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 & PART II

Volume II

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,
LONDON. EC2V 7JA

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,
Strand,
LONDON. WC2R 3EH

Telephone: (01) 379 3456

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 & PART II

Volume II

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,
LONDON. EC2V 7JA

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,
Strand,
LONDON. WC2R 3AH

Telephone: (01) 379 3456

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

INDEX OF REFERENCE:

A - DOCUMENTS INCLUDED IN THE RECORD

PART 1

Documents and Transcripts of Evidence

PART II

List of Exhibits

Respondent's Exhibits

In the Supreme Court, Court of Appeal
NO. 11 - Summons
11 May, 1984

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

SYDNEY REGISTRY

No. CA181 OF 1984 No. CL9702 of 1982

DAVID SYME & COMPANY LIMITED
Claimant

CLIVE HUBERT LLOYD
Opponent

SUMMONS

The claimant claims:

1. An order that the time in which the claimant may seek leave to appeal from the decision of Mr. Justice Maxwell delivered on 1 June, 1982 be extended to such time as the Court may fix.
2. An order that the claimant be granted leave to appeal from the decision of Mr. Justice Maxwell made on 1 June, 1982.

To the Respondent CLIVE HUBERT LLOYD
22 Lindslow Road
Heald Green, Cheadle
Cheshire, ENGLAND

Before you take any step in these proceedings you must enter an appearance in the Registry.

Appellant: David Syme & Company Limited
50 Margaret Street
Sydney

Solicitor: Norman Douglas Lyall
2 Castlereagh Street
Sydney
Phone: (02) 221.2366

Appellant's Address for Service: Ebsworth & Ebsworth
Solicitors
2 Castlereagh Street
Sydney 2000
DX 103 SYDNEY

ADDRESS OF REGISTRY: Supreme Court Building
Queen's Square
Sydney

N. D. Lyall
Solicitor for the Claimant

EBSWORTH & EBSWORTH,
Solicitors,
Castlereagh Street,
SYDNEY. 2000 DX 103
Tel: 221 2366
Ref: NDL:D:2658b

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL DIVISION

SYDNEY REGISTRY

No. CA181 OF 1984 No. CL9702 of 1982

DAVID SYME & COMPANY LIMITED
Claimant

CLIVE HUBERT LLOYD
Opponent

STATEMENT

BSWORTH & EBSWORTH,
olicitors,
Castlereagh Street,
YDNEY. 2000 DX 103
el: 221 2366
ef: NDL:D:2659b

NATURE OF THE CASE

The opponent sued the claimant for damages in respect of the publication in The Age newspaper on 21 January, 1982 of an article entitled "Come on dollar, come on" which the opponent alleged was defamatory of him.

The article and the imputations which the opponent alleged were capable of arising from it were set out in full in the statement of claim filed herein.

On 1 June, 1982 Mr. Justice Maxwell considered the question of whether the matter complained of was capable of bearing the imputations pleaded by the opponent. His Honour decided that the matter complained of was capable of conveying the imputations pleaded.

QUESTIONS INVOLVED:

1. Whether the "material date" for seeking leave to appeal from a decision in proceedings in the Court ordered to be tried separately pursuant to Part 31 rule 2 of the Supreme Court Rules is the date upon which the decision is given or the date upon which a verdict is given in respect of the case as a whole.

2. Whether the decision given after a separate hearing which has taken place pursuant to Part 31 rule 2 is an interlocutory judgment or order in the proceedings or a final judgment.

3. Whether the decision given after a separate hearing which has taken place pursuant to Part 31 rule 2 creates an issue estoppel between the parties.

4. Whether the imputations pleaded by the opponent were capable of arising from the matter complained of.

REASONS WHY LEAVE SHOULD BE GIVEN:

1. His Honour's decision was interlocutory and concerned a matter of substantive law.

2. His Honour was in error in holding that the imputations pleaded were capable of arising from the matter complained of.

3. By reason of His Honour's decision all the imputations pleaded were allowed to go to the jury and the claimant thereby suffered substantial injustice.

10

4. The matter complained of in these proceedings is the subject of 27 other defamation actions in which identical imputations are pleaded.

5. The time for leave to appeal should be extended because of the importantce of the questions involved in this and the allied litigation.

This is the Statement referred to in the appellant's Summons for leave to appeal.

.....H. C. Linnell.....
Claimant's solicitor

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

SYDNEY REGISTRY

No. CA of 1984
CL 9702 of 1982

DAVID SYME & CO PTY LIMITED
Appellant

CLIVE HUBERT LLOYD
Respondent

in the Court below:-

CLIVE HUBERT LLOYD
Plaintiff

DAVID SYME & CO PTY LIMITED
Defendant

AMENDED NOTICE OF APPEAL

The proceedings appealed from were heard before Mr. Justice Maxwell on 1 June, 1982 and before Mr Justice Begg and a jury of four on 16, 17 and 18 April, 1984 and were decided on 18 April, 1984.

The Appellant appeals from the decision of Mr Justice Maxwell and from decisions of Mr Justice Begg made in the course of the trial, His Honour's summing up and from the verdict of the jury.

GROUNDS

1. That the imputations pleaded in the statement of claim did not arise from the article complained of.

2. That His Honour was in error in admitting evidence concerning the way the match on the 19th January, 1982 was played.

3. That His Honour was in error in admitting exhibits, E,F,G,H,J,K, and L into evidence.

4. That His Honour was in error in withdrawing the defence of comment from the jury.

5. That His Honour was in error in failing to enter a verdict by direction in favour of the defendant

6. That His Honour was in error in directing the jury that in considering whether the imputations pleaded arose from the article complained of it was sufficient if the jury formed the view that the gist of the imputations arose from the article, but that the jury did not have to form the view that every word in the imputations must arise from the article.

EBSWORTH & EBSWORTH,
Solicitors,
2 Castlereagh Street,
SYDNEY. 2000 DX 103
Tel: 221 2366
Ref: NDL:3988b

7. That His Honour was in error in directing the jury that in considering the question of damages they were entitled to take into account the question of whether the defendant had published the article complained of recklessly.

8. That His Honour was in error in directing the jury that the jury could take into account the falsity of the imputations in the absence of evidence that the respondent was affected by such falsity.

9. That His Honour was in error in failing to direct the jury that a mistaken belief by readers that the respondent played in the match on 19 January, 1982 was not a sufficient identification of the plaintiff.

10. That His Honour was in error in failing to direct the jury that when considering the issue of identification they could not take into account readers of the article who mistakenly believed that the respondent played in the match on 19 January, 1982.

11. That His Honour was in error in failing to direct the jury that the intention to refer to the respondent was irrelevant on the issue of identification.

12. That His Honour was in error in failing to direct the jury that in order to be satisfied that the article referred to the respondent they must be satisfied that there was evidence that there were readers of the article who knew special circumstances concerning the respondent and who, knowing those special circumstances, in fact identified the respondent as being referred to in the article.

13. That the jury's verdict was excessive.

14. That His Honour erred in failing to direct the jury that the jury could only take into account the extent of publication in so far as the matter complained of was published to persons who identified the Plaintiff with the defamatory imputation, if they found any defamatory imputation or imputations.

These grounds of appeal are prepared without the transcript of His Honour's decisions during the course of the trial and His Honour's summing up. The Appellant may wish to add to the grounds of appeal when transcripts are available.

ORDERS SOUGHT:

1. That judgement be entered for the appellant
2. Alternatively, that there be a new trial on all issues.

Appeal Papers will be settled on 1984 at a.m. in the Registry of the Court of Appeal.

To the Respondent: CLIVE HUBERT LLOYD
22 Lindslow Road
Heald Green, Cheadle
Cheshire, ENGLAND

Before you take any step in these proceedings you must enter an appearance in the Registry.

Appellant: David Syme & Company Limited
50 Margaret Street
Sydney

Solicitor: Norman Douglas Lyall
2 Castlereagh Street
Sydney 2000
Phone: (02) 221.2366

Appellant's Address for Service: Ebsworth & Ebsworth
Solicitors
2 Castlereagh Street
Sydney 2000
DX 103 SYDNEY

Address of Registry: Supreme Court Building
Queen's Square
Sydney

FILED: 6/9/84

Solicitor for the Appellant

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COURT OF APPEAL

No. CA 181 of 1984
CL 9702 of 1982

DAVID SYME & COMPANY LIMITED
Appellant

CLIVE HUBERT LLOYD
Respondent

in the Court below:-

CLIVE HUBERT LLOYD
Plaintiff

DAVID SYME & COMPANY LIMITED
Defendant

NOTICE OF CONTENTIONS

TAKE NOTICE that the Plaintiff Respondent intends to rely upon the following contentions:

1. That the learned trial judge should have held that the matter complained of was incapable of being regarded as comment.

2. That the learned trial judge should have held that there was no evidence capable of establishing that any comment contained in the article was based on proper material for comment.

3. That the learned trial judge should have held that there was no evidence capable of establishing that any comment contained in the article was based, to some extent, on proper material for comment and represented an opinion which might reasonably be based on that material to the extent to which it is proper material for comment.

4. That because the only comment contained in the matter complained of was congruent with the imputations pleaded, and because the only relevant evidence was that the defendant did not intend to convey those imputations, the defence of comment should have been taken from the jury in any event.

ALLEN ALLEN & HEMSLEY,
Solicitors & Notaries,
Level 58, MLC Centre,
19-29 Martin Place,
SYDNEY, N.S.W. 2000.
DX: 105
Tel: 230.3777
Ref: BPJ:20253:JBB

B.P. JONES,
SOLICITOR FOR THE
PLAINTIFF RESPONDENT

FILED: 7th September 1984

IN THE SUPREME COURT) No. C.A. 181 of 1984 IN THE COURT OF
OF NEW SOUTH WALES) No. C.L. 9702 of 1982 APPEAL
COURT OF APPEAL)

CORAM: GLASS, J.A. NO. 15
SAMUELS, J.A.
PRIESTLEY, J.A. (McHugh)

Thursday, 6th September, 1984

DAVID SYME & COMPANY LIMITED V. LLOYD

MR. McHUGH, Q.C. and MISS McCOLL appeared for the appellant.
MR. HUGHES, Q.C. and MR. BANNON appeared for the respondent.

MR. McHUGH: This is an appeal against a verdict of a jury on 18th April of this year in which the plaintiff received a verdict of $100,000 in an action for defamation. May I take it that your Honours have read the summing-up?

GLASS, J.A.: Yes, and the written submissions.

MR. McHUGH: I propose to follow the order of the written contentions. The first ground of appeal on which reliance is placed is that found in ground (1) of the appeal book; namely, that the imputations pleaded in the statement of claim did not arise from the article complained of.

Your Honours will note that the judgment in respect of those imputations was given by Maxwell, J. on a preliminary decision pursuant to Pt 31 r.2. It is our contention that that judgment is part of the proceedings in respect of which an appeal may be brought but, in any event, an application is on for leave to appeal out of time in respect of it.

GLASS, J.A.: We have to hear you on the question whether you need leave and, if you do, whether

you should have it. We will allow you to argue those questions. We will have to decide whether you should be allowed to, in due course.

MR. McHUGH: That proceeds perhaps on the basis we need leave, but we say we have an appeal as of right.

GLASS, J.A.: You can argue that, too.

MR. McHUGH: I propose to do so. The article is set out in the statement of claim, which appears at pp.1 to 4 of the appeal book. The exhibit itself was reproduced but the form of it makes it almost illegible. The article is at p.55 of the appeal book.

MR. HUGHES: Can I assist by handing up the original newspaper exhibits and three sets of additional papers, which contain legible copies of the newspaper exhibits, together with a lot of material that was left out of the appeal book - my learned

1.

friend's address to the jury and part of mine. The newspaper containing the matter complained of is not without its own significance because one of the points made on damages was that the article appeared in a prominent position and in heavy type.

GLASS, J.A.: We will receive that material.

MR. HUGHES: There is one other point which perhaps ought to be cleared up. The first ground of appeal to which my learned friend has referred was expressed as an appeal on a question of fact - does the matter complained of convey the meanings or imputations contended for? If any ground of appeal were appropriate, it would be a different one.

MR. McHUGH: Ground (5) covers it. At the trial I specifically took a point in respect of these imputations as well. : The imputations are four in number.

GLASS, J.A.: Which copy of the article do you want us to have before us?

MR. McHUGH: I am not using any of the documents. I am using what I used at the trial - my own copy. It does not matter for my purposes whether one uses the statement of claim, which is probably a better way of looking at it because the paragraphs were numbered in the statement of claim. The imputations are set out on p.4 of the appeal book.

The imputations are: "The plaintiff had committed ... cricket match". That was relied on as an alternative to imputation (1). The third imputation is: "The plaintiff was prepared in ... cricket matches."

The plaintiff's case was put in two ways. It was alleged the article imputed that he had already committed a fraud in pre-arranging, in concert with other persons, the result of a World Cup Match and that he was prepared in the future to do it and, as alternatives to each of those imputations, it was said he was suspected of having done it.

If I could then take the Court to the Article itself. But before I do, may I make these points about it. The theme or purpose of the article was the author's concern, first of all, that commercial pressures from the present organisation of cricket may interfere with the normal incentive cog. Secondly, he speculated on whether this interference might have been a factor in the West Indies' recent loss and as to whether it might be in the Finals which were to be played in the near future. Thirdly, he commented that if there was this interference from commercial pressures the game would become, or had become, a charade. He finally comments that therefore somebody - that is the organiser of the cricket, Mr. Kerry Packer - was playing with the faith of the people.

GLASS J.A.: What was the verb you used for the fourth point?

MR. McHUGH: He commented in effect that somebody - which must have been the organiser, and was indoubtedly Mr. Kerry Packer - was playing with the faith of the people.

If I could go to the article, which is headed, "Come On Dollar, Come On", which, as the evidence disclosed, was part of a theme song in the advertising material for World Series Cricket.

MR. HUGHES: That was not the theme song. This was a smearing allusion to the theme song.

SAMUELS, J.A.: It was, "Come on, Aussie".

GLASS, J.A.: We all know how Mr. Hughes' client, Mr. Packer, has affected the way cricket is played.

MR. McHUGH: One should not say, "Mr. Hughes' client, Mr. Packer." He took great offence at my having said that at some stage, your Honour. Paragraph 2 of the article says, "I remembered, of course,... blowing a safe" That was a quotation from "The Great Gatsby" which is set out at the top of the article. Paragraph 3, "The only crisis of ... of the people." There are three factors mentioned: Nixon's indiscretions, the Vietnam War (which was an exercise in morality) and the fixing of the World Baseball Championships. In par. 4, "In Australia it is ... trying to win." So he draws a distinction between what happens in the boxing tents at the Sydney Show and what happens in the major sporting contests in this country.

In par. 5: "On this premise of ... team malfunction." In those two paragraphs he draws attention to the importance of the incentive machine and what causes it to operate, and he makes the point that quite often when a football team, for example, is assured of a place in the Final it is not necessarily charged up to the

same extent as if it really had to fight for a place, and sometimes it can lose in that situation. In par. 7: "For the same reasons in ... of the people?" So far he has used a general theme about incentive and sporting honesty. Then he goes on to say: "Let us consider the ... World Series." I place emphasis on the fact he talks about this delicate, unfathomable mechanism that gives one team a moral edge. "In last Tuesday's game ... is correct." and that is reference back to pars 5 and 6: "the West Indies were ... Come On."

The picture is given of the Australian spectators on the ground barracking for their country out of normal sporting patriotism, but the suggestion is that Mr. Kerry Packer is cheering them on because of the dollars that he can get out of it. It is difficult to fit that in with some concept of a pre-arranged fix in a match to begin with. In par. 13 - and this is a most important paragraph - "One wonders about the ... if we lose."

First of all, par. 13 is talking about a collective state of mind. It is a metaphorical concept. That is not collective states of minds. It is not in the plural and he talks about "bring about an unstated thought." In our submission it is difficult to perceive how you can have an agreement, a pre-arranging in concert with other persons, of something which is simply said to be an unstated thought - it does not matter if we lose. But par. 14 takes the matter further because it says: "This thought edges perilously ... taking a dive." So, far from giving any support for the proposition that there has been an agreement to take a dive, it says: "This thought", not "Its expression and acceptance by others"

but: "This thought edges perilously close to the concept of taking a dive." That ends the reference to what has happened in the past in this article.

In our submission it would not be open to any jury to say that the plaintiff, who did not play in this 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, nor could it be said, if it matters, that he was suspected of it. The reason I say "if it matters" is because these imputations were left en bloc to the jury and a single verdict was given in respect of the whole article. So that if any one of these imputations could not go to the jury, in our submission there would have to be a new trial generally. It is just the same as two heads of negligence being left to the jury and one -

GLASS J.A.: Did the Judge explain that (2) was alternative to (1)?

MR. McHUGH: Yes. The author then looks to the future and he says, "It is conceivable" - and by that he can be meaning no more than that it can be imagined or it is just credible - "that the same pressures would ... final series." So it is a reference back to pressures, which must be a reference back to the commercial pressures that are referred to in par. 13. When he says, "the same pressures" it must be a reference to the pressure of crowds, gate money, sponsorship, referred back in par. 13 - "will influence the thinking of both teams." He is not talking about their agreements, their thinking in the imminent Final Series. "Mr. Packer would prefer ... but if" - which is not an assertion. He does not say, "since both sides want a five-game series", but he says: "If both sides ... commercial connotations." The word "contrive" means a device or invented spectacle with unsavoury commercial connotations. In par. 17: "Two opposing teams with ... mutely arranged." - which is "mutely" meaning it must be silent or refraining from speech or utterance or dumb - "mutely arranged or ... incentive machine." He comes back to his theme about the vital cog and he comes back to say money has replaced that vital cog and is running the incentive machine.

Not that you have got some pre-arranged conspiracy, but that it would be by reason of money and the commercial pressures, the ordinary incentive factors have been overtaken by money which has replaced the vital cog.

In par. 18: "Somebody is playing with ... blowing a safe." In his address Mr. Hughes suggested I might suggest that the somebody was Mr. Kerry Packer.

SAMUELS, J.A.: Do you suggest that par. 18 should be read as if it started with the words "and in that case"?

MR. McHUGH: Yes, your Honour. The "somebody" is the somebody who is playing with the faith of the people. That is the person who has organised cricket as it is and set up this question of sponsorship who has an interest in television audiences.

SAMUELS, J.A.: Do you say that if you agree it means then that at the time the match in question was played somebody, whoever it was, was then playing with the faith of the people?

4.

MR. McHUGH: Somebody is playing with the faith of the people. I do not know that it has got any temporal connotation.

GLASS, J.A.: It is no longer conditional. It is in the incentive mood.

MR. McHUGH: Yes.

GLASS, J.A.: As a matter of fact somebody is playing.

MR. McHUGH: Somebody is playing with the faith of the people because the organisation of cricket is put in such a way that the ordinary incentives, the vital cog in the incentive machine, have been replaced by money. The money

is the product of gates, of television and sponsorship. People say, in effect, it does not matter". Paragraph 13: "Was it sportingly honest .... if we lose?" A situation is being brought into existence where players now say to themselves, "It doesn't matter if we lose."

What is of great importance in this case to bear in mind is that it is not a question as to whether or not this article is capable of some defamatory meaning: it is of paramount importance to remember that the plaintiff's case was - and it went to the jury on the basis - that it meant 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 and it says that he was prepared in future to commit the frauds. This is said, in our submission, in respect of an article which simply says one wonders about the collective state of mind of the West Indians. It does not say anything about the Australians. It says: "One wonders about the collective state of mind of the West Indians." These factors bring about an unstated thought. "It doesn't matter if we lose." It is only by disregarding the language of the article that you could possibly come to any conclusion that there had been a conspiracy.

GLASS, J.A.: What-about par. 17? Firstly, is that not capable of referring back to the match that had already been played as well as future matches?

MR. McHUGH: Let it be assumed against me for the moment that it can be. First of all, here you have the words "mutely arranged" and "mutely" in itself indicates no communication. You cannot have a conspiracy without communication. The fact it is mutely arranged tells heavily against it. Secondly, the whole theme of par. 17 is that money has replaced the vital cog and is running the incentive machine. So it is money that is running the incentive machine, the money coming from the sponsorship, the gate money and so on,

which brings about an unstated thought, "It doesn't matter if we lose, and the author's concern is that what has happened is that there is now so much money involved in this World Series Cricket that players are able to say, "It doesn't matter if we lose in a case such as Australia versus the West Indies. We are going to be better off anyway."

That is a very different thing to saying that you have pre-arranged the match. In our submission it is not possible for a jury to reasonably find that there had been such a conspiracy. I leave to one side the difficulty that the plaintiff did not even play in the match.

5.

PRIESTLY, J.A.: Would you agree that par. 18 is a reference back to par. 1?

MR. McHUGH: No, not that it is a reference back to par. 1 but that it takes one of the ideas from par. 1 and re-states it.

SAMUELS, J.A.: The idea is fixing a series, is it not?

MR. McHUGH: Not at all, with respect, because in par. 2 -

PRIESTLY, J.A.: I should have said par. 2.

MR. McHUGH: It is par. 3 as well, your Honour. "All three events ... of the people." Whatever you may say about Nixon's blatant indiscretions or the fixing of the baseball championships, the Vietnam War was a crisis in morality.

PRIESTLY, J.A.: Looking at par. 2, the incident of the fixing of the World Series in 1919, one of the most famous incidents in American Sporting History, and there will be a number of people reading that paragraph who would know that the fixing consisted of a gambler bribing a number of players in the Series.

MR. McHUGH: With great respect, if they did and they used that to interpret it, they would be using an illegitimate device.

PRIESTLY, J.A.: Before we get to that question there are two questions arising out of that. If you assume for the moment that the reasonable reader could have the knowledge that what happened in that World Series in 1919 was that one man started to play with the faith of 50-million people by fixing a series by bribing players - make that assumption, although I realize you do not concede it - and if you can link together pars. 2 and 18, what would you then say about the availability of the imputation?

MR. McHUGH: Again I would simply submit that it does not make out the imputation, even on the premise that your Honour put to me. The reason we put that is that you have to read the article in its context. The reasonable reader must read the whole of the article. It is not permissible for him to say, "I am going to read pars. 1, 2 and 3; I am going to skip over a number of paragraphs but I will pick out something else and finish up with par. 18." To do so is to act unreasonably. Although the High Court said you are not required to give the same emphasis to every part of the article, nevertheless the reasonable reader must read the whole lot of it.

What your Honour Priestly, J.A. puts to me leaves out the importance of par. 13 where one is talking about a collective state of mind, the question being asked, bringing about an unstated thought, and, importantly, par. 14 which says: "This thought edges perilously ... taking a dive." He says it does not. In terms he says it is a thought. If somebody has a thought which edges close to the concept of taking a dive, he does not go so far as to say that somebody with that thought takes a dive, but even that is another step removed. Even if one had a thought of taking a dive it is still a further step away from the players arranging in concert themselves

to bring about that result. That is what this article cannot get out of that - that there was a pre-arranged conspiracy.

6.

Could I then come to your Honour's major premise. In our submission it would not be part of the ordinary knowledge of an Australian reader in 1982 that Arnold Rothstein fixed in 1919 World Series, or is alleged to have done, by bribing players. To rely on such a meaning would have required at least a true innuendo.

PRIESTLY, J.A.: Assuming that in your favour and assuming that all the reader knows is pars. 2 and 18, in view of par. 18 being in the present tense in the way in which it is, is not par. 18 asserting by saying somebody is playing with the faith of the people that somebody has fixed this Series in the same way as the World Series was fixed?

MR. McHUGH: No, with respect.

PRIESTLY, J.A.: Not even as a possibility?

MR. McHUGH: It is not a question of whether it is a possibility. It would have to be open to a jury to reasonably come to that conclusion and it is not some juryman but somebody in the middle. To use Lord Reid's expression, a person not avid for scandal. If you look at par. 2 with par. 3 - and 2 cannot be divorced from 3, in our submission, he says, "You are playing with the faith of the people." That is a quotation. Then in par. 3 you get Vietnam and Nixon's indiscretions in addition to the fixing of the World Series Baseball Championships. Each of those is playing with the faith of the people so playing with the faith of the people is not necessarily the same as fixing a game. One can fix a game in a sense without entering into a pre-arranged concert to commit a fraud on the public.

It might be said of the game of snooker or billiards that it was fixed when the rules were changed preventing Lindrum from getting his successive canons. Let it be said for the moment that it could be said that in some way the game has been fixed by Mr. Kerry Packer. It is a question then in what sense you mean "fixed"? Certainly you can not come to the conclusion it had been fixed in the sense there was a fraud on the public in the pre-arranging in concert the result of the match. You might fix it in the sense that you had this and that as a result of the rules, as a result of what you do, and the result almost becomes pre-determined, but that is a different thing from committing a fraud in pre-arranging in concert the result of a match. That is the important thing that the respondent has to justify - that it was the result that was pre-arranged by way of fraud on the public.

SAMUELS, J.A.: I suppose it could be said that the reference in par. 2 to what Fitzgerald said was merely because the author remembered there was this useful quote. But what he is really doing is exemplifying three situations which, as he said, played with the faith of the people. That is to say, they misled the people: American Presidents are supposed to be honest; American soldiers kind; and baseball players are supposed to do their best. People believe that and when the contrary occurs then the people's faith has been tampered with. What the article is putting on that view is not at all that any of test matches has been fixed in that sense but simply that may be Mr. Packer, or whoever is organising it, by producing this money incentive is offering the players a complication; not that they are going

deliberately not to do their best but they may not do their best because there are pressures upon them in the game and that it does not matter whether they do or not. That may be as far as the argument goes. In fact, it is sympathetic to the players, not the promoters.

MR. McHUGH: It is possible that it is defamatory or critical of Mr. Kerry Packer, but, in our submission, it is very far from saying that the plaintiff had committed a fraud on the public for financial gain.

SAMUELS, J.A.: Is it defamatory to say of a player he may be led by financial rewards merely not do his best but not arranging it or agreeing with anyone, but mutely doing it?

