said, "This thought ... taking a dive". If one had to specify one subject of public interest with which it deals with more than another, it would be number 3 in the particulars, namely the incentives operating in the minds of the sporting team in general and cricket teams in particular or, if you like, the final game of cricket.

For the jury the issue will be whether an honest man, knowing the relationship between gate takings, receipts, the commercialisation of the sport, the fact that players' incomes are tied in with gate receipts, as Mr. Caldwell said, could make that comment. We say that the material is in the evidence from a variety of sources. We have evidence about what happened in Brisbane when the West Indies defeated Australia with five wickets in hand. We have

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Mr. Lloyd's evidence that incentive is very important, etcetera. We have this tie-up between P.B.L., TCN-9, Mr. Packer and the Australian Cricket Board and the fact, as Mr. Caldwell said, that there is a reasonable assumption that there would be more money from the West Indies/Australia final than a West Indies/Pakistan final.

We have indicated what the sub-stratum of fact is. We have indicated the facts to support it. We rely on them to support the comment. They would have been entitled to do so under the rules but they did not.

MR. HUGHES: Yes we did.

MR. McHUGH: They asked some questions but not the other questions.

HIS HONOUR: What makes this case unusual is the fact that normally in comment cases the comment is patent or reasonably defamatory. The comment of the defendant is admitted. He says, "True, I said defamatory things; I am entitled to under the law, but I was only commenting on matters on the basis of proper material". Your case has been, has it not, that the comment was not a defamatory comment and that it had other meanings?

MR. McHUGH: Yes.

HIS HONOUR: If all those numbered paragraphs are comment you say they do not bear the defamatory meanings or that taken together they do not bear defamatory meanings?

MR. McHUGH: Yes, your Honour. Let it be assumed that, read with everything else, they do hold it, they come to that view - we are entitled to justify those comments under s. 32 of the Act. I use "justify" in the sense that there is a relationship between the comment and the material upon which it was based, in the sense that an honest man could have made that comment on that particular material.

My learned friend said that Mr. Linton Taylor was not asked a single question about television receipts. There are two answers. First is the answer that your Honour indicated. Secondly, it is irrelevant in the sense that it refers to Mr. Packer. Third, in any event, the interrogatories that my friend tendered and the answers to them expressly state that as a fact. We are entitled to rely on that.

My learned friend attempted to get the best of both worlds. On the one hand he strongly maintained that there is no evidence that Mr. Thorpe was the servant or agent of the defendant, and on the other hand he sought to tender in evidence these articles on the question of the

honesty of the comment. He cannot have it both ways. It is extraordinary. He said that these articles show that the defendant did not have that information and then at the same time he said that there is no evidence that the author was the servant or agent of the defendant. If there is not an identity between the defendant and servant and agent, all the material is irrelevant.

In other words, it is no use my friend tendering all this material as to what the defendant had if there is not an identity

between the defendant and Mr. Thorpe because Mr. Thorpe can hold an opinion quite different to that of the defendant.

I shall say one thing in passing about Petritsis. We adopt what Hunt, J. said in Bickel about Butler's case. In Bickel at p. 486 in 1981 2 N.S.W.L.R. Hunt, J. said: "The Court of Appeal ... of this interlocutory". We adopt that part of his Honour's judgment where he said it is not stated as a legal proposition in Butler. It dealt with a factual situation and was in no way to cut down what was said in Petritsis. Samuels, J. expressly said in Butler that Petritsis did not cover Bickel's case. He dealt with it on the facts. Butler's case was an unmeritorious situation. There is no inconsistency with the fundamental principle of Petritsis.

HIS HONOUR: You say that Petritsis establishes that the defence of comment has to be directed to the material published and not the inferences or innuendoes that flow from it? Your argument to the jury will be that certain paragraphs are comment. Do you say all those paragraphs express a comment which bears no relationship to the innuendo?

MR. McHUGH: I do not say there is no relationship. Obviously there is some relationship but there is no identity between the two.

My friend gets his imputation by taking a quote from Scott Fitzgerald. He links it here and then takes it onto the comment made in respect of the plaintiff and then he says out of the whole article there are four imputations. That makes the case like Petritsis and not like Butler where the court seems to have taken the view that there was some congruency between the material and comment. It is difficult to see that. Butler's case stands only as an authority; it does not lay down any different principle from Petritsis. It does not affect the operation of the Act.

In respect of s. 13, the onus is on us. It is a large proposition, as I concede, to say that in those circumstances if the plaintiff makes out its case s. 13 could be a defence. The hypothesis is firstly that the article refers to the plaintiff and, secondly, that he has been involved in a fraud for financial gain or suspected of being engaged in a fraud for financial gain. If there were nothing more to the case than that I would be hard pressed to submit that there was any evidence to support the s. 13 defence.

HIS HONOUR: Cricket lovers who watch the game or read of it would have known that Clive Lloyd did not play that game.

MR. McHUGH: Exactly. The article could not have affected them at all.

HIS HONOUR: This article can be limited only to those uninformed people who did not know he did not play.

MR. McHUGH: That is on the assumption that there would not be much interest in cricket in any event. On the basis of that hypothesis the paper's circulation is irrelevant.

HIS HONOUR: You have to go so far as to say that there must have been a number of people who read the article and thought he was in the team and might have drawn the inference.

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MR. McHUGH: It is a jury matter. If this case goes to a jury and if the plaintiff obtains a verdict he will be the first plaintiff in the history of the law of defamation to recover a verdict first when he was not named and, second, when a single witness was not called to say that they were aware of certain circumstances and took the aticle as referring to him. Not one witness was asked whether he took the matter as referring to the plaintiff. If they had been asked they would have been cross-examined. No doubt the very experience advocate who appears for the plaintiff did not ask those questions for a very good reason. One suspects that the reason they were not asked was because they would have said, "No, I did not take it as referring to him because I knew he did not play".

That throws up the question as to whether in a defamation action when the plaintiff is not named - perhaps just another name for him, such as a reference to the Prime Minister - if the article talks about the Prime Minister doing this and that and it is published this year it is just another description of the gentleman known as Robert James Lee Hawke. If it had been two years ago it would have been Mr. Fraser. Here they rely on the fact that the plaintiff was the captain of a team in a general way. He was not the captain on this day. Something which is the product of a mistaken belief in the mind of a reader is not something that can be attributed to

the defendant. In other words, those readers who say, "I took that as referring to Lloyd because I know he is the captain of the team and I believed he was playing, "formed an adverse conclusion concerning Mr. Lloyd not by reason of what the defendant has published but by reason of their own mistaken beliefs.

In Steele and Murray Newspapers Samuels, J. said that it is necessary to call a witness to prove identity. There is some dicta in London Express and Hoffman reported in 40 vol. 2 of the English King's Bench Reports which says it is unnecessary to call a witness. It would be remarkable if a defendant would be held liable because there was circumstances which might make it reasonable to identify the plaintiff with the material, and yet there was not a person who identified the plaintiff with the material. We rely on the dictum of Samuels, J.

HIS HONOUR: Mr. Hughes tendered the article of the day of the match showing who the teams were.

MR. McHUGH: That would only mean that some people were operating under a mistaken belief. For some reason they did not know that Lloyd did not play so that when they read the article on the 21st they read it with the mistaken belief that he did play and say that the defendant is liable for that. The defendant is not liable for that because that is not a product of anything the defendant published on the 21st. It is the problem of the reader's mistaken belief, and for that the defendant cannot be held liable.

This is a fundamental point of principles, and the experienced counsel who appears for the plaintiff no doubt knew what he was about, and to think that he overlooked some fundamental point as he accused me of overlooking in respect of comment, I would not make the same accusation against him because it would be the product of a

deliberate choice. But now he gambles on a view of the law to get him to the jury. In our view his gamble lacks a foundation in law.

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There is no evidence to identify the plaintiff with the article. That is enough to remove the cae from the jury.

I shall finish on the s. 13 point because s. 13 can arise only if your Honour were against me on that identification point. On that basis I am entiled to rely on s. 13 in respect of the mistaken belief, although I must confess I have some difficulty in accepting that. If your Honour holds that the defendant can be liable because people have a mistaken belief that the plaintiff played, obviously it is still doing harm as a result of their mistaken belief. I do not think I could rely on that, not in that context.

We rely on s. 13 to the extent: If your Honour is against our identity submissions, a jury could find that there was a defamation in the sense that it was published to people who knew certain circumstances which objectively could constitute a publication, but there is no evidence that any actual person ever identified him as such, and therefore we can say that there was no harm done to him.

HIS HONOUR: If I hold against you on identity and hold that there is evidence that objectively the Age newspaper was published on the same day as the match, the statement that Lloyd was playing and then an article is published at the conclusion of that game two days later, that those people who read that and nothing more then read the article, I am inclined to take the view that the identification must be limited to that element of people. It certainly cannot be held

to be defamatory to people who knew he was not playing. If I hold that and so direct the jury you will not rely on s. 13.

MR. McHUGH: We say it is a fundamental error of law and does not represent the law in respect of identity. The case could not go to the jury on that basis. If your Honour says it can go to the jury on that basis and no other basis I could not argue about s. 13. If Your Honour let it go on some other basis I would press s. 13.

HIS HONOUR: On the question of identity, it is obvious if the large number of the community would know at the time of publication of this article on the 21st that Mr. Lloyd had not played and therefore could not have dived -

MR. HUGHES: That portrays the fundamental misconception. I called evidence as to the knowledge of the people.

HIS HONOUR: You say those people might still have though, even if he did not play -

MR. HUGHES: He was the leader of the touring side. They were under his auspices. The simple proposition is this: the reasonable reader would be entitled to say that even if the tour leader did not play in the match the team would not have taken a dive without his connivance.

HIS HONOUR: I do not think you said that in your opening. There is evidence that he said he did attend a meeting to discuss -

MR. HUGHES: The ordinary reader - the ordinary cricket follower who reads the Age.

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HIS HONOUR: How many people knew that he attended the meeting?

MR. HUGHES: I am not relying on that on the issue of identification. The ordinary reader would be entitled to take the view that the West Indies team would not take a dive without the connivance, knowledge and participation of the captain, even though he was not playing in the match. I said this in my opening. Mr. Chappell gave evidence, and so did Mr. Thorpe, that the tour leader's function extends to the control and supervision of the players on and off the field. The ordinary reader could say - it is a matter for the jury - whether or not Lloyd played in this match, the team of which he was the leader are said to have taken a dive.

HIS HONOUR: You say that conspiracy would be taken by the jury to have actually come into existence prior to the start of the game?

MR. HUGHES: Yes, it would have to. That is the theory of the article - fixing. The ordinary reader could say, "If that team took a dive, Loyd must have been in it even though he was not on the field of play; he was a principal person in the touring side". In my opening I said Lloyd did not play in this match. I said, "It stands to reason ... Mr. Lloyd's participation". There were 11 players on the field, and Mr. Lloyd was the leader even though he was in his sickbed. My learned friend's argument, although it concedes the existence of the evidence, perhaps overlooks the effect of that evidence. We also rely on the evidence of intent, the evidence that was objected to. It is to the same effect as Lord Denning's argument in Hayward 51 C.L.R. at p. 276. At p. 288 it states: "The actual intention ... were so read" in Lee v. Wilson & McKinnon. That is really the same as Lord Dennings statement. It would be dangerous to disregard those judicial statements in deciding to take the case from the jury. My learned junior helpfully pointed out that the article names Lloyd as a captain of the team. It is Ex. N.

HIS HONOUR: Mr. McHugh, if I hold, subject to anything else you say, that on this broad structure of the case, the publication should not be restricted to those who mistakenly thought, you still rely on s. 13A?

MR. McHUGH: Yes, your Honour.

(For his Honour's judgment see separate transcript.)

MR. HUGHES: There are some propositions I wish to put as to the range of material available to put to the jury on the issue of damages.

HIS HONOUR: At the moment I propose to reject from further consideration all those documents which you tendered in advance. They will not be evidence on the issue of damages.

MR. HUGHES: When I deal with the issues I am entitled to put on the question of damages to get your Honour's ruling I will refer to those documents. The first matter that I propose to put to the jury, unless your Honour rules that I am not entitled to, is that the defence of comment was persisted in but not sought to be supported by any evidence from the writer of the article, whoever he was. That matter goes to aggravation of damages on two bases;

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first, in his speech in Broome v. Castle (1972) A.C. 1027 at p. 1071 Lord Hailsham had this to say: "Quite obviously the ... malice of the defendant". The fact that a defence was put on and not sought to be supported by the evidence is a matter that goes to aggravation because one could deduce from the fact that no evidence was called to support it that it was not put on properly or bona fide.

HIS HONOUR: I do not agree with that. It is one thing that this defence had been persisted in right up to the very moment. Mr. McHugh is anxious for it to go to the jury. Although I have ruled against it, it is not open as a matter of law. I would not give that direction. It is not the same a throwing away justification or things of that nature.

MR. HUGHES: It is necessary to go to Andrews. One of the matters that went to aggravation on the basis that it could be inferred that the plaintiff was hurt by it was the discarding of the defence of qualified privilege on the morning of the trial.

HIS HONOUR: Did he not say it hurt him?

MR. HUGHES: No. It was the very point that I sought in vain to argue to the Court of Appeal. He did not say it hurt him.

MR. McHUGH: They led evidence from him that he knew of the particulars that were relied on in support.

HIS HONOUR: Qualified privilege was on the basis that he was a bad architect and it was an occasion on which they were entitled to say he was a bad architect.

MR. HUGHES: The defence of qualified privilege, albeit only in connection with the publication in Queensland and Tasmania, the code states, asserted that the matter complained of was published for the public good. They said only yesterday morning that it was for the public good.

HIS HONOUR: But Mr. Lloyd would not have the slighest idea about that. Sometimes it can aggravate a person to have his good name bandied about with persistence right up to death knell.

MR. HUGHES: I tried to lead this evidence - I had to bow to your Honour's ruling - as to the defendant's feelings on the defence of comment. Your Honour would not let me ask it. I asked a question about the s. 13 defence. Your Honour is letting that go to the jury so I have no complaint about that. In relation to comment, the plaintiff has been in court and he must know from the conduct of this trial that my learned friend is running comment without seeking evidence to support it.

HIS HONOUR: It is not suggested that Mr. Lloyd did anything wrong in relation to this cricket match.

MR. HUGHES: That is a very convenient utterance for my friend to make, but its intrinsic merit has to be examined.

HIS HONOUR: The persistence of the defendant's counsel to continue to press for the issue of fair comment to be left to the jury is a matter that can go to aggravation. It has been ruled by the court not to be available. I reject that submission.

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MR. HUGHES: I also submit that the plaintiff was entitled to have considered by the jury as a matter going to aggravation of damages the pleading and withdrawal of those defences of qualified privilege.

HIS HONOUR: Again there is no evidence that the plaintiff had the slightest idea about that. I do not see how his legal harm could be increased by that. He has been overseas playing cricket; he does not know anything about the litigation. I make that ruling.

MR. HUGHES: I wish to put to the jury that the falsity of the imputations goes to aggravation of damages.

MR. McHUGH: We submit that it goes to feelings.

MR. HUGHES: Yes, aggravation of damages. The documents upon which I rely go to establish not only that the imputations were false but also that the defendant knew them to be false. If the jury finds that these imputations are made out, they also know - and this evidence cannot be withdrawn from them - that the Age itself published articles which in effect recognised their falsity. The article of 20th January refers to the fact that Australia scraped home because of the rain and would otherwise have been beaten.

If the defendant publishes something that is false and knows it to be false, that fact coming to light in the course of the evidence tendered at the trial in the presence of the plaintiff, the defendant's inferred knowledge of falsehood, because the evidence is now answered, is a matter that goes to aggravation of damages. Consistently with Andrews one can as a fact find that the defendant's knowledge of the falsity demonstrated would add to the plaintiff's hurt. That is why I wanted the interrogatories and those answers in. It may be inferred without express evidence from the plaintiff that that would hurt him even more. It must go to the plaintiff's feelings if it be the fact that the defendant published what may be inferred to have been a lie. The position of the plaintiff is all the stronger because the defendant has not called evidence. That is a matter which is critical on damages.

HIS HONOUR: Malice is no longer relevant?

MR. HUGHES: Malice is relevant if it affects the relevant harm.

HIS HONOUR: That is right, affecting personal feelings. You are saying that he knew that what was published was a falsity and he also knew that they knew it.

MR. HUGHES: The jury is entitled to infer that that hurt him even more. I could not ask him at the time because I had not got the two newspaper articles in. It was in Andrews that the court said the jury is entitled to deduce that particlar conduct would increase hurt.

HIS HONOUR: Mr. McHugh, do you deny the proposition that it can be evidence relevant to hurt?

MR. McHUGH: On a number of grounds.

MR. HUGHES: The relevant part of the report is principally the judgment of Hutley, J.A. at p. 242. Glass, J.A. did not say anthing

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to the contrary. It is at 1982 vol. 2 N.S.W.L.R.. The plaintiff has said that he was hurt by the untruthfulness of the imputations. It is a short and legitimate step to infer that he would also be hurt by the fact that they knew the article to be false.

HIS HONOUR: Why does it hurt somebody more to know that somebody made a mistake, and they knew it?

[Luncheon adjournment]

61.

ON RESUMPTION

MR. HUGHES: Could I add to the submissions I was making before lunch by reference to particular judgments of the Court in Andrews v. John Fairfax.

HIS HONOUR: I do not know whether there is any evidence to say that he knew that they knew it was wrong.

MR. HUGHES: No Your Honour.

HIS HONOUR: I propose to rule that there is evidence fit for the jury to infer recklessness; I think that covers the same field, without putting yourself in too high a position.

MR. HUGHES: It does. There is evidence of recklessness in those answers to interrogatories because the answers specify the information -

HIS HONOUR: I do not know that. I am proposing to rule those out.

MR. HUGHES: I would ask Your Honour not to.

HIS HONOUR: You have got the articles and the facts of the case in. Nobody was really so awake up to what was going on, if the imputations held that that was the truth.

MR. HUGHES: Your Honour, it is very important; however, I appreciate the tentative concession that has been made in my favour that recklessness is open and that was going to be my submission based on Andrews' case, but also based on Andrews' case, I would submit that I am entitled to put to the jury that there is evidence for their consideration that it was deliberately false. The importance of Andrews' case is that the judgments would be - particularly that of Glass, J.A. - that the plaintiff does not have to say in the witness-box, "I was hurt by the deliberate falsity of the article, by the fact that it was a lie. I was hurt by the fact that it was reckless. I was hurt by the fact that no inquiries were made of me."

If the plaintiff says, as he has said here that he was incensed and very incensed by the article, it may be inferred by the jury - and this is what the Court of Appeal said in Andrews - that the hurt was aggravated by the failure to inquire, and the interrogatories establish that as it is the plaintiff's own evidence here, and was hurt

by the recklessness and/or deliberate untruth. Does Your Honour have access to Andrews v. Fairfax?

HIS HONOUR: Yes, I read the relevant parts at lunch time. I do not think I want to hear you further on it. If I let recklessness go and allow a head of damage to be argued and put to the jury which is highly debatable it does not serve any useful purpose in my view to get every possible conceivable hypothetical head and examine things on it. It is down to what the jury believe the imputations are made out, and if if they did it for a man like the plaintiff, obviously they would give appropriate damages.

61A.

MR. HUGHES: Subject to hearing from my learned friend, Your Honour is minded -

HIS HONOUR: I do not think there is any evidence from which you could address the jury on the basis that the defendant was publishing a falsity, the plaintiff knew and the defendant knew. I ruled that.

MR. HUGHES: Can I put the submission briefly. I submit that the jury is entitled to take into account as a matter of aggravating damages, the evidence if they accept it, and it is evidence that comes out of documents, that the defendant must have known at the time it published the article complained of that what the article imputed was false.

HIS HONOUR: I said I will put that to the jury. That is not in issue. The question is whether your client knew that they knew, and that is what I understood you, before lunch, to be asking me to put to them, that he was hurt all the more because he knew that they knew it was a falsity and they were putting it.

MR. HUGHES: What I have tried to put to Your Honour that the plaintiff, although he has not given express evidence that he was hurt by the fact that the defendant, as comes out of the evidence in the case in Court, knew what had been published was false, is entitled to invoke the falsity as a ground for aggravating the damages.

HIS HONOUR: Yes, I rule. You can have the benefit of your submission.

MR. HUGHES: Subject of course to anything, Your Honour, Your Honour's ruling, subject to my learned friend's submissions to the contrary being acceptable that I am entitled to put recklessness as a ground for aggravation.

HIS HONOUR: Yes, that they either knew or should have known what they were saying was nonsense, if that is what the jury think was put.

Do you want to be heard?

MR. McHUGH: I certainly do. Having considered what Your Honour has said about the s. 13 defence, it appears to me that I would not now press the s. 13. As I understand it, Your Honour is going to let go to the jury among the class of readers, not only those who had the mistaken belief that Lloyd had played in the match, but also other people who knew that Lloyd had not played in the match, but believed nevertheless that he was a party to a conspiracy.

HIS HONOUR: Yes.

MR. McHUGH: Your Honour, if the jury find that that class of people took it as referring to the plaintiff and find the meanings that my friend relies on, I would not rely on s. 13.

HIS HONOUR: Do you mean by that you want to put it on an alternative basis? That is the way I am going to rule, that the class of readers

to be considered by the jury can only be those two types of people.

MR. McHUGH: Yes, if Your Honour is going to put that, they are the only two that can be considered and I do not press s. 13. I am assuming that there is no technical defamation in this situation. My friend is not entitled to a verdict on the basis we do not have to call anybody; it does not matter if nobody at all read it.

HIS HONOUR: I do not think so when the question of identification is open. It is not a case, admittedly, of a named person; it is an unnamed person.

MR. McHUGH: In our submission the jury have to be satisfied that people did read it who not only knew the circumstances, but also believed it referred to the plaintiff.

HIS HONOUR: Yes, that is the class.

MR. McHUGH: If that is the class I do not want to press the s. 13 defence.

MR. HUGHES: That means the s. 13 defence is withdrawn?

HIS HONOUR: That is right. I am limiting you to those range of --

MR. HUGHES: They are the only possible classes, Your Honour. People who took the article as referring to the plaintiff either because they knew he was the leader of the team --

HIS HONOUR: Or mistakenly thought he was captain that day.

MR. HUGHES: Pre-match conspiracy in circumsances where the reasonable reader would say the captain must have been in it.

HIS HONOUR: That is the way I propose to rule and in view of that, Mr. McHugh will not press s. 13.

MR. HUGHES: Really that covers the available range; there is no third category.

MR. McHUGH: Well, there was.

MR. HUGHES: But I am at a loss to see what the third case is.

MR. McHUGH: I am not going to help your case.

HIS HONOUR: He is not being cross-examined by you.