MR. McHUGH: Unless he is under some duty to do so, in our submission it would not be. Let us take the case of, say, a prize fighter. Supposing he says, "If I knock out my opponents very quickly nobody is going to want to fight me. I'll just take it easy for a few rounds. The crowds won't come if the fights are going to be over in a round or two. So I'll carry opponents for a few rounds", is that defamatory? In our submission there is nothing defamatory about that. That is what I want to say about that part of the case.

Could I then go to the judgment of the learned trial Judge, Maxwell, J. In par. 2 of our written submissions reference is made to the two well known authorities, Lewis v. Daily Telegraph and Jones v. Skelton. The judgment of Maxwell, J. is at pp. 96 to 105 [8-10] of the appeal book. He sets out the issue at p. 96 [8]. At pp. 97 to 99 [9-11] he sets out the article at length and he sets out the imputations. At the bottom of p. 100 [12]: "Before dealing with the ... task at hand" and he cites those at some length. At p. 102 [14] the Judge turns to the article. He summarises, but does not really add any comments of his own, through to p. 103 line Q [15.8]. At p. 103 line R [15.8]: "Mr. Stitt argues that ... imputations pleaded."

Our criticism of the learned Judge is that despite his assertion at p. 105 line K [17.5] that the material is read as a whole, his judgment indicates he did not read it as a whole. He picked out some parts, took them out of their context, and then said that was capable of giving

rise to an imputation that the plaintiff had committed a fraud on the public for financial gain in pre-arranging, in concert with other persons, the rsult of a World Cup Match.

PRIESTLEY, J.A.: Before you leave his judgment at p. 105 [17] I think you said earlier, in answer to Glass, J.A., that there is no complaint raised about the directions concerning the imputations in the alternative. Do I understand you correctly there?

MR. McHUGH: No complaint?

PRIESTLEY, J.A.: By you as to what happened concerning the directions on imputations being in the alternative.

MR. McHUGH: We said none of the imputations should go.

PRIESTLEY, J.A.: Assume they were all open to go to the jury. Are you raising any point about the four of them being left without any proper direction about their alternative nature?

MR. McHUGH: Our objection was taken at the trial - No.

PRIESTLEY, J.A.: Connected with that, you said earlier that you would submit that if any one of these imputations was not capable of being derived from the material complained of then there would have to be a new trial. I was wondering whether it might be the other way around? If only one of them was capable then that would be enough on this argument, for the respondent's purposes, because the verdict conceals whether or not the jury found one or more of them against your client.

MR. McHUGH: With respect, that is not correct, and let it be tested this way. Let it be assumed against me, or in my favour, that the only imputation that could go with imputation (4). For all one knows, the jury may have found a

verdict for the plaintiff on (1) and (3). If they did, they would have found a single verdict for $100,000 on two grounds upon which they were not entitled -

GLASS, J.A.: Being four separate causes of action?

MR. McHUGH: Yes.

PRIESTLEY, J.A.: Let us assume of the four imputations only one could have been left to the jury. Is it not possible that the verdict of the jury was based on that one imputation only?

MR. McHUGH: Yes, it is perfectly possible, but that is not a ground for depriving an appellant of a new trial. When evidence is wrongly admitted it is perfectly possible the jury may not have taken any notice of that evidence but if it is probative evidence and if it might have affected the result, then a new trial is ordered.

SAMUELS, J.A.: It is the possibility of a miscarriage and not the possibility of a carriage.

GLASS, J.A.: I think Cutts v. Buckley deals with the two heads' liability - both left and one not legally supportable - and there is no way of knowing on which basis the jury found. Do you make the point that even if a reader could take par. 17 as meaning the members of the two teams were not competing in good faith to win each game as it came but doing it mutely, they could not be said to have pre-arranged, in concert, the result?

MR. McHUGH: Yes, your Honour. Let it be assumed that this article is capable of meaning that the writer was asserting that every West Indian had in his mind the unstated thought, "It doesn't matter if we lose." That, in our submission, would not mean that there had been a pre-arrangement, in concert with other persons, to fix the result of the match. On the

assumption that Maxwell, J. erred, we submit that we are entitled to an appeal as of right against the finding of his Honour. No appeal as of right lay against the order itself. That is made plain by s. 101 of the Supreme Court Act read with s. 103. Section 101(2)(e) read.

9.

In our submission this was an interlocutory judgment and that is confirmed by s. 103 which says: "An appeal shall by leave ... or issue." So you can have an appeal by leave of the Court.

GLASS, J.A.: How do you get from that to your proposition that you have an appeal as of right?

MR. McHUGH: Because in our submission it is part of the proceedings. It is a matter to be decided as a matter of principle. There is no magic in the fact that you make an order to have the proceedings heard under Pt 31 r.2. Strictly speaking, at the close of the evidence in the case the Judge could have made an order under Pt 31 r.2.

GLASS, J.A.: But he did not.

MR. McHUGH: That is right.

GLASS, J.A.: Is not s. 103 in its terms limited to the situation where an order has been made for a separate decision on a question and that happened here, did it not?

MR. McHUGH: Yes.

GLASS, J.A.: Why does it not follow that the appeal only lies to it by leave?

MR. McHUGH: We would simply say what it is doing is giving a right to bring an appeal because at that stage it might have been arguable that there was no judgment or order of the Court in any relevant sense because you can only bring an appeal against a judgment or an order and although it is an order in one sense -

GLASS, J.A.: It does not speak of an order. It speaks of a decision.

MR. McHUGH: But it says "an appeal shall by ... in proceedings." So it says if you have got a decision on a Pt. 31 r.2 then an appeal shall lie by leave of the Court but it does not lie as of right. That simply confirms the result that you would have reached independently of s. 103 that it is an interlocutory judgment.

There may have been thought to have been a further difficulty in respect of a decision of a preliminary appeal that it was not a judgment or order, notwithstanding the wide nature of the definition of judgments and orders in the Supreme Court Act. Al it is doing, in our submission, is making it plain that you can appeal against a decision by leave of the Court. We would submit it is not to be thought that that is the only way that an appeal can be brought. We would submit that a Pt 31 r.2 order is part of the proceedings in a suit and if there is error which results in a verdict then that verdict may be set aside on the ground of that error, notwithstanding that it is the product of a decision under Pt 31 r.2. It is in the same class as any other.

SAMUELS, J.A.: Does this mean at any trial when a decision has been made on this question under Pt 31 that the trial Judge can determine the matter all over again in a diferent way, if he is asked to do it?

10.

MR. McHUGH: That would be, I suppose, on the basis that a Pt 31 r.2 is not a final judgment. It cannot be a final judgment because the cases, which are referred to in our note, make it plain it is an interlocutory judgment. If it is an interlocutory judgment then no estoppel arises.

SAMUELS, J.A.: Is your answer Yes that -

MR. McHUGH: Theoretically the answer is Yes.

SAMUELS, J.A.: Even though an appeal has been taken from it and dismissed?

MR. McHUGH: Once there is an appeal the appeal itself may be a final judgment, depending on what is done. Supposing it is held that there is no cause of action at all; in that sense it is final. On the other hand, if it holds that the words are capable of that meaning, the appeal is not a final judgment because it does not finally dispose of the action between the parties. There is nothing unusual in this. Coles v. Wood (1981) 1 N.S.W.L.R. shows how the result of the proceedings, and not the issue, can determine whether or not a judgment is final or interlocutory.

SAMUELS, J.A.: That is right, but suppose a single Judge under Pt 31 r.2 holds that there is no imputation and that is that. That is a final judgment.

MR. McHUGH: No, that is not a final judgment. It would be final once he directs judgment be entered for the defendant on that finding. The decision itself does nothing. It is the entry of judgment in accordance with it. The Judge would then say: "I direct that judgment be entered for the defendant."

SAMUELS, J.A.: Let us assume he does not direct judgment. That is caught up by s. 103, I suppose, which you say shows that the decision is interlocutory. It is interlocutory at that stage. Now, if the Judge makes an order under Pt 31 r.2 and then directs judgment be entered, from what would the appeal be taken? Under s. 103 or under some other section, or the order directing judgment?

MR. McHUGH: In our submission it would be under s. 101 one would not require leave in that situation because you would then have a final judgment. It would be an extraordinary result that if you went to trial at the close of the

argument the Judge directed a verdict, you then had an appeal as of right, but if you said, "What I want you to do is decide this under Pt 31 r.2 as a separate question of fact or law" you would not have an appeal of right and would have to seek leave under s. 103.

In our submission these are purely interlocutory proceedings. There is much assistance to be gained from a recent High Court decision on this point. It is Computer Edge v. Apple Computer. For the purposes of the Judiciary Act is was necessary to determine whether or not the appellant was appealing from a final judgment and the High Court held that he was not because there were still orders outstanding. "This is an objection ... without leave."

There is a case where orders for permanent injunctions were made

11.

and if there were no more to the case than that there would have been final judgment. But because there was at least one other order which referred the matter back to the trial Judge to determine a question of fact for the purpose of assessing damages, then looked at as a whole, there was no final judgment. Even that judgment including the permanent injunctions was merely an interlocutory injunction.

GLASS, J.A.: What would you say against this approach? Because in the High Court decision there were outstanding questions between the parties, Maxwell, J. could not have made a final judgment, assuming he made a judgment -. Therefore you do not come within s. 101. You do not come within s. 102E because in fact he did not enter any judgment or order. He just made a decision. So you come within s. 103, meaning that you require leave to appeal?

MR. McHUGH: Yes.

GLASS, J.A.: And you ask for leave?

MR. McHUGH: Yes.

GLASS, J.A.: Out of time, as I recall it?

MR. McHUGH: There is an ellipsis.

GLASS, J.A.: Where is it?

MR. McHUGH: It is in s. 101(1). It says: "Subject to this and ... in a division." What we are appealing against is the verdict which was given on 18th April. That is what this appeal is brought against. What we rely on to invalidate that verdict is a legal error which occurred along the track. So the question is: Is a legal error on a preliminary point which vitally affects the final verdict of the same quality as a legal error concerning the admissibility of evidence during the course of the trial?

GLASS, J.A.: It is the judgment which the trial Judge directed should be entered in favour of the plaintiff for $100,000?

MR. McHUGH: Yes.

GLASS, J.A.: So it comes within s. 101A?

MR. McHUGH: Yes.

GLASS, J.A.: You would say s. 103 gives you an earlier right of appeal which you can renounce if you choose up until the final result is achieved?

MR. McHUGH: Exactly.: The difference is this: when you get leave under s. 103 you are appealing against what the trial Judge did. His decision is that you are appealing against. At this stage we are appealing against the judgment or order as a result or what happened on 18th April and to set aside that judgment we rely on a legal error in the train of the proceedings which affects that verdict.

SAMUELS, J.A.: When the case comes before the trial Judge he, nonetheless, has complete

discretion to follow or to vary the decision of the Chamber Judge along the way.

12.

MR. McHUGH: Theoretically, yes.

GLASS, J.A.: Because there is no estoppel?

MR. McHUGH: Yes.

SAMUELS, J.A.: In law he may be able to do that. So that what-happened in the present case? Was it just assumed that the decision of Maxwell, J. would be followed? I know you took an objection at some stage. The case was conducted on that basis, was it not?

MR. McHUGH: Yes, it was.

13/14.

MR. McHUGH: In fact it came as a great surprise to me to find a couple of days before the trial that there has been a Part 31, Rule 2 hearing in respect of this matter, but it had been there and that was it so the parties then - and being quite candid, I had not analysed it in my own mind quite to the extent I have since, and I think at that stage I assumed that it was binding in some way on the trial judge but in our submission it was not.

PRIESTLEY, J.A.: Does your present submission amount to saying that proceedings before Maxwell J. as a matter of law were pointless insofar as the trial was concerned?

MR. McHUGH: As a matter of law pointless? That puts it in an emotive way.

PRIESTLEY J.A.: Having no effect in law?

MR. McHUGH: Having no more effect than in any other interlocutory judgment, your Honour.

GLASS J.A.: Interlocutory injunctions?

MR. McHUGH: Interlocutory injunctions or a finding on a plea either. In Justin v. Associated Newspapers, which I think is 86 W.N., at one trial the trial judge had found a defence of public good was not made out and the appellant sought to say that we should rely on that decision in the subsequent trial but this Court said no, you cannot. True it is that issue was litigated and there was no appeal from it, but that was in those proceedings and it went off and there were further proceedings, there was no issue estoppel about that fact.

SAMUELS J.A.: In defamation cases, it may be in other cases, I do not know, the purpose of Part 31 Rule 2 is really to provide a means by which a defendant can obtain summary judgment as opposed to the plaintiff. Maxwell J. was quite right in his formal order, he refused what he described as a defendant's application for judgment and all that it does when the defendant's application fails is present the parties with a decision which is not binding in an affirmative way, it is binding in a negative way, that is all.

MR. McHUGH: That is so. May I just carry it on? If at the close of the evidence - it may not be at the close of the evidence - let it be assumed in this particular case that after my learned friend had tendered the newspaper I had jumped to my feet, assuming there were no previous proceedings before Maxwell J. and I said to his Honour, "It is pointless us going on. I want to argue the question as to whether this article is capable of these words." Now if his Honour had said, "Well yes, I will listen to submissions on that " and he then made the very same ruling as Maxwell J. had made nobody would dispute that there would be a right of appeal against that.

Likewise we would say if his Honour said, "I am going to formalise this and I am going to make a Part 31 Rule 2 order at this stage after the opening address and tender of the article,"

again we would say we could appeal against the ultimate verdict based on that Part 31 Rule 2 error.

SAMUELS J.A.: I am not sure this is a very plausible analogy, is it? In the first of these two assertions what actually are you doing? You get to your seat and say it is pointless to go on "I want to argue this", what are you doing? Are you moving for a judgment or what? You have no right to do that at all until the plaintiff has finished if all the plaintiff is going to do is to tender the newspaper, then you are entitled to ask for judgment at the close of the evidence.

GLASS J.A.: On the penalty you call no evidence at all.

MR. McHUGH: That is true, your Honour, but this is a matter of practice for many years and your Honours will remember this, that people would be non-suited on opening addresses - the books are full of people, particularly in the last century - people being non-suited.

GLASS J.A.: Is there anything else you want to put in relation to that?

MC. McHUGH: The authorities on which we wish to rely are set out in par. 3, sub-par. 2 of our written submissions.

GLASS J.A.: There are a lot of disparate procedural threads we will have to draw together.

MR. McHUGH: Could I go to grounds 3 and 11? Ground 3 provides that his Honour was in error in admitting into evidence, admitting Exs. E, F, G, H, K and L and the only ones that are concerned here is E and ground 11 is that "his Honour was in error in failing to direct ... issue of identification." Now Ex. E was an interrogatory and an answer to an interrogatory and if I could go to p.60 of the appeal book?

GLASS J.A.: On your argument that could have been objected to.

MR. McHUGH: It was objected to.

GLASS J.A.: Not only the tender of it but the asking of it was not objected to, it was answered.

MR. McHUGH: It could have been objected to on another ground, your Honour. The interrogatory is, "Did not the defendant intend to refer to the plaintiff therein as a member of the cricket team?"

GLASS J.A.: What is that supposed to refer to "in each and which"?

MR. McHUGH: Well, he refers to pars. 9, 10 and 11.

GLASS J.A.: I see. "in each and which"?

MR. McHUGH: In each and which of pars. 9, 10, 11 and 13 of the West Indies, and it was answered "yes".

SAMUELS J.A.: What does that mean, the "which"?

MR. McHUGH: It was answered "yes".

GLASS J.A.: It is capable of bearing the meaning that the defendants did intend to infer the plaintiff in relation to some paragraph, is it not?

MR. McHUGH: Certainly some, your Honour, yes.

GLASS J.A.: Why is that irrelevant?

MR. McHUGH: Because defamation does not depend upon the compensation of a libel, still less an intention to refer to somebody. It depends upon the effect on the reader and this, we would submit, is a matter of some surprise to find that

Sir Owen Dixon in a dictum seems to have suggested that evidence of intention of the writer could be relevant. In our submission nothing could be further removed from the correct principle.

GLASS J.A.: I am not so sure, Mr. McHugh. Suppose we went this far with you, that it is no defence for the defendant to prove that he did not intend to refer to the plaintiff de novo. You say that would not establish liability for the plaintiff to prove that he intended to refer to the plaintiff as establishing the fact that it did refer to him but in relation to the issue that the jury had to decide, did the subject matter refer to the plaintiff, why is the intention of the defendant so to do not relevant?

MR. McHUGH: Because the reader knows nothing about his intentions and cannot. Let it be tested this way: take a case like Consolidated Trust v. Browne and Cross v. Denley where the article was written about the plaintiff but nobody was called to say they knew the circumstances which identified the plaintiff. Now in our submission it would be remarkable if there was a case to go to the jury in that case if Frank Browne had said, "I intended to refer to them" because he did refer to them.

GLASS J.A.: You have got to prove it was published by someone who knew the extrinsic fact, who was capable of making it infer. All that was done. Why not a little additional evidence which strengthens the probability before the jury that it did refer to the plaintiff by proving that the defendant so intended?

MR. McHUGH: With respect, there is concealed in what your Honour put to me the error and your Honour said that it did refer to the plaintiff. Now that is ambiguous in the sense that it conceals the question as to whether "it did refer" means intended to refer or had the effect of referring.

SAMUELS J.A.: Would not the ordinary reader have taken it to refer?

MR. McHUGH: It tells you nothing as to what the ordinary reader would have taken the article to refer but in knowing that in the author's mind he had a particular intention, it is totally irrelevant.

17.

SAMUELS J.A.: It may be the criterion must be that you assume that there was no other evidence because I am not sure that it can be regarded as admissible merely to boost other admissible evidence and becomes admissible only if there is other evidence.

MR. McHUGH: Let me give an illustration from Sackgrove v. Hole, the case where the postcard was sent through the post, it did not name the plaintiff expressly but there were facts contained in that postcard. Now nobody was called other than somebody to whom the publication was privileged, was called actually who knew the circumstances, it was very much like Consolidated Trust v. Browne that the defendant intended to refer - the evidence must have been intended to mean he did intend to refer to him because the builder to whom it was sent knew who the defendant was talking about but there was no cause of action there.

GLASS J.A.: You referred explicitly to the way Sir Owen Dixon puts it.

MR. McHUGH: What has got to be remembered, of course, is that the idea of the relevance of intention died here. Steven on Pleadings, if I remember rightly, in a form of precedent actually had a reference to intention and over the adjournment I will get for your Honours a decision of McClements J. where he struck out a declaration where the words "intention" and so on were pleaded and based on -

PRIESTLEY J.A.: This is 51 C.L.R.?

MR. McHUGH: Yes, your Honour. It is Lee v. Wilson, 51 C.L.R. 276. This was the case where an article was published alleging corruption on the part of a detective Lee, and in fact there were three Detective Lees in the Victorian police force and it was held that each had a cause of action. Now at 287 his Honour Dixon J. makes the statement with which we find no disagreement. At .6 on the page, "A decision on this question ... upon its readers."

The passage upon which my learned friend will rely is the passage at the bottom of 288, six lines from the bottom his Honour says, "If it be necessary ... were so read." His Honour cites no authority for this proposition and it is a matter not easy to see where his Honour gets the statement from, "The reason ... actually so read."

GLASS J.A.: Someone who you say was unaware of the intention?

MR. McHUGH: Yes. Great is authority of any dictum, even an obiter dictum of Dixon J., in our submission this is one occasion in which he was clearly wrong.

SAMUELS J.A.: Well yes, except in the particular circumstances which arose in Lee perhaps when there are three Dets. Lee because the reasoning for this seems to be at 288 where his Honour says, "If the document must have a legal effect on one

of these persons no means exist of determining to which it refers except by an inquiry into the contents in the writer's mind." Then he says where there is no ambiguity in the words then there is no question of intention arising but if there is an ambiguity, a very special kind of case perhaps, perhaps -

MR. McHUGH: I am not sure that is what his Honour was really doing. That passage to which your Honour refers, he was answering an argument which had been put on the part of the defendant that he escaped liability if he intended to refer to another Lee apart from the plaintiff and then his Honour goes on to say, "If the document must have a legal effect on only one of those persons", and that was the defendant's submission, "No means exist of determining to which it refers except by an inquiry into the contents in the writer's mind." Then he says well, this question could only arise in any event when you have got some ambiguity. He goes on to reject that argument, but then he goes on to make this aside at the bottom of 288 that an actual intention cannot be treated as irrelevant and of course not even in his Honour's judgment could it be part of the ratio for the simple reason that the writer had no intention to refer to this plaintiff, in fact his whole case was, "I was not referring to this plaintiff but to somebody else."

The other reference to which my learned friend refers in his submission is a statement of Denning L.J. in Hayward v. Thompson reported in 1982 Q.B. reports, 47 at 60. This arose out of events concerning Mr. Jeremy Thorpe. At p.60 in Denning L.J.'s judgment in the second paragraph, "I readily accept ... by the defendant," and we would submit that that is an erroneous statement that the plaintiff should be aimed at or intended because Sir Owen Dixon says liability does not depend on the content or composition but on effect, "If the defendant ... he is liable", and that, with respect, cannot possibly -

SAMUELS J.A.: Supposing he covers his intention so perfectly, so adroitly that no one could possibly take - that he admits it. Surely he cannot sue that this material was intended to be defamatory of him and no one in the world could have taken it to refer to him.

GLASS J.A.: X can only be entitled by reason of something in the material known only to him. It was intended that he be referred to. It was known that the publication to him was not sufficient so there is no liability.

MR. McHUGH: Exactly. His Lordship goes on to say, "He is given to be ... libel." So he introduced a new principle altogether, that there are two grounds upon which a defendant can be held liable; one, if he intends to defame sombody whether anybody reads it that way or not, and secondly even if he did not intend if reasonable people could identify him.

The other judges do not give independent judgments and in our submission that doctrine ought to find no place in the law of New South Wales.

19.

SAMUELS J.A.: Suppose your submission is correct, what then?

MR. McHUGH: First of all, in our submission evidence was wrongly admitted and in our submissions, if I could go to them, reliance is placed on the thing. If I could go to my written submissions, under the heading Grounds 3 and 11, par. 2, at 54 C [89.5] in the book the trial judge says, "At the moment I propose to admit them." At 54C [89.5] there are various objections taken to all those interrogatories except 1 and 2. On p.38 [84-85], which is not in the transcript but consists of a couple of pages, it says in the absence of the jury on 16th April 1984 interrogatory No. 4 and the answer thereto was marked Ex. E. So p.54 [83] of the book, I have objected to it and, and that became Ex.E. Now the plaintiff's counsel relied on the interrogatory in his final address. If your Honours go to 54II [145.5]. Mr. Hughes' address, he says, "Before I pass from this question ... purpose of intention." Then he goes on to Ex. M.

So it was right there in the forefront of his case. After the close of the evidence the trial judge made it plain that he was going to lead to the jury as among the class of readers capable of identifying the plaintiff not only those who mistakenly believe that he had not played in the match but also other people who know he had not played in the match but believed he was a party to the conspiracy and the respondent's counsel sought -

SAMUELS J.A.: Why the emphasis on his having played in this match? I do not quite follow that?

MR. McHUGH: Not having played. Well, your Honour, because in our submission when you seek to make these imputations against the plaintiff and if he did not play in the match then that is really a case of true innuendo.

GLASS J.A.: I think you do that under ground 5?

MR. McHUGH: I do, yes. The respondent's counsel, the plaintiff's counsel, sought a specific direction concerning the intention of the defendant to refer to the plaintiff and if you go to the judge's summing-up at 88P [231.7] Mr. Hughes said, admittedly in the absence of the jury after the jury retired at 3.15 p.m., "On the other hand when your Honour ... identified the plaintiff." So my learned friend was asking for those two directions.

GLASS J.A.: The jury is absent.

SAMUELS J.A.: You are cranking up a little miscarriage here, I suppose.

MR. McHUGH: I asked at 92 Q [235.7] for a specific direction that the "jury on the issue of identification cannot take account ... for a direction." Then the trial judge got the jury back again and you gave my friend directions about the article not being defamatory. At 95G [238.3], "I am sorry, there was one further matter ...

leave it at that." That statement of intention is to do with the intention about defaming and it was part of my learned friend's submission that in terms of the direction that he sought, and I can pick it up, in his address he told the jury intention to defame had got nothing to do with it but he told them that intention to identify has and he asked for a specific direction and the trial judge gave a specific direction about intention to defame not being relevant.

GLASS J.A.: Your complaint is Mr. Hughes addressed the jury upon the proposition that intention to refer was an important matter they could take into account in deciding whether it did refer. You asked that that be corrected, his Honour refused and you say you are entitled to that direction?

MR. McHUGH: Yes, and the document, the interrogatory being admitted into evidence during objection and the jury being given a copy of it.

SAMUELS J.A.: The last thing the jury had ringing in their ears is any evidence of what he said had nothing to do with the case.

MR. McHUGH: That is true too, in our submission that hardly corrects the fact that the trial judge had allowed the interrogatory to go in, he allowed counsel to address on it and refused - it is plain enough what he was doing is in the context of whether the article was defamatory or not.

SAMUELS J.A.: This submission and the direction was substantially wrong or a miscarriage, I take it you would submit, and that we should exercise discretion in addition, what, to order a new trial on this ground?

MR. McHUGH: Yes, your Honour. Could I then move to the next ground of appeal which is ground 5, that his Honour was in error in failing to enter a verdict by direciton in favour of the defendant and we repeat the position that we made, it should be under ground 1, your Honour.

GLASS J.A.: Now you come to the extra argument based on the fact that the plaintiff was not a player.

MR. McHUGH: And more than that, that no witness was called to identify the plaintiff. Nobody was called who said "I read this article and I took it as referring to the plaintiff."

GLASS J.A.: It is a question of whether such evidence should be allowed, isn't it?

MR. McHUGH: It is certainly allowed, nobody would dispute it is allowed, in fact if this verdict stands it will be the first case in the law report where a plaintiff has obtained a verdict without calling a witness who read the article and was able to identify the plaintiff who was not named in the article.

GLASS J.A.: Yes, but in point of doctrine what do you say against the proposition that if it only refers to the plaintiff

21.

by reason of extrinsic facts not contained in the article, the plaintiff calls someone who says, "I knew those extrinsic facts and it was published to me", then that is as far as you can go because otherwise he would be allowed to say, "I took it as referring to the plaintiff" when in point of law it was not capable of referring to him.

MR. McHUGH: Well, your Honour has used the term "extrinsic facts" in the sense of identifying the plaintiff or extrinsic facts in giving the words an extended meaning.

GLASS J.A.: On the issue of identification.

MR. McHUGH: Many cases have held, including Steele v. Mirror Newspapers in this Court and Morgan v. Oldham's Press in the House of Lords that evidence is permissible of witnesses who are

called to say, "I identified the plaintiff". Indeed, one of the law lords said that a witness in Morgan could simply say, "I took the article as referring to the plaintiff", leaving it to the cross-examiner to make out the reasonableness of the identification.

Let us go to the matter of principle. After all, if the law of defamation is about the publication of a defamatory imputation to an individual, to at least one individual, then since the matter must be published of and concerning the plaintiff there must be one person who is able to say "It was published to me." Now in the ordinary case where the plaintiff is named in the article, somebody is given the article and he says "Yes, I read the article" and from that, because the plaintiff is named in the article, he does not have to go further and say, "I identified the plaintiff", and it may be that in a case where the article says "The Prime Minister of Australia did so-and-so," a witness says, "I read the article," he does not have to say, "I knew the Prime Minister of Australia was Robert James Lee Hawke", but when there are facts upon which a person could, but not necessarily must identify the plaintiff, surely to complete the plaintiff's case, to perfect it, you must show that it was published to a particular person, otherwise we get into this situation which I put in my written submissions, if my learned friend's submission is right the three witnesses whom you called could have gone into the witness-box and said, "Yes, I read the article but I did not identify the plaintiff." My learned friend would say I still have a cause of action even though the people who knew the circumstances said, "Well, I did not identify the plaintiff."

Now as a matter of principle that cannot be right but there is a further factor in this case and that is that you could only identify the plaintiff in this particular case by coming to a particular meaning in respect of the article. You see, the theory of the plaintiff's case is that he is entitled, because he had control of

the team on and off the field, and therefore if the article imputes there was a conspiracy it is said there could not be a conspiracy without the plaintiff being a party to it, but to identify the plaintiff with the article the first thing you have got to do is make

the finding that the article itself imputes the conspiracy. You have got to interpret the article. It is really a true innuendo case, it should never have been allowed though, with great respect.

SAMUELS J.A.: What should not have been allowed?

MR. McHUGH: This sort of case being made on what is really a true innuendo. It is not an identification case at all, with respect.

GLASS J.A.: Do you put it this way, if some member of the West Indian team that played that day, sued, then he could call someone to say "I read this article and I knew that the plaintiff played in the team," let us leave out whether he says - that would get into the jury?

MR. McHUGH: Yes.

GLASS J.A.: But in this case, so you argue, the defamatory imputation is directed at the player ex facie and if the plaintiff here not being a player wants to say that "It also disparaged me because although I did not play I was responsible for the way the team played," then that was a true innuendo which should have been pleaded?

MR McHUGH: Yes.

GLASS J.A.: Namely that he as Captain was in fact responsible for the way the team performed on that day and that was the meaning that the words bore because of the fact he was the Captain and that gave the additional true innuendo significance?

MR. McHUGH: Exactly, and you can test it this way, let it be assumed that the article was read by a person who knew that Lloyd did not play in the match.

SAMUELS J.A.: What else did the person know about Lloyd? Knew Lloyd was the Captain and a West Indies cricketer?

MR. McHUGH: Yes. So he reads the article and he says, "Well now, in its natural and ordinary meaning it says those who play in this match arranged it but by meaning of the extrinsic facts I know namely that Lloyd is the Captain and he has control of the team on and off the field and by reason of the fact I infer that this sort of conspiracy could not have been arranged without him, I draw the conclusion that he also was a party to the conspiracy." Now all of those matters that I have been putting are extrinsic facts which give it a different meaning.

So in that sense the article has two meanings: it means that the players arranged the game, that is what the article says in its natural ordinary meaning, and by reason of the extrinsic facts the Captain of the team was also a party to the conspiracy.

23.

SAMUELS J.A.: Why wouldn't it mean all the West Indies tourists since it is inconceivable that eleven playing in a particular game and the twelfth man would be party to conspiracy and take all the money; they would have to divvy up with the others?

MR. McHUGH: They do not have to divvy up with the others because that money would be paid as a result of the result of -

SAMUELS J.A.: That is right but they might have got a little bit extra. It is all speculative perhaps, but I do not see why the conspiracy imputation should not be applicable to anyone who

a reader would identify as a member of the West Indies touring team.

MR. McHUGH: Because that is not what the words say for a start. If one goes to the article, looking at pars. 8, 9, 10 and 11, "Let us consider .... three times" etc. etc. and then it says one wonders about .... sportingly honest" and so on.

GLASS J.A.: It all depends, does it not, on this, if this act's proper construction is only reasonably capable of derogating from the reputation of the players then you need an innuendo, but if it is capable of a meaning that the ones who actually played and the Captain, though he was not playing, were all in the conspiracy then it is not a true innuendo?

MR. McHUGH: No, with respect, we do not accept that because it still requires evidence that somebody identifies the plaintiff with the article.

GLASS J.A.: Then they call the witnesses who said "We knew that he was Captain."

MR. MCcHUGH: That is so, your Honour, but they do not say, "I identified him with the article."

GLASS J.A.: If the defamatory material is the President of the Bar Association in 1984 was guilty of misconduct and gross moral turpitude and you sue being President in 1982 and 1983, could you call someone to say, "I read the article and I thought immediately of Mr. McHugh"?

MR. McHUGH: No, he could not because the World Series host denies that in terms, he says the respondent is not responsible for the mistaken belief of the readers.

GLASS J.A.: Why shouldn't it be admissible in that way?

MR. McHUGH: Well it is not, your Honour.

GLASS J.A.: Does that mean you can never call anyone to say, "I identify the plaintiff"? All he can be called to say is, "This refers to the plaintiff because of extrinsic facts, and they are known to me."

MR. McHUGH: No, because the approach of the Court, whether it

is logical or not, has been to say you can call witnesses to identify the plaintiff but they must have reasonable grounds.

SAMUELS J.A.: Possibly Steele makes this quite clear.

GLASS J.A.: They have got to state their grounds.

SAMUELS J.A.: The ordinary reasonable reader who is affected let it be assumed by this article is likely to be someone who knows something about cricket or they would not be reading the article anyway, and assume for the moment that the article carries the first imputation which is that the game which was lost was lost as a result of a conspiracy and that conspiracy would have to have been conducted by the West Indies players who actually performed in that game and the twelfth man presumably might be called on at any time to go on and drop a catch and any others because quite often you run out of players - someone gets injured and you get another substitute in, why do you sell up people actually performing when there is actually no conspiracy about it?

MR. McHUGH: Because your Honour has added two facts which in our submission are not in the article. Your Honour spoke about the twelfth man and your Honour spoke about any other people and your Honour said the conspiracy could not have been without those. Now if as a matter of the natural and ordinary meaning of this article you

could not have a conspiracy without every member of the team being involved, I may be in some difficulty but in our submission that is not a necessary conclusion at all.

SAMUELS J.A.: It does not have to be a necessary conclusion, does it?

MR. McHUGH: In our submission in identification cases it has got to be and that is the vital distinction between the Prime Minister-type case and the ordinary case. When is a person who is either named in the article or the equivalent or it, then if you prove publication to a reader knowing the circumstances, then the inference is -

SAMUELS J.A.: You always have to go back to the article to see what it says, then you call your person to say, "I knew that Lloyd was a member of the West Indies touring cricket team," and then you have got to get the article and you have got to see whether the article is capable of imputing the thought to every member of the West Indies cricket team.

MR. McHUGH: Well, that is one way, yes, your Honour.

SAMUELS J.A.: If it is then the identification consists of establishing that the plaintiff was known on reasonable grounds by some reasonable reader to be a member of the West Indies cricket team.

25.

MR. McHUGH: Yes, your Honour, and that is what I said, if it means that this article meant that every member of the team -

GLASS J.A.: The whole touring establishment?

MR. McHUGH: The whole touring establishment, the manager, everybody else I suppose, has got to be in it then you say, "Well, Lloyd is a member of that particular -"

SAMUELS J.A.: That is my problem because this of course still leaves outstanding whether the imputations were run at all, but assuming they were run I must say I have a little difficulty in seeing why it does not apply.

MR. McHUGH: Because we submit for this reason, that it has been published to a particular person, let us say Mr. Chappell, and if he did not identify the plaintiff then supposing the evidence was that only one person had received a copy of it and it was taken off the press and it was Mr. Chappell and he says, "I knew he was the Captain of the team, fullstop." In our submission it has not been published on and concerning him unless he says, "I identified the plaintiff", because we would say there has got to be at least one living human being to identify the plaintiff.

Supposing Chappell himself had said, "Well, I knew that Lloyd had not played in the match. I know Lloyd is an honest man and in any event I did not read this article as having any of the meanings which the lawyers now say it is capable of, and it did not affect me in any way whatsoever."

SAMUELS J.A.: Didn't Mr. Chappell say that Lloyd was a West Indies cricketer?

MR. McHUGH: Yes, he did, your Honour, but the point I am seeking to make is that it is not published on and concerning Mr. Lloyd to Mr. Chappell unless he makes the identification himself. That is the point, we submit, the important point on distinction. But publication has got to be a human being who is capable of reading the material and identifying it, but supposing the article was published to a blind man who knew the facts but could not read. In our submission there would be no publication. Merely because you put a bit of paper in somebody's hand who knows these extrinsic facts but does not in fact identify the plaintiff, does not assist. The point being it is not that you have got knowledge of the extrinsic facts that makes the cause of action.

GLASS J.A.: That makes it referable to the plaintiff.

MR. McHUGH: It is the fact that some human beings - at least one - does identify the plaintiff.

GLASS J.A.: There is no suggestion of this in the reasoning of Sir Frederick Jordan in Consolidated Trusts v. Browne, is there? He said that J.K. Manning was led up the garden path

by J.W. Shand because the admissions he procured failed to show that it was published to someone who knew the extrinsic facts which made it referable to the plaintiff. He did not say "And failed to obtain admissions and was published to identify the plaintiff as being the person referred to."

MR. McHUGH: No. I think what your Honour says is accurate but that, with respect, is beside the point. Prudent judges, with respect, decide no more than the case requires and all that had to be decided in that case was whether the plaintiff could succeed if he did not prove that somebody knew the extrinsic facts. Not having done that he failed. It was not necessary to determine the further question as to whether if he had done that it was necessary for a person to identify.

Supposing this article was published to some foreigner who could not read English but knew the facts concerning Mr. Lloyd in the sense the paper was given to him. In our submission the mere facts about it, the fact that he put the paper in the person's hand does not complete the cause of action and the illustration -

GLASS J.A.: I think Mr. Chappell understands English.

MR. McHUGH: But the illustrations of the blind man and the foreigner throw up the point that it is not the placing of the -

GLASS J.A.: In point of principle would it be right that a witness who is not allowed to say "I understood the words to mean" to say, " I understood the words to refer to the plaintiff"?

MR. McHUGH: For this reason, that after Fox Libel Act and in an effort to control juries the judges invented the rule about reasonableness, it was only the hypothetical reader, reasonable reader meaning that could be relied on in a defamation action. Your Honours will remember the constitutional struggle where the judges had claimed the right to interpret the articles themselves and after Fox' Libel Act it restored the right of juries to say whether or not the article was defamatory and so one sees then the beginning of the doctrine that it is only those meanings that are reasonable and matters are refined again in cases like Lewis, which says the judge must make a ruling and not leave it to the jury in a general way. So that is dealing with meaning but identification is dealing with publication and as you will remember that somebody read the article as in Sackgrove v. Hole and somebody read the postcard likewise, we would submit in this particular case you have got to prove that the person who knew the facts identified the plaintiff because the facts do not necessarily point to the plaintiff. I gave the illustration if Mr. Chappell says, "I did not identify the plaintiff. As far as I am concerned it did not apply to him at all" -

PRIESTLY J.A.: You said that Mr. Chappell could have said admittedly, "I identified the plaintiff"?

MR. McHUGH: Yes. Steele's case holds that, so does Morgan's case.

27.

PRIESTLEY J.A.: If Mr. Chappell gave evidence without expressly saying, "I identified the plaintiff" but from which it could be inferred that he identified the plaintiff, what would you then say?

MR. McHUGH: We say it does not assist for the reason that it is not a necessary inference and that is the only -

PRIESTLEY J.A.: You say it has got to be a necessary inference. Why so?

MR. McHUGH: Because only then could one be certain that he did identify him. What you have got is a situation in a hypothetical case.

PRIESTLEY J.A.: He does not have to prove things beyond reasonable doubt, does he?

MR. McHUGH: No, but there is no defamation without publication.

PRIESTLEY J.A.: And that is decided on the probability, isn't it?

MR. McHUGH: Well yes, in an appropriate case it may be but it does not make it more probable than not, in our submission, that if you call somebody and you do not ask him the question which you can ask him and he merely has -

SAMUELS J.A.: And the question is precisely what is the question, the admissible question?

MR. McHUGH: The admissible question is, "Did you identify the plaintiff?" It depends on what the terminology did. If it is a single word you might say, "To whom did you see the article" -

GLASS J.A.: Well, your question I assume would be, "To whom did you understand the article to refer?" You say without that there is no case?

MR. McHUGH: Exactly, your Honour.

SAMUELS J.A.: But, in answer to Mr. Justice Priestley, that suppose that question is not asked of a witness, Mr. Chappell for example, who, however, being asked about the match and some reference to the article being put to him, he says with a chuckle, "I was very amused in the

article to see how accurately they described old Clive's owl-like demeanour", wouldn't it be the inference that he identified him in the article?

MR. McHUGH: It may be in that particular case.

SAMUELS J.A.: All we are putting is you do not have to ask the question. If there is a clear identification evidence that a witness did identify the plaintiff that would do.

MR. McHUGH: First of all, the discussion that has been going on has been on a particular premise. The premise is that this

article in its natural and ordinary meaning imputes that every member of the West Indies team has got to be in it, that is the whole basis of this discussion that has gone on, and it must be remembered in what has been said because first of all unless the plaintiff can persuade the Court that that is what the article means in its natural and ordinary meaning they do not get to first base, in our submission, but on the assumption which is put against me that as a matter of the natural and ordinary meaning this means every West Indies member was involved in a conspiracy then the further question arises as to whether or not merely because a witness knows that a plaintiff is a member of the West Indies team that there is a publication of and concerning that plaintiff to him and it has got to be a publication to him. In our submission the fact that you just put the circumstances themselves which are reasonable circumstances which would enable somebody to identify does not itself make a publication.

Now in our submission it is clear that there must be a witness called to do it and the authority upon which we rely most of all is your Honour Mr. Justice Samuels who said in terms that you must call a witness. That is in Steele v. Mirror Newspapers (1974) 2 N.S.W.L.R. 348 and the

relevant passage is at 373D. At D your Honour says, "With these principles in mind .... referred."

GLASS J.A.: That is not a ruling in your favour, it is a ruling that it is admissible evidence not necessary evidence.

MR. McHUGH: His Honour says at D, "Firstly there must be evidence capable ... referred to her", and then he says, "I should say at once .... contradicts this proposition because it was there held unnecessary."

PRIESTLEY J.A.: That proposition does not lay down any particular way of proving it.

MR. McHUGH: With respect not, because his Honour says, "There must be evidence capable of satisfying the jury ..."

GLASS J.A.: But his Honour says at 375A, "I do not think I need to attempt to resolve this question." Isn't that the question whether the evidence is necessary?

PRIESTLY J.A.: He said he was prepared to assume it.

MR. McHUGH: Because the case was dealing with a different question but one cannot leave aside the introductory sentence on 373D, "With these principles in mind .... to get to the jury", and might I say about Hoff's case, that is a case of a true innuendo.

GLASS J.A.: I do not think my brother Samuels says such a witness' evidence is necessary. Who does?

MR. McHUGH: That is the strongest passage on which we rely but if the witness can be called at all to give the evidence, then the issue must be as Morris L.J. said whether the jury

believe the assertion, the truth of the assertion made by the witnesses that it did refer to. After all, your Honours, the law of deramation is, in some respects, technical and unreal enough, it has added a new dimension altogether; if you say there can be a defamation because the article was read to somebody who could but we do not know whether or not he did identify the plaintiff and on my friend's submission as the logical consequence of what he put is that if Mr. Chappell had gone into the witness box and said, "I did not identify the plaintiff", nevertheless, there was a sufficient publication in his case.

PRIESTLEY J.A.: I have understood, I think, what you have been putting, but if I am correct you have been putting this submission by reference to the game that had been won by Australia. That is the imputation of past fixing but the imputation also goes to the fixing of the final series which was yet to take place between the West Indies and Australia. Now the paragraph referring to the series yet to come refers to the two sides; it says, "It is conceivable the same pressures will influence the thinking of both teams in the imminent final series." Now would you be submitting that the argument you put applies with equal force to those imputations of future fixings?

MR. McHUGH: Yes, your Honour, because the second imputation can only arise from the fact that the first game was fixed. So one has to identify the plaintiff with the first to come to the conclusion that in the future the plaintiff was pressured in the future to do this. If you cross out the first fourteen paragraphs or that part referring to the first matches and say it is conceivable that the same pressures will influence the thinking of both teams in the final series, etc. etc., you are not making any assertion that the game has been thrown, you are speculating, meaning it could be imagined or it is credible and so on, and par. 6 says, "But if both sides .... " it does not say "since both sides".

PRIESTLEY J.A.: When it talks about both sides doesn't that include Mr. Lloyd? You have not got the advantage in regard to the future the fact that he did not take part in the game that was won by Australia.

MR. McHUGH: Exactly, your Honour, but this is not a case of an imputation about the future alone, the imputations relied upon in 3 and 4 are derived from what appeared in respect of the first match. In other words, to even get off the ground in respect of imputations 3 and 4 you have got to have a determination that the plaintiff was involved in one or two, so it is only by identifying the plaintiff with 1 and 2 that you can get a case that the plaintiff pleads in respect of 3 and 4.

(Luncheon adjournment.)

29a.

MR. McHUGH: Q. I was arguing on the question of relevance of intention of the defendant in defamation actions and I referred to the fact that McClemments J. struck out a pleading based on Stephens' Principles of Pleadings (referred to Kear against Consolidated Press Limited 73 W.N. 387) and the plaintiff had pleaded in his declaration words that the defendant "contriving and intending...(read)" and it was struck out on the grounds that it was inflammatory.

GLASS J.A.: That is not intent to refer -

MR. McHUGH: It shows the question of intention. At 309 his Honour said: "(read)" The precedent had been based on Stephens' Principles of Pleadings. It indicates, even as recent as 1950, experienced counsel had been misled on the question of intention. Admittedly on the question of defamation, but it shows how persuasive was the notion that intention had something to do with the law.

GLASS J.A.: I suppose in Holderman case - who would you call the State, that they understood it to be the plaintiff, would make it referable to the plaintiff in that case.

MR. McHUGH: Yes, there were. He was the church warden that referred to him. The House of Lords' decision does not contain the article. There were witnesses called in that case.

GLASS J.A.: He was the barrister.

MR. McHUGH: Yes, and he was also the church warden, if I remember rightly.

GLASS J.A.: They could not prove he was the church warden.

MR. McHUGH: If you take a case like Steele's case, Mrs. Steele was not mentioned and indeed no individual was mentioned but her case was that the article alleged this theft of some 50,000 tonnes of wheat and she said, I am the only person who had the equipment to have moved the wheat from the five sites and I had worked on all three of the sites. I think there was indication that she could not have been the person, the majority of this Court held.

If I go to the written submissions and I round off by saying that paragraph 7 under ground 5, "It is submitted that the matters...(read)". At paragraph 13 on page 6 there are various other authorities referred to including the case of Jones and Davies where the Court seemed to take the view that if the facts pointed to anybody other than the plaintiff then he had a cause of action but otherwise not.

Moving to grounds 9 and 10, being that his Honour was in error in failing to, direct the jury that the mistaken belief - (read). The plaintiff's counsel put to the jury that the plaintiff was entitled to rely on the fact that on the day of the match the defendant had published a list of the teams which included the plaintiff and that

document upon which he relied is Exhibit N. It is in the appeal book at p.70. The first column of the last paragraph says (read). The admissibility of that was objected to at the trial and it is at page 38 [84-85] of the transcript which is not part which is reproduced. It is also on 54D, passage B [91.1] (read).

30.

Before the addresses the trial judge clearly indicated to counsel that he would allow as a circumstance of identification that people who mistakenly believed that the plaintiff had played in the match could be taken into account as amongst those as part of the circumstances of identification and that appeared at p.54P [113.9] opposite S (read). It seemed at that stage that his Honour was going to hold that the only people who were relevant readers were those who mistakenly believed he played the match. (Read).

His Honour at that stage made it clear that he was going to allow the people who mistakenly thought the plaintiff had played in the match and then the plaintiff's counsel addressed on that fact relying on Exhibit N, and that is 54 JJ , opposite line H [146.2]. (read). That is the last thing that my learned friend relied on for identification, Exhibit N. The trial judge's direction is somewhat obscure but in our submission against the background of the addresses, because I had to address on that fact as well. It appears at page 78, I through to Q [221.3-.8]. (Read).

GLASS J.A.: I do not think that brings in the readers of the State who -

MR. McHUGH: We would submit he does. He then, over to page 79K [222.4], says, "On other questions - "If you read those two passages, 78 and 79 against the background of the summing-up, his Honour was clearly endorsing for the jury that they should take into account the conduct on the field as well as off the field, at M. Even if it does not

go as far as I want it to go for the purpose of my submission, the trial judge was asked specifically to give a direction that the mistaken belief of readers could not be taken into account after document, Exhibit N, had got into evidence, and after my learned friend had addressed on it and that objection appears at 92P 235.7], (Read) and his Honour did not give that.

GLASS J.A.: What about the readers of The Age who read the article which said he would be playing and read the allegedly offending article a day or two later but did not read the description of the match or who took part; would it not be published - to think as Lloyd as a player was involved in what was said about all the players.

MR. McHUGH: To those readers who read the article, Exhibit N, and did not follow the match, they no doubt would have believed that the plaintiff played in the match.

GLASS J.A.: So, was it not relevant to consider the damage in their minds?

MR. McHUGH: No, because he did not play in the match and therefore their belief that he did play in the match was their mistake.

GLASS, J.A.: It was a product of your publication.

MR. McHUGH: No. It was a product of them believing what they knew the facts were. The facts were not the case. One thing that makes it plain is that the facts that are relied on to identify somebody must be true facts. They cannot be the product of somebody's mistaken belief.

31.

GLASS J.A.: I do not think it deals with defining it.

MR. McHUGH: The principle does. At 141 C.L.R. 632 Mason, J. and Jacobs J. - p.642 4th line down - said "The plaintiff did establish..."

GLASS J.A.: What is at the bottom of that proposition is that the defendant has done nothing to connect the plaintiff with the material, the action as made by those erroneous beliefs in the readers' minds. But suppose that erroneous belief is fostered by the defendant cannot be said against him that he published to the reader a notion, in this case that Lloyd was playing, and although it was a mistaken notion, nevertheless it was something that he indicated.

MR. McHUGH: No, because there is no difference between The Age having published a list and the Melbourne Herald having published a list. What you are sued on is The Age of the 21st. You are not sued on the 19th and the 21st. There is only one publication and it is the publication of the 21st. In principle it makes no difference that the erroneous mistake is something published in the Sydney Sun or Melbourne Herald or The Age - they are independent publications.

In our submission, and we make this at page 7, paragraph 6 of our written submission, "Even if contrary ... (read)" So, even if there was a case to go to the jury on identification and everything else was against us, the jury were allowed to proceed to their verdict upon the mistaken view that the law induced by the admissibility of Exhibit N and my learned friend's advocacy, that they could award damages in respect of a publication of persons who - under the erroneous belief.

Then, can I go to ground 4. (Read) The appellant pleaded a defence of comment based on s.33 of the Defamation Act. I have no defence of my own. In the appeal book at page 13, the fourth defence was, "Alternatively the defendant says that insofar as...."

The trial judge took away this definition on the grounds, as he held, that there was no evidence direct or inferential of the classification of the author of that comment. If we had pleaded that it was his own, it was the defendant's comment or it was the defence of the servant or agent or of a stranger, we could not get the case to the jury because the evidence did not point to any one more than the other. This is remarkable result and in our respectful submission notwithstanding he did not call any evidence and notwithstanding there was no direct evidence as to where Thorpe stood - he was the servant or agent - the trial judge said that the corporate defendant cannot rely on the defence as it was first.

GLASS J.A.: Do you accept that if you plead s.33 you must offer some evidence that the comment was that of your servant or agent?

MR. McHUGH: No, I do not. I rely on what Samuels, J. said in the Illawarra case; but, in any event, if that dictum is not acceptable, then I say that there is sufficient evidence to show.

GLASS J.A.: It derived from what source?

MR. McHUGH: From the material. We are being sued for what, on the hypothesis, is a defamatory comment but it is the defendant's comment which normally means that the comment of the directing mind as well.

32.

For instance, the Board, if they authorised it to be made, it may be the editor would go under that particular clause.

The second comment is that the servant or agent of the defendant and the third is framed in a negative way. It is 34 which says - (Read) and 33 (read). I should have referred to the defence in sub-s. 2 (read). It is up to the plaintiff to prove that the defendant did not hold that opinion. Sub-section 2 gives a different

defeasance (read). What the Act enables someone who says that defamatory comment, to say it is the comment of the defendant himself, servant or agent or it is clearly not made, not the servant or agent, it is clearly some stranger like a letter written in the paper.

We would submit that contrary to what his Honour said, that s.32 is available to a corporate defendant, if for example the Board of John Fairfax & Sons directs something to be written, then that is the act of the defendant itself.

GLASS J.A.: That is an irrelevant consideration for our purpose. You said it was the comment of the servant or the agent and the question was whether you established evidence of that.

MR. McHUGH: Yes. We submit clearly we have. First of all, it does not purport to be, if one looks at the article, anything other than that of a servant or agent. It is "come on dollar, come on", at page 56 it is headed and it is by David Thorpe and it is an article on that.