MR. HUGHES: I am not trying to, with repect Your Honour, and my learned friend no doubt because of my inadequate perception or understanding, is talking in riddles.

61C.

HIS HONOUR: I do not agree with everything Mr. McHugh says.

MR. HUGHES: I am contending for the widest range of publication. Your Honour's ruling permits me to do so.

HIS HONOUR: I think you know what the position is. Thirteen is not going to be put.

MR. HUGHES: That is one class, and the other classes are those who would reasonably read the article as imputing -

HIS HONOUR: Pre-match conspiracy.

MR. HUGHES: Pre-match conspiracy in circumstances where the reasonable reader would say the captain must have been in it.

HIS HONOUR: That is the way I propose to rule and in view of that, Mr. McHugh will not press s. 13.

MR. HUGHES: Really that covers the available range; there is not third category.

MR. MCHUGH: Well, there was.

MR. HUGHES: But I am at a loss to see what the third case is.

MR. MCHUGH: I am not going to help your case.

HIS HONOUR: He is not being cross-examined by you.

MR. HUGHES: I am not tryong to, with respect Your Honour, and my learned friend no doubt because of my inadequate perception or understanding, is talking in riddles.

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HIS HONOUR: I do not agree with everything Mr. McHugh says.

MR. HUGHES: I am contending for the widest range of publication. Your Honour's ruling permits me to do so.

HIS HONOUR: I think you know what the position is. Thirteen is not going to be put.
MR. HUGHES: I want to say something about s. 13 in those circumstances. I submit I am entitled to put to the jury that s. 13 was a defence that never ought to be raised. It is an insult, not a defence.

HIS HONOUR: I reject that. You can have the benefit of those submissions. That is the damages you are going to traverse.

MR. HUGHES: I have not mentioned the other ones, Your Honour.

HIS HONOUR: What about the recklessness - there is material before the jury is there not?

MR. McHUGH: No, there is not Your Honour, and my learned friend seems to have conditioned Your Honour, as he hopes to condition the jury; let it be assumed.

HIS HONOUR: Brain wash them?

MR. McHUGH: Yes. Let it be assumed that the jury find that this material has the meanings for which my learned friend contends. The material upon which he relies in respect of recklessness has not been really particularised by him in his argument, but one assumes he relies on the publications reporting the game. That is "Australia slips into the Cup finals."

HIS HONOUR: And two days later this "come on dollar come on".

MR. McHUGH: Yes and the fact there is no inconsistency between the two things at all. Australia slipped into the cup final because it had a better run rate, only marginal, about a decimal it works out on the figures - I think 3.9 instead of 3.8 runs per over.

HIS HONOUR: What run rate are you talking about? I thought that the win on this occasion was calculated on run rate and that Pakistan was knocked out of the finals because that left them on the day with eight each.

MR. McHUGH: No, I am talking about this game, the game that Mr. Caldwell spoke about, about the run rate.

HIS HONOUR: He talked about the run rate as far as Pakistan was concerned.

MR. McHUGH: No, he didn't, with respect. In his evidence in chief at p. 19 [58-59]-

HIS HONOUR: I must confess he did not make it very clear to me, but that is what he said. I will read it to you.

MR. McHUGH: Page 18.5 [57.2] and 19.2, [58.4] Your Honour asked the question,

"How did the match proceed" and there was a long answer, p. 18 [57]; then in the middle of the page four lines from the bottom of that long answer to Your Honour the witness says, "And it was realised ... which side is the winner." At p. 19 [58.4] Mr. Hughes said, "You mentioned that Australia won ... per over." So Australia won the -

HIS HONOUR: But he went on to talk about Australia got into the finals because of the superior run rate, about Pakistanis -

MR. McHUGH: That is true too.

HIS HONOUR: A moment ago you said it was not so.

MR. McHUGH: I did not. Your Honour said there was nothing said.

HIS HONOUR: I said there were two run rates mentioned, one in relation to winning the final game and the other, the run rate as to which team was going to play in the final, and Mr. Caldwell said and I repeat it, that Australia was selected to play in the finals because on a tally count between it and Pakistan, Australia had the superior run rate and therefore Australia came in on that run rate reckoning also. Do you dispute that?

MR. McHUGH: I do not dispute that. That has nothing to do with what we are talking about.

HIS HONOUR: I would not have thought your original question had much to do with it either.

MR. McHUGH: Let me start again from the beginning. I said that Australia won the game against the West Indies because it had a superior run rate of .1 of a decimal it works out at - 3.9 over 3.8. That was, with respect, what Your Honour challenged me about and I took Your Honour to pp. 18/19 [57-58] of the transcript to demonstrate that Australia won the game against the West Indies because of its superior run rate. We

start with that proposition and that is what the articles published on 20th March talk about. "Australia slips into the cup final." They give a figure, "Australia slips into the cup final" - it had been ahead on the run rate - 3.89 against 3.78. The fact is that the Australians had scored more runs per over as at that stage, three wickets in hand, and they were declared the winners.

The fact of the matter is that three days previously in Brisbane the West Indians had run up five wickets, had bolted in. On any view their performance against Australia was below or at least certainly on the view open, it was well below their previous performance. I put to Mr. Lloyd various figures of the various cricketers and in some of the material that my friend has tendered one sees the various scores. He has tendered this article now. You see what the score is, total 189 for the West Indies as opposed to seven wickets for 168 for the Australians.

HIS HONOUR: Mr. Lloyd says you cannot do it mathematically, so much depends on the circumstances.

MR. McHUGH: That is part of it.

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HIS HONOUR: You are trying to say you can ignore the circumstances and go to the figures.

MR. McHUGH: No, I am saying that is something you can take into consideration. What the article is talking about is the vital incentive missing or if you accept what my learned friend says, let it be assumed that the jury find that the article meant that there was a conspiracy, that is in no way inconsistent with the fact that Australia won by virtue of a superior run rate.

The fact is Australia won and they should not have won; the West Indies were expected to win. Naturally you would expect them to have a superior run rate. As at the stage when the

match finished the West Indies had scored less runs per over than the Australian team had scored per over, and the result of the match still had not been decided. Therefore, Your Honour, it is perfectly open to the view, or at least so the author might think, that the West Indians had played well below their form. After all, they had gone from winning by five wickets two days beforehand, to getting themselves in a position where they are beaten on a count back of run rates per over. My friend says that article provides a foundation for findings that the author of the article knew it was false or was reckless notwithstanding as to its falsity.

With respect, Your Honour, it does not provide a single shred of material, not to mention the point that my friend is now wanting to have the best of two worlds. The material in the interrogatories referred to what the defendant published. The articles that my friend has tendered are articles by Mike Coward and the other article is undated and it comes from Sydney. So they are two different sources. So you have got two articles from Sydney and you have got an article which is published in Melbourne. In our submission there is just no ground for recklessness.

May I make the additional point that in Andrews' case, as Glass, J.A. points out at p.249, "It was contended that since the plaintiff ... aggravated damages." Recklessness does not assist my learned friend on any view unless there was evidence that the plaintiff was arfected by it so that the relevant harm was increased by his knowledge of recklessness. There is not a shred of evidence of that. In Andrews' case, as the evidence points out, Mr. Andrews was taken through the pleadings as at p.242E where Hutley, J.A. says, "The problem as I see it ... than usual damages." There was evidence in Andrews' case that he had come along, that these matters were argued in front of Your Honour, and the defendant had gone on and said what material they were relying on in support of the qualified privilege belief, and the case is far removed from this case, with respect and in our

submission there is neither an evidentiary foundation for holding recklessness on the part of Mr. Thorpe in writing this article,nor is there any evidence within the meaning of s.46 that the relevant harm is affected. We would ask Your Honour not to let this head of damages go to the jury.

HIS HONOUR: I am against that proposition. I propose to let it be put to the jury. That one matter for them to take into account in assessing damages in an ordinary case is that if a defendant publishes

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something which is false, in fact, and published it with reckless disregard for its truth and falsity, then it is a matter that the jury can take into account and I think there is evidence here to support that.

(Jury returned at 2.25p.m.).

(Errata noted)

(Counsel addressed the jury at 2.26p.m.)

(Hughes)

MR. HUGHES: May it please Your Honour. Members of the Jury, you may be wondering why it is that you have to have inflicted upon you a second address by me without hearing any address, first of all, from my learned friend Mr. McHugh, who leads the defendant's team. The reason for that is simply this: the defendant which, of course, was entitled to call evidence if it saw any purpose to be served by doing so, has not called any evidence. That leaves the case in this position, that because Mr. McHugh has called no evidence, I have to speak to you by way of a closing address before he says anything. So that is why I am on my feet now. The pleasure of hearing Mr. McHugh has to be postponed until I have finished.

When I opened this case I outlined to you what the various defences pleaded by the defendant were. I did so because there is really no point

in somebody who is describing to a jury what the case is all about, omitting in so doing, to give some description of the issues raised by the pleadings, and therefore it was encumbent on me to tell you what the defendant's defences were, even though later in the day we might well be saying to you that there was nothing in them; at least doing that put the case before you as it were in the round.

The issues you will be, I suggest, interested in, and no doubt pleased to know, have been substantially reduced in number because of arguments that took place in your absence and because they are substantially fewer in number, you will be relieved of the tedium of having to listen to me for as long as you could have had to listen to me, but of course I have still got to cover the remaining issues, and that will take some little time.

You will recall that yesterday when I opened the case - you may think it is a long time ago - I said to you that the defences raised by the defendant were, first of all, that the article did not refer to the plaintiff, and I gave you an outline of how we would deal with that defence. That defence is still in play. Then I said that another defence was that the article on which we sue does not contain any of the imputations or meanings which we set out in our statement of claim and which are typed out on that piece of paper which I think is in front of you; that defence is still in play and of course I shall deal with it.

The third defence as it then stood when I opened the case to you yesterday, that the article was defensible because it was comment on proper material for comment. The foundation of that defence being that the material containing defamatory matter is an expression of opinion upon certain facts sufficiently indicated as being the

honest opinion of the author of the article. That defence no longer arises for your consideration, and the reason why I shall say nothing further about it is simply this: that His Honour has ruled that the defendant has made out no case under that defence, so comment as a defence is a thing or the past.

Then the fourth defence that I told you about yesterday was one raised by the defendant and it was to the effect, so the defendant alleged, that the matter complained of, this article, was published under circumstances in which the plaintiff was not likely to suffer harm. That defence has just been withdrawn. So I am spared, and so are you, the necessity of submissions about that defence. But I thought that at the outset of my address to you in this very important case, I should make clear what the remaining issues in contention between the parties are.

Identification of the plaintiff and whether the imputations or any of them upon which the plaintiff relies have been made out. And of course, if any of those imputations have been made out, it goes without saying that they are highly and seriously defamatory of the plaintiff, Mr. Lloyd.

What is the evidence that bears on those issues. It stands or lies within a narrow compass. The article, and I think with His Honour's permission it will be convenient for your consideration of the case if I place before you a photostat of the article itself with the paragraphs numbered from the top, so that instead of reading a whole paragraph to you, I can say, "Look if you please at par.11".

HIS HONOUR: Yes, I think that is a good idea Mr. Hughes.

MR. McHUGH: Can I have a look at that, Your Honour?

MR. HUGHES: There is no catch.

MR. McHUGH: It is the size of the print, that is what I am worried about.

MR. HUGHES: Don't worry about that. I will be asking the jury to notice the size of the print in the exhibit, which is Ex.A.

HIS HONOUR: You do not object to that course, do you?

MR. McHUGH: No Your Honour.

HIS HONOUR: Which is par.1, "Come on dollar".

MR. HUGHES: Yes.

(Exhibit A shown to Mr. McHugh).

MR. HUGHES: Since my learned friend has conveniently jogged my memory by referring to the size of the print, I am going to ask you to take the trouble now of looking at the sort of print with which the publisher of "The Age" saw fit to publish this article, the article sued on.

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Here is the original newspaper, members of the Jury. You will notice that it appears, as I said opening the case, on the feature page, "Age Features", the page for the reflective and thinking reader. No doubt a page which the proprietors of The Age, were, generally speaking, you may think, justly proud of as providing food for serious consideration.

(Exhibit A shown to Jury).

HIS HONOUR: Just note the size of the print at the moment. You will have that document with you, of course, in due course.

MR. HUGHES: You will notice that the print - it is only a small point - is distinctly darker than the print in the other article about Kirby, J. And of course the article, "Come on dollar come on" is published on the right hand side of the feature page in this rather distinctive print,

distinctive as compared with the other parts of the page, so it is, in that sense, attention arresting. There is another factor that goes to make it arresting for the reader who opens the page. It has got a catchy headline and a headline, of course, which, in a sense, sets the tone or part of the tone of this article - it is a sneer. It is a sneering allusion, you may think, to a well-known song associated with cricket.

You remember that Mr. Linton Taylor gave evidence yesterday, one of the short witnesses we called - I suppose all the witnesses were fairly short - and he said that the song has been associated with cricket, international cricket in Australia "Come on Aussie Come On" - no doubt we have all heard it at one time or another whether we are interested in cricket or not. So it is an article that in its get-up, in its position in the paper, and in its headline, is designed to attract the attention of the reader. And it is put on the page of the journal which you may infer is the page where they publish what purports to be serious material. Serious it is.

The defendant took yet another step to flag this article. He did not only rely on the catchy headline, which you may think was too clever by half, the publisher did not only rely on the blackness of the print and the position on the page, if you go, as I think I may have pointed out to you yesterday, to p.24 of Ex. A, of which you have photostat copies, you will see on the right hand side of that page an article which purports to be by Mr. Peter Macfarlane, "The One Day Phenomenon", and it is an article, members of the Jury, which you see extends over two columns occupying the cartoon above it, the columns being the whole right hand side of the page and at the bottom was this flagged page, "Come on Dollar Come On."

Why do you think they did that? If I may put that question into your mind. The answer is obvious. The publisher of this paper wanted this article, the article upon which Mr. Lloyd is suing, to be read by the maximum possible number

of people. You remember Mr. Chappell, Mr. Greg Chappell, gave evidence before you yesterday afternoon in which he said that his attention was attracted to the article, "Come On Dollar Come On" because he read, as one would expect Mr. Chappell to do, the cricketing item on the sporting page and his attention was attracted to the feature page by reason of this flag, this pointer.

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So there is no doubt that The Age set out to make this article in every way arresting, and to secure that it was read by as many of the wider readership of The Age as possible. You have evidence about the circulation of this copy of The Age. It is in answer to an interrogatory and I need not trouble you with the piece of paper. The evidence before you is that the number of copies of The Age bearing date 21st January, 1982, distributed was, throughout Australia, and the numbers are divided up between the various States and the Northern Territory, 264,827, more than a quarter of a million. May I remind you, without going over the ground tediously, about what I said yesterday, your commonsense, and this is one of the valuable commodities that juries can bring to cases of this kind, will tell you that if the number of copies of The Age distributed was nearly 265,000, the number of people who came to read that issue of the newspaper would have been very substantially more.

Let me just take you very briefly, before I come to the article itself, to the background facts which are revealed by the evidence. The three teams, that is Australia, The West Indies and Pakistan, were competing in this series of thirty matches, one-day matches, on a point scoring system, the preliminary series leading up to the final series of five matches. The West Indies was well in the lead. It had scored fourteen points, meaning that it had won seven matches. Pakistan was running second; it had scored eight points, Australia was in third place having scored six points. So that unless Australia could not only win the match that was to be

played at the Sydney Cricket Ground on 19th January, 1982, but also exceed Pakistan's run rate in the match series, it had to do those two things, otherwise Australia would not get into the final and the final would be fought out between the West Indies and Pakistan.

That was the background against which the match at the Cricket Ground came to be played, and we all know now what happened. It is best described in two other articles in The Age itself, the very same newspaper. The two other articles are Ex.L and Ex.M.

What I propose to do, with Your Honour's leave, I will show my learned friend copies and to distribute to the jury each a copy of those two articles.

MR. McHUGH: I have no objection, Your Honour.

MR. HUGHES: In Ex.L you have a description of the match as published in The Age newspaper of 20th January, 1982, that is the morning after the match had been played. Headline, "Rain Enables Australia to Qualify for Finals On Fractionally Better Run Rate, Win a Gift From The Heavens," and on the right it goes on, "The ultimate gift from the Gods. Unexpected rain squalls gave Australia a....to the runner-up." Then it goes on to a more detailed description of the play. I do not think I need to trouble you to read all of that. No doubt if you wish to you will read it in the jury room.

Down at the bottom you see is the score of each side, of each team, under the heading "Scores", and up in the top right hand side under the headline there is a photograph of the scene at the

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Cricket Ground on the night of 19th January when the rain was pouring down. Over on the right hand side an amusing little cartoon - it looks like a cartoon of Mr. Greg Chappell with six scalps under his cap - he had apparently been

having a very good run. That is an example, if I may say so, of decent amusing journalism. - a joke in good taste. A remarkable contrast with the article upon which Mr. Lloyd is suing. To that is one article by The Age describing the match and there is absolutely nothing in it, members of the Jury, in its description of the play and in particular of the finish of the play which would give the slightest ground for suggesting that the West Indies' team "threw the match" if I can use that slang expression, or to use another colloquial expression, "Took a dive."

Then the other article in The Age, "Australia Slips Into Cup Finals" again in The Age of 20th January. "A Typical Summer Rain Storm...Australia Seemed Beaten." May I ask you to mark those words "Australia Seeemed Beaten," written in a paper that published this article on 21st January, "With only three wickets in hand....three wickets for fifteen runs..."

Nothing, you may think, could be clearer than this: that those two articles published in The Age on the same day make it perfectly plain that the playing of the match was perfectly above board and that Australia won by a fluke of the weather, or a combination of a fluke of the weather and the application of the rules of the game to that situation. So that the winner was decided on the run rate, comparing the run rate of each team in an unfinished match. That is The Age itself speaking, telling the world, in effect, that the match was an exciting match, and it led to an upset, unexpected result depending on the vagaries of chance, and the skill, let me not omit to say, and the plucky innings of Alan Border. So much for the 20th, the very day after the match.

Then we come to the 21st and we find that the Age's journalism undergoes a sea change, a complete reversal. I have referred to the headline. Then this author, whom you have not had the opportunity of seeing in the witness-box, quotes from a novel or a book called "The Great Gatsby" written by a famous American author of the 1920's. "I remembered, of course, that the

World Series...playing a save." That, plus the headline, establishes the tone of this article which you may think may fairly be described as a filthy article and an utterly disgraceful article.

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MR. HUGHES: The author referred to crisis of conscience. "The only crises of conscience America has suffered this century have concerned President Nixon's blatant indiscretions, the Vietnam war and the fixing of the World Series Baseball Championship in 1919. All three events, to borrow Scott Fitzgerald's though, played with the faith of the people." You have probably read this article more than once. I will try not to worry you by going over it too much. What you will notice about it, I suggest, members of the jury, is that the theme of somebody playing with the faith of the people is stressed in the closing paragraph, paragraph numbered 18. "Somebody is playing with the faith of the people - with the singlemindedness of a burglar blowing a safe". This article says that the people are being deceived - that of course can only mean the cricket-watching public - and that they are being deceived by gross dishonesty equivalent to that of a burglar who singlemindedly blows a safe. That is the message.

It is necessary for me to endeavour to anticipate the ingenuity that my learned friend, Mr. McHugh, will devote to any examination of this article. May I suggest that you be on your guard because he might try to induce you to drop your guard against reading this article as if it stopped at par. 14. He may say to you the imputation is directed against Mr. Packer - the sting is directed against Mr. Packer, not the West Indies. that is not a viable proposition because par. 13 refers to the collective state of mind of the West Indians and asks: "Was it sportingly honest, this incentive to win?" You may think the one thing this author would not get is top marks for his clarity of expression, but it is the sense you get by reading not only the lines but also, presumably, between the lines that

create the defamatory stings of which we complain.

If it stopped short of saying that the West Indies in effect took a dive, as par. 14 does, that would be bad enough, or if it stopped short of suggesting that it looks as though they took a dive, but the article goes on to speak of the future. Paragraph 15: "It is conceivable that the same pressures will influence the thinking of both teams in the imminent finals series. Mr. Packer would prefer a thrilling fifth match decider to a three-nil whitewash, for commercial reasons. So would the crowds, for obvious reasons. But if both sides want a five-game series (intrinsically not a bad thing to watch) for Mr. Packer's reasons or any other reasons, then the game of cricket is not being made as a contest but as a contrived spectacle with unsavoury commercial connotations".

What is that but a plain suggestion directly, or both directly and by insidious insinuation, that both teams had and were going in the future to take part not in a real contest but in a contrived - that is to say fixed - spectacle. The theme is emphasised by the very next paragraph, the second last paragraph, which states:

> "Two opposing teams with a common goal cannot be said to be competing in good faith to win each game as it comes, but rather indulging in a mutely arranged and prolonged charade in which money has replaced that vital cog and is running the incentive machine."

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That is directed to both teams, as is paragraph 15. Paragraph 14, as I pointed out, seems to be directed to the West Indies. The punchline is right at the end, repeating the odious reference, divorced from the context of the book which was about America in the 1920s or 1919:

> "Somebody is playing with the faith of the people - with the single mindedness of a burglar blowing a safe."

It will no doubt have occurred to you that a cricket match involving a team of 11 people on each side is not likely to be fixed fraudulently for commercial reasons unless at least the team that is to take the dive, to use a colloquial expression, and in particular the man who was responsible generally for the conduct of the team on and off the field, whether he is playing or not, is in the plot.

You have had evidence put before you as to the function of Mr. Lloyd as the leader of an international cricket team on tour - the captain of the team on tour. In particular, evidence came from watching what I regard as an impeccable source of expertise, Mr. Greg Chappell. I asked him:

> "Q. Would you tell his Honour and the members of the jury what, if any, was your knowledge of the functions of Clive Lloyd as the captain of the West Indies touring team? A. Well, as captain of the team obviously Clive's role was to lead the side on the field and also off the field he played a very important role in selection, helping with the training of the team, generally assisting the West Indian team both on and off the field, and of course he was a very good and senior player in that side."

Much the same sort of evidence was given by Mr. Linton Taylor.

The point which I make is a short one and I hope it will appeal to you as common sense, and it is simply this: if the match were to be fixed so that the West Indies took a dive so as to have a West Indies-Australia final, no reasonable reader woud think otherwise than that the captain of the touring side would be in it - would be in the plot - even though on the day of the match illness precluded him from playing. It is hardly

likely, you may think, that the West Indies team, if it were to engage in such a disgraceful activity as this article imputes to it, would do so without the knowledge and connivance of the leader, so that any reference to the West Indies is inevitably a reference to Mr. Lloyd.