Then, if one goes to the exhibits that are put by my learned friend and which we are entitled to rely on for these purposes, namely Exhibits E,F,G,H, J and K - first of all, Exhibit E is at page 60 (read). We would say clearly you would not hold that it is a comment of the defendant itself. It is written by Thorpe. So it is either the comment of the servant or agent or it is not the comment of the servant or agent. It seems in a context that it has to be that the defendant through its servant and agent intended to refer to those.

In 5A the question is asked, "Did the defendant intend.... (read) and the next exhibit is 6A. (Read) So the defendant has got all of those documents.

GLASS J.A.: Is the name of the author of the article appearing on that?

MR. McHUGH: No, it is not. I am sorry, those documents were not tendered so it does not tell you. A couple of them were tendered but it is not those.

GLASS J.A.: What is the exhibit number of 6A and 6B?

MR. McHUGH: 6A and B is Exhibit G. They are all Age publications and apart from the two books, and one of them is The Great Gatsby.

Then in 7A at page 65, Exhibit H (read). Then over the page Exhibit J (read) and 8B (read). Then 11A which is Exhibit K (read) and then 11B (read).

33.

GLASS J.A.: I suppose you say that is some evidence that the author of the comment was someone who had derived his information from a succession of articles in his defamed newspaper and therefore is likely to be an employee than a stranger.

MR. McHUGH: Yes, or at least an agent and for the purpose of this defence its history is that the servant or agent was simply intending to cover persons who did something for the defendant. Section 33 was brought in based on what McArthur J. said in Falcke (1925) V.L.R. 56 p.207, (Read). The relevant passage is 72/73 (read). (Passage from Law Reform Commission read.)

The whole purpose of 32, 33 and 34 was to ensure that the plaintiff could destroy what was prima facie a fair comment by showing dishonesty in the state of the mind of the person who read it on behalf of the defendant, and by the agent or servant, for the purpose of 63, it is simply enough that it appears that it was something that was done for the defendant and which he himself could have done or it could have been done and in our submission there was evidence here. Samuels,

J. in Illawarra Newspapers v. Butler would appear to go to the extent of saying that the opinion - that the onus is on the plaintiff to negative the fact that the comment was the comment of the defendant. ((1981) 2 N.S.W.L.R. 502 read)

His Honour's judgment on this point is to be found in the appeal book at pages 108 [242] (read). His Honour then sets out sections 32, 33 and 34 and at page 108 [242] he said, "It should be observed immediately ..." We would submit that is not accurate and I refer to Tesco's case (1922) A.C. 153 and particular passages 171. One can be the agent when presenting the material to the paper for publication for reward and one would have thought that was fairly strong evidence of Peter Smark and he was at least the servant or agent of the defendant. What 33 and 34 cover is that 33 deals with these articles for which the defendant is vicariously responsible and 34 deals with the situation that the defendant went on to say that the author was not my servant or agent and there was nothing in the context which indicates that he was and if the author of that piece of material was dishonest, you cannot defeat my defence because I am not responsible for him.

I then move on to some of the articles on damages. We put on the grounds of appeal as a matter of some urgency because we wanted to get set and in our notice of appeal we said that we might add to the grounds and we gave notice to the other side that we would add ground 14 and I seek leave to file that ground 14. It is on page 12 of our written submissions. (Read).

GLASS J.A.: I suppose what appears at the top of page 3 should not be there.

MR. McHUGH: Yes your Honour.

GLASS J.A.: What do you say, Mr. Hughes, about this amendment?

MR. HUGHES: I am in the Court's hands.

GLASS J.A.: Very well, I will initial it and put it with the pages.

MR. McHUGH: The first one is ground 8 (read).

His Honour's direction appears at p.82 [225] of the book and at 82(I) [225.4] the trial judge said, "the next matter ... than if what was said was true". We would submit that there is no evidence that the plaintiff was affected by the falsity of the imputations pleaded.

Could I go to the bottom of p.45. 45T [70.8] Mr. Hughes asked him "I want to show you a copy of the ... you said you were very incensed by the article, is that right? A. Yes." He said, "This thought edges perilously close to the concept of taking a dive".

PRIESTLEY J.A.: Mr. Hughes asked a question at line I that you objected to. It was an invitation to you, as well as a question to the witness. Did you take up the invitation at all?

MR. McHUGH: No, I certainly didn't.

PRIESTLEY J.A.: I only ask you because the earlier questions, just reading them through, rather read as if Mr. Lloyd was prepared to give further details of what concerned him and he was chopped off by counsel.

SAMUELS J.A.: It wasn't a question. Further up: "And if you were asked you could give evidence of what Det. Bloggs said".

MR. McHUGH: The point being made is that the trial judge first of all just simply left falsity of imputation, covered it only tangentially at the bottom of 82(I) [225.4] when he said "Damage for hurt to feelings ... was true".

GLASS J.A.: What is wrong with the general proposition the jury could take the view that defamatory material which is wholly untrue is likely to be more hurtful to the plaintiff?

MR. McHUGH: There is nothing the matter with that as a general proposition but the question is whether or not the plaintiff was, in fact, hurt by it, and objection was taken to the direction if your Honour looks at p.93 [236].

GLASS J.A.: I know that is objected to but why can't his aggravated hurt be a matter of presumption like a matter of ordinary hurt?

MR. McHUGH: Well, it can be as in Andrews case. Here the plaintiff has specifically said "I was incensed at this thought which edges perilously close to the concept of taking a dive". He says it threatens their integrity, but that is a different thing from the falsity of the imputation.

GLASS J.A.: I don't think so. He says, "It adversely affected my integrity and it was entirely false and I was incensed by it".

MR. McHUGH: Yes, but a distinction has got to be made between a case which says "You stole some money" and the plaintiff says, "Yes, I read that and I was incensed by it and there is other evidence that shows it is false". Here the imputation is read

35.

out by the article. What is relied on is the drawing out of the particular imputation, and that is what the trial judge -

SAMUELS J.A.: Do you mean if the plaintiff had been taken carefully through each of the statements and asked, "is that true or false?" and he said, "That is quite untrue", that still would not meet your objection, would it? The part you get from the plaintiff is that "I was particularly annoyed because all these allegations are false".

MR. McHUGH: Yes, because that is the only basis upon which the falsity is relevant.

SAMUELS, J.A.: Why can't you infer that a plaintiff is likely to be more affected by false imputation than by a true one, because there are not so very many cases by which imputation is proved to be true or admitted to be true but, nonetheless, are actionable because there is no public interest?

MR. McHUGH: For this very reason, that this particular case - you see, it may be the case - we would submit it was the case - that the plaintiff never drew these meanings from the article at all.

GLASS J.A.: Well, why was he incensed?

MR. McHUGH: He says why he was incensed, because at that part where he is speaking about the plural "we" he said, "I was incensed ... to enjoy it". He was taliing about his team.

GLASS J.A.: Of which he was a member. He said, "I was incensed about taking a dive and that was utterly false.

MR. McHUGH: No, he didn't say that. He said, "That concept edges perilously close to the taking of a dive". He didn't say, "I was incensed because I had inferred that I was taking a dive". That doesn't go far enough from the plaintiff's point of view. the imputation was that he had entered into a conspiracy with other players, not that he had taken a dive. We would submit that in the circumstances the trial judge should have given the direction that was sought at p.93 [236] from H down to --

Then we next rely on ground 7.

There is something I must tell your Honours about corrected transcript. At p.45 [70-71] at the last line of the Appeal Book where it has got "I was invited into his room and I heard him speaking to David Syme & Co. Limited about this article and I was very annoyed about it". That was a mistake at the trial. I heard at the trial that the witness had said "He".

MR. HUGHES: I don't agree with that. It was originally "he". The transcript was correct. I certainly don't agree that the witness said "I". My learned friend has given me no notice of this.

GLASS J.A.: It can only be corrected by consent, Mr. McHugh, and I don't see any consent.

MR. McHUGH: I am certain it was consented.

MR. HUGHES: It certainly wasn't.

MR. McHUGH: Well, in my address which my learned friend has put in the documents, at 91-93 [199-200] I at point 5 say "That is ... I read it in his office".

GLASS J.A.: He was very annoyed.

MR. McHUGH: Yes.

GLASS J.A.: You say that is not what the transcript said, but where is the error?

MR. McHUGH: I thought it was corrected and, indeed, I have got a recollection that Mr. Lloyd, himself, in the witness box was asked about this.

SAMUELS J.A.: I must say it seems to me - this may be wrong - but the probability in the context would seem to favour it being "he". I would have thought he is saying how he was reacting to the article, not himself. "Did you read the article? A. Yes, I read it in his office". It may have been before he went into Linton's room or whoever's room it was. It seems likely that he read it after.

MR. McHUGH: Yes. At p.54 CC at E [134.5] before Mr. Hughes started to address there is "errata noted". Now, I have got my own copy of the transcript here from the original file. I have got a red mark around the "I" at p.27 [70-71]. I haven't changed it.

MR. HUGHES: Actually it looks as if it has been corrected to "I" because the "I" is out of line with the words on either side of it.

GLASS J.A.: Well, I think the "I" on that typewriter tends to be out of alignment. I think counsel ought to be able to reach some agreement about this.

MR. McHUGH: I think we probably will be by getting from the shorthand reporter overnight the reference to "errata noted" at E.

GLASS J.A.: Well, can we leave it at that?

MR. McHUGH: Yes. My recollection is that that was a mistake and it was changed.

Ground 7 is (read) the trial judge directed the jury that it was evidence that Ex.A was published recklessly because of an article published by the defendant which his Honour said was called "rain saves Australia" and his Honour directed the jury that they could take this factor of recklessness into account. That article was exhibit L that was relied on, and Ex.L is p.68. It is not a very good copy but it is under a heading "Rain Enables ... Cheered Wildly". The trial judge's direction is at p.83 of the book C to N [226.2-.6]. He says, "the next matter is ... to the plaintiff".

37.

We would submit the fact the defendant published Ex.L does not show that Ex.A was published recklessly. The facts which justified the publishing of the article included these facts. First of all, the West Indies had beaten Australia convincingly only two days before the Brisbane match and that is in the Appeal Book at 49K [75.9] and 50(O) [78.1]. Secondly, the West Indies was well clear of Australia on the points table. The West Indies was expected to win.

GLASS J.A.: There is a suggestion in the article that Border was hitting out desperately as though

there was no chance of reaching the West Indies' total. Why was he desperate?

MR. BANNON: Because the rain was coming on.

MR. McHUGH: The West Indies was expected to win the match. Australia has a superior run rate on the day. That was in the articles in Sydney. There is no evidence the writer had access to those articles. In the interrogatories the material that he says he had access to, that article is not one that was included. The better run rate does not explain how the West Indies lost. The defendant didn't include the implications. That is Ex.F that was put into evidence by the plaintiff. It cannot be said that the matter was published recklessly, particularly if most of the material is not, as we would assert, relying on basic facts.

PRIESTLEY J.A.: I am not quite clear about this. Are you saying that even if it bears imputations which the plaintiff says it does, it was not published recklessly?

MR. McHUGH: Yes.

PRIESTLEY, J.A.: And the facts which you put in justification here - in inverted commas - are facts justifying the imputations which the plaintiff says it bears?

MR. McHUGH: No. Not justifying the imputations but being part of the factual material which justified the publishing of the article, as opposed to the imputations.

PRIESTLEY J.A.: But if the article does give rise to those imputations - and assume you lose on that point for the moment - to get anywhere on this point wouldn't you have to say that the facts justifying the publishing of the article justify the imputations?

MR. McHUGH: No. There is a world of difference. The plea of justification, we have got to prove on the balance of probabilities that the facts are true.

PRIESTLEY J.A.: I know you are not using "justified" in that sense.

MR. McHUGH: The other way, the defendant is saying against us. Let us assume there is no evidence at all - I'm sorry - the plaintiff has got to say against us, "You published this knowing it was false or -" and they didn't go to the jury on that-

or you published it not caring whether it was true or false, yourself", and the one shred of evidence that they rely on is Ex.L, an article being the result of a match from Sydney in which it was said that the rain came and Australia was going to be beaten at that stage and the writer in the article from beginning to end didn't say anything about a conspiracy. This is what is derived from his comments in respect of the match and we would submit that he doesn't publish -

GLASS J.A.: But, Mr. McHugh, would we not be considering your submission on the issue of damages upon the footing that the material complained of was capable of bearing a defamatory implication?

MR. McHUGH: Yes.

GLASS J.A.: So at this stage it is no good you saying that the defamatory implications were not proved.

MR. McHUGH: I didn't say that. I said that the imputations which are relied on were derived from the comments of the defendant. Now, a defendant is entitled to publish comments even though it is untrue. Even though your defence of justification fails in a case where a defendant has gone on a plea of justification of comment and even though the jury find that the defence of justification fails, the jury is still entitled to find the defence of comment made out.

GLASS J.A.: Once the jury got to damages it was because the plaintiff had won on the issues of identification and defamation.

MR. McHUGH: Exactly, but the fact that the comment defence had gone does not stop the defendant from pointing to other facts which enables him to publish the article. If it be the true doctrine that the plaintiff can rely on the reckless publication of the imputations as increasing his hurt -

GLASS J.A.: Well, that is true doctrine, isn't it?

MR. McHUGH: According to Andrews' case, yes, and must be accepted for the purposes of this appeal. It doesn't follow that because the article contains the imputations and because they are false that the plaintiff published it recklessly.

SAMUELS J.A.: Isn't what the plaintiff claims he is saying and the judge is saying that the defendant wasn't entitled to make these false imputations about the plaintiff because there was nothing in what actually happened in this game which could possibly support them? It was as though in the first over of the day there had been an earthquake and the matter was decided on the run rate after three overs, or something like that kind.

MR. McHUGH: That may be what he is saying but the point is was he entitled to say it?

SAMUELS J.A.: No, because the answer would be, would it not, you look at Ex.L which is accepted as an account of the game and how does it come about that Allen Border smote the eleven runs in each of two overs and Sylvester Clarke threw an overthrow?

39.

There is plenty of material which would justify the imputations or the comment.

MR. McHUGH: Justify the imputation against -?

SAMUELS J.A.: No. I'm sorry. I haven't made myself very clear because of the using this word "justify", but if I understood what the argument was with the defendant, the article said these imputations, false and so on, were also made recklessly because the events of that game were such that it would be possible to suggest that the West Indies had thrown the game, the facts were not available for any such inference. You would have to have much stronger evidence that the plaintiff pointed to make that assertion.

MR. McHUGH: Well, that is our submission.

SAMUELS J.A.: Aren't you entitled to look into Ex.L and see what was there described as having taken place during the course of the game?

MR. McHUGH: Exactly.

SAMUELS J.A.: And it relies on the rain. The defendant says, "But what about this sudden spate of rain, Sylvester Clarke's overthrow, these are all events that counteract the act of God".

MR. McHUGH: On any view the West Indies had been so superior to Australia right through the series, they are so far ahead. Only two days before in Brisbane they only had to have five wickets to win the match. They only had to have their full batting team, and yet two days later they are beaten, admittedly on a superior run rate, but that fact is there that Australia had a superior run rate.

GLASS J.A.: The West Indies' run rate compared to their run rate earlier, was it that maybe there was something in the allegation?

MR. McHUGH: Exactly.

GLASS J.A.: I have got the original transcript here. I don't think you will get anything out of it. (Handed to Mr. McHugh)

MR. McHUGH: At p.11 of our submissions we say, "On our submission ... reckless publication" and we refer to Horrocks v. Lowe about how difficult it is to be reckless.

Then at ground 13 is the general appeal against the damages that the jury's verdict was excessive and we obtain a verdict of $100,000 and we rely on the following matters that are set out in par.2 of ground 13. (Read)

At p.58 at the right hand column is the apology: "Mr. Packer, players ... of the two teams", and Mr. Hughes actually at the trial complained about that apology.

GLASS J.A.: Where did the appology get the phrase "It was dishonestly pre-arranged"? I assume there was no statement of claim at that stage.

40.

MR. McHUGH: Well, we know Mr. Kerry Packer was on the phone, from Mr. Lloyd's evidence. He was speaking to the Age when Mr. Lloyd came into his office in Sydney. Lloyd didn't even see the article when it was published. He didn't see it until two days later.

Then the fifth point (read).

At p.33 of the book, J to L [50.3-.5], my learned friend was seeking to - 33(I) Mr. Hughes says, "What do you say as to ... I will say that", and in my final address I said the same thing.

And then the seventh point we make is (read) and while we don't suggest that that does not entitle the plaintiff to substantial damages if the imputations are made, there must be a difference between the damages that you pay to somebody who is living in the community and is going to live here all his life and somebody who comes into the community and then leaves again.

PRIESTLEY J.A.: He might be coming back to play another series.

MR. McHUGH: Exactly. The point I am making is that you simply don't - approach this on the same basis as somebody who is born and bred and works here and lives all his life here in Australia.

There is ground 14 and the matters are set out there at p.12.

I will just correct the transcript. At p.94 I [237] make this Delphic submission, according to the transcript, at 94D: "On the issue of publication ... who identified the plaintiff ..." and so on and we would submit that the trial judge should have given a direction because it is an important direction on the extent of publication.

PRIESTLEY J.A.: There is one matter, and if you have any authority I would be interested to know, arising out of what was asked this morning in regard to the readers who had some knowlege in a general way of what happened in the world series in 1919. I fully appreciate your submission about the ordinary reader or the reasonable reader and the rest, but undoubtedly there would be people, I would think, and a not insignificant number of people who would read the Age who would read the whole article in the light of their knowledge which would vary from person to person, of what was there being referred to. Is that sort of problem discussed in the cases anywhere?

MR. McHUGH: No, your Honour. When I say "No", I should say "Not to my knowledge", but it does raise this problem about the true jurisprudential theory about defamation actions brought against nnewspapers. Strictly speaking, each publication to a reader is a separate publication and theoretically there should be different defences available. In the days before 1970, strictly speaking, it should be that if you had a circulation of 1,000 you should have 1,000 defences, one to each reader. But the practice has always been to just simply sue on a single

count and the cases in this State have gone so far as to say that if the publication is over the border, out of the State, that is not a separate publication but it goes to aggravation of damages. That was a case against

41.

David Syme in 1982 W.N. and there is some discussion about this theory. Although it is followed in practice it is not a decision we would say that has got much authority behind it but as far as I know the matter has not been discussed except that the juries are directed in cases like Lewis which suggests that the reader has got to be not somebody extreme but just an ordinary reader, so you have got to try and envisage an ordinary reader of the Age.

I suppose there is one case that perhaps might deal with it tangentially and that is Senator Murphy against Australian Consolidated Press Limited where it was sought to be argued that it would be defamatory to people who are members of the Labour Party and it was said that you couldn't take just a section of it, you had to take all of the readers and it was what it meant to those readers. And there is also a case in the United States Supreme Court called, I think it is called Peck v. Chicago Tribune, which deals with a woman who was put alongside an advertisement, I think sponsoring a whiskey advertisement, and she was a teetotaller and it said that a section of the public -

GLASS J.A.: We have given a judgment on that and it says if it is defamatory of a section of the public it matters not if it is defamatory in the eyes of others. I don't think that was my brother's question. I think it was, to what extent would it be defamatory to the ordinary reader?

MR. McHUGH: It has to vary from case to case.

GLASS J.A.: Mr. Hughes, would it be convenient to you to tell us why it was not his servant or agent in the quarter of an hour left to us?

MR. HUGHES: Yes, I can do that but I will have to go into it in detail and it will take longer than a quarter of an hour.

His Honour rejected the comment defence on the ground that I am about to argue.

GLASS J.A.: I thought there was no evidence capable of saying that it was a servant or agent, as opposed to a stranger.

MR. HUGHES: But his Honour, as I read it - it is not altogether clear - also rejected that on the basis that no-one ultimately proved he honestly expresed an opinion.

GLASS J.A.: I thought it was the opposite. You had better put on a notice.

What about the other point?

MR. HUGHES: It is very simple. The defendant for reasons that don't require much imagination to deduce decided not to call any evidence. They didn't tender the author of the article, who ever he was.

42.

GLASS J.A.: Why can't he point to evidence in your case as he does?

MR. HUGHES: Because there is no evidence in my case that gives rise to an inference.

SAMUELS J.A.: That is the point, isn't it, whether in fact you can infer what was necessary from the material, itself?

MR. HUGHES: Yes.

SAMUELS J.A.: And the interrogatories which say the defendant prepared this article by researching a series of articles, things like exhibits A to K.

MR. HUGHES: I appreciate that I have got to deal with interrogatories and I shall deal with them in detail. It will take me longer than a quarter of an hour. We deal with the point at p.6 of our written submissions. We point out that the allegations in the defence of comment under s.33 are correctly distilled and set out in the judgment of Hunt, J. in Bickel's case. My learned friend relies on Illawarra v. Butler and with great respect, your Honour Mr. Justice Samuels, that passage at p.506 which was read by my learned friend we suggest is per incurium because it says that the defence is if the comment was the servant or agent.

SAMUELS J.A.: I would suggest that section refers to 33(2) rather than 33(1). We have been assuming here that that is why we said first of all in evidence in the plaintiff's case that the defendant would have some responsiblity of bringing the servant or agent with the rebuttal, of course, that feat (?) is to be met by the plaintiff, not the agent.

MR. HUGHES: Yes. when it comes to the question of whether it was the plaintiff or his servant or agent then the onus is on the plaintiff to establish affirmatively that on the balance of probabilities the opinion expressed was not the real opinion of the relevant person. That is all that that passage in Illawarra Newspapers v. Butler was relly dealing with.

SAMUELS, J.A.: I suppose you could say that if the defendant pleaded comment under s.32 there might be circumstances on which the plaintiff could rely under s.32(2) and then have to deal with it himself?

MR. HUGHES: Yes. It is very important to bear in mind that the defence was founded and founded only on s.33.

GLASS, J.A.: Well, Mr. McHugh puts the argument that the comment was made by a servant or agent. He said that he was materially capable of

establishing that. Take 62L: "The defendant had access to the material in the following articles and documents".

MR. HUGHES: Could I just invite your Honours' attention to the form of the interrogatory? (read) It is not a question which says "At the time of the writing of the article did the writer of it have any information?" The question is whether at any time before publication the defendant - that means anyone in the defendant's organisation - had the information referred to in the interrogatory.

43.

GLASS, J.A.: No doubt, but let me put it to you, Mr. Hughes, there is evidence in the interrogatory at 62(O) that the defendant had access to the material in a series of page articles and then at p.65(O) says, "The defendant's research in the preparation of the article was confined to the above material". Could not a jury from those two statements alone reasonably infer that the article was prepared in house and not contributed by some outsider.

MR. HUGHES: No, because it is quite consistent with reality that the defendant by some servant or agent or independent contractor other than the writer of the article did some research on it before it was published.

GLASS, J.A.: But couldn't a reasonable jury think that the other is more probable?

MR. HUGHES: It is not a matter upon which the finding that the other was more probable would be mere speculation, particularly when - and I am entitled to rely on Jones v. Dunkel in this type of situation - the key to the question could have been provided by the defendant calling the writer.

GLASS, J.A.: The question is notwithstanding that he didn't call the author, was there enough without it?

MR. HUGHES: The answer is "No", because nowhere is there material from which it can be ultimately inferred at all on a basis of probability that the writer of the article either had this material which the defendant says it had before publication or that the writer of the article, if he had it, was a servant or agent.

GLASS, J.A.: Well, I just put this one to you: Could not a juror in the jury room reasonably say to his fellows, "Well, look at that feature page. There are three articles, one from Peter Smark our chief European correspondent - well, he would be a servant or agent because he is the European correspondent. Then he says, "Diedre Macken in Sydney, well, she is likely to be a servant or agent rather than an outsider", and then "David Thorpe. But if it comes from outside we say this has been taken from some other publication".

MR. HUGHES: But that would be the merest speculation, and I dispute that the description of Mr. Smart as "our European correspondent" is indicative with some other probability that he would be a servant or agent.

GLASS, J.A.: You mean that he could be a freelance?

MR. HUGHES: Yes.

GLASS, J.A.: Yes, I suppose so.

PRIESTLEY, JA.A: Looking at 65(O) and at the form of words used, the answer to question 7 does not use the language of the question. It says (read). Isn't it a legitimate inference from that that the defendant prepared the article?

MR. HUGHES: No.

PRIESTLEY, J.A.: The defendant's research in the preparation of the article?

MR. HUGHES: Yes, but that doesn't mean "in the writing of the article".

GLASS, J.A.: What, they prepared it in-house and it was written by outsiders?

MR. HUGHES; No. An article is not just written out of the blue.

PRIESTLEY, J.A.: Putting it another way, that first blush conveys to me that the defendant prepared the article.

MR. HUGHES: Well, that may mean that the managing director prepared the article or that the article had the approbation of the Board of Directors. We just dont know.

PRIESTLEY, J.A.: But if the defendant prepared the article, even if it was prepared by a person who you wouldn't ordinary regard as a servant, wouldn't it follow that an ordinary person prepared the article within the context of the defendant preparing the article must have been the defendant's servant or agent?

MR. HUGHES: No, for the simple reason that my learned friend's own argument conceded that in the case of a corporate defendant such a defendant would have a defence under s.32 if the article emanated from this governing body, its directing mind or will, and my learned friend's concession to wind down as far at least the managing director and that suggested that the editor would be in the case of a corporate defendant within the meaning of or the concept of, the ambit of, defendant.

GLASS, J.A.: If it was the editor or the Board they would not have attributed it to someone called David Thorpe.

MR. HUGHES: We don't accept that the Age was telling the truth about anything.

GLASS, J.A.: You don't. it is a question that the jury could reasonablythink.

MR. HUGHES: There was no evidence as to who Mr. David Thorpe was. No description was given of him, even in my case, and I answered the question in the way I did because your Honour's question invited me to say whether we accept the proposition.

GLASS J.A.: If you think the hpothesis that the Board wrote this enjoys an equal degree of probability with the hypothesis that it was written by a servant named Thorpe, then it doesn't get to the jury.

MR. HUGHES: then there is another factor. Who is to know that Mr. David Thorpe wasn't a freelance, in which case the appropriate defence would be s.34.