Any reasonable reaer - if you look at this from the standpoint of the reasonable reader who brings common sense to bear upon the interpretation of an article like this - would assume that if, as this article says, there was a plot between Mr. Packer and the players it must have been a plot which was hatched well before the team or teams went onto the field to play. So by all routes this article strikes at Mr. Lloyd - strikes a wounding and stinging blow utterly without justification of any kind whatsoever.

Before I pass from this question of identification and take you to the imputations themselves for a brief look let me tell you that the defendant has admitted in answer to one of these written interlocutories - Exhibit E - that in this article it intended to refer

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to the plaintiff as a member of the cricket team referred to in certain paragraphs of the article as the West Indies. With his Honour's leave I will hand individually to each member of the jury a copy of that interlocutory (Exhibit E). (Copy handed to jury)

You can pick up the paragraphs that are mentioned in the interlocutory. There is the clearest admission in that answer that the defendant intended to refer to the plaintiff in its reference in the article to the West Indies team. The reference to the West Indies team was in terms of common sense in the context of a touring side a reference to each member of the overall team that constitutes the touring side and, in particular, its captain. We know that the defendant intended to hit, as it were, in the sense referred to, Mr. Lloyd.

In considering the question whether this article reasonably is to be taken as referring to the plaintiff, a conclusion that is reinforced by the simple thought that the defendant should be credited for achieving its purpose or intention. Then there is another exhibit that has gone into evidence; it is Exhibit M. With his Honour's leave I will hand you a copy of it to each of you individually. This is published on the 19th of January, the day of the match in question. Because of a defect in the photostatting equipment the headline had to be handwritten in, but you can get the sense. It reads: "Come on Aussie, the Promoters Plea." There the two teams or squads are listed at the bottom. Mr. Lloyd's name is mentioned and the letter C standing for captain is in brackets immediately after his name. Any cricket following reader of The Age of 19th January would take Mr. Lloyd either to be in the team in this match or being closely connected with the team in this match if he was not playing. The headline, "Come On Aussie, The Promoters Plea" perhaps gave the germ of the thought to the writer of the article complained of for his sneering headline.

> Now I bring you to the imputations. The first one is:
>
> "That the plaintiff had committed a fraud on the public for financial gain in pre-arranging in concert with other persons the result of a World Cup Cricket Match."

The point is simply this: This article in its references to the match being played on 19th January, references to the West Indies taking a dive, references to somebody playing with the faith of the people, the reference to crises of conscience, references to an unsavoury contrived spectacle, the reference to a contrived spectacle with unsavoury commercial connotations, the reference to pre-arranged and prolonged charade in which money had replaced some vital cog and is running the incentive machine plainly means, we suggest, and could not more plainly mean, taking the article as a whole, that the plaintiff was a

party to a fraud on the public for financial gain because the reference is to money replacing the vital cog - pre-arranging in concert with other persons the result of a World Cup Cricket Match.

The second imputation, is, as it were, on a lower scale of seriousness. What a plaintiff has to do when it starts a defamation case is to distill the substance of the meanings conveyed by the words. Sometimes views may differ as to what defamatory

meaning the words conveyed. We suggest for your consideration that you will fix your attention on the first imputation in preference to the second because the article goes much further than imputing a suspicion of match fixing against Mr. Lloyd; it really says in substance that he had committed the fraud on the cricketing public for financial gain in pre-arranging in a conspiratorial way the result of the match. But even if - I suggest you will not - you take the view that the second meaning or imputation is to be preferred to the first, the second would be a very, very serious imputation indeed, although not so horrifyingly serious as the first, but it is the first for which we ask you to choose.

You will see that the first two imputations relate to past conduct. That follows the trend of the argument because you will remember the statement about taking a dive in the recent match, the one that had been played on the 19th. The third and fourth imputations relate to future conduct by Mr. Lloyd. The third is:

> "That the plaintiff was prepared in the future to commit frauds on the public for financial gain by pre-arranging in concert with other persons the results of cricket matches."

The fourth is:

> "That the plaintiff was suspected of being prepared in the future to commit frauds on

the public for financial gain by pre-arranging in concert with other persons the results of cricket matches."

That the article contains serious imputations about Mr. Lloyd's forecast future conduct emerges plainly. I suggest to you, from paragraph 15, which states:

"It is conceivable that the same pressures will influence the thinking of both teams in the imminent final series....."

Paragraph 16 refers perhaps to the present and the future. So the suggestion is quite plainly not only that Mr. Lloyd had fixed the match of the 19th in a fraudulent way but also that he was going to do so in the future. Those are atrocious allegations to make about Mr. Lloyd - atrocious.'

It is difficult, you may think, to imagine a more serious libel of an international cricketer whose reputation prior to the publication of this article for honesty in cricket was conceded here at the Bar table yesterday to be excellent. It is difficult to imagine a more serious libel upon such a person than a libel saying that he had and would defraud the public for financial gain by pre-arranging in conspiracy with others the results of cricket matches.

It is really not possible to summon up words that will adequately describe the appalling nature of those imputations. They strike right at the heart of Mr. Lloyd's integrity as a man and as an international cricketer. So it would follow, in our respectful submission, that if this article contains any or all of the imputations that we have particularised, Mr. Lloyd has been defamed in a horrible and horridly serious fashion.

65.

That brings me to put some submissions to you on the ultimate and enormously important question in this case: How much are you as jurors going to award him in this defamatory article? How much?

There are many factors indeed to be taken into account. First of all there is the imputation of Mr. Lloyd himself. I think I may have said something to you in opening along the lines of what I am about to say.

A serious piece of defamation perpetrated at the expense of a person of no reputation is one thing. It may attract a very modest award of damages. Even people of soiled reputation are entitled to its protection by the only instrument that the law knows - an award of damages. But this is not the case of a man with a soiled reputation; it is the case of a man of whom the defendant says in open Court that he had an excellent reputation before this article was published. The thought I wish to express to you is that the taller you are the harder you fall when somebody strikes you down. That is one factor that points in the direction, I suggest, of a very high award. There are many other factors, and I must come to each of them individually.

The second is the degree of dissemination of the newspaper. We know its circulation. We can infer, as I said earlier, that is readership is very wide. Members of the jury, may I ask you to consider this thought: if this article had been published to only 100 people its publication would entitle Mr. Lloyd to a substantial award of damages. What I ask you to consider is the multiplier factor that it is fair to apply in assessing Mr. Lloyd's damages by reason of the fact that this article was published to 264,000 people - not just 100 - and published in circumstnces in which the newspaper went out of its way to attract people to read the article. I will not go over that ground but I ask you to consider the multiplier factor that has to be applied by reason of the fact that this is not a publication to just 100 people but to so many more. This libel published to an audience of 100 people would attract, you may think, a very substantial verdict. How much more substantial because of the enormous circulation of this newspaper.

The next factor that I ask you to take into account has been established by the evidence from the very get-up of The Age. It is put to the public as what I described in my opening as a journal of quality. You will hardly expect my learned friend, Mr. McHugh, to deny that proposition; a journal of quality, a journal of reputation, meaning good reputation. How much more damaging it must be to be seriously defamed in a journal of that kind - a newspaper of that kind - than in some gutter rag of the yellow press. It stands to reason that the matter is much more serious when it is published under the banner of David Syme & Co. Limited. I ask you to take that into account in your assessment of the damages.

I ask you to consider another matter to which I adverted in my opening. First, the two inch disclaimer. With his Honour's leave I will give you a copy of it and photostat copies of the newspaper in which that two inch disclaimer was published.

(Copies handed to jury)

You might have some difficulty finding it, members of the jury, but it is there on probably the most inconspicuous part of the page that it would have been possible to select. That, you may be disposed to infer,

66.

was no accident. What a paltry little disclaimer. The editorial staff must have engaged in a sort of burial party. What good is that going to do Mr. Lloyd? They did not even have the decency to say they were sorry in this newspaper. It states:

> "The Age yesterday carried in the features pages a story headed "Come On Dollar, Come On." concerning the current one-day Benson & Hedges World Series Cup matches.

"The Age" did not intend to impugn the integrity of any cricketers participating in the series or the intergrity of Mr. Kerry Packer, or any person or organisation concerned in the series, or to suggest that financial consideration have affected or might affect the result of any match in the series."

You know from Mr. Lloyd's evidence in the witness box that nobody from The Age troubled to get in tough with him either before the defamatory article was published or afterwards. But what good is that? Not a word of apology.

One can imagine circumstances, members of the jury, in which after the publication of a libel - it may depend on how serious the libel is - a frank and unqualified sincere apology and expression of regret may go some way towards easing the plaintiff's feelings and in some way, probably only a little way, towards reducing the harm to his reputation.

But compare the treatment, if I may ask you to do so, of this two paragraph disclaimer with the treatment of the defamatory article with the pointer on the sporting page - the catching headline, the extra black print. What a contrast. what a miserable effort to slide out from under, an effort which, in all justice, is destined to fail, I suggest.

As I said to you in my opening, it is no defence to the action for deramation when undoubtedly defamatory words are published for the publisher to say, "But I didn't mean to; I didn't mean to convey that meaning". If any such principle applied it would be open slather for publishers. The publisher is liable to pay damages in the absence of a lawful defence for the publication of any material that has a tendency to lower people in the eyes of the audience to whom the publication is made, irrespective of the publisher's intention or lack of intention to convey a particular meaning. So this piece of almost varied material did nothing, you may think.

Of course, you may think - it is a matter entirely for you - that the very fact that The Age proclaimed its lack of intention to impugn the integrity of the cricketers and Mr. Kerry Packer is as good as an admission that the actual tendency, in respect of the intention of the proposition, that the article did impugn their integrity.

Then we come to the next effort, and that is Exhibit C. With his Honour's permission I will give you a copy of the boxed article and a copy of the newspaper. With his Honours' permission I will hand to you a photostat copy of The Age newspaper of 27th January 1982 which is Exhibit C.

MR. McHUGH: I object to this , your Honour. Mr friend has a big copy of Exhibit A and he has a very small copy of it, much small than the actual print.

MR. HUGHES: The jury will have the original newspaper.

HIS HONOUR: If there is objection taken to the size of it, I will not allow it, but you can show them the actual size.

MR. HUGHES: Let me do it this way: It want you, if you would, to look at Exhibit C first of all, this front page six days after the article complained of. Nobody from The Age has got in touch with Mr. Lloyd. Cricket takes pride of place under a phtograph of a swimming camel on the front page. "How long can this go on?" There is a photograph of Mr. Greg Chappell, and then underneath that, "Border Saves Australia". There is a reference to his cricketing performance and then another of these pointers or flags. "Page 2 Peter McFarlane reports from Sydney Chappell not being pushed Out". That would take the reader to page 2. I think there is some slight mistype; it should be page 32.

Anyhow, the reader of this copy of The Age is given a flag to another cricketing article.

Interestingly enough, however, and in contrast with the treatment of the article, "Come on, dollar, come on" there is no pointer or flag on page 1 to what appears on page 11. I will show you the paper. There is a photostat of the actual boxed article.

(Copy shown to jury)

The first point I want to make to you is that this so-called apology published on the 27th was published without any consultation so far as the evidence goes with Mr. Lloyd and was not published in such a way as to point readers of cricket news to the feature page upon which this boxed article was published. Why not? It maybe an interesting subject for speculation - the editor did not take the steps that it did take in relation to the deramatory article when it came belatedly and without talking to Mr. Lloyd about it to publish this so-called apology. I say "so-called apology" because even despite the passage of time The Age could not bring itself to acknowledge that the article did defame Mr. Lloyd and other people.

You will notice the heavily conditional nature of the words expressing regret:

> "It has been suggested that some persons may have read the article as carrying the meaning that the outcome of the West Indies and Australia match on Tuesday 19th January at the S.C.G. was dishonestly pre-arranged by Mr. Kerry Packer, or by anyone else, for profit, and that the Australian and West Indies teams had or would allow commercial considerations to affect the result of matches. Such a suggestion - "

That seems to refer to the suggestion that some persons may have read the article in that sense and no more -

"...would, of course, be completely and utterly false, and would have not foundation in fact whatsoever."

That is unfortunately obscure in its wording. May I remind you of the example I gave you yesterday when I opened the case. If this article

plainly defamed Mr. Lloyd or anyone else in this heavily conditional kind of an apology not rather reminiscent of the man who deliberately treads on your toes and is seen to have been doing so and found to have been doing so, who says, "If I trod on your toes, I am sorry. Not much of an apology. Mr. Lloyd - he was not challenged about this in cross-examination - gave some evidence as to his reaction.

"Q. Did the article, Exhibit C, which you have just looked at do anything to diminish the feeling of being incensed that you say you had wnen you read the article, "Come on, Dollar, Come On?"

So far as his answer was allowed to be given, he said, "No, not really..."

You can well understand, I suggest, why his answer was not challenged. We suggest to you that the petty disclaimer and the heavily conditional apology published belatedly would, if anything, each of them and in combination, tend to aggravate the damages rather than tend to diminish them. Indeed, the derendant did not particularise either of these articles with which I have been dealing as articles relied upon in mitigation of damages.

The derendant is entitled, if he specifies in his pleadings - in his particulars - that he relies upon an apology to use it in mitigation of damages, that a defendant can rightly, you may think state in its pleadings rely upon either of those apologies, and you can see the wisdom of

that course. The truth of the matter, you may think, is that that was a wise course and that, if anything, these apologies do nothing but aggravate the damage.

In a case of this kind the plaintiff is entitled to damages at your hands under two broad headings: damages for injury to his reputation which is presumed from the publication of defamatory matters, and damages for injury to his feelings. It has been said that in an action of this kind damages are at large. The reason why that is so said is that damages for this kind of wrong could never really be the subject of objective measurement. There are so many intangible but utterly vital factors involved. When a deramatory article is published it goes out to the readership of the newspaper - in this case a wide readerhship.

People who read the article will probably talk about it. The difficulty - this is one of the reasons why damages are at large - is that when something like this is published you can never track the scandal down into all the holes and corners of people's minds in which it lurks. It goes out and out and you never know when it will end as an agent of harm. The only thing that the law can do - this is why this type of case is so important in our community - is that a Court, and in this case a jury, can give a sum that is sufficiently large to enable the plaintiff in future to say, "I have got my vindication. This sum represents my vindication. If anybody comes out of the woodwork and reiterates this libel I can point to the verdict of the jury as an indication of its baselessness and wrongfulness.

(His Honour gave the jury the usual warning.)

(Jury retired.)

69.

MR. McHUGH: The matter I want to rely on is something that my friend said in address; namely that the defendant is not entitled to rely on and does not rely on the apologies.

HIS HONOUR: I do not think that is sound. They do not have to plead. If they are before the jury and in the statement of claim the plaintiff is entitled to rely on them.

MR. McHUGH: The purpose of sub-rule 18 of rule 16 was to prevent a party being taken by surprise.

HIS HONOUR: Do you wish to press an argument in law?

MR. HUGHES: No, your Honour.

(Further hearing adjourned to Wednesday 18th April 1984 at 10 a.m.)

70.

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 9702 of 1982
COMMON LAW DIVISION)

IN THE SUPREME COURT

NO. 7

(Hughes)

CORAM: BEGG C.J. at C.L.
And a Jury of Four

LLOYD v. SYME

THIRD DAY: WEDNESDAY, 18th APRIL, 1984

MR. HUGHES: Members of the jury, I shall not detain you for much longer. I want to refer briefly to an incident that occurred during the cross-examination of Mr. Greg Chappell. He was asked a question in answer to which he stated as his belief that the members of both the Australian and West Indies teams had commenced defamation actions against The Age. Was that question, you may ask yourselves, designed to influence you to mitigate the damages payable to Mr. Lloyd by reference to the possibility that the article upon which he sues may lead in other cases to a number of verdicts against The Age? If it were not asked for that purpose, for what purpose was it asked? Perhaps Mr. McHugh will explain.

There is no principle of law which says that if a large and powerful newspaper commits a bulk libel it is entitled to a discount on the damages payable. Please do not allow the introduction into the case of that piece of information, which you may regard as utterly extraneous, to deflect you from your all important duty of making a proper and individual assessment of the damages to which Mr. Lloyd as an individual plaintiff and as the captain of this West Indies touring side is entitled.

The introduction of that material into the case may be regarded as no great compliment, and indeed as no compliment at all, to your sense of justice. Please bear in mind steadfastly that all the readers of this article would most likely have known that Mr. Lloyd was the captain of the

touring side and that most readers - indeed all readers of this article who knew that - could have appreciated that if that team or side rigged a match by taking a dive he, Mr. Lloyd, must have been guilty of complicity in the plot. He was a well and widely known and respected cricketing figure. The reference to his team is inevitably a reference to him. That is just common sense.

Please, members of the jury, do not be deflected from these practical and realistic considerations by a particular argument that Mr. McHugh may put to you. I have to do my best to anticipate what he may put to you because he, in the light of having called no evidence, is entitled to the last say before his Honour sums up. Perhaps he will say that I did not ask the witnesses I called - Mr. Greg Chappell, Mr. Peter Thorpe and Mr. Linton Taylor - whether they took the article to refer to the plaintiff. It was quite unnecessary for me to do so, and to ask that question may well have been

regarded as an attempt to get them to usurp your function.

It is for you to say whether the article refers to Mr. Lloyd. It was appropriate for me to lead evidence of a formal kind to show that the article was published - it would be pretty obvious anyway - to persons who had knowledge of facts which would lead a reasonable reader to understand it as referring to the plaintiff. That was the purpose for which those witnesses were called. Every cricket follower in Australia, and many other persons besides, who read that article would have understood it to refer to the plaintiff.

I come back now to the ultimate and, I submit, the transcendent question in this case, the question of damages. One of the elements proper for your consideration in deciding how much Mr. Lloyd should have at your hands is that a plaintiff is entitled to be compensated for

having to undergo the anxiety and the uncertainty inevitably involved in bringing and fighting an action to vindicate his reputation.

Then there is the hurt to the plaintiff's proper human feelings which inevitably flows from the infliction of public defamation. Mr. Lloyd has told you how incensed he was. Let it not be thought, if I may make this suggestion to you, that his calm demeanour displayed throughout this case indicates feelings of little depth. Still waters are often deep. The utter falsity of these imputations is another and most important factor that serves to aggravate or increase the damages that this newspaper ought to pay.

A false libel is more wounding than a true libel. The recklessness accompanying the publication of this article is yet another factor of great significance aggravating the damages. When the article, "Come On, Dollar, Come On" was being considered for publication the staff of The Age admittedly knew, and indeed must have known, of the two news articles of which you have copies published on 20th January 1982, the day after the match, which described Australia's win in the match played on the 19th as an unexpected and lucky win from a position in which it appeared to be the loser.

In answers to interrogatories which you will have available to you the defendant has admitted that before the publication of the article of which we complain the defendant had access to those two articles of which I gave you photostat copies yesterday. It is admitted in answer to the interrogatories that those two articles were part of the material available to the writer of the article which published these imputations of match rigging. The utter recklessness of the "Come On, Dollar, Come On" article is therefore manifest - plain for all to see.

It is all the more plain for everyone to see because it would have been open to The Age in this case - in this Courtroom - to call evidence to rebut any inference of recklessness that comes

from the proven facts. Instead, The Age has fought this case behind a wall of testimonial silence. The relevance of this proven recklessness and irresponsibility is that the publication of a false libel is hurtful enough. If it is recklessly false, as the evidence shows, that is additionally painful, you may infer, to the victim.

Remember, it you please, that The Age is shown to have made no enquiry of Mr. Lloyd. He said this himself and it was not challenged - no enquiry of him whatsoever before this "Come On, Dollar, Come On" article was published. That failure, coupled with the falsity and

the recklessness, are matters of grave aggravation of his hurt and, therefore of his compensation. Members of the jury, Mr. Lloyd has come from afar to obtain his due measure of justice from an Australian jury. He seeks reparation and vindication for a piece of calumny, a piece of defamation that strikes at the heart of anyone's personal pride not just personal pride - a professional reputation for honesty, a reputation for honesty in his chosen and honourable calling.

I ask you to ensure by your verdict that he goes away with a full and ample measure of justice. I submit to you with respect that a full and ample measure of justice and fairness entails in the circumstances of this case a very very large award indeed. Thank you.

MR. McHUGH: Members of the jury, it is now my privilege on behalf of the defendant in this case, The Age, to outline to you our defence in respect of this case. In his opening address, and particularly in his final address, Mr. Hughes said that this was a very important case. We agree that it is a very important case. It is a very important case because it involves a claim on the one hand that there has been a very serious defamation of Mr. Lloyd. It is also a very important case because you have heard

(McHugh)

evidence that the whole of the Australian and West Indian teams are suing. You may have little doubt that Mr. Packer, by reason of the evidence you have heard about his complaints would be suing in respect of this matter.

If you find in this case that a reference to a team is a personal reflection on Mr. Lloyd and you award substantial damages - I think Mr. Hughes asked you to award very large damages - it is obvious that it will throw the whole dimension of critical articles - any form of discussion of subjects of public interest - into a new domain. For that reason it is an important case not only for Mr. Lloyd but also for the defendant.

Let me make it plain at the outset: The Age, I submit to you - I will take you through the article line by line because, despite what Mr. Hughes said yesterday, he having opened on the opening couple of paragraphs, went to the last paragraph. He touched here and there and referred to various words in the article. It will be our submission that this article does not mean what Mr. Hughes says it means, and that is what this case is about. I will come to that in a moment.

May I point out to you at the outset what a remarkable and unusual action this is in many respects. Mr. Hughes gave you copies of many articles and other documents. When he referred to the circulation he read from a document; he did not give you a copy of that document. You will remember he spoke about circulation of 264,000 copies throughout Australia.

This is the document - you will have it out in the jury room with you - which sets out the circulation of the newspaper. The defendant is asked what number of copies bearing the date 21 January were printed, distributed, offered for sale and sold as the case may be in each of the States and territories of Australia. The answer is this: in Victoria 257,000 copies, in New South Wales 12,022 copies.

It is a remarkable fact, you may think, why this action is brought in the Supreme Court of New South Wales. Why is it not brought in the Supreme Court in Victoria. If Mr. Lloyd has been done damage

and if these other people have been done this gross damage that my learned friend has spoken about, why has the action not been brought in the Supreme Court of Victoria. You might think that nobody would have a better idea of the effects that some article in the features page of The Age would have on a person than a Victorian, particularly somebody in Melbourne, but this action is brought here in Sydney.

The next remarkable feature of the case, you may think, is that not a single witness was called to say "I read this article and I took it as referring to Mr. Lloyd". My learned friend, Mr. Hughes, said it might be thought to usurp your function. This must be the first defamation case in history in which a person is not named in the article and nobody is called to say, "I read the article and I took the plaintiff as the person referred to". Mr. Chappell, Mr. Thorpe and Mr. Linton Taylor were called. It was open to my friend to say, "you read the article, to whom did you think it referred in the reference to the West Indies team? The witness would be entitled to say, "I took it as referring to Mr. Lloyd" or "I took it as referring to Mr. Gomes" or "I took it as referring to Mr. Richards or each and all of them".