GLASS, J.A.: He might be an agent, you know, freelance correspondent.

45.

MR. HUGHES: I have thought about that but that is a very doubtful question.

SAMUELS, J.A.: In 4A did not the defendant intend to infer that whoever wrote the article must have been someone for whom the defendant was responsible?

MR. HUGHES: No. Because there are at least two stages in the puting into a paper of any article - probably three stages: Preparation which might be done by a number of people, the actual writing and then the decision to publish, and that interrogatory is referrable and expressly made referrable to the publication of the articles.

SAMUELS, J.A.: No, that is not the one. 4A is the one that isn't. It is 5A that says (read). It might be thought that the omission of the words "By the publication" would suggest that this was directed to authorship rather than publication.

MR. HUGHES: Well, it is equivocal. It is equally referrable to the writer as to the actual intention of the person who makes the decision to publish up the editorial line.

GLASS, J.A.: Then at 67 we have got the author and the date specified in the answer. We used the aticle as source material as to background for the article complained of, so some complete outsider was coming in to the office each day and leaving the article on the day it was published, on your hypothesis?

MR. HUGHES: I don't think your Honour's last statement is wrapped up in my hypothesis but even if it were, nothing outlandish about that.

GLASS, J.A.: It is whether the jury could reasonably think each probability is less than the other explanation.

MR. HUGHES: We say it does but is it on the evidence more probable than not that the person described as Mr. David Thorpe, whoever he was, is a servant or agent?

GLASS, J.A.: Why do you say a freelance correspondent would not be an agent? He would be doing it for money.

MR. HUGHES: He would be an independent contractor.

GLASS J.A.: Isn't he an agent?

MR. HUGHES: No, but we just don't know. It is for the defendant to make it appear who this person who wrote the article was, and that is not done by means of any of the interrogatories or answers upon which reliance is placed, and we deal with the matter significantly in our written submissions.

MR. McHUGH: Can I correct a misstatement of fact of mine during my address. When I was dealing with the question of recklessness of publication I said that the article, Ex.L which appears at

68, that there was no evidence that that was known to the author of the article. It appears from p. 64 that that article was one of those which he had in mind. It is at 37.

(Further hearing adjourned to Friday, 7th September, 1984, at 10.15 a.m.)

10

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL)

No.CA.181 of 1984
CL.9702 of 1982

IN THE COURT OF APPEAL

CORAM: GLASS, J.A.
SAMUELS, J.A.
PRIESTLEY J.A.

NO. 15

(Hughes)

FRIDAY, 7TH SEPTEMBER, 1984

DAVID SYME & CO. LIMITED v. LLOYD

(PART HEARD)

MR. HUGHES: At the adjournment yesterday I was dealing with the question which I was invited to deal with first and that is whether there was any evidence that the writer of the article was the servant or agent of the defendant. I put some submissions orally. I would like to hand up, if I may, and hope that it will help, some written submissions on the point. (Submissions handed up.)

Par.1 of those submissions simply states the question we say that the only possible basis for a conclusion that there is prima facie evidence in favour of the defendant would be either the getup of the article, including its description of the author, or the answers to the interrogatories.

Now dealing with the getup, we say it is important to compare and contrast ss.33 and 34 of the Defamation Act. Under s.34 a double condition has to be satisfied before a defence of comment is available under that section. The double condition is that if the comment is not and does not purport to be the comment of the defendant or a servant or agent of the defendant. So s.34 defence we would put is not available unless the comment as well as being in fact the comment of an outsider also appears to

be so. Section 33, on the other hand, does not provide a defence where the comment merely purports to be the comment of a servant or agent, it must be so in point of fact.

If the draftsman had wished to include within the ambit of s.33 comment which merely purports to be the comment of the servant or agent of the defendant he would have said so because in s.34 he turns his mind to the question of the purported or apparent authorship of the comment. There is nothing, we submit, on the face of the article or in its surrounding context on the same page which is capable of providing evidence as to the relationship of the writer of the article to the defendant.

Even if the article has designated the writer as "Our staff correspondent" or used some description descriptive or indicating a relationship of master/servant principal/agent

that would provide no defence because the statement would simply be unsworn hearsay. One should bear in mind, we would submit, that the circumstance that the appellant as the publisher of the newspaper assumes responsibility for the contents of an article by publishing it is not probative of a relationship of master/servant or principal/agent between the appellant and the author of any particular article.

Next we come to analyse the effect of the answers to the interrogatories. We would submit it is clear enough that in each of the interrogatories numbered 1, 4, 5, 6, 7, 8 and 11, which are the interrogatories relied upon, the word "defendant" is used in the sense of defendant by its servants or agents. This is clear from interrogatory 1 which deals with publication and it carries through into interrogatories 4 and 5 which are directed to intention. We say the answer to interrogatory no. 6, which starts at p.62 of the appeal papers and finishes on p.64, in no way

suggests that any servant or agent of the defendant wrote the article.

The tender of the interrogatory is, for reasons which I will explain later when I come to the appropriate section of my submissions, relevant to the question of recklessness on damages because it shows that the publisher had in its possession before publication of the newspaper, inter alia two newspaper articles which are in evidence as exhibits, namely, The Age's own description of the match in its edition of 20th January and The Sydney Morning Herald's description of the match in its edition of the same date. The answer to interrogatory no. 7, which starts at p.65 and finishes there, is consistent with the defendant's servants or agents preparing or researching material for an article to be written by a person other than a servant or agent of the defendant.

GLASS J.A.: Of course it is consistent with that, the question is whether a jury could reasonably suppose that the hypothesis it was researched by them for an article that they wrote enjoyed a higher degree of probability.

MR. HUGHES: We say that the matter is left at its highest against us in a state of equilibrium.

GLASS J.A.: Exact equilibrium. There they are beavering away collecting all the material, no one could know as a probability that it was being assembled for an article they were preparing or an article prepared by someone external to the organisation.

MR. HUGHES: The other possibility which is not pronounced in your Honour's summation is that the defendant's servants and agents were researching, that is the word that is used, for the preparation of the article material for consideration by a writer outside the organisation.

The answer to interrogatory no. 8 does not detract from the inference just propounded. It again goes to the issue of recklessness for reasons which I will develop later and which I have already outlined very briefly, the answers to interrogatories 7 and 8 taken together are also quite perfectly consistent with the inference that the defendant's research was

directed to checking the contents or for the truth or otherwise of the statements made in an article written by someone else in the preparation for the ultimate act of publication.

So we say the answers to interrogatories 7 and 8 are quite equivocal as to the relevant status of the author of the article. The answer is perfectly consistent with the carrying out of research by servants or agents of the defendants as a prelude to the writing of the article by someone other than a servant or agent. The answers are perfectly consistent having regard to the presence of the phrase "before publication" that someone - not the author - being a servant or agent of the defendant having done research after the writing of the article but as part of the preparation for the ultimate publication. We give an example; it could have been perfectly consistent and equally consistent with having been a prelude, the research that is, to an ultimate decision of the use or getup of the article, the editor saying, for example, "I want more research done before I decide to publish this article".

The answer to interrogatory 11, we venture to submit, is very important and it draws a clear distinction between the defendant and the author. The interrogatory asks two sets of questions: one in relation to the composition of the matter and one in relation to the publication of the matter. The answer, your Honours will see, deals with the latter aspect first, that is publication, and then it turns to the author.

The second part of the answer deals with the aspect of composition. In this part the interrogatory which asks for the first time about composition, the word "author" is used and then in contradistinction to the word "defendant".

SAMUELS J.A.: I would have thought not quite. I agree it is a very important one, the interrogatory, but the defendant relied upon it, the defendant presumably itself relied upon it and then it goes on to say how the defendant relied upon the article and that is by the author obtaining an reading each one and by the author using the articles. Now isn't that - I do not say it is the only way to look at it - but is it not a legitimate way which would have been open to a jury which would lead them to suppose the necessary nexus between author and defendant?

MR. HUGHES: Your Honour, it would not be legitimate to the jury to do that if the inferences are balanced in equipoise and that is my point. Your Honour's tentative reading a moment ago of the two sentences rather depends upon a supposition.

SAMUELS J.A.: An assumption?

MR. HUGHES: Exactly, yes.

GLASS J.A.: You say balanced in equipoise, to use a legitimate phrase in a way which suggests to me that it is the judge or this court which decides whether there is a perfect equilibrium but I am putting to you that according to the High Court they only ask whether the jury could say reasonably that they were not in perfect equilibrium and one was more probable than the other.

MR. HUGHES: There must always be a preliminary question for the judge and if the preliminary question is answered by saying

there is no evidence upon which a jury could conclude more probably than not that in this case the author was a servant or agent, then the issue does not go to the jury.

GLASS J.A.: Well, that is obviously true but the question I would be disposed to ask myself is whether it would be reasonable for a jury to think on this material that the compilation more probably occurred in the defendant's organisation than outside it.

MR. HUGHES: Well then, in examining that question there is, I venture to suggest, the basic preliminary question which I have endeavoured to postulate or propound.

GLASS J.A.: That is the preliminary question?

MR. HUGHES: Yes. Now it has to be remembered that the documents tendered are the defendant's own documents. It has to be remembered, I suggest therefore, that if there is any ambiguity in those documents it would be resolved against the author, the author of the documents, I mean.

SAMUELS J.A.: Well, is that right? After all, if it is the plaintiff's evidence you might as well have the plaintiff cross-examine the defendant's witnesses. Any ambiguity in the answer is not against the witness, normally one would read it against the cross-examiner, wouldn't one?

MR. HUGHES: One may. It all depends. But when the plaintiff tenders these documents for an ostensibly permissible purpose, it cannot be left out of account. The document is written by the defendant or its legal advisers. It is only a small point to be added and I do not want to make a big thing about it.

If the defendant had meant that the author was its servant or agent, why, one asks, draw the distinction between the defendant and the author in answer no.11?

SAMUELS J.A.: For what precise purpose did the plaintiff tender these answers to interrogatories?

MR. HUGHES: On two issues, your Honour. The first, if one goes back to interrogatory no.1, "Merely to establish that the defendant was the publisher". That is not so important as the others. Interrogatory no. 4 was tendered as being relevant to two issues and they can be regarded as of equal importance (1) on the issue of identification of the plaintiff in point of fact and the hypothesis that underlies the admissibility of interrogatory no. 4 on that issue is that there is evidence which the judge holds as a matter of law is capable of enabling a jury to conclude that the article referred to the plaintiff.

GLASS J.A.: Well, you are separately arguing that?

MR. HUGHES: I am just answering Mr. Justice Samuels' question. The next issue upon which the interrogatory was relevant was the issue of damages and I will cite authority when I come to argue the point to which your Honour Mr. Justice Glass just alluded, which shows that such an interrogatory is admissible on the issue of damages. Interrogatory no.5 was tendered for the purpose

50.

of establishing whether or not as publisher the defendant intended to convey the imputations, such evidence whether it was yes or no would be relevant on an issue of damages but also relevant in case the defendant ultimately adduced some evidence that the writer of the artricle was the servant or agent of the defendant, providing some evidence to rebut a defence of comment.

GLASS J.A.: If you agree that that is the meaning that the words bear because he would say they did not bear that meaning. If he honestly

held as an opinion the differing meaning that they did mean.

MR. HUGHES: But the relevance of that sort of interrogatory, and it is established by one decision of this court, I venture to suggest, that is Butler v. Illawarra, and by the decision of Hunt J. at first instance following Butler in Bickel v. John Fairfax. Both those cases are in 1981 2 N.S.W.L.R. and I will have to go to those later but just in answer to Mr. Justice Samuels' question, the relevance of that interrogatory, assuming that evidence is ultimately given that the writer of the article was a servant or agent, is that a negative answer rebuts any suggestion that the comment could be honest comment if the comment is congruent with the imputations or any comment in the article is congruent with the imputations.

Interrogatory no. 6, before the publication did the defendant have any information in respect of any and which matters in the article or statements contained in it, was relevant on an issue as to whether the publication was reckless and was possibly relevant on the question of the honesty of any comment once some evidence was given that the comment was the comment of a servant or agent of the defendant and I merely remind your Honours of what I said earlier in that connection about two of the articlces that are itemised at p.64 of the Appeal Book, they are items 37 and 38, two articles dealing with the relevant match.

SAMUELS J.A: It is interesting in the answer to 6 at p.62 the defendant said it had access to The Great Gatsby. That is the fulcrum on which the article turned on one view and if it were a commissioned article or from an external article on this the defendant would have answered the interrogatory in that way.

MR. HUGHES: Not really, your Honour, because there is an equally open hypothesis that the defendant in the sense of some servant or agent of the defendant other than the author had The

Great Gatsby and gave the book to the author for consideration in relation to the writing of the article. We just do not know. And there is also the question of checking prior to publication. It is perfectly consistent with that answer and equally consistent with that answer as with any other hypothesis that the editor of this journal might very well want to see The Great Gatsby before an article of this kind was published.

GLASS J.A.: I think 7B is probably the part of the interrogatories that is most damaging to your position, 65.0.

MR. HUGHES: Well, your Honour, I have endeavoured to deal with that.

51. (Mr. Hughes)

GLASS J.A: But that could reasonably be taken by a juror, it seems to me, to identify the party researching with the party preparing.

MR. HUGHES: But the hypothesis equally open is that there was a party researching even though that party was not the ultimate writer of the article and, as I said, and I do not wish to be repetetive but perhaps I should say it again because the point obviously concerns your Honour, there is a lot involved in preparation - that is a matter of commonsense - it can be preparation prior to the writing of the article and it can be preparation for ultimate publication.

GLASS J.A: Well, I think, Mr. Hughes, battle lines have been drawn on that question. Is there anything more you want to say on that, that there is evidence of servant or agent because I understand you want to make submissions about contentions on the comment defence?

MR. HUGHES: I have some contentions I want to put on the comment defence and I apologise in fact I have not earlier filed a notice of contention: frankly, I overlooked it.

GLASS J.A: I do not think Mr. McHugh is going to object.

MR. McHUGH: No, your Honour.

(Notice of Contention handed up.)

MR. HUGHES: As my learned junior reminds me, the likelihood or equal possibility of preparation involving preparation after the writing of the article is strengthened by the circumstance that the article did not appear until 21st January, that is to say two days after the match.

GLASS J.A: Hunting down that provocative quotation from Fitzgerald.

MR. HUGHES: I am glad your Honour used the word 'provocative'.

GLASS J.A: I must say, Mr. Hughes, whether you win or lose I will be impressed by the literary polish of the article because it is utterly irrelevant.

MR. HUGHES: In a sense it is not and in a sense it helps me because it is an article with a degree of literary polish and it is an article that is full of insinuation and it is an article - and perhaps I am being tempted into saying some thoughts in your Honour's mind before I come to this part of my argument - it is an article which begins and ends with an assertion of criminality because the quotation from Scott Fitzgerald refers to the fixing of the World Series in 1919 and refers to it in terms that bluntly state that that activity was criminal. All the singlemindedness of a burglar blowing a safe.

GLASS J.A: It may be the criminal allegation is directed to one person only, somebody, and not to all the players but you will be dealing with that in due course?

MR. HUGHES: I shall, your Honour, but I believe - I hope not wrongly - in trying to answer questions as they are put to me.

The answer to that, of course, is that if there is to be a criminal fixing of a series of sporting events, as was the case apparently as is suggested in relation to the World Series in 1919, that cannot be done without the participation of the teams because the article is speaking, amongst other things, about a five match final series.

Your Honours will see from the evidence that the preliminary series in this World Series Cup consisted of 30 matches, each team had to play ten matches, Australia had to play five times against the West Indies and five times against Pakistan and so on, so you had the preliminary series -

PRIESTLY J.A: Does it matter whether it be 30 or 15?

MR. HUGHES: I'm sorry, your Honour, each team plays fifteen -

SAMUELS J.A: Quite a lot anyway.

MR. HUGHES: Quite a lot.

GLASS J.A: Why don't you leave that until we come to the imputations and go on to this now.

MR. HUGHES: I am quite happy to do that, your Honour. On the question of the dichotomy between freelance writer and agent or stranger - trichotomy, I suppose - my learned junior has put some thoughts to paper, for which I am indebted to him, and could I hand those up? (Document handed up.)

A freelance writer we say who is an independent contractor who is not a servant or agent and that submission ties in with what I was trying to say earlier, one should not confuse the position with the thought that the defendant as the publisher is ultimately responsible for whatever appears in the paper, whether it be the

product of one of its servants or agents or of an outsider.

I won't read through that.

GLASS J.A: We will read that.

MR. HUGHES: My not reading it is not meant to imply that my learned Junior's work is not useful. I do not know which is the most convenient course, whether to now deal with the matters raised by the Notice of Contention or then return to the mainstream of our submissions as set out in the written submissions.

GLASS J.A: The former, if that is all right with you, the comment.

MR. HUGHES: An examination of this issue requires that I ask your Honours to look at the amended defence. Relevantly it is at pp. 13 and 14 of the Appeal Book. Paragraph 4 raises the defence of comment and then the particulars under part 67 rule 17(3) set out the basis for the comment and I would invite your Honours to look at what the alleged basis of the comment is. First of all the Benson & Hedges World Series Cricket Competition, second, the results of the games between the contestants in that competition; (3) the incentives operating on the minds of

sporting teams in general and cricket teams in particular; (4) and in my submission, very importantly, the final game of cricket between the West Indies Cricket Team and the Australian Cricket Team and the Benson & Hedges World Series Cricket Contest so that is the very match that appears to have given rise to this article being the immediate precipitating cause of the writing of the article. Then the fifth matter is the television ratings of audiences watching games of cricket of contestants in the Benson & Hedges World Cup cricket series; (6) the advertising

revenue earned by television stations during the course of the Benson & Hedges World Cup cricket series.

Next I should give your Honours reference to the evidence that was adduced without objection in our case - ours was the only case, so to speak, in an evidentiary sense - as to the way in which this match was played and in the course of play. Perhaps I need not take your Honours to the detail of it because it was never suggested in cross-examination of either of the witnesses who gave evidence on this point - and they were Mr. Tim Caldwell, a well known cricket administator, and Mr. Greg Chappell, the Captain of the plaintiff's opposing team - and no suggestion was made in the course of any cross-examination of either of those witnesses that this match was played otherwise than in a strongly competitive spirit and I would leave that point there.

Then it appears from the answers to interrogatories, which I have already gone over, that if, contrary to my previous submission on the servant/agent point, the writer of this article was a servant or agent of the defendant, he did not watch the match. I emphasise that that point is put on the hypothesis that the court is against me on this servant or agent point.

The interrogatories, and I shall not weary your Honours by going over them again, not only give full scope for what I am about to mention to be done but require the person answering the interrogatories on behalf of the defendant to state if it were the fact that part of the material available to the writer of the article were his visual impressions of the match. He did not say so.

PRIESTLEY J.A: Where does it appear?

MR. HUGHES: It appears by omission.

PRIESTLEY J.A: Was the question asked in those terms?

MR. HUGHES: No, but what was asked, and your Honour has seen it, what was the material that was available? and they never said the writer watched the match.

PRIESTLEY J.A: They said "the final game of cricket".

MR. HUGHES: Yes but in the interrogatories which were so cast as to require -

PRIESTLEY J.A: That was what I was asking you, where is it that it appears that an interrogatory is so cast as to require a specific statement of watching the match?

54. (Mr. Hughes)

MR. HUGHES: Page 62, Your Honour, "Did the defendant have any information in respect of any or which of the statements contained in the article?" That would include information based on watching the match. Now all they do is to set out a large number of newspaper articles and seven asks, "Before the publciation of the matter complained of did the defendant take any steps to verify the truth?" Now if the writer was a servant or agent and he set about, whether intentially or otherwise, writing an article containing reflections upon the integrity of the West Indies players surely the interrogatory should have indicated that the writer watched the match, if he did.

PRIESTLEY J.A: Looking at 62 6A(1) does not appear to be answered in 6B but there is a blank there. I do not know whether anything has been obliterated but it must be implied that the answer to 6A(1) is "Yes" otherwise you never get down to 6A(3).

MR. HUGHES: Yes, that is so.

PRIESTLEY J.A: Assuming one way or the other 6A(1) is answered "Yes", 6A(2) does not appear to be answered and 6A(3) is specifically confined to documents.

MR. HUGHES: Yes. Well, that is part of my point. Your Honour has put it more clearly than I did.

PRIESTLEY J.A: It seems, with respect, a pretty, not exactly complicated but a rather slender thread of reasoning upon which to base such a positive conclusion as you wish to draw from it.

MR. HUGHES: First of all, one would submit rhetorically, does not the interrogatory invite a disclosure of all available information?

PRIESTLEY J.A: To answer your question, perhaps I should not get too much into that situation, but to answer your question, reading 6A(1) when I first read it did not bring to my mind that the reply would need to deal with the matter that you say the question required. I can see now that you have drawn my attention to it, that you could answer in that fashion but it does not spring to mind on reading the question - not to my mind.

MR. HUGHES: But, your Honour, could I approach the matter this way, and perhaps on this part of my submission I can invoke the propostion that sauce for the goose is sauce for the gander. If all that I need is a slender inference, I have got it, and just the same way it may be held and in my submission should not be held, there is a slender inference probative of the fact that the writer of the article was a servant or agent. The steps are thse: information can clearly come and would come from visual impression of a match watched by the writer and the article is about, inter alia, that match. If the defendant does not say in response to a question that could reasonably be expected to elicit a statement that the match was watched and after all it is said that the comment, if any, is a comment on the match, the answer to the interrogatory should have said so. When I say the answer to 6, instant 6, there is an example, the answer to the other interrogatories could be expected to elicit that information if it happened to be the fact that the match

was watched by the writer and one bears in mind in this connection that this area of the case provides a true example, a real example of the operation of the principle in Jones v. Dunkel. If the inference is there, even though a slender one, the failure of the defendant to go into the witness box, the author to go into the witness box, strengthens the inference.

Now the next point is that particulars were sought and given, they are not in the appeal book but it is a very short letter. They were used by the trial judge. I think they were marked for identification.

GLASS J.A: Is there any objection to his, Mr. McHugh?

MR. McHUGH: No, your Honour, the trial judge had this, it was handed up to him.

MR. HUGHES: It is convenient to look at these particulars in the light of the numbering of the paragraphs in the Statement of Claim, the numbered paragraphs set out from p. 1, 2 and over to p. 3 of the Appeal Book. Your Honours will see that the whole of the article is said to be comment except three paragraphs and part of the contents of a fourth and your Honours might find it convenient just to mark pars. 4, 9 and 11 with "fact" or the letter F to indicate "fact" so alleged and the first sentence of par. 12, reading at the bottom of p. 2 of the Appeal Book, "These figures will be reflected ... been so exposed." The alleged Statement of Fact is as to the figures, that is as one would understand it, the figures in relation to crowds would be reflected in television audiences and larger television audiences, according to the writer of the article, would mean larger advertising revenue. I pause there to say no evidence was given that that was so.

SAMUELS J.A: A fairly reasonable proposition.

MR. HUGHES: No, your Honour, it is equally reasonable that the advertising was presold, with respect. Anyhow, that is not the largest point in my attack on the defence of comment.

GLASS J.A: Anyway, we have got the defendant's segregation of fact from comment.

MR. HUGHES: Then it is convenient to go to material that, according to the answers to the interrogatories, was available or said to have been available to the defendant and on the hypothesis which I am now operating under, to the writer of the article. The first document to which I would invite your Honours' attention is Ex.L and if I might say so that needs to be read in full. It is at p. 68 of the Appeal Book and the headline is "Rain enables ... a gift from the heavens". This is in The Age. "The ultimate gift from the Gods ... virtually forgotten". Your Honours will see there is a cartoon referring to that failure and an amusing one on the right hand side of that page, Mr. Greg Chappell with six ducks under his hat. Then it goes on to say, "Chappell made his sixth duck for the season ... most required".

I won't read on but it is most important, as I suggest your Honours will have seen from reading this far, and I would

invite your Honours to read to the end to get the flavour of the content of this article.

GLASS J.A: Was it suggestive one might have thought of a fluctuating outcome?

MR. HUGHES: A fluctuating outcome in which each team was doing its level best with fine performances on both sides. Fluctuating outcome, the match in the balance and, if anything, going against Australia and in favour of the West Indies until from the Australian point of view

the providential intervention of rain and this is an article which on the hypothesis I am making was used as part of the basis for the composition by the author of the article sued on and it is not the only article we have in this vein. Page 69 - this again is The Age - I think I wrongly described it earlier as The Sydney Morning Herald - another article in The Age of 20th January, "A typical summer rainstorm ... to try our very best". That was available to the author of this article.

GLASS J.A: In a sense we ought to be considering the defamatory imputations because whether the comment was based on proper material depends on what comment was being made.

MR. HUGHES: Well, we say that the comment, if any, in the article was congruent with the defamatory imputations.

GLASS J.A: Yes, but there is no comment.

MR. HUGHES: We say no comment because -

GLASS J.A: It is a statement of fact.

MR. HUGHES: It is all fact. It is all bare inference because there is no basis for the comment, there is no factual basis indicated, and insofar as a factual basis is indicated it includes these descriptions of the match which show that it was a tussle in which both sides were dong their utmost - there is no suggestion in either of those Age articles that anything was fixed or the players were acting on the footing that the match was fixed.

SAMUELS J.A: Or the comment, the opinion, that the West Indies threw the game.

MR. HUGHES: Yes.

GLASS J.A: Mr. Hughes, there is a lot of material here which could be said to provide a basis for the comment. Maybe some of it does not but by concentrating on that you cannot overlook

what the defendant says are allegations of fact in the Statement of Claim upon which it bases -

MR. HUGHES: I am going to examine these and certainly one must and one must also examine the question of whether one is capable of recording them as statements of fact or if they are whether there was any evidence to support them but before I go to that can I now go with a purpose other than the purpose for which my learned friend -

57. (Mr. Hughes)

GLASS J.A: Is there any evidence to support the defendant relying on comment which says "These are material on which I base them" to prove the existence in fact?

MR. HUGHES: Oh yes.

GLASS J.A: What is the paragraph of comment defence which that comes under?

MR. HUGHES: The only conceivable proper material here is statements of fact.

GLASS J.A: I misdirected myself, it has to be subtantially true if it does not relate to a matter of public interest but what about (1)?

MR. HUGHES: A statement of fact is a matter of substantial truth, it is proper material for comment whether or not the statement relates to public interest, it still has to be a statement of fact. Sub-section 2 does not say that you can make comment on something that is not a statement of fact.

GLASS J.A. Well, in any event, that is a barrren argument because it seems to me pars. 4, 9 and 11 and the first sentence of 12 relied on as statements of fact could be so regarded.

MR. HUGHES: The question then is whether there is any evidence to support them?

GLASS J.A: Well, which could be regarded as substantially true?

MR. HUGHES: The comment is said to be a comment on that match.

GLASS J.A: All these things?

MR. HUGHES: Yes, your Honour.

GLASS J.A: The match is only part, if I may put it to you, of what the writer speaks of as the incentive mechanism, the extent to which it is tampered with by the many rewards.

MR. HUGHES: It is said to be a comment on the match played at the cricket ground on 19th January and a comment on the series. Those are the underlying facts, the match and the series. There is nothing in the match which, as I have said earlier, was not seen by this author which could possibly found an honest comment that it was fixed.

GLASS J.A: Well, you have to prove that, isn't that right, under 33(2)?

MR. HUGHES: But there are antecedent questions that come into play and they are most conveniently set out in Bickel's case (1981) 2 N.S.W.L.R. page 490, the first two questions, question 1 "Is the statement in question ... sufficiently indicated material", and (b) that "If the opinion is ... material".

57A. (Mr. Hughes)

MR. HUGHES: Now on those issues the onus is on the defendant.

GLASS J.A: I do not know about that. I saw something contradictory about it in Austin.

MR. HUGHES: Your Honour, I have the task of reading your Honour's judgment again in Austin. There is a notice of motion on appeal to the Privy Council.

GLASS J.A.: You see, that is stated without authority.

MR. HUGHES: I would venture to suggest there is nothing that your Honour said in Austin that contradicts that. Bickel was copiously cited to the court in Austin.

MR. HUGHES (In answer to his Honour Glass, J.A.) Sutherland v. Stopes along time ago. I think that was on what they used to call the rolled up plea.

GLASS, JA: Stopes lost a verdict. There was no evidence capable of proving . . .

MR. HUGHES: We suggest his Honour, Hunt, J. has rightly said -

MR. McHUGH: That was done by agreement. What happened in Bickel, I actually opened to the jury a theory in accordance with what your Honour, Glass, J.A. did and his Honour said I misstated the law that there had not been a change in the law and I was only too happy to embrace that because I was for the plaintiff and that gave me an opportunity to defeat my learned friend's defence on the basis that an honest man could not make the comment without putting an onus on him. I went along with that my learned friend and the Judge said was the law because it suited my purpose. I won't submit the same here when I am on the other side of the record.

MR. HUGHES: We rely upon the statement of the issues that arise when a comment defence is pleaded in the judgment of Hunt, J. If he is right the first question to the Judge is to determine whether the statement sought to be defended as comment could be regarded by a reasonable reader as having been intended by the author to be an expression of opinion upon sufficiently indicated material and secondly whether the opinion is one which an honest man might have held on that material.

"The first of these questions" (Page 190) ". . . is irrelevant to their resolution". Now whether or not the imputations or all of the imputations in the alternative forms pleaded by the plaintiff were in fact comment or were capable of being comment, there is no doubt in our submission that if there is any comment in the article - and I assume for the present purposes that there is - that is, matter expressed in the form of comment, then it is comment very largely upon, and indeed relevantly entirely upon this match and on the series.

It is our submission that as a matter of law no honest commentator, given the material that is shown to have been available to him, could have formed an honest opinion that there was anything derogatory to anyone in the playing of that match. It fits in to the proposition on the footing that if he did not see the match all he had to go by

58. (Mr. Hughes)

were those two newspaper articles I have read.

SAMUELS, J.A: You have to look to see whether what he does assert is capable of sustaining an opinion. If you looked at something else you might come to a different opinion.

MR. HUGHES: Yes, but he asserts in his pleading - the defendant asserts in his pleading that the match was part of the basis of comment.

SAMUELS, J.A: The result of the match.

MR. HUGHES: And the match.

SAMUELS, J.A: Why could not, if you take the comment to be in terms of the present, why could not someone say the result of the match was very much against the running and I am not convinced by the fact that it appeared to be a close contest. Is not that a possible view?

MR. HUGHES: Your Honour, it is a possible view. Even if it be a possible view it is not a view which, as expressed by your Honour, is stated in those mild terms in the article.

SAMUELS, J.A: I meant to say in my opinion the West Indies blew the match and I have come to that conclusion because thy were so far superior nobody could reasonably expect them to lose and it may be said that it looked to be a very close contest. I do not know, they are all very skilled players, they could make it look that way if they wished. Is that possible?

MR. HUGHES: No your Honour. Could I just say this, your Honour's description of the mental process is, if that was what the writer thought, would presumably involve a belief that the game was ordained by human intervention.

PRIESTLEY, J.A: Let me add in something that was not mentioned but was implicit in what was put to you, that the total achieved by the West Indies of 189 on this theory was itself indicative of the West Indies getting ready to throw the match.

MR. HUGHES: My learned friend put submissions to the Court yesterday which may have lodged in your Honour's minds I want to deal with them. My learned friend did, so be it. One of his submissions was - and this is what may have impressed your Honours - was that the West Indies had won by five wickets in Brisbane in the preceding game in this series against Australia.

My learned friend's submission seems to be founded upon an assumption that the form of cricket teams, the collective entity of people constituting a cricket team, can be assessed with the same degree of accuracy and reliability as a person may be able to employ in relation to assessing the form of race horses.

SAMUELS, J.A.: If that were put to Mr. David Syme the answer would be, yes it can.

MR. HUGHES: It is, in the nature of things, not possible to draw a graph through the form of a cricket team, a collective entity and say because they won that match by five wickets they should and must win the next match.

59

Could I add one other factor. If it be granted - and it must be - that this was a comment on the match and on the series there was evidence that the West Indies had never won a match against Australia or against anyone I think in this series under lights at the Sydney Cricket grounds. In case it be forgotten I should take your Honours to the evidence of Mr. Clive Lloyd on this point.

That evidence, of course, is uncontradicted. I had not finished entirely the laying out of the material upon which we would rely, the evidentiary material upon which we rely to found the submission that no honest person coud have formed the opinion that the West Indies threw the match on the basis of the material that was shown to have been available to the writer of the article and the other material I was coming to and I think I was deflected, no doubt usefully, by a question, was ther material my learned friend used yesterday, namely the so-called apologies, or, as we prefer to call them, the disclaimer.

SAMUELS, J.A: How does this fit it?

MR. HUGHES: Because if you read the disclaimers they are saying we never intended to impugn the integrity of the cricketers or of Mr. Packer.

GLASS, J.A: He is saying we did not say the things in your imputations but if the jury thinks we did then they were based on proper material. He is facing in two different directions.

MR. HUGHES: So be it but the fact that he says publicly, the defendant, what is said in the disclaimers has to be weighed in the balance. Your Honour, with respect, is perfectly correct in saying the comment defence does not arise until the imputations are establshed. That is the pre-condition. When one gets to the comment defence it might be fair to say there are two broad questions. Not the only questions, but very important ones.

Number one is the comment, if any, if it is capable of being regarded as such according to Hunt, J. - is it a comment congruent with the imputations or is it some other comment.

At this stage it is important to bear in mind, in considering the question, whether any honest person could have formed any opinion expressed as comment in this article derogatory of the teams and Mr. Lloyd to look at what they said. page 5 of the appeal papers. Headline "one day match, the Age yesterday . . . any match in the series". They disclaim any intention of expressing an opinion derogatory of the players.

Then we come to the next day when apparently they feel themselves under some pressure to get out from under as best they can.

GLASS J.A: Not the next day, five days later.

MR. HUGHES: The 27th, yes. "Mr. Packer, players and the cricket . . and would have no foundation in fact whatever". "Furthermore the Age readily acknowledges . . . to Mr. Packer and the members of the two teams".

60.

PRIESTLEY, J.A: Do you use this as an admission that the defendant or that no person could have reasonably expressed the opinion that he did based on the material that he had?

MR. HUGHES: Yes, precisely.

PRIESTLEY, J.A: It is evidentiary.

MR. HUGHES: It is, and it could not be more striking in its evidentiary force.

PRIESTLEY, J.A.: An admission of fact or an admission of law?

MR. HUGHES: An admission of fact, with respect. "Such a suggestion". Can I dwell on those words?

GLASS, J.A.: Yes. "No foundation of fact" so you say comment of that kind would have no proper material -

MR. HUGHES: On their own admission and what can be better than their own admission?

GLASS J.A.: It is not conclusive. Of course it is . . . to what they were saying that that is not a suggestion they intended to make or a suggestion which the words are capable of bearing.

MR. HUGHES: They are saying if you put this article together and work out what it is saying, they are saying any suggestion that the West Indies took a dive would be completely and utterly false and have no foundation in fact whatever. Because the suggestion that they are seeking to bury and disclaim is that the Australian and West Indies teams had, or would allow commercial consideration to affect the result of matches and if, as the article suggests, that is what was happening, the Age is saying on this basis that would be a false suggestion with no foundation, in fact.

"We go on to say" - says the Age, "That the series has been and will be played . . . every possible match".

GLASS, J.A.: We understand the evidentiary operation from your point of view of that statement.

MR. HUGHES: Your Honour said that is not conclusive. Can I just ask your Honours to look at the matter in this way, a new trial is discretionary remedy and here a consideration comes into play that came into play in Butler v. Illawarra Newspapers, if I may use the expression, a twin case in terms of reporting with Bickel (1981) 2 NSWLR. One is entitled to consider in determining whether the discretionary remedy of a new trial should be granted, that if the case goes down to another trial that those two disclaimers would be part of the evidence.

The newspaper articles on this match published by the Age on 20th January will be part of the evidence and presumably if the matter goes down to a new trial Mr. David Thorpe, if that was the name of the writer of the article, would not make that short but significant journey from the well of the Court to the witnessbox.

61.

If we had a new trial then the Age or Mr. Thorpe, if that is the person's name, we have to - if you go to a new trial what a fascinating exercise in mental and verbal gymnastics the defendant and the author of the article, assuming he went into the witness box, would have to undertake. Just the same sort of exercise in mental gymnastics as your Honour, Samuels J. commented on in Butler v. Illawarra Newspapers.

In that case the defendant had answered an interrogatory denying there was any intention to convey the imputations pleaded by the plaintiff and your Honour pointed out that that was really the death knell of the defence of comment but even if it was not in the context of that case, quite the death knell, the only way the defendant could, as it were, win a defence of comment, win on a defence of comment on the new trial would be by swallowing not only the answer to the interrogatory but the evidence given by the two people responsible in that newspaper for writing the article in which the evidence, they

said they meant to convey an imputation of a slightly lesser gravity than the imputation alleged by the plaintiff in its statement of claim. I think the dichotomy was between an imputation as laid by the plaintiff suggesting that the article said the plaintiff was racist and on the other hand an imputation saying that the article - that the plaintiff was hostile to the core - if your Honour thinks I have said enough on that -

GLASS, J.A.: I think you have made your point.

MR. HUGHES: We have not referred your Honours to Kemsley v. Foot. It is an important case, (1952) A.C. It has now been much cited to your Honours but that is the case in which the House of Lords dealt with a defence of comment where the comment was a bare comment.

GLASS, J.A.: No proper material.

MR. HUGHES: Yes. We say if the comment is a bare comment, and we suggest this is because of the lack of any possible supporting material, then the comment defence goes out the window.

GLASS, J.A.: It cannot be a comment then?

MR. HUGHES: Yes. If it is a bare comment in the sense of an inference unsupported by any facts then the only defence is, apart from principle, justification.

In considering whether there ought to be a new trial on the grounds that the defence of comment was taken away it is very important to bear in mind that we are entitled to the benefit of the principle in Jones v. Dunkel, not only in relation to the matter I averted to earlier - that is the absence from the match of the author as revealed by the answers to interrogatories - but also because of the absence of any evidence at the hearing in this case attempting, on the part of the defendant, to explain or qualify or get out from under those unequivocal disclaimers.

Now I come to the imputations. It has been suggested I might read some of the passages in Jones v. Dunkel.

GLASS, J.A.: I think not.

62.

MR. HUGHES: I think not.

GLASS, J.A.: It is the most cited case.

MR. HUGHES: Now I can turn to the written submissions.

GLASS, J.A.: I do not think they deal with the imputations.

MR. HUGHES: No, but we say, and I propose to develop this proposition, Maxwell, J. was clearly right. I want to deal first with the other question which is really preliminary and that is whether it is now open -

GLASS, J.A.: Would it be convenient, we have to consider these imputations - they are the heart of the case.

MR. HUGHES: Your Honours do not have to consider the imputations except that they were found by the jury - if the procedural question falls against my learned friend.

GLASS, J.A.: That is right. You follow your own course. I would like to hear you on the imputations and then come to the other later.

MR. HUGHES: It will be convenient if I go to the articles as set out in the statement of claim. First of all we have the senior single headline with its allusion indirectly to the song that has come to be known, or come to be associated in the public mind with the cricket. The stage for this article is set and its foundation stone is in the second paragraph. The assertion that the World

Series in 1919 had been fixed, and criminally fixed. That is the only meaning of that second paragraph associated with the word "fixing" in the third paragraph - because of the reference to the single mindedness of the burglar blowing the safe.

This is an article we would say which is a fortiori from the article that we dealt with by several courts in Jones v. Skelton. In Jones v. Skelton 63 S.R. their Lordships, when it got to the Privy Council, 63 S.R. p. 644 - it was an article - I should be able to remember it even now by heart I suppose.

GLASS, J.A.: What is there that is going to solve my problems?

MR. HUGHES: There is no self-contained solution to your Honour's problem, if it is a problem, in this case. I merely wanted to point out, and I can do it in five lines, that in the Privy Council in Jones v. Skelton their Lordships at p. 651 attributed to the words, "Or is it" which is at the bottom of the article, "It is beyond understanding, or is it" - they said "the questionmark may convey to the . . . impropriety." "The reader" they said "was asked to adopt a suspicious approach and so to be guided . . . in direct terms".

Here is an article which is a fortiori, the author compares the World Series of 1919 which was fixed with the series of cricket matches currently being played in Australia.

Paragraph 3 adds to the heavy import of the suggestion of criminality by referring to the fixing of the World Series baseball championships in 1919 as one of America's three crises of conscience in the preceding fifty years. The reader is not allowed

to forget the reference to criminality because in par. 18 the author says, "Somebody is playing with the faith of the people with the single mindedness of a burglar blowing his safe". Somebody in relation to this series of cricket matches being played in Australia is engaging in criminal conduct, fraudulent conduct. He did not plead criminal, he pleaded fraudulent - fraudulent conduct by agreeing to the fixing of the matches.

SAMUELS, J.A.: I would have thought the emphasis is rather the fraudulent or criminal conduct. "The single . . . faith of the people."

MR. HUGHES: They are the people who watch matches, the followers of cricket.

SAMUELS, J.A.: Exactly. They go along thinking all the time the resolution of the match is being tampered with by the financial rewards. Is not that what the author is saying?

MR. HUGHES: It is not all he is saying. It may be it could be one view of what he is saying.

May I make a reference to one aspect of my learned friend's submissions. When one is considering the capacity of the words to bear the particular meaning alleged. It is easy to engage in a process of ... and slip over to the second question and address the Court, or ask the Court to address itself to the question, what the words do mean.

SAMUELS, J.A.: You are perfectly right to sound that warning note.

GLASS, J.A.: Could I direct you to the fact the imputation - par. 4 - that the plaintiff captain of the West Indies Cricket team who did not play, "Committed a fraud on the public for financial gain . . . result of the match."

MR. HUGHES: Yes.

GLASS, J.A.: Does not that in other language say that the result of the match was fraudulently pre-arranged?

MR. HUGHES: Yes, not only the result of that match but of other matches.

GLASS, J.A.: Now where do you get your best support for that imputation in the language of this article?

MR. HUGHES: Your Honour, is your Honour asking me to deal with the issue of identification?

GLASS, J.A.: No.

MR. HUGHES: Your Honour referred to identification.

GLASS, J.A.: No. It is that meaning, that there being fraudulent pre-arrangement between various persons on the result of the match.

MR. HUGHES: Because of the clear suggestion of riminal conduct that pervades this article by reference to the 1919 series.

64.

GLASS, J.A.: Is it criminal to abuse the confidence of the public?

MR. HUGHES: If it is criminal to abuse the confidence of the public it can only be so because the public is being duped by being asked to watch fixed matches.

GLASS, J.A.: Where does he say this match was fixed?

MR. HUGHES: In par. 18 he is saying that somebody is playing and that in its context relates to the series and this match. He has said two opposing teams have a common goal. Par. 17. He said, "They can't be competing in good faith to win each game ... incentive machine".

IN THE COURT OF APPEAL

NO. 15

(Hughes)

My learned friend sought to found very heavily on the use or the word, "mutely" and he suggested one cannot have an arrangement which is mute.

GLASS, J.A.: Do you suggest you can?

MR. HUGHES: I suggest that in certain circumstances -

GLASS, J.A.: An arrangement to fix the result of the match. How do you do that mutely?

MR. HUGHES: Perhaps by winks and nods and inferences. Arrangements can be made in other areas of activity that command the attention of courts. Your Honour, my learned friend in his argument overlooks the fact that - the fundamental principles that are expounded in Lewis and in Jones v. Skelton. A libel may be conveyed by insinuation, by words that invite a reader to read between the lines. A libel can be conveyed even though words are used which may be deliberately used to make a suggestion that is contrary to the grain of the article.

If the reader of this article were struck, as I suggest he would be struck by the initial reference to the fixing of the series and the ultimate reference to the fixing of the series and the reference to criminality, he would not pay much attention or would not be unreasonable in paying no attention to the word, "mutely". The two teams are said to want the five game series finalised. They are said to have a common goal which is to prolong the series.

SAMUELS, J.A.: Not quite. "If" both sides want. It does not say both sides do, have, will want. They are under pressure to want.

MR. HUGHES: A defamatory imputation can be conveyed by the use of additional words.

SAMUELS, J.A.: Yes but let me put directly to you a possibility. In my mind the imputation is that the West Indies in the match in question would not do their best - but it does not stretch so far as to suggest that they have fraudulently pre-arranged the result.

MR. HUGHES: That meaning may be open. I suggest it is not really but the other meaning is reasonably open. I have not got to show that the meanings for which we contend are necessarily the only meanings. All I have to show is that they are meanings that

65.

would occur to the mind of some reasonable readers.

GLASS, J.A.: The jury could reasonable think WOULD HAVE occurred.

MR. HUGHES: Yes, to some reasonable readers, not to every reasonable reader.

GLASS, J.A.: Yes, but if it does arise prior than the insinuation because of the commercial pressure on the West Indies players they are not trying their hardest, could that language support No. 1.

MR. HUGHES: Yes. If they are not trying their hardest that is a conscious state of mind. They are not trying. They are not trying to win.

SAMUELS, J.A.: Not trying their hardest.

MR. HUGHES: Your Honour, the meaning of "they are not trying" comes out of 16 and out of 17. It is not a matter of not trying their hardest, it is suggested they are not trying and it is suggested that somebody is doing what was done with the 1919 World Series. Fixing the matches dishonestly and criminally. Certainly fraudulently.

GLASS, J.A.: That is, somebody.

MR. HUGHES: Yes.

GLASS, J.A.: You have to get out of that because somebody on this hypothesis has, with money, interfered with a mechanism.

MR. HUGHES: Influenced people not to try.

GLASS, J.A.: And that person and all the people who are not trying have fraudulantly pre-arranged the result even though they have not communicated with each other.

MR. HUGHES: The word "mute" could be disregarded by a reasonable reader in the way of suggested insinuations in this article.

SAMUELS, J.A.: Do not you have, if you are deliberately going to lose a cricket match, would not that necessarily require some planning?

MR. HUGHES: Precisely, that is why the word "mutely" can be thrown out.

SAMUELS, J.A.: While it is there if you give weight to it it would be antipathetic.

MR. HUGHES: An arrangement cannot be made mutely, that is the whole point. The word "mutely" is essentially antipathetic to the word "arranged".

GLASS, J.A.: That is against you.

MR. HUGHES: My point is a reasonable reader could say, "mutely arranged". That is an odd form of words but the writer is saying it was arranged and I will discharge the word "mutely".

66.

In the context of this article with its allusions to criminal conduct the word "arranged" in the mind of a reasonable reader could have much more weight than the word "mutely". This is an article that was written with what might be

called, picturesquely called perhaps devilish cunning. One of your Honours complimented the writer on his literal style.

PRIESTLEY, J.A.: "Skill" I think rather than "style".

MR. HUGHES: Yes, skill. This is an article which says somebody is capable of meaning somebody is, in relation to this series, playing with the faith of the people in the same way as the faith of the people was played with when the 1919 World Series was fixed.

To take up a point that engaged your Honour, Priestly, J.'s attention yesterday, a reader of this article would not need to know just how the World Series was fixed by Mr. Rothstein, or whatever his name was, in 1919. All he needs to know on this point is what he is told in the article, that there was a series of comparable sporting events fixed. And, criminally fixed. The next point that should be mentioned is that if somebody - and of course somebody does not necessarily connote the singular, it can refer to more than one person on the sort of broad reading between the lines that a reasonable reader could adopt - even if only one person is playing with the faith of the people by fixing the series, causing the players not to try to win in particular matches so as to prolong the series, or the final aspect of the series, one invokes the commonsense proposition that is expressed in the aphorism that it takes two to tango.

You cannot fix a series in a criminal sense without the participation in the scheme of the players.

GLASS, J.A.: Strange it does not arise about this imputation that somebody, the person who organised the money incentives, has, by their nature in the circumstances ... the West Indies players to win - that does not psotulate any fixing between him and the players at all. This means conditions have been produced in which they

say to themselves it does not matter if we lose. That would be unexpected, would it not, if that is all that was said?

MR. HUGHES: That would not carry the imputation. It says much more than that because their sporting honesty is impunged in par. 13. I am just instancing a particular fix. "Was it sportingly honest"? That is impunged. Then the writer says, "This ... taking a dive". As in Jones v. Skelton by the use of the question mark the writer is inviting the reader to draw the inference that they are taking a dive.

SAMUELS, J.: Which question?

MR. HUGHES: Paragraph 14.

GLASS, J.A.: There is no question mark there.

MR. HUGHES: No, par. 14 is analogous to the question mark in Jones v. Skelton.

67. (Mr. Hughes)

GLASS, J.A: On the other hand is not a reasonable man bound to observe that it is setting a gap. There is a gap between taking a dive and the thought it does not matter, win or lose, even though it is a small gap.

MR. HUGHES: A reasonable reader would be entitled to say, he is inviting me to pay, even though by a choice of words this is what they are doing. It does not to say that, "Both sides may want a five series game ...".

SAMUELS, J.A.: The history ends with 14 does it not. That is what the writer has to say or mainly what he has to say about the match which has just finished and then he goes on to consider-

MR. HUGHES: Yes, exactly but he does not draw the line at 14. He says it is conceivable the same pressures will influence the thinking of both teams in the future if both teams want a

five series game, and I have suggested, to suggest the premise is to invite some reasonable readers to adopt it for Mr. Packer's reasons. The writer is emphasising in terms they import the very sinister implication that the players want a five game series for Mr. packer's reasons or perhaps their own reasons, for other reasons.

SAMUELS, J.A.: Would not the ordinary reader note that while the use of the word is inconclusive in fact par. 15 says, "Some pressures may influence ...". 16 - "If both sides want ..." and so on, then there would be this consequence. 17 indicates what the situation would be if the assumptions in 16 were satisfied.

MR. HUGHES: That is reading this article as one would construe a legal document. We have the highest authority that warns us against that approach. I do not want to but if I need to counteract this sort of legalistic approach to the interpretation of this article I will read what the Lords said in Lewis.

GLASS, J.A. Your premise is correct. We have to read it in some way or other through the eyes of the jury and ask whether they could reasonably think a significant section of the public would understand it in the sense of your imputations.

MR. HUGHES: Yes, and the reasonable reader could take 15 and 16, although expressed conditionally, as suggesting an inference which, by implication, the reader is being invited to make as a matter of fact. That interpretation is supported by par. 17 because it refers, not in terms of conditionality, to two opposing teams with a common goal already described as lacking in sporting honesty and says, "They cannot be competing ... machine". They are not trying because there is something in it for them.

GLASS, J.A.: I do not see how 15 and 18, which are directed to the future, can support your first imputation which is wholly in relation to the match that has been played.

MR. HUGHES: Because readers are not bound by strict rules of grammar and syntax. As I have pointed out 18 uses the present continuous tense. It is perfectly capable in the mind of

a reader of referring to the match which is the centre piece of the article insofar as the article is not also directed to the series because it is quite plain, the writer was provoked into writing this article lby the match played under lights at the cricket ground.

SAMUELS, J.A.: The result of the match.

GLASS, J.A.: the result of the match, the underdog winning, "in the context of the financial inducement ...".

MR. HUGHES: To answer your Honour's question I invite your Honours to look at 9. They describe or purport to describe what happened in par. 9, "In last Tuesday's game ...". 10, "Unfortunately they say" "the argument becomes muddied by material and commercial factors". That is the introduction to the suggestions later in the article that somebody is playing with the faith of the people. Somebody - something being something that causes the West Indies and Australia not to try and it is said in the context of an allusion to criminal conduct. There is plenty of material in this article which would enable a reasonable reading between the lines to attribute the sting of what is said as embracing the match that has just been played.

GLASS, J.A.: 14 relates to the match. Would it be defamatory to say the West Indies team were not trying their hardest to win that match?

MR. HUGHES: Yes and I have screwed it up higher because not trying to win a match for which the public are invited to pay to watch - which the public are invited to pay as spectators is a fraud.

GLASS, J.A.: By act trying their hardest to win?

MR. HUGHES: Yes.

GLASS, J.A.: But yu said fraud by pre-arranging with others, the result.