Not one of those witnesses was asked the question. If they had been asked the question I would have been entitled to ask them what the reasons were for thinking it did refer to Mr. Lloyd. You would have had not only the positive evidence that they took it as referring to Mr. Lloyd, but under cross-examination from me, if I had wanted to cross-examine them on their reasons for thinking it - but instead not a single question was asked of any of those witnesses by my learned friend.

It is a principle of sound common sense that if one side calls a witness and asks him a question on some point that you would expect to assist his case you are entitled to believe that that witness cannot support or help that person's case. I suppose it does not require much common sense to evaluate why those witnesses were not called. I suppose Mr. Chappell, if anybody, would know that the plaintiff did not even play in this game; he was not even a player in this game on 19 January. You know from the evidence that he was home sick in bed, or was in his hotel sick in bed.

Members of the jury, the next remarkable thing about this case, you may think, is that no a single witness was called - Mr. Lloyd himself did not give any evidence of any actual damage. Mr. Lloyd did not say, "As a result of this article I have suffered this loss and that loss". We know he is the captain of the West Indies cricket team, and still is today. Nobody was called to say, "I read the article. I believe it referred to him, and as a result of what I read I made up my mind I would not have any dealings with him as a cricketer or I have my doubts about whether or not I could have some dealings with him". None of that evidence was called.

In the submissions I make in respect of this case I have no criticism or attack on Mr. Lloyd. You will remember two days ago at the Bar table I said he was a man with an excellent reputation for honesty. He is a great cricketer - a famous cricketer. He has led his country successfully in cricket matches for many years. No criticism is made of Mr. Lloyd. But this action has, you may think from his evidence, been instituted on his behalf, and you may infer the other cricketers, by PBL. You will remember his evidence.

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"Q. Did you go and see the solicitors yourself personally, Mr. Lloyd? A. We left it in the hands of the cricket, the PBL..."

That is the Packer marketing organisation. That organisation is responsible for the institution of these proceedings. Before it was started Mr. Lloyd had spoken to Mr. Kerry Packer about it. He said "We lert it in the hands...of PBL". You will remember he left the country at the end of the series, which was the end of January, 10 days or so after this article.

Two other more important things about this article, you may think, are that Mr. Lloyd himself - I am not blaming Mr. Lloyd, naturally enough - but his solicitors, according to what Mr. Hughes said, Mr. Lloyd said he was not responsible in any way for these disclaimers - this apology that appeared on 27 January - and nobody showed him the particular article until a couple of days ago. He did not know a thing about it. Yet what do we find in the statement of claim, a document filed in the Court here in which he announces his claim? It says that the defendant published in The Age what Mr. Hughes calls this disclaimer of 22 January and publishes this apology on the 27th.

It says that "the plaintiff relies on these facts...complained of". Mr. Lloyd had never been shown these things by his legal advisers. That is in the statement of claim. These matters show the remarkable nature of this claim. Is there anything more remarkable than when Mr. Lloyd saw The Age article in Mr. Kerry Packer's office? What he was incensed at, he said, was the statement that it edged perilously close to a dive. He never suggested, according to the evidence, he was not incensed at any belief that he was engaged in some pre-match conspiracy or fraud, as his counsel, Mr. Hughes, claims. That was not his claim. It was the line about edging perilously close to a dive which he said incensed him.

What are the defences that the defendant makes in respect of this case? It says two things in terms of defences. It is very important that they be very clearly understood so I will do my best to make them as plain as I can. In a

defamation action, as Mr. Hughes told you, a plaintiff sets out the meanings upon which he relies. It is very important that the plaintiff be held to those meanings because, depending on the meanings that the plaintiff relies on, there are defences which a newspaper can plead. If you pitch your meaning high, if a defendant wants to defend that meaning it has to defend that particular meaning. I will give you a simple illustration. Supposing you have an article which says that a tennis player served a number of double faults in a match, and supposing his counsel says that that means that he played very badly in that match serving doublt faults. A newspaper can say, "That is true, and we will defend it on the ground of truth". But supposing he says, "what you really mean is that he is a very bad player generally". A newspaper might say, "We can't defend that. He might have had an off day. We are prepared to defend what you say in that in respect of that but we are not prepared to defend it in the wider meaning.

In this case Mr. Hughes has pitched his case as high as he possibly can. What he said in the first place is that this article

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means that the plaintiff had committed a fraud on the public for financial gain in pre-arranging in concert with other persons the result of a World Cup Cricket Match. Picture in your minds what he claims an ordinary reader of this article would read from it: That the plaintiff and other persons - I suppose the rest of the West Indies Cricket Team and perhaps Mr. Kerry Packer; they just use the term "with other persons" - got together and arranged the result of the game on the 19th.

You have got these. You will remember Mr. Hughes gave them to you. On the first day in the first part of it he said that the plaintiff was suspected of committing a fraud on the public for financial gain by pre-arranging in concert with other person...he said that either it means he did commit a fraudulent conspiracy by entering

into this agreement with other people or that he is suspected of entering into this criminal conspiracy. We say that those meanings are just not in this material. I will take you through that in a moment to demonstrate why it is not there.

Secondly, Mr. Hughes says it has the same sort of meanings in respect of the future. We say that those meanings are just not there. It is not for you to say " I will try and work out if there is some other meaning which is defamatory." That is what he has nailed his case to. You may think that the counsel who appears for Mr. Lloyd, no doubt at the instigation of PBL, is no novice in this field and that he knows what he is about. Let me tell you how important it is. While I think of it, you will remember that yesterday soon after he started his opening address Mr. Hughes said to you that Mr. McHugh has just withdrawn this defence about if it was published in circumstances it would not suffer any harm.

Let me explain to you why that defence was withdrawn. Clearly enough, if you come to the conclusion that the plaintiff has committed a fraud on the public for financial gain by pre-arranging in concert - if that is the meaning it has - and if you think that readers would have read that as the meaning and would have taken it as identifying Mr. Lloyd, I would have to be a fool to submit to you that it would not do him any harm if readers would think that that is what it meant and it was a personal reflection upon him. That is why I withdrew it.

But notice this, members of the jury, because of the very wide nature of the words that Mr. Hughes relies on. He makes an allegation of fraud - a fraudulent conspiracy - "Committed a fraud on the public for financial gain in pre-arranging in concert with other persons the result of a World Cup Cricket Match". As we will see when we go through the article it is impossible to come to any such conclusion. There is reference to unstated thoughts, to muteness, which means dumb. Before I come to the article may I point out to you that some strong things have been said

by Mr. Hughes about The Age. He said that this is disgraceful journalism and that it is atrocious journalism.

You may think of The Age, which Mr. Hughes is kind enough to concede is a paper of quality, a reputable newspaper, that it has given Mr. Packer's organisation massive publicity, as you can see from the report of the games - large stories about the games in the very articles that my friend has tendered published on 19 January, 20 January and so on. Also in this very issue on which the plaintiff

sues - my friend talks about boxes, pointers and everything, Exhibit A. On the front page there is an article by Peter McFarlane and Gary Hutchison, "The one day phenomenon". You will see it there. It is on page 24 and it is at the bottom of that that my friend speaks about the pointer. At the bottom of page 24 is this pointer: "The one day wonder still faces test." It says how well it has gone and then down at the bottom there is "Come On, Dollar, Come On" just drawing attention.

There is nothing in the box referring to the article on the front page. It refers to this article. There is reference to an article on Kirby, J. in the features section. The Age did not emphasize this. The Age is a newspaper which publishes different points of view. It is one of the great newspapers of Australia, as my learned friend is the first to concede.

One thing you have not been told by my friend, except in a very oblique way when opening, is what the tests are for determining deramatory matter and the meanings of articles. What I say is subject to correction by his Honour, but in a defamation case it is very difficult to explain a case without reference to the legal principles. Sometimes counsel are in error in what they say as to what the law is. If they are his Honour corrcts them. What I say about the legal rules is subject always to His Honour's direction and what his Honour says is the final direction about legal principles. Facts are for you.

The first principle is that an article has to be read as a whole. You just do not pick out a word and say "I seize on that word and say that it is defamatory of the person who is suing". You have to read the whole of the article.

The second thing is, as Mr. Hughes quite rightly said, that defamation has got nothing to do with intention. It is not even permissible, except on this particular issue, for the author of an article to say, "I didn't intend that meaning". It may have some relevance on damage. Mr. Hughes has tendered something on that. Defamation depends on effect. Look at the article. It does not matter what the writer intended. It is what a jury thinks it reasonably holds as its meaning which is the important point.

The next important point is that you have to try and strike a balance in reading. You are here as representatives of the community and you have to try and put yourself somewhere in the middle of the community. I suppose, to borrow a phrase from Mr. Hawke, you have got to try and see what the consensus - the reasonable consensus - in the community would be as to the meaning. There are people in the community who see evil in everything. There are people in the community who have a Pollyanna-type view of life. They do not see any harm in anything. But what a jury has to do is to take a reader somewhere in between those two spectrums and try to determine what the meaning would be to the average, reasonable person reading The Age. What would that person take this article to mean?

One very important point is that the ordinary, average reader - the reasonable reader - is not a person avid for scandal. He does not read articles looking for scandal. He is entitled to read between the lines. He is entitled to use his ordinary common sense and understanding of the English language. But no witness can say, "I think the article means so and so". He can say, "I think the article referred to the plaintiff." But Mr. Hughes relies on the natural and ordinary meaning of these words. That does not depend

on what any person believes it means, whether Mr. Lloyd, the author, the newspaper, the seller or anybody else. It depends upon what you think it means as representing the consensus of the community - down the middle - what would a reasonably balanced person reading this article think?

There is one aspect of the case which I would ask you to bear in mind. It is this: in his address to you Mr. Hughes said that this is on the features page and that you would think that the average reader of the features page would be a thinking, reflective reader. You have to read it in its context, of course. This is on the features page - on the literary type page - and the bulk of the readers, you may think, would fall within that; people who are interested in serious subject matters. Alongside is an article on Kirby J. It is not on the back page, although there is a pointer there, and people who are cricket buffs - interested in cricket but not in literature or serious subjects - may read it. They may have got halfway through it and said, "I'm not interested in this, this is too literary for me, I want to get down to the scores, the details and the personalities and so on. This is on a different intellectual level to what I operate on". We are happy to adopt Mr. Hughes' expression that the average reader of this page would be a reflective and thinking reader.

Before I take you to the article in detail I want to make a number of points about the theme or the purpose of the article. Quite contrary to what Mr. Hughes says about this article, it is not an article which is telling the world that Mr. Clive Lloyd or anybody else is engaged in this criminal conspiracy. It has a number of sections in it but it has some four basic themes. What is the first theme? The first theme is that commercial pressures or the present organisation of cricket may be interfering with the incentives, the normal incentives that affect sportsmen.

Then it speculates on whether those commercial pressures may have interfered with and brought about the result of the game on 19th January. It goes on to speculate whether that may have been in the future. It is very important that it does not make any suggestions. It does not say "they did this" or "they did that". This writer speculates and he makes use of the same right as any one of you have or anybody else in this court has.

Then the writer makes two comments. He comments that if - that is the important word in this, and I will come to it when I go through it; not like Mr. Hughes; I will go through every line of this with you to make good what I say - if this is happening the game would then be a charade because the vital incentive - the normal incentives - are being replaced by different incentives. The expression about commercialism. Finally the writer comments that in those circumstances somebody - that is obviously enough the organizer of this modern structure of cricket - is playing with the faith of the people. We would say it is absurd to suggest as Mr. Hughes suggests, that this article says that Mr. Clive Lloyd entered into a pre-match agreement with his players and other people to fix or rig this game.

77.

Members of the Jury, I ask you to pick up your articles, I ask you to pick up the one with the big type, the one with the numbered paragraphs on it. The heading is "Come On, Dollar, come on". Of course, as Mr. Hughes said, that is taken from the song about cricket. Those of you who follow cricket to any extent would recollect that it is part of an advertising jingle. The first paragraph states:

> "I remembered, of course, that the World Series had been fixed in 1919...it never occurred to me that one man could start to play with the faith of fifty-million people - with the single mindedness of a burglar blowing a safe."

That is a citation from the Great Gatsby by F. Scott Fitzgerald. We come to the first section which states:

> "The only crises of conscience America has suffered this century have concerned President Nixon's blatant indiscretions -"

That is clearly enough a reference to Watergate and so-on -

> "the Vietnam war -

You will remember great moral issues about the Vietnam war. People said "you should not be in Vietnam, you should be out of it" and all the marches and so on -

> ...and the fixing of the World Series Baseball Championships in 1919.

There is a reference again to the fixing. My friend places great weight on that. He says that that is what this article is all about. I will show you that that is not what the article is all about. The writer illustrated the three crises of conscience because he spoke of three events, to borrow Scott Fitzgerald's thought, to play with the faith of the people. Then he moves on to a different section. Paragraph 4:

> "In Australia, it is an article of faith that while the lower echalons of sport may be tainted with the 'taking the dive' concept of the prize-fighting booth, our main gladiatorial contests are conducted on the principle that the participants, be they teams or individuals, compete in good faith, i.e., they are both trying to win.

What is the point this author is making? He says you go to the Royal Easter Show. They still have the tents out there with the fighters in the tents - people take the dive. It might be done here and there, but in the big contest both teams are trying to win. It is an article of faith among the Australian people. Teams and

individuals are trying to win, whether it is John Newcombe or Yvonne Goolagong, whether it is St. George or Souths, or whatever it is, it is an article of faith. In our main contests they are both trying to win. In paragraph 5 he goes on to say:

> "On this premise of good faith, no contestant wants to lose, but there are degrees of wanting to win that must be considered."

In other words he is saying that not everybody wants to win the same. He gives an illustration:

> "A football team assured of top place on the ladder playing a lowly placed team in the last home and home game of the year is missing a vital cog in its incentive machine".

Note those words, members of the Jury, "A vital cog in its incentive machine". The writer is saying that it might be Parramatta which is at the head of the competition and its place is assured in the Rugby League Final. It might be Apia in the soccer - whatever it is. In the final it is playing some home team and it goes a bit easy. It has not got the same drive or is not revved up the same way. It is not a matter if it loses so they do not have the same vital cog in the incentive machine. Then he says:

> "On the other hand, its opponents may well have its incentive machine supercharged by the underdog's desire to topple the champion, a recurrent theme not confined to sport."

It is like me against Mr. Hughes. I am against the champion. I am super-charged trying to overcome this champion counsel that the Packer organisation has got here. I am the under-dog. I am super-charged trying to topple a champion. He says:

"...a recurrent theme not confined to sport. Often that missing cog makes the champion team malfunction."

I did not see any sign of Mr. Hughes malfunctioning in this case. He was flat out all the way. Maybe that applies only to teams and not to barristers of the same standard as Mr. Hughes.

That is the contrast he is making; that the champion is on top, he does not have to run like a champion racehorse against some low opponent - does not have to try so hard. A champion team may beat the other side by four goals to one. In fact it might only scrape home, or it might be a draw. In paragraph 7 the writer goes on to say:

"For the same reasons in cricket, the team that has already lost the Test Series often reverses form to win the last match. In both of these cases, the precepts of sporting honesty are then strictly observed. Nobody is playing with the faith of the people."

What this author, Mr. Thorpe, is saying is this: sporting honesty is being strictly observed even though you do not have the same desire to win as you might if you really had to win to get into the finals and so on. Even though you are going at half pace because you do not have that incentive, he says, the precepts of sporting honesty are being strictly observed. So far the article has been talking in generalities removed from the context of this case. Then he goes on to say - I asked you to emphasise these words:

79.

"Let us consider the delicate, unfathomable mechanism that gives one team a moral edge over another in the context of the current Benson and Hedges World Cup Series."

In paragraph 9, having raised the question, he comes down to the game. He said:

"In last Tuesday's game the West Indies, certain of a berth in the finals, lost to the under-dogs, Australia, thus making it a West Indies-Australia Finals Series."

That is the fact. He says that the West Indies, certain of a berth in the final, have lost to the under-dog. In the first sentence of the next paragraph, no. 10, he says:

"If my argument is correct, the West Indians were missing the vital cog in the incentive machine."

You will remember his argument: when you are on top you do not have to pull out all stops because you are already here; you have missed that incentive, therefore you are likely to be beaten. He said:

"If my argument is correct, the West Indians were missing the vital cog in the incentive machine. Unfortunately the argument becomes muddled by material and commercial factors".

He does not say there is a conspiracy. He said "my arguments which otherwise would be valid because of the fact that they are already in the finals, becomes muddied - it becomes less clear by material and commercial factors. He says:

"Had the West Indians won on Tuesday they would have played a best-of-five finals series against Pakistan. It is estimated that the West Indies-Australia finals will draw three times the crowds a West Indies-Pakistan series would have.

You will remember the evidence from Mr. Caldwell from the Australian Cricket Board saying you would get more people there and so on. In paragraph 12 he goes on:

"These figures will be reflected in television audiences - "

You may think that is a matter of common sense -

> "with a corresponding difference in advertising revenue (rival stations would counter-attack had Channel 9's flanks been so exposed).

I want you to note this next sentence because it is of great importance in the case:

79A.

> "So while cricket-loving Australians were barracking for their country out of normal sporting patriotism, Mr. Kerry Packer's cheers had a strident dollar-desperation note about them. Come on dollar, come on."

Just imagine that and try and get the picture in your mind. Up at the Sydney Cricket Ground is Mr. Kerry Packer. He is out there, all the Australians are up on the Hill. They are barracking for their country. Mr. Packer is cheering Australia along because of the dollars that he will get out of it. Does that suggest that Mr. Kerry Packer is involved in this conspiracy? He was out there cheering them along. Why was he out there cheering them along? Because of the dollars he would get out of it. He would not be worried about cheering them along if it was a conspiracy, if it was pre-arranged, as this article supposes. Where would he be? He would not bother going out to the games. He would be looking after one of his other enterprises, you would think. You would think "it is all pre-arranged; I don't have to worry about cheering". In its plainest terms that sentence makes that important point that while ordinary cricket-loving Australians are barracking for their country because they want Australia to win and because they are Australians, the article says about Mr. Kerry Packer that he is cheering not merely because he is a patriot of Australia but because of the dollar desperation - because he would get more out of it. Why would he get more out of it? The writer says in paragraph 12:

> "These figures will be reflected in television audiences, with a corresponding difference in advertising revenue..."

Mr. Packer is saying "Good. If Australia can win, get into the finals, it is more money for me". That is why he was cheering them along. Then the article drops to another dimension. The writer comes to discuss the matter psychologically and philosophically. He says:

> "One wonders about the collective state of mind of the West Indians."

I emphasise -- "collective state of mind". What is a collective state of mind? He does not say that one wonders about the mind of Mr. Lloyd. He does not say that one wonders about the minds of Mr. Richards, Mr. Gomes, or Mr. Kerry Packer, or anybody else. He said "one wonders about the collective state of mind". It is like talking about the collective state of mind of the Australian people. You say the collective state of mind of the Australian people. We are talking about some philosophical concept. It is not the individual; it is the collective state of mind. There is no such thing in reality as a collective state of mind. It is not even collective states of mind; it is collective state of mind. Then he poses these questions which he is speculating about:

> "Was it sportingly honest, this incentive to win? Or did the factors just mentioned - commercial pressures of crowds, gate money, sponsorship - bring about an unstated thought..."

79B.

How can you have an agreement? How can you have a conspiracy if you do not state it? If there is one single word in this article which totally destroys Mr. Hughes' case it is:

> "Or did the factors just mentioned - commercial pressures of crowds, gate money, sponsorship - bring about an unstated thought: 'it doesn't matter if we lose'?".

What is being said by this writer is that one wonders - he spoke about Mr. Kerry Packer. He is cheering because of the dollars. You wonder about the collective state of mind - this metaphorical state of mind. Did those commercial factors bring about the unstated thought in their minds: "It doesn't matter if we lose"? It is unstated. They do not go up to their team mates and say "it doesn't matter if we lose". That is what they would have to do to enter into this agreement Mr. Hughes talks about; that he pre-arranged in concert with other persons the result of a World Cup Cricket Match.

No, Mr. Hughes can do what he likes. Apart from a very quick reading of this article he did not state or analyse it in his final address. He relied upon his great powers of advocacy and abuse of the Age to persuade you that this article means something. It does not mean something. You can read this article for three days. You could read it with a dictionary, a microscope and a magnifying glass, but what you could not get is that the words bring about an unstated thought - "it doesn't matter if we lose" mean that there was a pre-match agreement - conspiracy, as Mr. Hughes says. That is the end of his case on this first meaning. Then the writer goes on to say:

> "This thought edges perilously close to the concept of taking a dive."

While I think of it, there is no assertion in paragraph 13 that they had that unstated thought. He says he is wondering. Mr. Thorpe, the author of this article, is entitled to wonder about these things as is anybody else in this room. This is a free country, and that is why this case is so important. Newspapers have not got any

greater privileges than anybody else in the community. If he cannot say this in this newspaper, neither can any of you members of the Jury or anybody else in this country, otherwise they are held guilty of deramation. The writer's point in paragraph 14 is:

> "This thought edges perilously close to the concept of taking a dive".

What he is saying is that if those factors just mentioned bring about an unstated thought - it doesn't matter if we lose - that is edging perilously close to the concept of taking a dive. He does not say they took a dive; that is what Mr. Hughes has been saying. He said it is edging close to it. He put the alternatives:

> "Was it sportingly honest, this incentive to win? Or did the factors just mentioned - commercial pressures of crowds, gate money, sponsorship - bring about an unstated thought..."

79C.

Something that interferes with this vital cog. Then he moves on to the next section - to the future. Before I move on to the next section I shall go to these imputations. Mr. Hughes has got four imputations and he says it means an ordinary reader not avid for scandal - a fair-minded reader - would read that article as meaning that the plaintiff, who is not mentioned from beginning to end and did not play in the game, had committed a fraud on the public for financial gain in pre-arranging in concert with other persons the result of a World Cup Cricket Match.

You represent the community and, more so than lawyers or judges, and I say it with very great respect, naturally, you come from different walks of life, represent different sections of the community and would have a better idea as to what the consensus of the community would be than would lawyers. That is why you are chosen for

this task, even in other countries or states where juries are abolished and do not hear many cases except criminal cases, juries still hear defamation cases because it is the Jury representing the community to say what the community would think these words mean.

In my submission to you, although it is your decision, and I can only make submissions, - counsel make submissions they do not give evidence - my submission on behalf of the newspaper is that in this section in the article dealing with this match of the 19th you could not conclude, we would say - the plaintiff has to prove this - that the plaintiff had committed a fraud on the public for financial gain in pre-arranging in concert with other pesons the result of a world cup cricket match. Mr. Hughes said that that is the main meaning but I want you to savor it. He savors number 2. He says that the plaintiff was suspected of committing a fraud on the public by pre-arranging in concert with other persons the result of a world cup cricket match.

What form of mental telepathy must they be using with these unstated thoughts? We know the West Indians have marvellous capabilities on the cricket field. Do they have other abilities to enable them to communicate with each other? Not only is the article not suggestive that Mr. Lloyd committed a fraud, it also does not suggest that he is suspected of committing a fraud by entering into a pre-match agreement. When you get to paragraph 15 we move to the future. The first thing said is this:

"It is conceivable..."

What does "conceivable" mean? It means it can be imagined or it is just credible. If I say it is conceivable that a Z-grade player might one day be an A-grade player, it can be imagined, it is credible, anything is possible - but that is a very important word. It is like the word "unstated" or "collective state of mind". It is conceivable. The writer is not making any

assertions. Mr. Thorpe is not saying the same pressures will influence the thinking of both teams in the final. He says it is conceivable. He says it is possible. It can be imagined that the same pressure will influence the thinking of both teams in the imminent final series. Then he comes back to Mr. Packer. He says:

79D.

"Mr. Packer would prefer a thrilling Fifth-Match decider to a three-nil whitewash, for commercial reasons. So would the crowds, for obvious reasons."

Mr. Packer wants a thrilling Fifth Match decider, and so the crowds. The next paragraph is 16:

"But if both sides want a five-game series..."

He is not saying that they do want it. It does not say "but since both sides want a five-game series" - this is part of the writer's argument. He is saying that it is conceivable that the same pressures will influence the thinking. I forgot to emphasise that word "thinking" in paragraph 15. It is thinking, not an arrangement, not a conspiracy, not an agreement. It is thinking. Then he goes on in 16:

"but if both sides want a five-game series (intrinsically not a bad thing to watch) for Mr. Packer's reasons or any other reasons, then the game of cricket is not being made as a contest but as a contrived spectacle with unsavoury commercial connotations."

You have to read paragraphs 15 and 16. You have to read the whole article. You cannot do what Mr. Hughes did and pick a word out here, there and everywhere. The writer is saying it is conceivable that it will influence their thinking. He says it is possible. He does not assert that they want to; he said that if they do for Mr. Packer's reasons, etc. What is saying is if both sides really want a five game match, it

is a contrived spectacle. In paragraph 17 he says:

"Two opposing teams with a common goal..."

This is this writer's comment finishing off his argument -

> "Two opposing teams with a common goal cannot be said to be competing in good faith to win each game as it comes, but rather indulging in a mutely arranged..."

What does "mutely arranged" mean? It means silent; it means refraining from speech or utterance, it means dumb. We talk about a deaf-mute. When he talks about mutely arranged he means silent. There is no speech. Why? Because it is this unstated thought "it doesn't matter if we lose" that is referred to back in paragraph 13.

This is Mr. Thorpe's complaint. He says that if two opposing teams have a common goal they say "we want this five game series; it doesn't matter if we lose". He says they are not competing in good faith. That is a reference to what he was talking about earlier when he was talking about the vital cog in the incentive machine in paragraphs 6 and 7 of the article:

79E.

> "...is not being made as a contest but as a contrived spectacle with unsavoury commercial connotations - "

This is important -

> "...but rather indulging in a mutely arranged and prolonged charade in which money has replaced that vital cog and is running the incentive machine"

The incentive is still there but instead of it being the normal incentive to win just for the

game's sake money is the incentive that is running the incentive machine. In the final paragraph he says:

> "Somebody is playing with the faith of the people..."

Who is somebody? It is pretty obvious who the somebody is. It is the person who is organising cricket. Mr. Hughes said that I might suggest it was Kerry Packer. The first line in the quote:

> "...it never occurred to me that one man could start to play with the faith of 50 million people - with the single-mindedness of a burglar blowing a safe".

This writer is obviously very critical of the new organisation of the game - sponsorship money, gate receipts and I put these commercial pressure which put into the player's heads this unstated thought "it doesn't matter if we lose". That has replaced the vital cog, as pointed out in paragraph 7, and is running the incentive machine.

We are not here to defend some other meaning of this article. My friend might have said that it has some other meaning that is defamatory. We are not dealing with that; we are here to meet a charge of conspiracy. That is what the imputations are. When I come to deal with the terms of those apologies where we said it has been suggesed that we never intended those, naturally, because we didn't suggest there was a conspiracy. You might think there are some harsh things said about the organisation. Somebody is playing with the faith of the people but we have not said that Mr. Clive Lloyd or anybody else is. Look at imputation number 3 dealing with the future. They say that this article means that the plaintiff was prepared in future to commit frauds on the public for financial gain by pre-arranging in concert with other persons the result of a World Cup Cricket Match. Number 4 states:

"That the Plaintiff was suspected of being prepared in the future to commit frauds on the public for financial gain by pre-arranging, in concert with other persons the results of cricket matches)".

You as representatives of the community will hold that the average, reasonable reader, the reflective, thinking reader, picking up his Melbourne Age and perhaps reading it on the bus or the tram on his way in to work or sitting back in his study at home

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would not conclude that that article has these meanings - any of them. If you come to that conclusion, that is the end of the case.

To find a verdict for the defendant is no reflection on Mr. Lloyd - none at all. Indeed it is almost to his credit from beginning to end of this case. I think I made it plain that there is no attack on Mr. Lloyd. The Age made it plain on the 21st and on the 27th when exhibit C was published. You will remember that. To find a verdict in favour of Mr. Lloyd, paradoxically enough, it would seem to indicate to people a thing about this man who did play in the match on the 19th.

(Short adjournment).

MR. McHUGH: I was discussing with you the meaning of the article. You will recall that I had taken you to the imputations which Mr. Hughes had given you and I suggested that the article did not bear those meanings or any of them. You will see that in each of those it is alleged that the plaintiff has committed a fraud and, logically, when I was talking to you about the meaning of the words, I also asked a rhetorical question about whether the words referred to the plaintiff, but basically I was discussing the meaning and whether we are talking about the

plaintiff or anybody else it would be our submission that the plaintiff did not enter into a fraud by pre-arranging in concert with any other person the result of a cricket match.

However, there is a second point which is closely tied up with that point, and that is whether or not this article is published of and concerning the plaintiff. That is the second matter of defence that the defendant relies on. In a defamation action in most cases the person who sues and who is to say that will be named. The article might say it is John Thompson, John Smith, John Jones, or whatever his name is. If so, there is no problem about identifying him. But merely because you are not named in an article does not mean that you cannot sue, because in some circumstances you can. Sometimes you may be described in the article under some other description.

For instance, supposing an article said the Prime Minister did this, or the Commissioner of Police did that. The fact that he was not called Mr. Hawke, or Mr. Abbott is irrelevant. People will know that it is Mr. Hawke they are talking about and that it is Mr. Abbott they are talking about. He has a cause of action. As his Honour will tell you, there are some cases in which there is not even any other description of a person, but yet a reader of an article would reasonably take it as referring to the plaintiff because he knows of circumstances concerning that article. For instance, if an article said that the man who robbed the bank yesterday lives at 3 Smith St. Bankstown, anybody who knew he lived at 3 Smith Street Bankstown would say he is the man who robbed the bank. In that sense it is said to be published of and concerning him.

In a statement of claim, that is the document which starts the proceedings, the lawyers who appear for Mr. Lloyd say that the defendant published of and concerning the plaintiff the following matter, "come on, dollar, come on" and they set out the article. What they say is that this article was published of and

concerning the plaintiff. In other words it is a personal reflection on the plaintiff. When you get into this question of teams and so on you start to get into a murky area. For instance if you say "all lawyers are dishonest -" it would be hard pressed to say that is published of and concerning every lawyer, so that every lawyer then has a defamation action. Or if you said "every member of the Liberal Party or the Labor Party is incompetent" you might think it is not a statement published of and concerning an individual; it is published about the party; about this amorphous collection of people, and not about any individuals.

The question becomes this: Was this article published to people to knew special facts which enables them to say that the article was published of and concerning the plaintiff. There would be many people in the community who probably do not know who Mr. Lloyd is - famous as he is as a cricketer, plenty of people in the community would not have any real interest in cricket. The West Indies team means nothing to them. Even those who have more than a passing interest might not be able to tell you every member of the team.

Supposing some other member of the team sued. You know what the evidence is in respect of that. The issue is: is it published of and concerning those people. The defendant says that there is nothing published of and concerning Mr. Lloyd and that this article does not make any personal reflection on Mr. Lloyd. What is the answer the plaintiff's counsel makes to that? He says two things. He says there are people in the community who mistakenly believe that Mr. Lloyd played in this match. We know Mr. Lloyd did not play in the match. Mr. Hughes says that there are people who thought he played in the match; he was the captain; they thought he played in the match and therefore would take this article as referring to him when the article talks, for example in paragraph 9, as follows:

"In last Tuesday's game, the West Indies, certain of a berth in the finals lost to the under-dogs, Australia..."

Mr. Hughes says there would be people who would think that Mr. Lloyd played in the game. They knew he was captain, they thought he played in the game and would take it as referring to him. That is the first class of people he relies on. Paragraph 13 states:

"One wonders about the collective state of mind of the West Indians"

Mr. Hughes says that those people would think that Mr. Lloyd was one of them and that it reflected on him personally. They were mistaken.

In the ordinary case witnesses go into the witness box. The next-door neighbour from 1 Smith Street Bankstown goes into the witness box and says, "I live at number 1 Smith Street Bankstown and I know Tom Smith" or whoever the plaintiff is, "I know he is the man who lives at 3 Smith Street and I read this article and I identified him." Was that reasonable? The fact that he identified

79H.

him would seem to indicate that it is reasonable, that it is for a Jury to say whether or not it was a reasonable belief.

Let me give you another illustration to show something that was unreasonable. The article stated that the man who robbed the bank lived at 1 Smith Street Bankstown. Suppose someone said "I live at 1 Smith Street Berowra". It would be totally unreasonable for him to say "I thought it was the man who lived at 1 Smith Street Berowra". There must be a mistake in the article. That would be an unreasonable belief if that man identified his neighbour with it. It would be unreasonable and the jury would reject it. It is a question of reasonableness. You

have to determine what would reasonable people knowing the circumstances that Mr. Lloyd was captain, - would they have thought this article referred to him? That is a different thing to what it means. We say that whether they would take it as referring to him or not, it does not mean what Mr. Hughes says it means.

Even if it has that meaning that somebody entered into a conspiracy, we say it does not. This article does not make any personal reflection on Mr. Lloyd. It is not published of and concerning him. It cannot be reasonable, we would say, if people have a mistaken belief that Mr. Lloyd played in the game. The newspaper is not responsible for that. That is the result of somebody's unreasonable, mistaken belief. We would say that you would dismiss those people. He did not play in the game. Any person who knew he did not play in the game could not possibly have thought it referred to him. They knew he did not play in the game.

That does not satisfy Mr. Hughes. What does he say? He says "nevertheless, those people who knew he did not play in the game would still think he was in it". Of course, Mr. Hughes gets involved in a circular argument. He says this article means there was a conspiracy and therefore people would think the Captain would have to be in the conspiracy. If it does not have that meaning his reasoning falls to the ground. That is the way he brought it.

Let it be assumed that contrary to what I have told you, ordinary reasonable readers would think this article meant that the West Indies had pre-arranged the game and committed a fraud. We would say it would be totally unreasonable for any person to think Mr. Lloyd, who was not in the game, who was sick with the 'flu and was in his hotel room, would have thought he was a party to this game. He is a man with an excellent reputation for honesty. Australian readers - people down in Melbourne, whatever their nationalities or their origins - the people down

there are so avid for scandal that they would say, even if Lloyd was back in the hotel in Sydney "he was a party to this. I think he organised this conspiracy. He entered into an agreement with his players and got them to throw this match and commit a fraud on the public for financial gain." In our submission no reasonable person would come to that conclusion.

79 I.

MR. McHUGH: One of the most important questions is whether it is published of and concerning the plaintiff. We say it is not; it does not make any personal reflection on him at all and it does not have the meaning. Now what does Mr. Hughes say on this question of identification? The best evidence would be witnesses to say they picked it. Supposing he had a string of ten witnesses to say they had read that article - "I read that article and I thought it referred to Mr. Lloyd". I could then cross-examine if I wanted to and they would give their reasons why they thought that. And Mr Hughes would be able to say to you, "Members of the jury, isn't that powerful evidence? These people who knew the circumstances, they took that as referring to the plaintiff and they have pledged their oath in the witness box and they have identified the plaintiff as the person who entered into this conspiracy."

Mr. Hughes, with all his experience, all his ability, did not call a single witness to say that. And what he asks you is by inference: he asks you to substitute inference for evidence. And it is good tactics: you are being asked in effect, I suppose it is putting it too high to say you are being asked to speculate, but he is asking you to say, "Well, people out there in the community who read this article would have taken it as referring to Mr. Lloyd; reasonable people who knew the circumstances". When, with the resources there he could have gone out and got in all these people, if there are any out there anyway. Do you think that the people who instruct Mr. Hughes are so lacking in

intelligence, industry and resources that if there were anybody out there who read this article as referring to Mr. Lloyd, they could not produce him there in that witness box to say so?

Members of the jury, you do not leave your common sense out there and listen to a great advocate attempt to persuade you to infer things that he could have evidence about. That would be grotesque and I suggest to you that you will hold that no one out there would have inferred that Mr Lloyd was a party to any conspiracy even if they thought other people had conspired, even if it were Mr. Packer. Why? Because he has an excellent reputation for honesty. A man does not lead an international cricket team for all the years he has - is that reasonable? Is that what the average reader of the Melbourne "Age" thinks? Has he got such a low opinion of human nature, the average reader, that he is going to think it refers to Mr Lloyd when Mr Lloyd is not mentioned, when Mr. Hughes cannot produce a single witness in the witness box?

The absence of a single witness is eloquent testimony. The silence was deafening. Not a single person came forward to say, not a single member of the Australian cricket team, not a single member of the West Indies cricket team, not Mr Kerry Packer nor Mr Linton Taylor, nor Mr. Greg Chappell. Not one person said "I read the article and I put it as referring to Mr Clive Lloyd" and if they had, I would have asked them why and cross-examined them on it.

As I say, members of the jury, that is a vital point. Matter must be published of and concerning the plaintiff.

Now how does Mr Hughes seek to get around it? He seeks to get around it with very great cleverness. Yesterday he tendered to you this article, the article about "Come on, Aussies", which is Ex. N.

Now in Ex. N you see the heading "Come on, Aussies. The promoter's plea" and that was published on the day of the match, the morning of the match, 19th January, and they had "Aust. Squad and West Indies" and the third line was "Clive Lloyd Captain". Mr Hughes says people would have read that on the Tuesday morning, they would have seen Clive Lloyd was the captain and two days later, when the article they sue on appeared, the one on the 21st, they would say "Clive Lloyd played in that game. Here it is". Now does not that really border on the farfetched and ridiculous? If anyone is a keen enough follower of cricket to read the whole of that article to find out that Mr Lloyd was there and to remember it for two days and then this other article appears two days later, on which they are suing, don't you think such a person would know that Mr Lloyd did not play in the game? On the morning of the match when this was published in Melbourne obviously they thought Mr Lloyd was playing, although if you look over in column 1, the very last paragraph in column 1, it has Captain Clive Lloyd has influenza".

That is published on the morning of the match. But Mr Hughes wants you to believe that some reader of the Melbourne "Age" would have read this on the Tuesday before the match, had so much interest that they would have remembered that Clive Lloyd's name appeared as playing this game in Sydney and would not have heard that he was not playing, would not have bothered to look at scores the very next day, and you have the copy of the scores, which is an exhibit, would not know anything more about that, but then blithely on Thursday would pick up his "Age", read about the West Indies team and say "Yes, Clive Lloyd. He played. I read that two days ago. Clive Lloyd was in the team".

Now that is so ridiculous, but that is one way Mr Hughes seeks to get around it. What is the second way he seeks to get around it? He seeks to get around it with a very clever lawyer's question and answer procedure called interrogatories. That is Ex. E.

MR. McHUGH: You have exhibit P. "Look at the matter complained of. did not the defendant intend to refer to the plaintiff there not as a member of the cricket team referred to in each of paragraphs 9, 10, 11 and 13 as West Indies". Let us look at paragraph 9:

> "In last Tuesday's game, the West Indies, certain of a berth in the finals, lost to the under-dogs, Australia, thus making it a West Indies-Australia Finals Series".

Mr. Lloyd was not in that West Indies game last Tuesday because he was sick. The interrogatories state: "Didn't intend to refer as a member of the cricket team? A. Yes". Obviously it can only be referring reasonably to the West Indies-Australia finals series. It cannot be referring to the last game. If it does, it is meaningless. It does not help at all.

Let me make this point: Mr. Hughes said that this is some sort of admission by the defendant that it intended to refer to him in last Tuesday's game. As I said, it has nothing to do with intention - just what the average reasonable reader would think. I may write an article and I may not intend to name somebody, and in fact, unbeknown to me, I do name him. Bad luck for me, I am liable.

There was a famous case in the Courts. Somebody wrote an article and said that Detective Lee was a so and so. It turned out it was Detective Lee in the Motor Squad. There were three Detective Lees. They were entitled to sue. The article said "detective Lee, the police officer". The fact that I intended to refer to one is irrelevant. It cuts the other way. I may intend to refer to somebody and do not do it. When people read it they do not understand who I am referring to. For instance, I might say that the

Captain of the Argentine Soccer Team is a very poor player, and it is published. I may have somebody in mind, it is read by people and they do not know who I am talking about; they have never heard of the gentleman.

Another illustration: I might seek to refer to somebody and I try to be smart and mention his address and give the wrong street. I say that the man who lives at 4 Smith Street Bankstown was responsible for this robbery. There may be no 4 Smith Street there; I made a mistake. The person I really wanted to refer to lived at 14 Smith Street. Intention has nothing to do with it. Defamation has nothing to do with intention. It depends on the effect. It is the effect on the reader, not what is in the mind of the author. Let us look at paragraph 11. It says:

> "Had the West Indians won on Tuesday they would have played a Best-of-Five Finals Series against Pakistan".

It cannot be referring to Mr. Lloyd last Tuesday because he did not play.

> "It is estimated that the West Indies-Australia finals will draw three times the crowds a West Indies-Pakistan series would have".

83.

Of course the plaintiff is a member of the team, but, in our submission that is a very different thing from saying this article was published of and concerning him. They are the magic words. In the plaintiff's statement of claim he says that the defendant published of and concerning the plaintiff that article which is headed "Come on, dollar, come on". In our submission to you, you will find that this article was not published concerning the plaintiff.

If you accept our submission or either of those two, because they are alternative submissions, the defendant is entitled to succeed in this action. As I said, that is no reflection on Mr.

Lloyd in any way because this is not the sort of case in which somebody comes along and says "you are a crook and I am going to prove you are a crook". If the Jury found a verdict for the newspaper or the defendant in that case it would reflect on the plaintiff, but in this case we say tha these words do not mean what Mr. Hughes says. We say that no reasonable reader would ever take them to refer to the plaintiff, Mr. Lloyd, and whatever meaning the reader might have drawn from it in any event he would not have drawn a meaning either that the plaintiff had entered into a pre-match agreement to fix the game, the result of the game, nor would he have believed that anybody suspected the plaintiff of having entered into an agreement to fix the game.

I do not want to go over what I have said before, but you remember the words "unstated thought" "mutely unstated" - it really required some ingenuity. Not even Mr. Hughes with all his pwoers of advocacy and experience was prepared to tell you how the words "unstated thought" at the other end of the equation equals "agreement between other persons". Not a single word.

Did you see the skill with which he addressed you in respect of that article yesterday? He started off with the first couple of paragraphs, down to paragraph 18, and then he said, to be careful of me; I might suggest that this was against Mr. Kerry Packer; do not miss this paragraph; I might not read it all. I read every line to you - every single line - and did not flinch from any word. What did Mr. Hughes do? He just here and there and talked about fixing and this and that.

In our submission, you will find a verdict for the defendant. When you come in and are asked in accordance with the oath you took to give a true verdict according to the evidence, in this case, how do you find? For the plaintiff or for the defendant? In our submission, you should say "for the defendant" because the plaintiff's counsel has not proved the case that they set out to prove here, that this article means what they

say or that it was a personal reflection on the plaintiff. Members of the Jury, you do not suddenly go out and decide the case now and determine who wins at this stage; you go out and consider the whole issues in the case.

If you accept our submissions remember this: Mr. Hughes has to prove the case he makes. He has to satisfy you that it is more probable than not that reasonable readers would understand the words to mean what he says they mean. He has to prove it is more

84.

probable than not that this article is a personal reflection on the plaintiff. If he fails to do that we say it is a verdict for the defendant and that is the end of the case. It is no reflection on Mr. Lloyd as I have said many times. We say that no reasonable person would ever think that we were making the sort of accusations Mr. Hughes says we have made against him. But you are against my submissions, if you say "we think that the article means that he has committed a fraud but we do not take it that he is suspected of having committed a fraud" and you think it means one of those meanings, you have to consider damages.

85/86.

MR McHUGH: Now I only got one address, so I have to address you on all issues, and I am now going to address you on the question of damages. But you will bear in mind of course that simply because I am addressing you on damages does not mean that I am conceding that the plaintiff is entitled to get a verdict. I have spent the last hour and a half or so telling you why he should not get a verdict. However, if you are against my submissions and you come to the question of damages, then there are submission that I want to put to you.

The first matter that you consider on damages is this: what is the imputation, because the assumption is - you only award damages if you

find it has one or more of these meanings, and if you come to that conclusion, well obviously you have found that it has this meaning and it concerns the plaintiff and I would not flinch for a moment from it: it is quite a serious thing to say of a person that he has committed a fraud, that he has entered into a pre-match arrangement. And because it is such a serious thing I have been saying to you that no reasonable person would do it. But you are entitled on that basis to compensate him if these things have been said about him and you then will say, now what is the extent of the damage?

Now Mr Hughes did not say this, but I will say it for him; I will give him a little help, not that he needs much help: you are entitled to assume from the publication of the article that the plaintiff does suffer damage. If you publish something defamatory about someone, then naturally you would expect him to suffer some damage. But it is a matter for you to work out how much damage he has suffered.

Now the first thing you will bear in mind is that there is not a shred of evidence and, in fact, there is not even a suggestion that he has suffered any actual damage. You know the case where something is said about a plaintiff, it might be said he is an incompetent typist or she is an incompetent typist and the person may lose his or her job over it. Well if that flows from the defamatory material, they would be able to prove that damage and be compensated for the loss of their job. Someone may falsely say of someone, "That clerk embezzled money from the firm" and that person is dismissed as a result of that publication. He could be compensated for the actual damage that he suffered.