MR. HUGHES: that is not said because of the references to the fixing. In these questions which are very useful because they expose possibilities, the questions are predicated on a rather legalistic approach.

SAMUELS, J.A.: I would disagree. I think the proposition that not trying as hard as you can is fraud. If anyone has ever played body contact sport you would know that is not true. It is a question of how much pain you feel inclined to suffer at the time. Quite a lot or a tolerable amount. If you play like Andy Roberts it may be a psychological consideration merely because you think it does not matter, you have to get your teeth knocked out.

MR. HUGHES: This article says much more than that.

SAMUELS, J.A.: Does it say anywhere how the team may depend financially on a five game series? It seems on one view - assumed they are going to get something out of it. It does not say that their stipend was geared to -

69.

MR. HUGHES: It is more than an assumption. There is a reference in 10 to the argument being muddied by material and commercial factors.

GLASS, J.A.: Is there any clear description in the record of the relationship between advertising, revenue and gate money and rewards to the players or not?

MR. HUGHES: There is no clear description but there is a clear impliation that there are

commercial considerations for the West Indies and we would add, for the Australians, to prolong, the series. That is part of the structure of the defendant's case, the assumption that there is something in it for everyone if the series is prolonged.

GLASS, J.A.: What would the resonable reader take it to mean - he knows about Benson and Hedges and their sponsorship. Are they on a sliding scale which varies?

MR. HUGHES: I think they are but there is no real evidence of it. Paragraph 17, "Two opposing teams with a common goal ... charade". "Charade" means people acting, "in which money .... machine". So there are commercial considerations, the author suggests, operating in the minds of the players, the individual minds of the players and the collective minds of the team to cause them not to compete in good faith.

PRIESTLEY, J.A.: Paragraph 16 also contains a hint that there is something in it for the players.

MR. HUGHES: Yes, then the description of the game of cricket being, not being made - that means "played" obviously - as a contest, "but as a contrived ...". I have not dealt with use of the word "contrived". How can a spectacle be contrived without the willing participation of the players.

PRIESTLEY, J.A.: There is a point I want to clarify there. You have mentioned that to fix a game the co-operation of the players is necessary.

MR. HUGHES: Yes your Honour.

PRIESTLEY, J.A.: Would it not be right, although the success of your efforts to fix the game might be less, you could go about fixing the game by arrangement with only a few of the key players - what the result might be. If you took the view

the West Indies were a superior side and you wanted to arrange with them to lose a match which, in the ordinary run of the odds would favour their winning, would it not be perfectly logical to make an arrangement with a couple of the key players in that team?

MR. HUGHES: You might be able to do it that way.

PRIESTLEY, J.A.: This is not critical of your argument.

MR. HUGHES: In one way it helps because - I am not, as it were, rejecting the helping hand implicit in the form of the tentative suggestion your Honour has made - in one way it helps because we gave evidence without objection that Mr. Lloyd was the captain and known to be the captain. He would have to be one of the

70.

players a reader could assume -

PRIESTLEY, J.A.: If the team is defamed and there is a finite number of members is not everyone of them - ?

MR. HUGHES: If it is a sufficiently limited class and we have made that point in our written submissions. We have relied on Nutley's case.

GLASS, J.A.: But if you could arrange for a few key figures and that would destroy the hope of the members of the team.

MR. HUGHES: That is a problem for another day.

GLASS, J.A.: The essence of it is that the plaintiff fraudulently pre-arranged the result, he was party to an agreement.

MR. HUGHES: If there was an agreement it at least involved - and I am putting it at the very lowest - the captains and perhaps notable players on both sides and Mr. Packer. It takes two to make a contrived spectacle - at least two.

We suggest in the context of this case many more. It would suggest a reasonable reader could take the view it involved all the teams as well as Mr. Packer but even if a reasonable reader stopped short of saying it involved every member of the West Indies team nobody could challenge anyone who said if this game is a contrived spectacle pre-arranged, I must assume that Mr. Lloyd, even though he was not playing in the match, was part of the pre-arrangement.

GLASS, J.A.: I have no ulterior motive in asking this, if it were to happen that a decision was that the imputation was pitched too high ... that would be without prejudice to your right to sue again on a lower imputation.

MR. HUGHES: Yes. I have not dealt with the lower pitch of the imputations which were properly put to his Honour as alternatives.

GLASS, J.A.: It is the suspicion.

MR. HUGHES: Yes. This at the very least.

GLASS, J.A.: You have the problem they all went together.

MR. HUGHES: The jury were told they could find either 1 or 2 and they were told they could find either 3 or 4.

GLASS, J.A.: Just say for example that the language would support 3 and 4 but not 1 and 2 since we would not know on what basis the jury verdict went, there would have to be a retrial.

MR. HUGHES: Your Honours do not need to know because the damages are supportable on the assumption that the jury picked the lower imputations or one of them.

SAMUELS, J.A.: One of the four put to them. They are not bound by the precise wording of course if four imputations go to the jury or, let

us take two pairs of 2 and 1 or each pair is excluded, there must be a new trial. One does not know what

the jury found it on.

MR. HUGHES: That may be so. If they are all available as matters that can be left to the jury the fact the jury was not asked to say which they found won't affect it. I have sought to argue why they are all open. I have put my argument on the highest plane by suggesting this article suggets to the reasonable reader, or is capable of suggesting to the resonable reader that there is fraud involving the plaintiff and others both as to the match played and as to the future and in response to your Honour, Glass, J., I have indicated why the imputation would reasonably arise both in relation to the past match and the future matches because of the structure of the article and the reference to the lack of sporting honesty - the question in par. 13, was it sportingly honest, that refers to the past. So the reader is asked to consider the past and the future in the context of these not at all veiled suggestions of criminality.

GLASS, J.A.: 15 is the bridge passage between the past and the future.

MR. HUGHES: The same process would influence it.

GLASS, J.A.: There is the word, "it is conceivable" that - If it would not be reasonable to get out of that more than a possibility to be influenced by the money mechanism, could the jury say, "committed a fraud"?

MR. HUGHES: Yes, because of other material in the article.

GLASS, J.A.: It raises the possibility of an actuality.

MR. HUGHES: Yes. The use of the words "it is conceivable" cannot be regarded as the successful erection by the defendant of the barrier against the reasonable reader reading between the lines and drawing the conclusion from these words that it is an actuality.

GLASS, J.A.: He could be a crook.

MR. HUGHES: Yes.

GLASS, J.A.: You could take that to mean-

MR. HUGHES: "Of course he is".

GLASS, J.A.: I am using those words in a cunning attempt to mask my real meaning. My real meaning appears between the lines.

SAMUELS, J.A.: Nudge, nudge.

MR. HUGHES: Wink, Wink, and the question is settled in par. 18.

(Mr. McHugh handed up correction to the transcript of previous day.)

71A.

ON RESUMPTION

MR. HUGHES: Before I pass from the question of the capacity of the article to convey the imputations pleaded, I ask your Honours to look at another aspect of the article. For the purposes of his article the author defines by reference to that quotation from Scott Fitzgerald what is involved in a sporting context in playing with the faith of the people. The concept is related to (1) criminal activity in fixing a series of sporting events and (2) circumstances giving rise to a crisis of conscience, the second really being a corollary of the first.

The author then proceeds to describe in pars. 5, 6 and 7, activities in sport that do not involve playing with the faith of the people. He

gives examples which, to use his own words, involve no breach of good faith. In other words he gives examples of circumstances that give rise to a slackening of a sportsman's will to win without any conscious effort on their part not to win; the example of the Test match and of the team lowly placed in a competition, like for instance a Rugby League competition. He says there are not cases in which anyone is playing with the faith of the people. Perhaps the last sentence of par. 7.

Then he turns specifically to the current series (par. 8) within which he includes the game played on the 19th January and that is par. 9. Then in par. 10 he says in effect that the cause of that loss was more fundamental and serious than a mere absence of a vital cog in the incentive machine. He does that by saying in the second sentence of par. 10, "unfortunately the argument becomes muddied by material and commercial factors". He is saying there is something more to it and they have to do with those factors. We venture to suggest that sentence is the bridge as it were across which the author passes in the development of his theory and towards the conclusion that in relation to the then current series, the faith of the people was being played with and in the course of doing so he refers and I have been over this so I will not touch on it except briefly, to contrived spectacle, the idea of taking a dive, the charade and then he finishes with a conclusion that someone is playing with the faith of the people and, as I said earlier, that takes you back, back past the examples of innocent activity on the part of sportsmen in which their impetus to win may be unconsciously diminished; it takes you back to his opening paragraphs, which are really like, if one wants to adopt a legalistic analogy, really like a definition clause in a document: "I am telling you", says the author, "what playing with the faith of the people is. I am telling you that sportsmen play with the faith of the people when they take a dive, when they engage in a contrived spectacle

for commercial reasons, when they fix or take part in the fixing of the results of a series of sporting tests". And to say in that last paragraph that faith of the people is being played with is to say that the sportsmen involved are engaged in the fixing activities.

That concludes my submissions to the court on the question

72.

of the capacity of the words to convey the imputations which we have pleaded.

That brings me to the next point under ground 1 of the notice of appeal and I invite your Honours' attention to our original written submissions. There was a trial here of a preliminary issue under Pt. 31. There was a decision on that trial. It is not a case where the defendant sought an order striking out the imputations on the ground that they were vexatious or an abusive process; it was a trial of a preliminary issue of law and it is to be borne in mind, in our submission, that that trial was sought on the defendant's initiative, not on our initiative. It was their application. On the assumption that there is no appeal as of right, the defendant seeks leave but also seeks extension of time within which to make the application for leave.

Not one word has been said, not one evidentiary fact has been adduced to support the proposition that an extension of time should be granted. The court may assume that if there was a fact that could be abused, it could be assumed that the defendant, having sustained an adverse result on the issue tried by Mr. Justice Maxwell, accepted that result; otherwise it would have, as it could have, sought leave to appeal. And why, one asks, should the defendant, having accepted that result for the purposes of its case, have an indulgence by way of an extension of time after all the trouble and all the expense of a trial

and the preparation for trial on the issues of fact have been incurred?

SAMUELS, J.A.: What would happen if the defendant seeks to obtain a trial under Pt. 31 where there were four imputations and he seeks to obtain a trial under Pt. 31 concerning two of them, the issues being whether those two are capable and it is adverse to the defendant and he goes to trial and the plaintiff wins? At that stage is the defendant limited in its appeal to testing only the two imputations which were not tried under Pt. 31?

MR. HUGHES: It is limited to the two.

SAMUELS, J.A.: Isn't it entitled to appeal against the decision?

MR. HUGHES: But it was entitled to appeal against the decision.

SAMUELS, J.A.: No, it had the leave to appeal against the interlocutory decision. If it chooses not to do it, how does it follow that it's ordinary rights to appeal against the final judgment are limited?

MR. HUGHES: Because it elected not to seek leave.

SAMUELS, J.A.: I know it did, but does that work really as a kind of estoppel? If it does not seek leave to appeal you submit that it loses part of at least its final right to appeal?

73.

MR. HUGHES: Yes. The alternative view necessarily involves the proposition that a trial under Pt. 31 sought by the defendant in this case, of a preliminary issue of law, may as well not have occurred at all. The argument that my learned friend has presented involves the proposition that if the defendant had sought leave to appeal and had appealed to the Court of

Appeal and failed, the matter could be re-agitated after verdict. Now, with resepct, that just cannot be right. It cannot be right because the right of appeal under s. 101 of the Act is expressed as being subject to this and any other Act and any other Act doesn't matter in this context, and subject to the rules, "An appeal should lie to the Court of Appeal from any judgment or order of the court in a division" and then, "(b) without limiting the generality of par. (a) from any known decision, direction or report in the division" - and if one runs down sub-s. 2, "An appeal shall not lie to the Court of Appeal except by leave from an interlocutory order" and this may be taken to have been an interlocutory order but it was something more: it was a decision for which express provision is made in s. 103.

SAMUELS, J.A.: Yes, of course. There must be. The idea is that s. 103 gives leave but in this case Mr. McHugh is not appealing against Maxwell, J.'s decision. He is appealing against the judgment that was entered.

MR. HUGHES: If my learned friend is right, Begg, J. was not bound by Maxwell, J's ruling and what is the use of a preliminary trial in those circumstances?

SAMUELS, J.A.: I don't think that follows, although I must say I wonder a little if there had been an appeal and whatever the Court of Appeal had done, does an interlocutory decision become a final one? It really means, I suppose, that it is a decision of the court to which the court will give credibility. If there is a judgment there is no longer an interlocutory order. Part 31 is a utility and the defendant may get rid of some imputations and thus restrict the matter and the defendant may of course succeed in getting judgment.

MR. HUGHES: Section 101 is expressed as giving a right of appeal subject to the Act. Section 103 provides an exclusive regime for testing the

correctness of decisions made on the trial of a preliminary issue and if in this case the defendant elects not to seek leave and by so doing puts the plaintiff to all the expense of getting ready for and fighting a trial, there is no right to appeal against the judgment when the Act says that the right to appeal against that judgment is subject to s. 103.

SAMUELS, J.A.: But the right to appeal against final judgment cannot, I would have thought, be subject to the right to seek leave to appeal against the interlocutory judgment.

MR. HUGHES: It is, if the Act says that.

74.

SAMUELS, J.A.: I don't think that is what the Act is saying.

MR. HUGHES: Then what do the words "subject to this Act" mean?

SAMUELS, J.A.: But there is no inconsistency. They are dealing with a different subject matter.

MR. HUGHES: There is an inconsistency because the one subject matter, a particular regime or procedure is prescribed. That is my point.

GLASS, A.P: So long as it has the quality of an interlocutory decision you cannot come up here unless you get leave. But when it acquires a different quality, namely one in which the conclusion upon which the judgment is founded, that is the ruling of the trial judge, then it is a judgment and comes under s. 101.

MR. HUGHES: That is the argument. He has advanced no reason for getting it out of time. Not one factor has been put upon the exercise of discretion. If the defendant seeks the judgment on a preliminary issue it is a fair proposition that if he does not exercise his right to seek

leave to appeal, he should be bound by in effect his election.

PRIESTLEY, J.A.: It is a trap in some circumstances but I do not think this point has been raised before about the operation of Pt. 31 decisions but if the law is as Mr. McHugh says it ought to be and becomes known as such then there would be no element of trap involved that I can see.

MR. HUGHES: it still makes preliminary decisions pointless.

PRIESTLEY, J.A.: If I understand Mr. McHugh correctly it doesn't make them pointless completely. If the defendant gets judgment on the preliminary issue, as he can if he succeeds in respect of any one imputation, then there is a lot of point in that because that is a judgment and a final judgment. The problem, if it is a problem and it is one I have never been conscious of, is if a party in your client's position succeeds, but does not get a judgment. There appears to be a distinction drawn by s. 103 and Pt. 31 between a decision and a judgment.

MR. HUGHES: We say that if you look at s. 101, sub-s. 2(e) and s. 103 of the Act it will be seen that independently they cover the same ground in relation to Pt. 31 decisions.

SAMUELS, J.A.: If it is Pt. 51, r. 15(I)(d), "any appeal from any decision" - that is the current appeal - "the Court of Appeal may exercise its powers under the Act notwithstanding that there has been no appeal from some other decision".

MR. HUGHES: If that is so I take comfort from the fact that the jurisdiction of the Court of Appeal under that rule is discretionary.

SAMUELS, J.A.: I would not have thought so. I would have thought it means that the Court of Appeal has power.

MR. HUGHES: Yes, but not power that it must exercise. "May exercise" and it cannot exercise that power without regard to the consideration that the other decision in the proceedings was a decision against which an appeal did lie without leave and that leave wasn't sought and it is now very long out of time to seek leave.

SAMUELS, J.A.: Indeed it is, but what is the prejudice to you if this court were to entertain the appeal?

MR. HUGHES: Well the obvious prejudice is the whole of the costs.

PRIESTLEY, J.A.: It is the sort of prejudice which can be met on a cross order.

MR. HUGHES: Up to a point.

PRIESTLEY, J.A.: Is there any prejudice that occurs by reason of what has happened?

MR. HUGHES: I suppose one says the loss of a verdict. Potentially.

PRIESTLEY, J.A.: Assuming the appeal had been brought within time, how are you worse off otherwise than in costs because of it not having been brought in time?

MR. HUGHES: Because we have gone ahead on the assumption which was perfectly warranted and won a verdict.

PRIESTLEY, J.A.: On the hypothesis that had the appeal been brought in time you would not have got the verdict anyway, it seems to me at the moment that the only prejudice could be met with costs.

MR. HUGHES: We say that there has to be a discretion under Pt. 15. It is a rather

significant fact that no one has sworn an affidavit here saying "We considered an appeal and somehow forgot that we had rights to seek leave". No one would expect for one moment that those who had been briefed at the time would have been lacking in awareness of the right to seek leave to appeal and lacking in awareness of the obvious need to seek leave if they thought they had an arguable case.

One asks what happened? The most probable inference of what we have been told or rather, resulting from the deafening silence from the other side on this point is that they thought about an appeal and didn't think it would run. Why else wouldn't they have appealed?

Those are the submissions we put.

GLASS, A.P.: I think we understand that. Where do we go after that?

MR. HUGHES: Well we go after that, if I may suggest, to the

rest of these submissions in the order in which they appear in the written submisions.

GLASS, A.P.: That would be grounds 3 and 11 at p. 2?

MR. HUGHES: Yes. As we understand the written submissions that were presented in support of this appeal, the only error now alleged under ground 3 is that the trial judge wrongly admitted Ex. E (p.60 of the appeal book). The argument is that once evidence had been given, "That the article ... he intended to hit".

SAMUELS, J.A.: I cannot understand how that could be right in principle and I think my Brother's last question to Mr. McHugh, it is absolutely inpenetrable, no one could concede that the article referred to "X" but "X" sued because he came into possession of a letter

written by the author saying "I intended this". Now how can that be?

IN THE COURT OF APPEAL

NO. 15

(Hughes)

MR. HUGHES: My argument is completely able to accommodate itself and to get around that problem. My central proposition is that the evidence of intention becomes admissible only after evidence has been given which is capable of reaching a reasonable reader, of leading a reasonable reader who understands that the article does refer to the plaintiff. So that if, having an intention within his own breast, the writer writes the article but uses some inpenetrable code which is so effective to mask his meaning that no reasonable reader could read the article and deduce that the plaintiff was being referred to, in other words no one had knowledge of what I have called the connected facts, evidence of intention is totally inadmissible.

GLASS, A.P.: But if it is there, it can augment.

MR. HUGHES: Yes.

GLASS, A.P.: How can that be justified in principle? If the inquiry is before the jury, "Does this article refer to the plaintiff" how can it be relevant that it was meant to refer to him but doesn't?

MR. HUGHES: Because once it is established that reasonable readers had knowledge of facts which are capable of constituting a reference to the plaintiff then on the purely factual question "Does the article refer to the plaintiff", the defendant's intention is relevant. It is a proposition that has been used widely in other analogous fields of enquiry and we give your Honours references there to Cadbury Schweppes in the Privy council 1980 Vol. 2 NSWLR 851 at p. 861, par 33, "Where an intention ... will be effective".

SAMUELS, J.A.: And what is the issue?

MR. HUGHES: The issue is whether it is likely to deceive, just as here in a defamation action the factual question for the jury, once the judge has ruled in favour of the plaintiff on the question of law, namely that there is evidence capable of

being considered by a reasonable reader that the plaintiff was referred to, the question in the passing off case which was Pub Squash was "Was the get up likely to deceive" and I speak subject to correction by Mr. Justice Priestly because I know your Honour was there, as it were. But the question for the jury in a defamation case is would a reasonable reader be likely to take the words as referring to the plaintiff?

SAMUELS, J.A.: Well when you lead evidence which is capable of establishing such then you can say you can then lead your evidence of intention?

MR. HUGHES: Yes, your Honour.

SAMUELS, J.A.: In order to make it the truth. If the jury decides that the extrinsic evidence did not suggest it, you are then left with evidence of intention which doesn't make it the truth but carries it alone and that, surely, would be contrary to your thesis. You will see in Cadbury Schweppe that "Where an intention to deceive is found" where the only evidence is the intention to deceive, it is not difficult for the court to infer, without any other evidence, there is a rule that from intention you may infer deception but your argument is that given evidence of (a) you can then lead evidence of intention. That is a different thing. You are seeking to authorise the admissibility of evidence of intention by arguing that it is ancillary to evidence of another sort but if the other sort is rejectd by the tribunal of fact, what basis is there to justify it?

MR. HUGHES: The justification for it in this cae is involved in a separate head of argument which is that this case is not properly to be regarded

as a case which required any evidence of identification. It is a case that is like the Prime Minister of Australia example given by Sir Frederick Jordan in Consolidated Trust and Brown or the case of the libel in relation to a limited class or group, as in Knupffer v. London Express which we refer to in our submissions.

GLASS, A.P.: The plaintiff was a member of that class.

MR. HUGHES: Then evidence was given that the plaintiff was a member of that class in this case and it was a simple question for the jury whether he was in fact referred to. There was relevantly no evidence which was in issue. It was never in issue that the plaintiff was a member of the West Indies and that he was the captain of the team. In this case there was no issue on the basic question of identification. The plaintiff was not challenged on his statement that he was in the West Indies touring side and was the captain of the team. We could have got a verdict, I suggest, all other issues being in favour simply by proving that fact. I called three witnesses to say that they knew Mr. Lloyd was the captain of the team but that was probably a super-abundance of caution on my part and this evidence of intent is not only admissible on fact but on damages.

78.

MR. HUGHES: And it has been so held in Victoria?

GLASS, J.A. But would that help you if it was not relevant to liability, because that is the way in which you addressed and his Honour refused to direct, so it would not have gone to the jury on liability and if it couldn't then that would be a misconception, wouldn't it?

MR. HUGHES: Perhaps I should refer to what was said in my address (p.54 read). What was not in dispute in any sense was that the plaintiff was the playing captain of the touring side.

SAMUELS, J.A.: But there was an issue as to whether the article referred to Mr. Lloyd; that was disputed by the defendant. The problem is, on one view, this: I think that, although there is, I would think, a very strong argument that the article referred to any member of the West Indies touring party, nonetheless there had to be some formal proof that it referred to the plaintiff. This was disputed and this evidence went to the jury specifically in aid of that issue. Now, it is conceivable, I suppose - I don't know, maybe it is conceivable that the jury could have rejected the other proof and been carried away by this evidence, and if this evidence is inadmissible - and the learned judge, I think, made a particular reference to it in his charge - if it is inadmissible then one is cast back to consider whether the jury retired under a misapprehension as to the evidence.

MR. HUGHES: The first thing is that, as one of your Honours said yesterday, the last thing that the jury heard before they retired to deliberate - indeed, after they had been called back - was that evidence of intention was to be disregarded and it was said in terms that were wide enough to include any evidence of intention. If this Court is satisfied that the article was capable of defaming any member of the West Indies team, it would be satisfied, I suggest, on the basis that the case of identification, apart from this disputed evidence of intention, was overwhelming.

GLASS, J.A.: This, I see, is the vice that might be alleged in this case, the jury could have thought that this material was disparaging only of the players, upon their construction of it, and someone may have said that in the jury room, "We don't have to worry about that, because they admitted that it referred to this plaintiff". In other words, they jumped over the question of whether, upon its proper construction, it could refer to a nonplaying captain, capitalising on an admission that, whatever it said, it referred to him.

MR. HUGHES: But I would answer that in this way: the proposition that the proof of identification failed as a matter of fact because the plaintiff was not playing in this match, he was indisposed through flu, was really a red herring raised by my learned friend. Once you get to the position that this article means that the West Indies team is fixing the result of matches in the sense pleaded in the imputations it must follow as a matter of probability that the plaintiff would be in that activity up to his neck, because matches have to be fixed by a degree of prearrangement, especially when you are fixing a series.

79.

Now, one asks, in considering the question of discretion, what would be the likely position if the plaintiff had to go down to a new trial and didn't tender that disputed interrogatory. The case on identification would be overwhelming. There is a high degree of probability amounting to a certainty, a practical certainty, that given the sort of identification that was given in the article and given the conceded position that the plaintiff was the captain of the team, of the touring side, a jury would find for the plaintiff and a new trial on that issue would be a work of superfluation. If my other argument fails, the discretionary argument, I suggest, should succeed.

Can I just say something about Holten v. Jones; the rationale of that case is that proof of identification does not depend upon establishing that the publisher intended to refer to the plaintiff. In other words, the plaintiff does not have to prove intention. To say that does not need that proof of intention is irrelevant.

GLASS, J.A.: Would you agree with this point that it is irrelevant for the plaintiff to prove intention, just as it is irrelevant for the defendant to disprove intention?

MR. HUGHES: It is not relevant to the establishment of a cause of action in defamation that the plaintiff should prove that the defendant actually intended to refer to him or that he actually intended to defame the plaintiff. The evidence may be admissible for some other reason.

GLASS, J.A.: If it is not going to one of the causes of action, to what is it relevant?

MR. HUGHES: It is relevant to identity, in fact.

GLASS, J.A.: That is an element in the cause of action.

MR. HUGHES: It is proof that can be given, even though you can make a cause of action out without it. There is certain minimum proof to make out a cause of action in defamation; it does not say you cannot add to the proof; there is no principle in Holten v. Jones which says you cannot add to the proof.

GLASS, J.A.: You cannot add to it with an irrelevancy, so we are back where we started.

(Mr. Hughes read from (1909) 2KB 480)

MR. HUGHES: It is that thought that is carried into Haywood v Thompson and is found expressed in Lee v Wilson. There is nothing in Holten v Jones which is to the contrary of that. All that Holten v Jones decided was that you do not have to prove intention. You can prove identification in another way, but it is not the exclusive way. Once evidence has been given capable of leading a reasonable reader who has knowledge of the relevant extrinsic facts to include that the plaintiff was within the ambit of the reference. Irwin v Southdown Press 1976 VR353 is to the same effect. (p. 361 read).

Cassidy v Daily Mirror (1949) 2KB 231 at p. 241 is consistent with the submission I am advancing as to the limited effect of Holten v Jones on this question of intention. There are a

number of other cases in the passing off or trade practices field,

apart from the ones we have cited here, but I will not give your Honours reference to them, they all say the same basic thing, intention is relevant to prove identification, in fact.