But there is no suggestion here in any shape or form that that happened. There was no actual damage at all. There was not a single shred of evidence. In fact, all the evidence, you might think, points quite to the contrary. Mr. Lloyd is still the captain of the team, he has been playing since 1982, and has come out here for the

test match series and so on, and is still captain of the team. But no actual damage. No shunning of him. You might have a defamation case where something is published in the paper and the person goes down to his club the next day, or walks down the street, and people give him the cold shoulder. Well he is entitled to be compensated for that. He can call witnesses and they can go into the witness box and he can give evidence himself. He can say "I was walking to the bus stop the day after or the same day an article appeared and the next thing, someone I had been speaking to for ten years turned his back on me and walked off". Well he would be entitled to be compensated for that. Here there is no evidence of anything like that.

87.

Subject to what his Honour says, I want to correct a submission that Mr Hughes made. Someone said this would be a serious thing if this was published to 100 people but in this case it was published to 257,000 people. In effect, he was saying "if you get "X" for publication of 100, you get so many "X's" for extra publication". Well you don't approach this sort of thing on a multiplied effect; you don't say that because you get X if it is published for one person, you get ten X's if it is published for ten people. It is absurd. That has got nothing to do with it. It is actually the extent of the damage.

Now that raises very important questions in this particular cause because this is not a case where the article says "Tom Smith Embezzled the Money". This article does not refer to the plaintiff. So if it is defamatory ot him, and of course we say it is not, but assuming that you have found against me and rejected my submissions, what you have to day to yourselves is this, "How many people would have identified the plaintiff with this article?" How many? How many people would have believed it referred to him? As I said to you ten minutes ago, you have not heard one signel person; Mr Hughes asked you to try and work it out. How many people down

there in Melbourne with the 252,000 copies, 257,000 copies, how many of those would identify it was the plaintiff.

It is absurd to think for a start, even if you were named in the article, that everybody would read the particular article. Mr Hughes says you can think that everybody, not only that everybody reads the paper, but you have families and there is more than one buyer and so on. Members of the jury, do you read every article that is in the paper? Do you read every article on the features page? After all, this is the literati section, I suppose, it is the feature section. You have got the full copies there. Some lawyer might pick it up and say "There is an article on Mr Justice Kirby" and say "That is very interesting. I will read that", but being not interested in cricket, he turns the page over. Someone else who might be interested in cricket, turning it over, says "Oh there is a feature article of Mr. Justice Kirby. I am not interested in that" and misses the other article by mistake. Now how many people, for a start, would have read the article? That is point 1. Consequently, how many would have taken it and identified the plaintiff and said to himself, "Clive Lloyd is the captain. I don't care whether he played in the match or not." He read this article and it has got this particular meaning. "He pre-arranged the result of this game".

88/89.

MR. McHUGH: Mr. Hughes was unable to produce one. Perhaps I should not say "unable". He has not produced one. He has not produced a single person. He asked you to guess. If you are against my submissions and you come to damages, that is a matter for you to work out yourselves. I cannot help you. Mr. Hughes has not helped you with any evidence. He blithely, you may think, says it has 264,000 copies and there would be more readers than that.

In effect he is asking you to think that every person who read the Age - the father, the mother,

the seven year olds, the twenty year olds, those who are still at home, etc. - would have read it and taken it as identifying the plaintiff. In our submission you would not accept such an unreasonable statement when he failed to produce any evidence about identity.

The important thing is that, even if there are some people who would take it as referring to the plaintiff, there must be many - tens of thousands you might think - would automatically know that the plaintiff did not play in the match. They took so much interest, they would say, that the plaintiff did not play in the match, and it has nothing to do with him. Members of the Jury, it is a matter for you.

What is the next matter you have to look at? It is the so-called, according to Mr. Hughes, disclaimants and apologies. It is very hard to win with Mr. Hughes. It would not matter what the Age did, it could not be right in Mr. Hughes' eyes. He has a complaint about both these articles which appear and which are exhibits B and C.

I suppose in the course of your reading of the newspapers of this country you have seen many apologies by newspapers. You would be hard-pressed ever to find a bigger, more handsome apology statement than that to Mr. Packer, players and the Cup Cricket. I will set about it chronologically. I turn to exhibit B. Mr. Hughes said you would be flat out finding it; it is in the most natural place to get it. Of course it is not up - I am the first to concede it - the top. It is on the sports page on the right-hand side. On the far right-hand you have the tennis - $15,000 fine for Gerulaitus. He is in trouble again. "Dunk runs hot in S.A. Open". In the centre you have the racing. There is a photograph of a jockey, and over on the left hand side: "Windies Packs, sour on Tour Cup".

Any cricket reader who is going to read that will get down to the end of the article, and there is

a reference to the one day match, and then he read this opposite there. What does it say? It is almost grovelling. It says:

> "'The Age' did not intend to impugn the integrity of any cricketers participating in the series or the integrity of Mr. Kerry Packer, or any person or organisation concerned in the series, or to suggest that any financial considerations might have affected or..."

90.

If there is anybody in the community who reads this, and we know from the evidence that Mr. Kerry Packer was on the phone to The Age - do you remember that evidence from Mr. Lloyd? Mr. Lloyd was in the witness box and Mr. Hughes showed him The Age. He said:

> "Q. When did you first see it? A. I was in Mr. Packer's office -"

You can see the close relationship - nothing wrong about that; I am not suggesting that for a moment -

> "A. I was in Mr. Packer's office because we had something to discuss with, I think it was Linton."

I think that was a reference to Mr. Linton Taylor who was also in the witness box. He continued:

> "I was invited into his room and I heard him speaking to David Syme and Company -"

David Syme and Company are the proprietors of "The Age". They are the defendants for whom I appear.

> "I heard him. "

That is Mr. Kerry Packer speaking to David Syme and Company about this article -

"and he was very annoyed about it".

That is what Mr. Lloyd said in the witness box. Then he was asked:

> Q. Did you read the article? A. Yes, I did, I read it at his office".

Later on he spoke about being very incensed and you will remember that evidence. You might not have much difficulty in coming to the conclusion that Kerry Packer here in Sydney, after this article appeared on the 21st got on the phone to David Syme and complained about it. The Age put its statement in that it did not intend to impugn the integrity of any cricketers.

If out there in that world there is somebody who in our submission read that article in such a way to think that there was prefixing of the game and so on, they are told the very next day that The Age did not intend to impugn the integrity of any cricketer or of Mr. Kerry Packer. If that is not good enough what do they do again?

Six days later, on 27th, they published this big article on the features page right up the top. You will have exhibit C with you. There it is in big black print, "Mr. Packer, players and the Cup Cricket". It is in a big black box. You would have to be blind if you did not see it.

91/93.

What is Mr. Hughes' complaint about this? He says there was no admission that it means about a pre-arrangement. He wants "The Age" to admit what they say, that nobody should have read it, in any event. But what "The Age" has done, perfectly responsibly and respectably, the moment there is any suggestion that it could possibly have this meaning they have - and in your ordinary experience of life you know that newsprint columns cost money - "The Age" has taken up this space, and the publishers state "'The Age' on 21st January 1982 published an

article in 'The Age' feature section under the heading 'Come on, Dollar, Come On". It has been suggested that some persons may have read the article as carrying the meaning that the outcome of the West Indies and Australia match on Tuesday, 19th January, at the Sydney Cricket Ground was dishonestly pre-arranged by Mr Kerry Packer or by anyone else for profit and that the Australian and West Indies team had or would allow for commercial considerations to affect the result of matches. Such a suggestion would of course be completely and utterly false and would have no foundation in fact whatsoever. Furthermore, 'The Age' readily acknowledges that the World Cup Series has been and will be played by all participating teams with one aim only, to win every possible match. Mr. Packer is not involved in the conduct of the Series in any way".

You will remember the evidence that Mr Packer's company promotes the cricket, PBL. "Is not involved in the conduct of the Series in any way and could not and would not influence the result of any match. If the article was read by any person as suggesting then "The Age" sincerely regrets that and apologises to Mr Packer and the members of the two teams".

Now, what does Mr Hughes want "The Age" to do? His complaint seems to be "You did not say this article would be read by everybody as meaning that he dishonestly pre-arranged that". Members of the jury, it is very difficult to satisfy Mr Hughes. If we put it on the front page his complaint no doubt would have been that it should have been on the features page. When it is on the features page you find something else is said.

Let us assume that there was some person out there in the community who, after reading that article, thought that Mr Clive Lloyd had dishonestly pre-arranged the match. Let it be assumed there was someone out there, let it be assumed he was not influenced by this article or,

according to Mr Hughes, may not have even read it, how unreasonable would that person be if, having read that, he still retains some defamatory notion about Mr Clive Lloyd? It is quite easy, members of the jury, to understand why we have had no witnesses here to say that Mr Lloyd suffered any damage, because after that was published he could not possibly have suffered any damage, to any reasonable person. I suppose there are people out there in the community who are so unreasonable that they will believe the worst about everybody and then when told there is nothing in it, they will still believe the worst about everybody. Well they are unreasonable people and we cannot deal with those. We cannot deal with those, his Honour cannot deal with those people. They do not enter into the calculations. Courts can only operate on the basis that people are reasonable, otherwise the whole system breaks down, and in our submission there could not be any really reasonable people who by the 27th January could have believed for a moment any adverse matter concerning Mr Clive Lloyd.

94.

Why is this action brought in those circumstances? I am not blaming Mr Lloyd. In one sense he is a cog. He left it up to PBL. They are handling it. The last question on p.34, I said to him, "Did you go and see the solicitors yourself personally, Mr Lloyd?" He said, "We left it in the hands of the cricket, the PBL, because we were leaving at that particular time so that meant we wouldn't have been able, we were not here, to continue with it, more or less".

So PBL, and PBL apparently did not even give Mr Lloyd a copy of either of those two matters that you have there before you, because Mr Lloyd had never seen them until he arrived back in Australia a couple of days ago. And PBL or the lawyers do not show it to Mr Lloyd before a couple of days ago, notwithstanding that in the statement of claim, the document filed in court, it is referred to; in fact they say they rely on it as inadequate.

Now there has got to be some reasonableness about all this, members of the jury. In our submission "The Age" did not libel Mr Lloyd in the way it is alleged, but if it did, it apologised for it there. It says if people did read it there in that way then there is no substance in it. It would be false and we apologise for it, and what is more, I apologise for it now, if, contrary to my submissions you say it has this meaning, which we do not contend.

Now what damage can the plaintiff suffer in those circumstances? It must be very minimal. You see, there are all sorts of defamation cases. You may have a case where the defendant publishes something about someone, says "You are a crook, you took the paintings" or "You are an incompetent pianist, player, or something" and then comes along to the court and says "It is true. You did take the paintings and it is true you are an incompetent player" and it goes on and the case is fought out for days and weeks in this court and the jury is entitled to say "This man is still being done damage. They won't retract it. We have got to award damages". Mr Hughes' expression was "to vindicate".

95.

MR. MCHUGH: Members of the jury, if contrary to my submissions this article referred to Mr. Lloyd, Ex.C vindicated him to the end - up to the hilt. No rational person, if he ever had any doubts about the matter, would have any doubts after that appeared.
This is not a case of continuing damage going on where a person is under the stress for weeks and months - maybe even a couple of years, before he clears his name. In our submission he did not have to clear his name because no reasonable person would have read it in that way. It may be of the greatest significance that Mr. Lloyd did not complain or say that he was incensed at the article meaning that he pre-arranged the game. He complained about the unstated thought; that it edged perilously close to a dive.

Members of the jury, my learned friend is asking you to award some - I forget his terms; you will remember his adjectives; he had so many adjectives in this case it is hard to remember them all. He asked for an extremely high award. There are cases when plaintiffs are entitled to high damages because it is necessary to vindicate them in the sense that the defendant says that the plaintiff - he defames him and will not apologise for it. He said that it is true. This is not this case.

If you think that people would not have adversely read this article so far as Mr. Lloyd is concerned, any damage he would have been done by those people - a small group in our submission - would have been wiped out by those two articles that you have before you. Mr learned friend, Mr. Hughes, is short on evidence about people taking it to refer to the plaintiff. He did not have a single witness. He was short on evidence about any actual damage to the plaintiff. What did he do to try and get you to build up the damages? "Aggravated" was his expression. He says the defendant was reckless as to the truth of this publication.

By that he means that they were reckless about whether the plaintiff had committed a fraud. What are the facts upon which you may think the article comes into existance? The first thing is that is Brisbane, two days before this article on the 17th, the West Indies had defeated Australia by five wickets. It took only half their team to defeat the Australians. At that stage they were on fourteen points. Australia was on six and Pakistan on eight. So as Mr. Lloyd conceded, the West Indies were expected to win the match on the 19th.

It is no good trying to explain it away as a question of lights at the Sydney Cricket Ground because the West Indies batted in the daylight but the West Indies were beaten. Mr. Hughes says it was a lucky win. Maybe it was a lucky win.

Maybe it was won on a count-back, but the plain truth of the matter is that, lucky or not, it is as plain as a pikestaff that the West Indians did not play anywhere near as well as they did in Brisbane. You will remember that I put to Mr. Lloyd how the players went. I will not go over those details again. It took only the loss of five West Indians to beat Australia in Brisbane. They were out for 189 in Sydney, and Australia was 7 for 168, as you will see.

96.

Mr. Hughes was arguing about it being straight out - you will see that ten were out; 189 is their score. Border was still batting. He was 30 not out, and Pascoe was not out, nil. They had three wickets to go and to win they had to get 190, so they have got three wickets to get an extra 22 runs. They may not have got it. The point is that the West Indies did not play anywhere near as well as they played in Brisbane. It took half the wickets to win in Brisbane, batting second, and - this is the important point - it was the count-back; Australia scored more runs per over than the West Indies.

The way it is done is simply this: you have 189 divided by 50 overs, which works out at 3.76, or something like that. Then Australia got 168 in 43.1 overs, and that works out slightly better. That is explained in that other article, "Australia slips into the Cup finals". If you look at the second paragraph - my friend relies very heavily on this and says that this makes it false and reckless - it states: "Australia seemed beaten ... the last two overs". They won because they were scoring more runs on the average than the West Indies. Obviously, the author, Mr. Thorpe, took the view that they were not playing as well. Can any reasonable person come to any other conclusion that the West Indies were not playing as well? Even if they won by getting out the last three batsmen, it means they would have scraped home - compare that to their performance in Brisbane previously.

That motivated the writing of this article. there is no inconsistency between that article and those that you have, Exs.L and M. For a start, they are written by different people. They were written in Sydney. The first one was written in Sydney, but it does not say who it is by. To say that this article is reckless is a travesty, but Mr. Hughes has to do that; he has no identity witnesses and he has no proof of damage. He is faced with this disclaimer and apology. He has to bolster his case somehow to get some damages out of you, so he alleges it was made with recklessness. Even that does not get him home, because under the law - I am subject to what his Honour says - even if Thorpe were reckless in writing this article, damages can be included only in the factors you take into account, if it affected Mr. Lloyd.

97/99.

Mr Hughes could have put to him in the witness box and said, "Did this affect you? Are these facts?" and got Mr Lloyd's expression of opinion. But he did not ask him, and what Mr Hughes says is "I ask you to infer that Mr Lloyd would have been upset because he would have believed this was recklessly false" and he asks you to infer it.

Well, members of the jury, we submit that you will reject that out of hand.

Now if you come to this question of damages. then the only damages you will award are damages to compensate the plaintiff for the harm he has suffered. In our submission the harm he suffered would be very small indeed. We would say you would not find there were any aggravated damages. If the defendant has made a mistake and if you think this article has these meanings for which Mr Hughes contends, then it has done everything it could to amellorate that position and withdraw that and apologise for it and to retract any harm that could have been done.

If you do reach damages, they are for compensation. There is nothing for aggravation. Still less are they for punishment. You do not punish. This is a civil case and that would be a terrible thing. Mr Hughes has been using phrases like "atrocious journalism, disgraceful journalism", as though he is a judge summing-up in a criminal trial and sentencing someone. If you come to damages, you have to compensate for what has been carried out.

On the question of damages, you cannot leave out of sight also the fact that Mr Lloyd is a native of the West Indies and lives in England and in saying that I am not saying in any way that if you come to the question of damages he is not entitled to what you think is proper compensation, but clearly there is a world of difference between saying something about someone in the community where he lives and where his friends and associates are, and no doubt he has friends and associates and has a great reputation in this country as well, but although it may be of similar importance, it nevertheless is different to have published something about someone who lives in a particular country from publishing about someone who does not.

If, for instance, you publish something in "The Sydney Morning Herald" about someone in Chile, it may be defamatory of that person, but is it not the same in the sense as if you published it in Chile. That is all I say. It is a different aspect.

So could I summarise what we say about this case. The plaintiff's legal advisers have set out four meanings. They have pitched their case to those four meanings. They allege the plaintiff entered into agreements with other persons, other players and Kerry Packer, I suppose, to fix the result of the match. And we say when you read the article it has got nothing to do with that sort of thing. It talks about unstated thougts. How could you have a conspiracy from unstated thoughts? There is just no substance in this claim that is made by lawyers who represent Mr Lloyd and we say that

you will find that the case brought by Mr Lloyd's lawyers falls on that aspect.

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Secondly, in any event, no reasonable person would take this article as being published of and concerning Mr Lloyd. It is not a personal reflection. And for either or both of those reasons you will find a verdict for the defendant. But, if contrary to what I have said, you come to the question of damages, then in our submission the damages must be very moderate damages. There is no evidence of identity from people who read it; there is no evidence of actual damage; there is a fulsome retraction and apology which is quite magnanimous in what it said about Mr Kerry Packer. If there was any damage done, it could only have been of the most fleeting kind. And we say that if you bring in a verdict for the defendant it is no reflection on Mr Lloyd in any way, this action that he left in the hands of PBL to institute on his behalf because from the beginning to the end of this case I, as counsel for "The Age" , have made it plain that we do not make those allegations against him. In fact, I have gone far beyond that, and I have said, and I have addressed you for a long time, to say that it is in words that no reasonalbe person could ever have come to that particular conclusion but if they did, it is certainly wrong and has been retracted and apologised for. And so it is no reflection on Mr Lloyd if you find a verdict for the defendant. His reputation is high. He does not need your verdict and I do not say that in any sense critically. This is not a case where you have to give him a verdict to justify it. You cannot get a greater tribute to him than from "The Age's" own counsel who says he has an excellent reputation for honesty but says that was never said about him and so on.

So, members of the jury, I would ask you to uphold freedom of speech in this very important case. Important because "The Age" is a newspaper

publishing an article about cricket, about the team has a vital interest in this, just as I concede Mr Lloyd has. It is a very important case. It is important for "The Age" and for the freedom of the press and freedom of speech in this country, and it is for the protection of Mr Lloyd's reputation. You are committed to this task of determining this action, and I leave it in your hands and I thank you very much for giving your attention to my submissions.

(Luncheon adjournment)

101.

ON RESUMPTION:

(Hughes)

MR. HUGHES: Before the jury comes back to court I have an application which arises out of my learned friend's address. My application is that your Honour will discharge the jury on the ground that my learned friend made remarks that are quite outside the evidence and are quite uncalled for, and are also highly prejudicial. The remarks are as follows: I was referred to as this super counsel of Packer which the Packer organisation has got here. That is a plain suggestion quite unsupported by any evidence that Mr. Packer is nourishing and supporing this litigation. Secondly, in another part of his address my learned friend says: "Why is this action being brought?" I will read from my learned junior's note. "I am not blaming Mr. Lloyd. He is a cog. He left it up to PBL. They are handling it. The only evidence concerning Mr. Packer is, first of all, at the bottom of p. 27 [70.9] where the plaintiff was asked, "When did you first see it ... he was very annoyed about it".

The next piece of evidence is at p.33 [78.9] where he was asked: "Your attention ... was it?" He said Yes. Then at p.34 [81.7-82.1], the third question from the bottom of the page, "Did Mr. Kerry Packer ... with it more or less".

There marks I have quoted from my learned friend's address clearly infringe the spirit and

substance of your Honour's ruling that your Honour decided to reject the question suggesting that Mr. Kerry Packer had encouraged the commencement of Mr. Lloyd's action. The remarks of my learned friend impute as clearly as possible that I am here because I am told by Mr. Packer to be here - Mr. Packer's super counsel; got here by the Packer organisation.

Of course, the observation that I have quoted from my learned friend's address to the effect that Mr. Lloyd is a cog clearly implies that his action has been brought without any independent volition or consent on his part. The appalling aspect of this part of my learned friend's address - I choose that word carefully - is that it raises a matter of prejudice which is no more than a red herring designed to distract the jury or calculated in the sense of likely to distract the jury from a proper consideration of the issues in the case. There is not one piece of evidence capable of suggesting that Mr. Lloyd is a cog or a puppet in these proceedings. There is not one piece of evidence to suggest that the decision to bring these proceedings was taken by PBL without regard to Mr. Lloyd's wishes. There is not one piece of evidence capable of suggesting that my solicitors are taking instructions in this matter from anyone other than Mr. Lloyd as the client.

It stands to reason that it is an attempt to smear Mr. Lloyd without any basis in the evidence with a connection with the Packer organisation, the suggestion being that they are calling the shots and that Mr. Lloyd is only a cog, and that I am the Packer organisations's paid counsel. The prejudicial effect of that in the sense of its capacity to distract the jury is so enormous that, regrettably, the damage cannot be undone by directions. These remarks must have been made designedly.

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Your Honour will recall that another exercise in distraction was undertaken by my learned friend.

I said to the jury - this is minor compared to the last two matters, but one has to look at the cumulative effect of everything - why did Mr. McHugh ask a question of Mr. Chappell designed to establish that all the other team players had brought actions? Mr. Chappell said he believed that that was the case. I concede that your Honour entertained an objection and disallowed it. On reflection it will be seen, in the light of the way this trial has developed, that that question was calculated in the sense of likely to suggest, as I put to the jury, that newspapers that libel a number of people in one article are entitled to a discount for the bulk. That was a most improper suggestion, if that is the suggestion. Apparently the suggestion is something less close to it - perhaps not quite that. It was one of the opening lines of his address.

The reason I opened up that question was because, if an article like that is published of a lot of people and they all sue, this will open up a new dimension in the treatment by the law of matters of public interest. That is a most prejudicial remark. There is no defence which raises any matter of public interest. The only defences that were do so were either withdrawn or taken away, and one has to consider the cumulative effect of the three matters to which I have adverted, although I place primary importance on the first two.

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MR HUGHES: The other aspect of the situation in considering what ought to be done in the light of this prejudicial and irrelevant treatment of these matters by my learned friend is this: those remarks about Mr Lloyd being represented by Mr Packer's "paid counsel" and about Mr Lloyd being "a cog" are remarks which, if they had any impact at all on this case, would go to aggravation of damages.

My friend has chosen to make these observations without putting one question to Mr Lloyd in

cross-examination which would warrant the assertion that Mr Lloyd was a cog, lacking any volition in relation to the bringing of these proceedings. Mr learned friend put not one question to Mr Lloyd designed to establish that I was Mr Packer's "paid super counsel", sent here by him. This is regrettably a case in which my friend's sense of humour has overcome his sense of the fitness of things.

There was one other incident in the address - some people find this very amusing; I am glad that they find something in it. Perhaps the laugh will be on the other side of their face. I was not referring to anyone at the Bar table.

At another stage of his address my learned friend castigated or criticised the plaintiff for having brought the action in New South Wales and not in Victoria. That is a total irrelevancy. The plaintiff is perfectly entitled to bring his action in New South Wales and a reference of that kind could only have been calculated to prejudice the jury with irrelevant material. If the action was not properly brought in New South Wales, that fact should have been established long before my friend got up to address this jury. And of course it is a matter that is incapable of establishment.

It is now my regretful submission to your Honour, regretful because Mr Lloyd has come 10,000 miles to fight this case, that the only appropriate course, because the prejudice may be thought to be irremediable, is to discharge this jury, so that Mr Lloyd goes home without a result. That is not his fault.

If your Honour is against me on the application for discharge, it is in my respectful submission clear that two things should happen; first, that I should in the exceptional circumstances of this case be given an opportunity of addressing the jury on these irrelevant and prejudicial side issues that have been brought into play by my learned friend and in particular of course the reference to my position as Packer's hired hand

and the reference to Mr Lloyd being a cog; secondly, the matters to which I have adverted would require directions by your Honour to the jury to disregard them whatsoever, together with an animade version upon their impropriety.

Those are the alternative submissions that I make to your Honour.

HIS HONOUR: The matters raised by Mr Hughes give the court considerable cause for concern. Unfortunately, this is a case where both senior counsel have been criticising each other in front of the jury, a thing which is deprecated by the court, but, having considered carefully what has been put to me, I would think that the proper course is to take the jury's verdict on the action and I propose to refuse the application for discharge. I do not propose to grant leave

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to give Mr Hughes a second address. I will deal with the matter in summing-up.

MR HUGHES: I am obliged to your Honour. I must just say this, that I have not levelled any personal criticism against Mr McHugh from the beginning of this case, until I had to make this application.

HIS HONOUR: All the words have been taken down.

MR HUGHES: And my friend did not complain of it. In my address I treated him with scrupulous courtesy, I thought.

(For summing-up, see separate transcript.)

106.

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COMMON LAW DIVISION.) NO. 9702 OF 1982

IN THE SUPREME COURT

NO. 7

CORAM: BEGG, C.J. at C.L.
And a Jury of Four.

LLOYD V. SYME.

(Extract taken from the notebook of reporter Gail Lane from transcript of Tuesday, 17th April, 1984).

(Errata noted).

(Correction to transcript, page 27, at the bottom, last line, last sentence:
"I was invited to his room ...."

"I" should be "He").

"I was in Mr. Baker's office because we had something to discuss ..."

And then over on the following page he talks about he then read the article. It was Mr. Baker he said was annoyed at this stage, and when he was shown it he said he became incensed.

HIS HONOUR: I think that is probably right, Mr. Hughes. Does your recolleciton coincide with that?

MR HUGHES: My recollection does not enable me to contest that.

(Counsel addressed jury at 2.26pm).

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 9702 of 1982
COMMON LAW DIVISION)

CORAM: BEGG, C.J. at C.L.
And a Jury of Four

WEDNESDAY, 18TH APRIL, 1984.

LLOYD v. DAVID SYME & CO. LIMITED

SUMMING-UP

HIS HONOUR: Members of the jury, in this action the plaintiff, Mr. Clive Hubert Lloyd, sues the defendant, David Syme & Co. Limited, seeking to recover damages for defamation arising out of the publication on 21st January, 1982, by the defendant in its newspaper the Age an article of which Ex.A is a copy. It is necessary for the Judge presiding at a trial of this nature to direct the jury on the principles of law which are appropriate to the case in hand, but it is for the jury to return the verdict in this case either for the plaintiff or for the defendant. In defamation actions in this community it has been traditionally left as a question of fact for a jury to decide whether the plaintiff has been defamed by the article sued upon. It is your duty to observe the directions of law that I give you and to consider what the appropriate verdict should be in this case.

The defendant, David Syme & Co. Limited, has denied that the article admittedly published by it defames the plaintiff, and you have heard argument for many hours addressed by counsel to you on the article itself. Before you can determine what is

defamation and what is not defamation it is necessary for you to know the principles of law that are appropriate. For the purposes of the case in hand defamation arises when there is publication of written material which imputes certain matters against the plaintiff - matters which, in the jury's view, are likely to injure his reputation or by which he is likely to be injured in his trade or calling. In this case the plaintiff is, as you know by the evidence, the captain of the West Indies cricket team, and has been so for a number of years.

In the relevant times cricket matches had been played in Australia between three countries: the West Indies, Australia and Pakistan. At the time of the publication of this article that series had reached a certain stage. I will develop the facts and the submissions that have been made to you, but there are a few other preliminary matters of law that I want to bring to your attention.

The first is that the onus of proving the case is on the plaintiff. Mr. Lloyd brings the action and he bears what in law we call the onus of proof or the burden of proof. It is a civil case in which damages are claimed, and the standard of proof in a civil case in which damages are claimed is proof on a balance of probability. If you, the jury , think that what the plaintiff contends for in any particular fact or matter has been proved to your satisfaction on a balance of probability you would regard that as being proof for the purposes of this trial. The plaintiff bears the onus of proving his case; it is not for the defendant to disprove anything. The standard of proof, as I say, is proof on a balance of probability.

The plaintiff claims that his reputation has been injured by the publication of this article, and he brings this action for the purposes of obtaining an award of damages in his favour to compensate him for the injury which he alleges he suffered. The onus of proving that is upon the plaintiff.

Now I have told you that it is for the jury to answer this question: libel or not libel. It is a question of fact for the jury to determine. The jury's duty is to look at the article in question and see whether in their opinion it bears the meaning that the plaintiff alleges it means. I will say a further word about that in a moment.

In law the plaintiff is obliged to specify the meaning that he says flows from the publication of the printed word. In his statement of claim he is obliged to set forth meanings or imputations that he says flows from the publication, and he has done so. You have the meanings that he has contended for - I think you have them before you. They are four in number and they have been given to you as a matter of convenience. The defendant denies that the published material bears those meanings. You have heard arguments from both counsel about that subject matter. In the end it is a matter for you. How does the jury determine what meaning a particular piece of printed matter bears?

The law has laid down for generations that a jury should endeavour to ascertain in their own minds what they think an ordinary reasonable reader of the material would conclude from the printed or written words. Both counsel have referred to this, accurately, in their addresses to you. It has been said in one of the English cases, a jury has to decide what view the man on the back of the Clapham bus would think flowed from the article he is considering. And when a jury like yourselves is considering

it, it is your duty to try and imagine what would be in the mind of such an average member of the community. You should avoid the view that you think might be taken by extremists because in this community there are extremists, one way or the other. As counsel has pointed out to you, there are those who are avid for scandal, who see imputations or wrongdoings suggested in anything that is said about anything on the one hand; and on the other hand there are those members of the community who go round unpersuaded that there is anything harmful about it unless it is pointed out very vividly to them: people who refuse to see matters that an ordinary reasonable man would see.

So it is your duty to try and take the view of what you think an ordinary reasonable reader would think flowed from these printed words.

You will notice that the imputations that I have mentioned - and you have a copy of them - are four in number, but they are in the alternative. The plaintiff contends that an ordinary reasonable reader, as I have defined for you, would either conclude that the plaintiff had committed a fraud on the public for financial gain in pre-arranging in concert with other persons the results of a World Cup cricket match or secondly that the plaintiff was suspected of having committed a fraud on the public for financial gain following the words of the first matter.

You would not find, if you found for the plaintiff, both of them. They are put to you as alternative meanings that the plaintiff relies on. That is (1) or (2). And the plaintiff says that that deals with one part of the article. Then he says that the latter paragraphs of the article give rise to imputations against him in the form of either (3) or (4) of the imputations which you have in front of you.

Now it is the duty, as counsel have told you, of the plaintiff to allege what he asserts the article means and it is those meanings which go before the jury as issues in the case. No other meanings can be intruded into the case. Those are the ones that he relies on and you will either find that the article bore those imputations, if you feel that is satisfactorily proved - you would not be able to go off on an excursion of your own and say that you thought it meant something else and that was also defamatory because such a matter has not been litigated. The matters that have been the subject of litigation between the parties are these imputations or nothing.

When I say "these imputations" I do not mean that a jury would have to be satisfied in regard to every exact word written in the sentences but the gist of what is written in each of the sentences is the thing that is important. It is set out broadly as being substantially the plaintiff's claim as to what this article meant about him.

Now, as I have told you, you judge it according to the standard that I have mentioned to you and I invite your attention to the arguments that have been submitted to you by Mr. Hughes, learned counsel for the plaintiff. He took you through the article and he says that any reasonable reader would conclude that what this article meant was that the plaintiff had put his head together with others to lose this particular match for mercenary reasons that have been mentioned in the case. And Mr. Hughes has said that even if those exact words are not found, that you will at least find that the article meant that he was suspected of having done so.

On the other hand you have heard Mr. McHugh of learned

counsel for the defendant company strenously deny that the meaning as alleged by the plaintiff should be accepted by the jury and you will know, Mr. McHugh has taken you through the article sentence by sentence and he has analysed it for you and he asks you to find that no reasonable reader, judged by the standards that I put to you, would find that the article meant what the plaintiff says.

I do not propose to repeat all those arguments because you have heard them all today and no useful purpose would be served by it. I think it is clear that nowhere in the article itself will you find the words of the imputations set out verbatim. It is not suggested that those imputations were set out word for word in the article; but an imputation is a meaning which flows from the use of certain words and when a jury is considering this type of issue, and it is the type of issue that juries consider daily in defamation actions, they are entitled to read between the lines; they do not construe an article as if they were trained lawyers or indeed Judges or barristers, they do their duty and say, "Well, an ordinary reader of the public who read this article, I think or we think would come to this conclusion about its meaning." If you are satisfied that the plaintiff has proved the meanings he has contended for and if you are satisfied that the meanings in the article were directed towards him, even though they may have been directed towards others, he would be entitled to have the jury assess damages in his favour.

As far as the defendant is concerned you heard the remarks put by Mr. McHugh when he started his address to you at half past ten this morning. He said, first of all, "We ask you four jury persons to hold that the meaning asserted by the plaintiff just does not flow from the printed words". He took you through the

article in detail and he showed you what he said was the scheme of the article. He said that the article meant what it said, and nowhere in the article did it assert these particular meanings that you have listed in front of you. On the other hand, Mr. Hughes said that if the ordinary reader reading that would come to the conclusion of what the article was saying there was an extraordinary reversal of form last Tuesday. The ones who were not supposed to win won. One wonders why it was that they won, and then Mr. Hughes suggested that the article is inferring that the game was won because the West Indies team would be better served if they lost that particular match. He said that is what the article meant.

Let me say that in connection with the arguments Mr. McHugh put to you he made it very clear that at no stage in the defendant's defence of this action was it suggested that there was any truth in the words contained in the alleged imputations.He has said right from the beginning of the case on his client's behalf, "We never really suggested that Mr. Lloyd was such a person, and in Court we now say so, and say so again; he is to be regarded as a man of the highest reputation". It is not one of those cases in which a defendant comes to Court and says, "Yes, we said that, and what we said is true".

Mr. McHugh indicated early in the case that that was his client's attitude. The action, he said, is defended on the basis that the jury applying the ordinary principles of law would not conclude that those meanings reasonably flow to readers of the newspaper.

The other matter that we are concerned with is that the publication of printed matter has to be shown to be directed against particular persons. You do not have to name a particular

person in an article, but a plaintiff has to show that he is one of the persons or the person referred to in the article. You have heard a deal of argument from Mr. McHugh in which he asserted that the plaintiff's legal advisers have not placed before you any evidence from any witnesses that they thought the article referred to Mr. Lloyd. That is true; there is no particular witness' evidence that can be shown. But the law is that if there are readers in the community who can identify the persons referred to if they have certain knowledge of certain facts they may well consider that the article refers to a particular person.

In this case it was put to you by Mr. Hughes for the plaintiff that the attack or the thrust of the article was against the West Indies team. He said he has proved - it is no doubt common ground - that Mr. Lloyd was in fact the captain of the West Indies team and brought the team to this country. There was evidence before you that as captain he would be the person responsible for the conduct of the West Indies players on and off the field. It was put to you by counsel for the plaintiff that reference in the article to the West Indies team of necessity included reference to the plaintiff. He said that that would be a reasonable view available to readers of this article who knew that Mr. Lloyd was in fact the captain of the West Indies side.

The defamation law is this: a publication has to be made to persons who can identify the persons in the article. If it were addressed to people who have no knowledge of who Mr. Lloyd was it would not be defamatory in their eyes. Mr. McHugh in his address to you pointed out that although this article had a circulation of some 264,000 copies, the number of persons who read it would be nothing like that figure. He said that first of

all there are people who have not the slightest interest in cricket, would not know what is going on, and are annoyed because they cannot get another programme on Saturday afternoons other than the cricket, which is a view shared, perhaps, by a number of people in the community.

However, Mr. McHugh says that there must be a great body of people in the community who just do not follow cricket; it is not their sport or interest. Insofar as the 264,000 persons who bought that newspaper are concerned, Mr. McHugh asks you to find that nothing like that figure would have actually read it or would have known or had the necessary information that Mr. Lloyd was the captain of the team. I invite your consideration of that type of submission to you.

The other question of identification was that the particular match which was the subject of criticism in the article had been played in Sydney on 19th January, and in fact Mr. Lloyd did not play in it; he had influenza. Mr. Hughes asked you to say that nonetheless people who read the article, if they were interested in cricket, would know that he was the captain, and if it was true to say that there was an arrangement to lose the match it could not possibly have been arranged without Mr. Lloyd knowing and therefore he was implicated in it. That was the argument - you heard the counter-argument too - and those are matters about which you have to make up your mind.

So the position of the action is that the plaintiff bears the onus of satisfying the jury that the article referred to the plaintiff, Mr. Lloyd, and that it contained the meanings that have been alleged. He bears the onus of proving that. If he has not proved it to your satisfaction, the action fails and there should be a verdict for the defendant.

I do not propose to take you through the article again; you have been through it in detail, you have copies of it, and no doubt you will read them again before you decide the matter. You will apply the principles I have mentioned to you. What would the ordinary, reasonable reader - the man on the back of the Bondi bus - think when he read it?

If you decide that the matter is not as the plaintiff contends and is not proved to your satisfaction, your verdict would be for the defendant. If on the other hand you think that what has been put by the defendant is more probably correct than not, on the evidence before you your duty would be to award a sum of damages to compensate him for the defamation as you find it to be.

There are some principles of law which apply to questions of damage in defamation actions. It is said - accurately said - by counsel that damages in a defamation action are compensatory. Of their very nature they are designed to award a sum of money which compensates the plaintiff in respect of certain matters. I will run through them for you in a moment. It is not - I hasten to stress it - an occasion for a jury to punish anybody by an award of damages. In certain known forms of action heretofore, in days gone by, juries could award punitive damages. That is to say, assess their view of how harshly the defendant had acted and punish it for the way in which it acted. That has been abolished in Australia. What is required of a jury, if it is awarding damages, is to provide a sum which in its opinion reasonably compensates the plaintiff for these matters. Firstly the gist of the action is that it is brought because the plaintiff alleges he has been defamed because he alleges there has been the publication of matters which were likely to affect his reputation.

And that is the first matter that a jury has to consider.

Now here you start off with the proposition which was unchallenged, that the plaintiff in this action, Mr. Lloyd, is a man of unblemished reputation in this country and elsewhere, throughout the world probably, where they play cricket. It is not suggested for the defendant that he is not a man who at all times has borne the highest reputation. And Mr. Hughes has said that when you get an allegation published about a man like Mr. Lloyd in a paper which has a circulation such as has been mentioned, it is a serious thing indeed to allege against such a man that he is a fraud and would get up to fraudulent tactics for the purpose of arranging the results of cricket matches to suit his financial ends. Indeed Mr. McHugh in his remarks to you did not seek to suggest to the contrary but if it was regarded as being defamatory, then certainly it is serious. He argued, of course, strongly that it did not apply to the plaintiff at all but he said if it did, there is no doubt that to say that of a man of Mr. Lloyd's reputation is a serious defamation.

So the jury would be asked to compensate him with a sum of money to compensate him for that injury. When it is said that damages are at large, I can only say that that means that it is left to the good judgment and common sense of the jury. There is no rule that if you say it is that or the other about someone you get X damages or if you say something else about someone you get Y damages. To endeavour to codify damages or resort to rules would be impossible. So our system involves the jury using its own judgment, its own discretion, if they find for the plaintiff in the matter of the sum of damages which should be awarded.

So the first matters that damages are designed to cover are to compensate for injury to reputation.

The next matter is that they are designed to compensate the plaintiff for hurt to his feelings and you will remember the evidence was led by Mr. Hughes for the plaintiff that when he read this article he was incensed by it, very incensed by what had been said against him and you heard Mr. Hughes, his submissions to you, you heard him say, "Well no doubt an honourable man who has never had the slightest thing suggested about him would be severely hurt by a newspaper coming out and saying that he had arranged for his team to throw the match for financial gain". So that is the second matter, hurt to the plaintiff's feelings.

The next matter that the plaintiff is entitled to have a jury take into account in considering damages is whether what has been published is false or not. The curious thing about the defamation law in Australia is that you can publish the truth about people here and unless certain other things are shown, you can actually defame them by publishing the truth about them.

However, it has been traditional in Australia that if a plaintiff has something said against him and if that something is entirely false, he is entitled to plead falsity to the jury on the basis that to say something that is false against a person obviously affords greater harm to a person than if you are actually telling the truth. And that is why the evidence was allowed in when Mr. Lloyd was asked by his counsel, "Did you ever agree with anybody to take a dive, to throw the match?" and he said, "Certainly not. There is no truth in it whatsoever".

So that is the next matter that the jury has to bear in mind in considering the overall question of damages. I will review them: damages for injuries to reputation; damages for hurt to feelings, remembering that if the article is entirely false then

the hurt no doubt would be greater than if what was said was true.

The next matter is that it is proper to tell you in the circumstances of this case that if a defendant recklessly publishes something which, if he had taken the trouble to really ascertain the facts, he would have seen to be false, if he recklessly goes ahead and publishes it, a plaintiff is entitled to say, "I have been hurt all the more because if these people had bothered really to check out the facts they would have known that what they said against me was entirely false. What the West Indies team did that day had nothing to do with the fact that Australia won and the newspaper itself knew it, because of the article they published on the day in question, 'rain saves Australia'",and you will remember that play stopped when Australia had only played 43 overs, there being 50 overs for each side in the match. So the plaintiff's counsel says that this is evidence from which a jury is entitled to conclude that the defendant was reckless in publishing that article and that that is something to be borne in mind in assessing the hurt to the plaintiff.

The other matter that is important in questions of damages in defamation actions is the extent of the publication. It is one thing to publish, say, a defamatory letter amongst six or seven members of a committee. It is another thing to publish a defamatory article to the world; in other words, to anybody who happens to buy the paper and read it. So the extent of publication is always a matter that the jury has to take into account because it is injury in the eyes of those readers that is important. A jury has to endeavour to ascertain how many readers would have read this article and would have drawn the conclusion that that is what the article meant. If it were only a handful, it would

be one view. On the other hand, out of the publication of some 264,000, it is submitted by Mr. Hughes that the area of publication would be considered to be a lot greater.

The other thing that is considered important is the position in the paper in which the article appears. You have copies of Ex.A. I invite you to look at the actual paper itself when you are considering it. Have a look at this paper because that is the only way in which you can see what I am talking about at present. Turn to page 11 of the paper. You will have this in front of you and you will see the sheet has a photograph on the front of it of a gentleman holding a pen in his hand. That is said to be a picture of Mr. Justice Kirby. On the right hand side of it you will see this article, "Come on, dollar, come on". That is the position in the paper where it was. That is important when you are considering how many readers would in fact read it. The other matter to direct attention to the article itself - it was referred to on the sports page at the back of the paper. On the back of that paper of 21st January, right in the very bottom right hand corner after an article headed "One day wonder still faces test", by Peter McFarlane, is a reference to page 11, "Come on, dollar, come on".

That has been pointed out to you as being another indicator in the paper inviting readers, if they have been reading the sports page, to turn back to page 11 and pick up this other page and read it. Indeed, you will remember Mr. Greg Chappell who himself was a very distinguished captain of the Australian cricket team. He said that he got on to the article because he read the sports page and then read this line, "Come on, dollar, come on", and he said he turned and read it. That evidence is led on the question as to manner and form; how far the article would have

been directed to the readers of the paper, the size of the print, the position held, and matters of that nature. They are all relevant to the "extent" of publication.

Another matter that was urged by Mr. Hughes to be taken into account on the question of damages is the question of whether or not they ever offered an apology. Both counsel have addressed you on that. Mr. Hughes said that the apologies referred to - indeed referred to in the plaintiff's own statement of claim - were not real apologies or suitable to mitigate the damage that flowed from the publication of the article. On the other hand Mr. McHugh has asked you to find that you could not get a better apology; you could not get one published quicker to endeavour to heal any wound that had in fact been inflicted upon the plaintiff.

Again it is a matter for you to consider - a factual matter You have got these two other newspapers that were published; Ex. B which was published on the day after. The one sued upon was published on Thursday the 21st, and on the day after, the Friday, at the back of the sports page at the bottom you will see a reference in the corner, "One-day match" which states:

> "'The Age' yesterday carried in the features page a story headed 'Come On, Dollar, Come On' concerning the current one-day Benson and Hedges World Series Cup matches.
>
> 'The Age' did not intend to impugn the integrity of any cricketers participating in the series or the integrity of Mr. Kerry Packer, or any person or organisation concerned in the series, or to suggest that financial considerations have affected or might affect the result of any match in the series."

That was published the day after. Mr. Hughes criticised it and said that they did not apologise but merely said that they did not intend any suggestion to flow, as indicated there. Mr. McHugh

on the other hand said that they got it out quickly; if there were any readers of this article who thought that Mr. Lloyd was referred to in the article, if they read the paper the next day they would have seen there was not the slightest intention on the part of the newspaper to assert that any such imputations were true.

You have Ex.A on the Thursday, Ex.B on the Friday, and then on the following Wednesday, the 27th, you have on the front of the feature page, page 11, this article. Just above the exhibit mark somebody has put a circle around it. That is addressed: "Mr. Packer, players, and the Cup Cricket". It states:

> "'The Age' on 21 January, 1982, published an article in the 'Age' feature section under the heading 'Come on, dollar, come on'.
>
> It has been suggested that some persons may have read the article as carrying the meaning that the outcome of the West Indies and Australia match on Tuesday, 19 January at the SCG was dishonestly pre-arranged by Mr. Kerry Packer, or by anyone else, for profit, and that the Australian and West Indies teams had or would allow commercial considerations to affect the result of matches. Such a suggestion would, of course, be completely and utterly false, and would have no foundation in fact whatsoever..."

Although Mr. Hughes said it does not really destroy the hurt or reduce the damage that flows from the publication, Mr. McHugh suggests on the contrary that it is a straight-out apology to Mr. Packer, to the players, and those associated with the game.

If a matter is defamatory and is so found by the jury, the fact that an apology is made is to be treated as evidence of conduct by the defendant by which he seeks to lessen the effect of the publication he has made, and in the ordinary terms of the law, an apology goes towards mitigation or breaking down of damage.

Those are the features of the case. Yu have heard counsel talk about it for some hours, you have got the papers, and there is very little further that I need to tell you. However, I will not depart from the case without saying that I deprecate very much the language that counsel have seen fit to use in the case as personal reflections. It reminds me of a method of playing the man and not the ball and I invite you to discard all those types of remarks which were made about Mr. Hughes being Mr. Packer's leading counsel and on the other hand about Mr. McHugh being a David Syme defender and things of that nature. Counsel have a clear duty to present the issues in a case to a jury for consideration and a jury should not be deflected from its tasks by these perhaps humourous asides that are made by counsel one against the other.

The issues in this case are relatively short and straightforward. You have the article in front of you. You have an allegation that it means certain things and if you find that in accordance with the rules of law that I told you about then there would be a verdict returned for the plaintiff. If you found that he failed to satisfy you, there will be a verdict for the defendant.

If you find a verdict for the plaintiff then you proceed to assess damages in accordance with the principles that I have explained to you.

Those are the matters that embrace your task. Counsel in the their flights of rhetoric sometimes lose sight of the real issues that have to be decided. It matters not at all whether Mr. Lloyd is a cog in anyone's wheel. If Mr. Lloyd is defamed and is found by a jury to be defamed then he is entitled to have the jury award him damages. The fact that he left his litigation to be conducted

by anyone alse does not in any way detract from the fact that he is entitled to bring the case to Court. I ask you to put out of your minds all these flights of rhetoric that both counsel from time to time indulged in and to consider only the issues that I put to you for determination.

The exhibits will be sent out to you. If I have to give you any further legal directions you will be recalled but for the time being please retire and consider your verdict. Have counsel thoguht further about the exclusion of any of the matters contained in the exhibits?

MR. McHUGH: I do not think there is anything.

(At 3.15 p.m. the jury retired.)

IN THE ABSENCE OF THE JURY:

MR. HUGHES: If I may say with respect, your Honour, you did not tell the jury that in a case of defamation the plaintiff need not prove actual damage and that the law presumes some damage to flow from the publication of such matter.

Your Honour did not make clear to the jury that in considering whether published matter is defamatory the intention of the publisher is irrelevant. Indeed in one part of your Honour's summing-up your Honour said that publication has to be directed against particular persons, which might give the jury the idea that there was some intention. On the other hand when your Honour dealt with the question of identification your Honour did not tell the jury that the proved intention of the publisher is a matter to be taken into account in determining whether the matter complained of does refer to the plaintiff.

HIS HONOUR: It is a matter that has been dealt with by both counsel and I do not think it is necessary for me to give directions on that. Both counsel referred to the particular matter and I invited their attention to it.

MR. HUGHES: But it is a matter that justifies and requires a direction of law from your Honour and particularly because of the dichotomy in this case the jury has to be told that intention is

irrelevant. I ask for a direction that the intention of the publisher is irrelevant on the question of whether the matter is defamatory and for a further direction that the intention of the publisher to refer to the plaintiff is relevant in considering whether the published matter identifies the plaintiff.

In dealing with damages your Honour says that it is common ground that the plaintiff is of unblemished reputation. That is not common ground and cannot be in the context of this case because the plaintiff's case is that his reputation has been blemished by this article and the concession that was made at page 14 of the transcript was formulated by me and if I may, I will read it to your Honour: "If my friend is prepared to say before the jury that his client recognises that prior to the publication of the article complained of Mr. Lloyd had an excellent reputation for honesty in cricket, I could save some time" and Mr. McHugh said, "There is no problem about that. I will say that". It is, with respect, imappropriate to put before the jury a matter of common ground that is not common ground and what ought to be put by your Honour to the jury is the concession made which does not relate to the present but relates to the time before the publication of the article.

The next matter is that in dealing with the various heads of damages your HONour did not direct the jury and I do submit this is an important matter, that a factor affecting damages is the seriousness of the imputation. I ask for a direction that that is a matter to be considered..

HIS HONOUR: I have directed them on that. I will not do that.

MR. HUGHES: Furthermore, your Honour did not tell the jury that a factor to be taken into account in assessing damages is the anxiety and the uncertainty involved in the litigation itself and I ask for a direction that that is a factor to be taken into account.

I also ask for a direction which your HOnour has not given that the defendant's failure to enquire of the plaintiff before publishing the article complained of is a matter to be taken into account in the assessment of damages.

Unless those directions are given the position of damages is not fully put to the jury.

MR. HUGHES: I also ask for some other directions. In my respectful submission your Honour has not adequately dealt with the prejudicial effect of the observations made by my learned friend in the course of his closing address.

HIS HONOUR: I do not propose to say anything further to the jury. It is the discretion of the Judge. I think it would be calculated to augment the matter rather than lessen it. Everything you have said has been recorded. You have the benefit if anything goes wrong and you have to take it to an appeal. I do not propose to say anything further about it.

MR. HUGHES: Your Honour imputed to me in front of the jury that I had engaged in some uncalled for, unkind comments about Mr. McHugh. I did no such thing in front of the jury. Your Honour referred to Mr. McHugh as the defender of David Syme. I did not use that term; I always used the conventional description of my learned friend - that is, my learned friend who appears for the defendant. It would create a most unfortunate impression, as it were, implicating m e in the same kind of conduct as that about which I complained in relation to Mr. McHugh.

It is calculated in the sense of likely to leave a quite unfair effect with the jury. I suggest that your Honour cannot point to one improper, uncalled for or personal impression that I made about my learned friend in front of the jury. If there is one I would like to be told of it.

HIS HONOUR: Anything else?

MR. HUGHES: Yes, your Honour. I ask your HOnour to tell the jury that there is no evidence that the West Indies, as asserted by my learned friend, did not play as well in Sydney on 19 January as they did in Brisbane. My learned friend relied upon that assertion to rebut the suggestion of recklessness. When that matter was being discussed yesterday your Honour indicated that that was not the view of the evidence that was open. To say that is to put to the jury a false issue unless it is corrected.

I also ask your Honour to instruct the jury - and this is not related to the imputations that my friend made about my position as Mr. Packer's hireling or super counsel, or whatever he liked to call me. It goes to another matter of prejudice. I ask your

Honour to tell the jury to take no notice whatsoever in their consideration of the case of the proposition that the fact that all the other players have brought actions is significant, because if this sort of thing happens it will put public discussion of public issues in a new dimension. I make that application, that being the substance of what my learned friend said on the point because there is no defence left to the defendant which makes public discussion of public issues in any way remotely connected with the issues in this case.

I also ask your Honour to tell the jury that it is not a remarkable fact or a fact of any significance at all that this action is brought in New South Wales and not in Victoria.

HIS HONOUR: It has no legal significance. It is a remarkable fact but it has no legal significance.

MR. HUGHES: Absolutely none. It is not even remarkable.

HIS HONOUR: It is really because it was an article published by a Victorian newspaper and we have a Sydney court dealing with it. It seems to suit the defendant, and he has not taken any steps. It has no legal significance.

MR. HUGHES: I ask your Hondur to tell them that.

HIS HONOUR: I will tell them.

MR. HUGHES: I ask your Honour - I want to be specific about this - to tell the jury that there is no evidence to support the assertion that my friend chose to make in his closing address, that I am Packer's super counsel whom he has got here for this case. That is a most damaging assertion, an assertion that should never have been made, and unless it is quite clear that it is so there is a danger of this trial miscarrying. I submit with very great respect that your Honour's general direction which you gave in which your Honour implicated me in some sort of impropriety without any ground is not calculated to undo that piece of damage.

HIS HONOUR: You have made that submission -

MR. HUGHES: I have not made it in that form and I have to make my submissions precisely. I submit that your Honour has not dealt adequately - I put this, of course, with respect - with the other statement that my learned friend made without any warrant in the evidence that Mr. Lloyd was just a cog. Why was this action

brought? He is just a cog - left everything to P.B.L. That is a reflection on Mr. Lloyd and it is a reflection on my instructing solicitors.

Another matter upon which I ask for a direction is this: my learned friend in the course of his closing address said that the Age has given Mr. Packer's organisation massive publicity in connection with the games. I ask your HOnour to instruct the jury that that observation has nothing to do with the issues in this case. The reason I make that suggestion is that in conjunction with the other comments that my learned friend made in his address - or statements or assertions - that observation which is quite unsupported by the evidence is calculated to distract the jury from the determination of the true issues in this case.

HIS HONOUR: I did not tell the jury about actual damage and I did not tell them about intention in relation to publication. I propose to give those directions.

MR. HUGHES: There is just one other matter which my junior has reminded me of. I ask your Honour to tell the jury that the "disclaimer" in "The Age" of the 22nd January is incapable of being understood as an apology.

MR. McHUGH: I ask for a verdict on the main issues although I think that is covered by the Part 31 rule 2 finding but I just formally take that point. I have already asked for a verdict in respect of identification.

HIS HONOUR: I have rejected that.

MR. McHUGH: I ask for a specific direction that the jury on the issue of identification cannot take account of readers who mistakenly believe that the plaintiff played in the match. Next, I either ask for a direction that intention is irrelevant on the issue of identification -

HIS HONOUR: You have already mentioned that in the running of the hearing and I ruled against you on that.

MR. McHUGH: Yes, but I was asking for a direction. Since my friend has been complaining about various phrases of mine, I ask your Honour to direct the jury that in his references to disgraceful journalism, sneering headlines and so on he has engaged in emotional attacks on the newspaper which, to use the words of Mr. Justice

Maxwell in Andrews' case, can be calculated only to induce a jury to award punitive damages and that such terms do not go to any relevant issue in this particular case.

I would also ask your Honour to withdraw the statement that in considering imputations the jury is entitled to consider the gist of them. I ask your Honour to withdraw that and say that they can find imputations where there are some verbal alterations which do not really alter the meaning but I ask your Honour to withdraw the direction about gist.

Your Honour put to the jury that there are circumstances which would be known to readers and that they may well consider that the article refers to him. I ask your Honour to withdraw that direction and direct the jury that they must be satisfied that not only the readers knew the special circumstances but, knowing the special circumstances, in fact identified the plaintiff.

Your Honour put to the jury on the question of hurt that the plaintiff said he was very incensed by the article. I would ask your Honour to withdraw that and put to the jury that he said that he was incensed at that part which reflected on "Our integrity" concerning the "edging close to the precipice". He never said anything about himself. He said he was incensed about "our integrity".

I would ask your Honour to withdraw the direction that the jury could take into account the falsity of the imputations on the ground that there is no evidence that the plaintiff himself was affected by any falsity, it was never put to him in the witness box but in any event I ask your Honour to direct the jury, if your Honour is against that submission, that the falsity of the imputations could only be taken into account if the plaintiff knew about it and it affected his hurt.

Your Honour directed the jury about taking into account the falsity of the article and I would submit that the relevant question in this case if the falsity of imputations.

I would ask your Honour to withdraw from the jury's consideration those directions concerned with reckless publication. I ask your Honour to direct the jury that they cannot take into account any aspect of reckless publication either on the ground that there is no evidence of it or that there was no evidence that it

affected the plaintiff, if your Honour is against me on that, but in any event they could only come to the conclusion that it increased the plaintiff's hurt.

On the issue of the extent of publication I would ask that your Honour direct the jury that they can take into account the extent of publication only for reasons to identify the plaintiff with the defamatory imputations, if they found defamatory imputations or any defamatory imputation.

I ask for a specific direction that the jury cannot consider damages on the basis of a multiplied factor on the basis that if you award so much damages for 100 copies then you give a pluralled amount for more copies.

IN THE PRESENCE OF THE JURY:

HIS HONOUR: There are two further directions I should give you which I ommitted to give you earlier. You will remember that Mr. McHugh when he was speaking about the issues of damage if the jury came to the conclusion that damages should be awarded, said to you that the plaintiff has proved no actual damage. That is true. There is no precise evidence here of any actual loss by the plaintiff from a financial point of view but it is not necessary in order to make an action good that you prove actual loss. In some cases you could prove actual loss: if for instance someone publishes that a well known doctor is in such a condition that his hand now shakes, he cannot cut the line straight and if his patients start to drop off, you could claim that as actual damage but every defamation action does not have to have that element. The law presumes that if a publication is in fact defamatory, there is some damage and the jury then assesses damages in accordance with the considerations that I have given you.

Counsel have reiterated a number of other arguments to me and asked me to deal with each one in turn. I do not propose to

but I invite your attention to the arguments that have been put to you by counsel. The real issues in the case are the ones I have indicated to you and I ask you to direct your minds to those issues and consider the evidence. Will you please now retire.

MR. HUGHES: Your Honour indicated your HOnour was going to give them an appropriate direction on intention. The direction I seek is on two heads.

HIS HONOUR: I am sorry, there is one further matter I forgot to tell you about. This is the question of the intention of the publication. You will remember both counsel adverted to it during the course of argument. I do not know whether you remember what they said. Whether an article is defamatory or not does not depend in any way at all upon what the writer intended to do. Take the article and ask yourselves this question: what does that article mean to an ordinary, reasonable reader? Any evidence as to what he intended has nothing to do with the case. I will leave it at that. You may now retire to consider your verdict.

(Jury retired at 3.46 p.m.)

(At 4.25 p.m. the jury returned with a verdict for the plaintiff in the sum of $100,000; judgment accordingly with costs.)

In the Supreme Court, Common Law Division.
No. 9 - Minute of Judgment
18 April, 1984

IN THE SUPREME COURT OF NEW SOUTH WALES
SYDEY REGISTRY

COMMON LAW DIVISION

DEFAMATION LIST

No. S9702 of 1982

CLIVE HUBERT LLOYD

Plaintiff

DAVID SYME & COMPANY LIMITED

Defendant

MINUTE OF JUDGEMENT

JUDGEMENT -

that the defendant pay to the plaintiff

$100,000 and costs.

This judgement takes effect on 18th April,1984.

~~REGISTRAR~~

By the Court

(Sgd) W. FARLOW (L.S.)

Chief Clerk

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IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 9702 of 1982
COMMON LAW DIVISION)

CORAM: BEGG, C.J. at C.L.

Monday, 7th May, 1984.

LLOYD v. DAVID SYME & COMPANY LIMITED

JUDGMENT

(On whether the Defendant's plea of comment should be taken from the jury.)

HIS HONOUR: At the close of the case for the Plaintiff, Mr. McHugh Q.C. announced that he proposed to call no evidence. Motion was then made for, inter alia, an order taking the defence of comment from the jury. I decided that this was a proper course to take and indicated that I would publish my reasons in due course. I now publish them.

By its pleadings, the Defendant denied that the imputations alleged were defamatory of the Plaintiff, or that they were published of and concerning the Plaintiff. It then proceeded to allege in the alternative a further defence:

> "4. Alternatively the Defendant says that insofar as and to the extent that it may be found that the matter complained of was published of and concerning t he Plaintiff (which is not admitted) and to be defamatory of him (which is denied) the said matter:
> (i) related to matters of public interest and amounted to comment based upon proper material for comment and upon no other material, and was the comment of the servant or agent of the Defendant;
> (ii) related to matters of public interest and

> amounted to comment based to some extent on proper material for comment and represented opinion which might reasonably be based on that material to the extent to which it was proper material for comment and was the comment of the servant or agent of the Defendant."

The first question arises whether there was any evidence to support the plea given in the Plaintiff's case or elicited by cross-examination of the Plaintiff's witnesses. I form the opinion that there was evidence capable of being accepted by the jury that the matter complained of related to matters of public interest and could be found to be based on proper material for comment. But assuming for the moment that the relevant parts of the article were in fact capable of being found to have the character of comment by the jury, there was no evidence, direct or inferential, of the classification of the author of that comment.

The Act provided a defence for three classifications of authors:

(1) s.32 says it is a defence as to comment that the comment is the comment of the Defendant.

(2) s.33 says it is a defence as to comment that the comment is the comment of the servant or agent of the Defendant.

(3) s.34 says it is a defence as to comment that the comment is not in its context, and in the circumstances of the publication complained of did not purport to be, the comment of the Defendant or of any servant or agent of his - that is, comment of a stranger (as the side note to the section indicates). In such a case, the defence is defeated only if it is shown that the publication of the matter was not in good faith for public information or the advancement of education.

It should be observed immediately that where a Defendant is a corporation publisher it can only assume the character of author of material by its servants or agents, or publish the material of "strangers".

But in the instant case, I find there is no evidence of "the character" of the author. He may have been a servant or agent or he may have been a stranger, and to ask a jury to determine which would be asking them to speculate.

It has been argued by Mr. McHugh that the article itself supplies inferential material covering the point or that some admissions might be extracted from the interrogatories and answers tendered by the Plaintiff. I do not accept this view. If one looks at the article itself it will be seen that it appeared on page 11 which is entituled "Age Features", and it will be seen that that page contained three articles: one on the left relating to Mr. Justice Kirby under a by-line "From Deirdre Macken in Sydney"; the subject article next to it, appearing under a by-line "By David Thorpe"; and, at the left hand foot of the page, an article under the heading "The Swiss eagle has landed in Skibbereer", which had a by-line "From Peter Smark, chief European correspondent". It would be guessing in my mind to say of any of those three apparent authors that they were servants or agents of the Defendant, or that they were authors who presented material to the paper for publication for reward.

I am of the opinion, and it was conceded by Mr. McHugh, that the Defendant having pleaded the plea is under a legal onus either to produce evidence to support it or to point to evidence of the facts in the Plaintiff's own case. Here it would have appeared to have been a simple matter for the Defendant to produce the author or if it did not wish to subject that person to cross

examination some other member of the staff could have given evidence of the capacity in which Mr. Thorpe wrote. It is obvious that the legal advisers for the Defendant wished to have the last address to the jury. However, in pursuing that result it appeared to me that they left a vital gap in the necessary proof of a defence, onus of proof of which they bore. I would like to make it quite clear here that I am in no way confusing a subsequent onus which would lie on the Plaintiff if the Defendant succeeded in proving what it had to prove. There is a defeasance of the defence if the Plaintiff can show that the opinion represented by the comment was not the opinion of the servant or agent of the Defendant (under s.33(2) or in the case of a stranger, s.34(2)). I mention this because in publishing the judgment of the Court of Appeal in Illawarra Newspapers v. Butler [1981] 2 N.S.W.L.R. 502 at 506, Samuels, J.A. appeared to think that in that case, by remarks I made, I had erroneously reversed the onus of proof, and I take this opportunity to correct that misapprehension.

Mr. Hughes has argued two additional grounds as to why the plea should not go to the jury. He firstly says that even assuming that the Defendant had shown that the matter complained of had the character of comment of the Defendant's servant or agent, the opinion expressed was not the opinion of such author. He asks me to find that on all the undisputed facts before the Court, no honest opinion could be held by a person who knew the facts upon which he alleged to be stating his opinion, that the cricket match played on 19th January, 1982, was won by Australia because the West Indies team in general, and the Plaintiff in particular, had "taken a dive". He submitted that the evidence was all one way, and he referred to the two articles published in the Age

which clearly showed that the only reason why Australia won the match, at the point of time when active play ceased (namely after 43 overs), was that Australia's run rate was greater than that of the West Indies, and if rain had not then stopped play, Australia probably would not have won the match.

However, powerful as this submission may be, if the matter rested there I would have let that issue go to the jury.

The other point that Mr. Hughes had relied on, but which was not fully argued before me, was that the Defendant must fail on the plea for these reasons: the plea of course only assumes importance once the jury have found that the material published contained the imputations as alleged by the Plaintiff, but the Defendant in this case was asserting that the meaning contained in the comment was not coextensive with the imputations alleged by the Plaintiff. Therefore, the plea must fail in any event and should be taken from the jury.

Mr. McHugh appeared to base his submissions on what was said in the judgments of Reynolds, J.A. and Samuels, J.A. in Petritsis v. Hellenic Herald Pty. Limited [1978] 2 N.S.W.L.R. 174, but I am unable to find anything in those judgments which support his submissions. But what had happened in that case was that the jury had first retired to consider whether the four imputations expressly left to them were defamatory and in each case whether they were justified as being substantially true. Having found those four defamatory imputations and having found that they were not substantially true, the Judge was then asked to put the defence of comment to the jury, and it was argued that using the words of the precise imputations found, the jury should be asked to hold that they were not comment but were statements of fact. For this

purpose, the original material published was ignored. Mr. Justice Reynolds and Mr. Justice Samuels spent some little time in showing that this approach was entirely erroneous and that to yield comment, the words that were actually published must be examined. The case decided nothing else.

Mr. McHugh was seeking to assert that of the paragraphs of the printed matter published, certain paragraphs were matters of comment and certain paragraphs were statements of fact. Those were enumerated in a letter of particulars (m.f.i. 2). He was then seeking to say that the statements of fact were not defamatory, and the paragraphs which were couched as comment did not give rise to the imputations pleaded, but meant something which was non-defamatory.

In my judgment this course if defective in law. A plea of fair comment was and is a plea of confession and avoidance.

The matters he wished to raise were raised unsuccessfully under the general issue.

I do not think that Mr. McHugh's submission is supportable. The plea of comment in my view starts to require consideration under the Defamation Act 1974 where the jury finds the imputations as alleged by the Plaintiff. It will be defeated if the jury hold that defamatory opinion was not an honest opinion of the author when this issue is raised by the Plaintiff.

In my view the whole purpose of the plea was to enable a person to express an opinion on facts stated or referred to, even though it defamed the Plaintiff, in all cases where the comment related to a matter of public interest.

For these reasons, the defence must be taken from the jury.

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