The next point, Ground 5, we summarise that the particular grounds upon which the appellant seeks to found its argument that there should have been a verdict by direction as (1) the article sued on was, on its face, incapable of referring to the plaintiff and (2) that no evidence of identification was given. For the reasons I have already advanced, the article was, on its face, capable by the description "The West Indies team" in relation to the series, not just the match, capable of referring to the plaintiff. We draw support from Sir Frederick Jordan's statement in Consolidated Trust Company Limited 49 SR91 (read).

If one takes the view that - and the jury could well have taken the view - there were a large number of cricket followers who read this article because there was a flag or pointer on the back or sporting page to the article on p. 11, the readers of the sporting page were directed to go to page 11 and I think I am right in saying the title of the article "Come On Dollar, Come On" was used as bait. One cannot read what is on p.91 [234] without regard to what is said on p.89 [232] (read). HIs Honour was propounding for decision in this case (and necessarily so in regard to the question involved) what was the minimum proof that has to be given in a case where you have an article which defames someone who is not named or is capable of defaming someone who is not named.

SAMUELS, J.A. The reference to Knupffer v London Express Newspapers, of course, may be less than wholly accurate because Hough was really a true innuendo case.

MR. HUGHES: The same principle must apply to both, but there seems to be a relaxation of the principles both in relation to true innuendo cases and identification cases, because there are cases in which witnesses have been allowed to give the evidence of identification or as to meaning. As already said in these submissions, in principle it is wrong.

GLASS, J.A.: I would have thought it would create all kinds of difficulties if you put the extrinsic knowledge together with the identifying material in the matter published, and it seems to the judge it is still not enough to be capable of referring to the plaintiff, how do you handle the evidence of a witness who came along and said "Well, I understood it referred to him"?

MR. HUGHES: How do you handle the evidence of a witness as in Hough, which was a true innuendo case; the witnesses called by the plaintiff must have struck the plaintiff's counsel as with a thunderbolt, because they both said they knew the real Mrs. Hough, the plaintiff, and of course they didn't take the article to mean that she was living in concubinage with the curly headed boxer who was Mr. Hough.

GLASS, J.A.: It seems to be well established that you cannot call anyone to say "I understood the article to mean this". One would think, as a result, you cannot call anybody to say "I understood it to refer to the plaintiff".

81

MR. HUGHES: That is the point, and there is no case which says otherwise. There is Kruse v Lindner in the Federal Court, some members suggested connecting evidence there, but it was not necessary to the decision because no evidence of identification of any kind was called and, on the other hand, your Honours would find in a carefully considered judgment by Blackburn, J. in Vlasic v Federal Capital Press (1976) 9ACTR 1 a statement that, in principle, it was not

necessary to call a witness who says "I took it to refer to the plaintiff" (p. 10 read).

We do not rely on Knupffer's case. We put Mr. Lloyd's case to the jury on the basis that his name and position as captain of the West Indies team, in the sense of the touring side, would be well known, that any reader of the article would know that a reference to the team would be a reference to him, and that appears at p. 54 of the Appeal Book. We also put it in part of the address which has been handed up by way of supplement to the Appeal Book (p. 70 transcript read [155.9-156]). So it was put as a Knupffer type of case or a Vlasic type of case, even though we introduced the additional proof from those three witnesses who proved extrinsic facts, simple extrinsic facts of their knowledge of the plaintiff's position.

GLASS, J.A.: If the matter published bore a construction that there was a prearranged plot, then that could very readily be an imputation adverse to the captain of the team, even though he was not playing, but if, on the other hand, it didn't rise higher than the fact that the individual players didn't try their hardest to win this match, that is not an imputation that so readily is attributable to the nonplaying captain.

MR. HUGHES: I don't want to go over the question of the imputations again.

GLASS, J.A.: But that is how they are interrelated.

MR. HUGHES: I have endeavoured to suggest to the Court and to support the suggestion that this article relates to the performance of the West Indies team in the series, including this match - in particular this match and future matches. Of course, the validity of this point depends on the court's reaction to the argument about the necessity for leave (p. 5 par. G read).

GLASS, J.A.: Was that debated before him?

MR. HUGHES: He said that the words had the capacity to convey the imputations involving the plaintiff in fraudulent conduct. It is not right for my learned friend to say that -

SAMUELS, J.A.: Are you putting that the decision of Maxwell, J, excludes the possibility of the defendant taking the point that the plaintiff failed to prove the article referred to him?

MR. HUGHES: Yes, because the imputation in a case of an article that does not specifically name the plaintiff, the question before Maxwell, J, was whether the article was capable of conveying the imputation of and concerning the plaintiff that he had been engaged in this.

82.

SAMUELS, J.A.: How should Maxwell, J, have approached the matter?

GLASS, J.A.: He didn't have any evidence by which the plaintiff could be linked to it.

MR. HUGHES: He didn't need any.

GLASS, J.A.: I would have thought he merely determined the defamatory capacity of the words in relation to anyone proved to have been a subject of the publication, no one had been proved beforehand.

SAMUELS, J.A.: He may have taken the view it could have been excessive proof, but I don't know how it follows from his decision, which really is in the nature of a demurral.

MR. HUGHES: The nearest analogy is a demurral, because it is not a strike out.

GLASS, J.A.: There are two issues, intention and identification; I would take his judgment to be limited to the former.

MR. HUGHES: My learned friend sought to develop an argument that the intrusion into the case (albeit without objection on his part, because there was no objection taken at any stage) of evidence dealing with the plaintiffs position in the team - I am talking about oral evidence, which we called to prove that people knew that Mr. Lloyd was the captain of the touring side. Exhibit N was objected to, it was merely a piece of evidence which could be considered by the jury on the footing that people who followed cricket in The Age or descriptions of cricket in The Age would have seen Mr. Lloyd's name as the captain of the team in the article published on 19th January.

GLASS, J.A.: Missed the description of the match and picked up this article -

MR. HUGHES: No description of the match on 19th January, but dealing with the forthcoming match and its significance.

GLASS, J.A.: That's right. So if they had read who was going to play and "Come On Dollar, Come On", but didn't read an account of the match which told them who actually played, you say that they would include among others the plaintiff who was defamed.

MR. HUGHES: It was a grain of sand on a slip of identification, no more. The case which was essentially put to the jury, in any event, was that Lloyd was widely known and would be widely known to readers of that article, cricket followers - not that it would have been restricted to cricket followers, but cricket followers as the captain of the team and would be identififed by a reference to the team. If there was any mistake in the minds of readers about Mr. Lloyd's position in relation to the match of 19th January, it was a mistake that was engendered quite innocently, of course, by the defendants own publication and the relevant fact is the belief engendered by newspaper article of 19th January, Ex.H, the belief that Mr. Lloyd was

playing, because there he was in the list of players.

In any event, the misreception of Ex. N, is it was misreceived - and we submit to the contrary - is not a fault or an error that in the exercise of discretion should lead to a new trial.

Now, grounds 9 and 10. The notice of appeal may not have complained of the wrongful admission of Ex.N, but obviously that should not stand in the way of my learned friend arguing it. We say, dealing with pars. 2 and 3 of my learned friend's submission on the alleged misdirection in connection with identification, the passage in the trial judges summing up at pp. 78 I to Q [122] is not properly to be read in the light of a discussion recorded at p. 54P [112.4-114.2], which took place in the absence of the jury. Actually, your Honours will see His Honour did not direct the jury that on the issue of identification they could take into account that readers of the article sued on would include persons who mistakenly believed that the respondent played in the match of 19th January. In any event, we say a direction to that effect would not have been wrong for the reason I have just endeavoured to express. Such a belief would not have been outside the limits of reasonable deduction by a sensible reader and your Honours will see several statements in Morgan v Oldhams Press, Lord Reid, Lord Morris and Lord Pearson, which emphasises th wide limits or ambit of reasonable deduction. So we say that the particular direction sought at p. 92 [235] of the Appeal Book was not warranted. My learned friend's argument really is based on false premise.

GLASS, J.A. You say that he misconstrued what the judge said?

MR. HUGHES: Yes. I have dealt with ground 4 in the narrow, and in the wider sense I have mentioned Jones v Dunkel 101 CLR 304 (read)

MR. HUGHES: After setting out the relevant evidence his Honour said this, "but that is only to say .....judicial mind."

GLASS, J.A.: That is on servants or stranger?

MR. HUGHES: Yes, your Honour.

GLASS, J.A.: That is what you call the equipoise.

MR. HUGHES: Yes but you cannot make the choice between equipose conjectures, it has got to be something better. Falsity and recklessness, we say that his Honour correctly left recklessness in publishing the article as an element in damages, "evidence of recklessness....prior reference to the plaintiff." - that appears at p.46T of the appeal book - "and despite the knowledge of the defendant....rules of play". The two newspaper articles are Exhibits L and M.

Mr. Chappell gave evidence as to the course of play and so did Mr. Caldwell, he was the cricket administrator who was the referee for this match, and we say that the appellant's own publications demonstrated both the recklessness and the falsehood of the article complained of and of course so do the disclaimers that I read this morning. We say Andrews' case - this is familiar territory and I do not want to read too much or it - is authority for the proposition that the jury may infer that additional hurt to a plaintiff's feelings flows from the circumstance that an article reflecting upon his integrity was false and was recklessly published.

May I simply give your Honours references to the relevant passages in the judgment: Hutley, J.A. at 241, 242, 243 and 244, your Honour Glass, J.A. at pp. 248-250 and it is one of life's little ironies that here am I relying upon the doctrine that I thought, I hope

hard, but certainly unavailingly, to prevent being established in Andrews' case where my learned friend's role and my role were reversed, but there it all is. If one goes back through the whole of history to 1969 in Rigby v. Associated Newspapers reference is given there, your Honours will see, that Walsh, J., albeit in the context of the 1958 Act, propounded the view that hurt could be presumed from flasehood of common sense, lies of the kind that your Honour Glass, J. expounded in Andrews.

GLASS, J.A.: I think as one sees in domestic altercations the most wounding comments are those that are wholly baseless.

MR. HUGHES: Your Honour is resiling from what your Honour said in -

GLASS, J.A.: I think it is more wounding if it is false as well as defamatory.

MR. HUGHES: And reckless. Ground 12 we say that his Honour's directions on identification were adequate and we have dealt with the three grounds of objection to those directions. If the jury found the imputations either on the higher plane or the lower plane, it matters not, they were entitled to take the view that the range of publication was large.

85.

GLASS, J.A.: I am not sure what you mean by the higher or lower plane.

MR. HUGHES: Well, actual fraud or suspected fraud.

GLASS, J.A.: We put this to you before that if actual fraud could not reasonably be imputed, wholly suspected fraud, would a new trial not be necessary because we do not know on what basis the jury found for the plaintiff?

MR. HUGHES: No, your Honour, it would not be necessary in this case because the jury have to - while they have to consider the imputations they are left with two groups as alternatives and the simple proposition for which we contend is that $100,000 is an eminently reasonable verdict whichever combination ot imputations the jury chose.

GLASS, J.A.: What about liability?

MR. HUGHES: It does not matter. They found that the article was defamatory and the plaintiff in the sense contended for by some one or more of the imputations. The only question then is can that verdict in the amount of $100,000 be supported as not exceeding the bounds of reason?

GLASS, J.A.: Aren't they different causes of action?

MR. HUGHES: In a sense but only a very limited sense because the jury has to bring in a global verdict.

PRIESTLEY, J.A.: Yes, but if the material won't bear the imputations of actual fraud but will bear the imputations of suspected fraud, if that is what the Court arrives at.

MR. HUGHES: If the Court arrives at that -

PRIESTLEY, J.A.: Well, it is unknowable whether the jury found on a cause of action open to it or not.

MR. HUGHES: Yes it is because the jury were directed, and this is conceded, that in relation to imputations one or two they could only find one of them.

PRIESTLEY, J.A.: Yes but on the assumption that the actual ones were not open, the suspected ones were open, there is no way of knowing.

MR. HUGHES: There is no need to know, your Honour, because the amount of $100,000, the global sum they award, is eminently reasonable.

GLASS, J.A.: It is not the damages we are putting to you.

MR. HUGHES: That deals with counts and raising separate causes of action.

GLASS, J.A.: So do these four separate causes of action.

MR. HUGHES: Well, it cannot be regarded as being as plain as that, your Honour.

86.

GLASS, J.A.: Doesn't the Act say so?

MR. HUGHES: The cause of action in respect of the imputations but the jury have to give a global verdict.

GLASS, J.A.: Why did you and Mr. McHugh, such experienced defamation counsel, not take separate findings?

MR. HUGHES: Begg, J. on one occasion declined to do it and perhaps it is also easy to be wise and learned in hindsight.

GLASS, J.A.: It could not be done before the Supreme Court Act but now there is ample authority for doing it.

MR. HUGHES: Begg, J. has manifested a very considerable disinclination I think my learned friend will agree, to do that.

GLASS, J.A.: I just interrupted you where you said the higher and lower plane it would not matter for damages perhaps but it matters very much for liability. I can see the force of that but in any event both the higher plane - they are all open?

MR. HUGHES: Open, because that question falls to be resolved by the beginning paragraphs and the end paragraph coupled up with all that is in the middle, contrived spectacle, playing with the faith of the people, criminal activity, fixing matches, lack of sporting honesty and the very important aspect, or I submit it is very important, to which I drew attention this afternoon, the author's clear distinction between sporting activities involving an unconscious loss of the impetus to win on the one hand, that is not playing with the faith of the people, and on the other hand what had been happening and what was going to happen in this series and if that is not an actual imputation of actual fraud it is very difficult to see what could be.

Now ground 14 was the new ground.

GLASS, J.A.: I asked Mr. McHugh this so I will ask you what would you nominate as the upper limit of the jury range in this case?

MR. HUGHES: $300,000. It was a very moderate verdict. We have got Andrews in the history books, we have got Bickel - Bickel, the author of whom it was said that in a review the contents of the book were misrepresented and that he lacked moral concern for the future of humanity arising out of the use of nuclear weapons - $180,000 - also in the history books, and the case the other day -

GLASS, J.A.: So you are going to genetically malform somebody's grandchildren is perhaps even more serious?

MR. HUGHES: It did not say that.

SAMUELS, J.A.: It criticised him for not dealing in the book with the philosophical aspects of humanitarian aspects of nuclear power and he was outlining the history of nuclear power.

MR. HUGHES: $20,000 in a case like this would be

SAMUELS, J.A.: Looking at this case, I suppose if you take all the imputations this is a suggetion - well, an allegation that this long-serving, very well respected cricketer, the father of his country, has engaged in a very serious and blatant fraud for money and I

87.

suppose I might say if it applied to him and he is the captain and anyone who knows anything about cricket would know he is a good many years older than many others and has been there for a long time, I suppose it is a very serious allegation.

MR. HUGHES: There was no adequate apology; there were aggravating circumstances that the trial judge allowed to be put to the jury, and rightly.

GLASS, J.A.: Why was the apology at all, it was buried away in some -

GLASS, J.A.: And the second one.

MR. HUGHES: The second one was conditional. It is very suitable as a disclaimer for the purpose of dealing with the defence of comment but it was "if I trod on your toes I'm sorry."

GLASS, J.A.: "We did not mean that but if anyone thought we did it is totally wrong."

MR. HUGHES: "And utterly false." But the essence of an apology is that it should be a frank avowal of fault and unconditional. That was a view open to the jury to take and I was allowed in my address -

GLASS, J.A.: To encourage them to take it?

MR. HUGHES: To encourage them to take it and my learned friend, well knowing the rules, did not complain.

Those are the submissions we want to put to the Court.

MR. McHUGH: Can I deal with my learned friend's submissions in the order in which he dealt with them. The first point that he made was that there was no evidence that the writer thought that he was a servant or agent of the appellant. It is intersting, in our submission, as my learned junior pointed out to me, that whereas in s.34 one must be able to show both from the context and the circumstances that the publication did not purport to be the comment of the defendant or a servant or agent of his, there is no prohibition about inferences from context and circumstances in ss.32 and 33 and of course we rely on the context and circumstances of the publication as one limb of our submissions but not only do we rely on the context and circumstances, we rely particularly on interrogatory 7 and interrogatory 11 and my learned friend in his submissions concedes that the word "defendant" throughout those interrogatories is to be read as including the defendant's servants or agents when one reads interrogatory 7 and, more particularly, interrogatory 11 at p.67 of the book that is quite fatal to his case. And far from the distinction between the defendant and author in interrogatory 11 helping him, when you read the question, which my learned friend did not do, his case falls to the ground.

Could I just read the whole of interrogatory 11, p.67, because I skimmed over it, and just drew the Court's attention to it. It says, "As to each document....when, where", and I emphasise these words, "by whom and to what effect," and the question is answered "the defendant", "the defendant by its servants and agents relied

upon each of the articles....interrogatory number 6 above," and then in answer to the question "By

whom?" It is the author obtained and/or read each article on or about the date specified in the answer. The author used the articles as source material and background information for the preparation of the material complained of.

So what that makes clear is that the only servant and agent of the defendant who used those articles was the author and that puts a total end to my learned friend's attempt to argue, "Well, it is open to the inference that there were some people doing the research, feverishly beavering away at these documents, looking at them, when this stranger came in from the cold with his article and they just checked it". Now, your Honours, with respect, it would be well open to a jury to take the view that - and indeed 11 compels the only view that it was a servant or agent.

Can I also answer in the written submissions that were handed up this morning, there was an express submission that a freelance journalist could not be an agent of the defendant. Your Honours, what Falcke's case makes plain is that the term includes any person who is doing something on behalf of the defendant and it may be on what the defendant himself could have done and that case is borne out by the cases to which we refer in our written submissions which I did not read but namely Heyn's case at p.8, paragraph 6 of our submissions, and Doolan's case. In Heyn's case it was held that for the purposes of one of the treaties the expression "agent or servant" was wide enough to include the servants of the independent contractor who was doing our work. So the servant of an independent contractor was our agent and that was decided in Heyn's case.

In Doolan's case it was held that the word "servant" in a railway statute in its context was wide enough to include a person -

GLASS, J.A.: I think it is a matter that has been much discussed. You put, I believe, that

"agent" has a different meaning in tort law than in contract law. My brother Priestley points out something on this argument between your and Mr. Hughes about s.101 etcetera may turn on the actual order that Maxwell, J. made. Now I do not think we have that in the appeal book. Can you get it for us?

PRIESTLEY, J.A.: I do not mean the final order, I mean the order under part 31 rule 2A. We have struck some instances here where in the first instance judged go ahead and decide matters without first making that preliminary order. It makes it difficult later on to see what they were doing.

GLASS, J.A.: We ought to have both really.

MR. MCHUGH: It is highly unlikely that any formal order formulating a question was made. My experience is it is just never done.

GLASS, J.A.: Where was the originating process then that got the question before his Honour?

MR. MCHUGH: You have a Friday list and the matter is just put in and it is argued on a Friday list on a directions sort of day.

GLASS, J.A.: You check for us. If there was any order before we will have it.

MR. MCHUGH: Yes. At p.105Q [17.9] in the book the trial judge finishes off his judgment by waying, "The defendant's application....is refused."

GLASS, J.A.: It was not that at all, was it?

MR. MCHUGH: No.

SAMUELS, J.A.: In a way it was.

MR. MCHUGH: It is a first step. If the trial judge makes the finding in favour then you move

on to the second but of course it is not for the simple reason that judges allow plaintiff's to replead and imputations are struck out by Hunt, J. Clarke J. and other judges every day but maybe all the imputations are struck out and they just say "replead."

GLASS, J.A.: Application for judgment has a technical meaning as summary judgment and interrogatories too, a different part.

SAMUELS, J.A.: If you are there, suppose the judge gives judgment and he says, "Right, I will strike out these four imputations," counsel for the applicant would then rise and say, "I ask for the judgment", would he not?

MR. MCHUGH: Yes.

SAMUELS, J.A.: Then there would be an argument as to whether a right to replead should or should not be given.

MR. MCHUGH: If counsel for the plaintiff said, "That is the only imputation I can rely on" that is the end of it.

GLASS, J.A.: They would say "We either give you leave to replead or start another proceeding".

MR. MCHUGH: That is probably right, yur Honour. Could I now deal with my learned friend's notice of contention because that was the next thing that he dealt with. I want to make two very brief submissions in respect of the proper material. My learned friend said that the visual images are not included and he relied on the answer to the interrogatory. In our submission you would not construe an interrogatory asking you for information that you had as constituting what you yourself had observed and was present in your mind.

Secondly, in so far as my learned friend points to Exhibits L and M as material that was in our possession, I would point out that those

Articles were written by other people, not Thorpe and he is in no way bound by any comments and indeed, for that matter, any statements in that material. That may be material my learned friend could rely on if he wanted to in respect of defeasance, an issue on which he carries the onus of proof under 33(2) and say you could not have had an honest belief but in our submission he cannot say you must take that into account or -

GLASS, J.A.: You nominated the proper materials for comment in your defence.

90.

MR. MCHUGH: We said these were all the materials that we had. That was all the information but we were not bound by everything that was there. For example, there was a passage in Exhibit M which my learned friend did not read, he stopped reading where it went on after Mr. Richards had said, "We did not come here to throw the match, we came to try our very best," "But the result will be a relief....last night's game." But in our respectful submission my learned friend's whole approach to the principles applicable to a defence of comment were erroneous and not only at one point but at several points and the first point I want to join issue with him about is on the view that you ask could a hypothetical honest man have made this comment? That is the way that the matter was expressed by Hunt, J. in Bickel's case.

Now what we would submit is the proper construction of ss.32, 33 and 34 is simply to ask whether the material could be identified as comment. If it could be identified as comment by the jury and the other conditions are fulfilled, that is it relates to a subject of public interest and so on and it is all proper material for comment, the defendant is entitled to succeed unless the plaintiff succeeds in the defence under sub-section 2 ofeither s.32, s.33 and s.34.

What happened in Bickel was that I opened to the jury for the plaintiff on the very

basis that I have just put now as the proper view of the law and Hunt, J. said to the jury I told them wrongly and that the law had been changed in favour of defendants and he formulated the view and Mr. Hughes, as appears later in the book, agreed with it and I saw a tactical advantage for myself because I was then able to say no honest man could have made these comments on this book so I agreed to fight that case on that basis. It created this difficulty for me at the first trial that I had opened the Arena articles on the basis they could only go to the issue of honesty. Then when it was agreed that the case was to be fought on these other principles it became plain that there was no issue that the Arena articles could go to and I was caught in a dilemma and the first jury was discharged after some six days but then the case went back again and it was fought again at the second trial on the same principles as expounded in the first trial and the plaintiff obtained a verdict on the issue that obviously no honest man could have made the comment on the article but we would submit that the proper test under the Act is simply is it comment which satisfies -

GLASS, J.A.: Is it comment? Is it based on proper materials and is it in the public interest, that is the view I take, and it was expressed in Austin.

SAMUELS, J.A.: What happened in Bickel in the Court of Appeal?

MR. MCHUGH: I wasn't up here, Mr. Shand did it up here.

MR. HUGHES: That was only an appeal against the discharge of the jury.

MR. MCHUGH: The argument was that the Arena articles were still admissible and this Court rejected that view.

SAMUELS, J.A.: Yes, I do not recall there being any argument on ss.32, 33 and so on and a change if there is a change in the law. Am I right in that?

MR. MCHUGH: I was not here, your Honour.

GLASS, J.A.: We have actually dealt with this in Austin. We said, as I recall, that this is a code, there is nothing left to the defence of comment on the matter of public interest except what condition 7(11) allowed and it does conclude with two issues you raised at common law, namely, whether it was governed by malice which has gone and likewise it has attracted the old issue, which was probably for the plaintiff to disprove, that it was an opinion that a fair-minded man could reach on the material; that has gone in favour of a different test, namely that the comment was an opinion that the defendant or his representative did not have, so it is an actual enquiry not a hypothetical enquiry.

MR. MCHUGH: We would submit on the proper construction of the Act that is so. In the report they tendered , to take the view there was no change in the law and I until recently had never read the report deliberately -

GLASS, J.A.: I read it in connection with Austin. I think they do say there is a change.

MR. MCHUGH: I got the impression, in fact my only reading of the reports was those paragraphs I read the other day, on the basis it only influences your approach to the Act. So we would submit first of all that is the first point. As an alternative, even on Mr. Hughes' approach that there must be the honest man's comment for the reasons I will demonstrate in a moment, we would say there was still an amount of material to go to the jury on that matter.

There is a second point I want to join issue with my learned friend about. Until Kemsley v. Foote in 1952 the general view seems to have been that a defence of fair comment could not succeed unless the facts upon which it was

made were stated in the article and if those facts were neutrally stated the defence failed. That was never correct as the fair comment cases on theatres and so on show but what Kemsley v. Foote made plain was that if the comment could be recognised as a comment and on some stratum of fact there did not have to be any facts in the article justifying the comment, a plaintiff could come along at the trial and say "This is comment and these are the facts which showed it was an honest comment" and your Honours will remember that in Kemsley v. Foote what Kemsley sued on was the heading of an article which simply said, "Lower than Kemsley" and the rest of the article was about another newspaper proprietor and Kemsley was not mentioned from beginning to end and the defendant pleaded a fair comment defence to the words "lower than Kemsley" and Mr. Diplock, who appeared for the plaintiff, sought to strike it out on the basis it was fair comment and the House of Lords and the Court of Appeal said no, it is comment, it indicates what it is, namely, Kemsley's newspapers, and the defendant can come along at the trial and point to facts, even though the reader did not have them in his possession when he read that article, which would justify the comment.

GLASS, J.A.: There would have to be facts which could be thought to be within the possession of readers.

MR. MCHUGH: No, your Honour, what had to be in the possession of readers was not in possession of readers but which the readers' mind was directed to.

92.

GLASS, J.A.: Externally to the article?

MR. MCHUGH: But not in terms, just a simple sub-stratum of fact. The subject matter of the comment was Kemsley's newspapers and to show how low his newspapers were the House of Lords said you could go and you could particularise 25 facts

and if you succeeded in proving one which would support the comment the defence succeeded and the relevant passages are in Porter L.J.'s speech.

GLASS, J.A.: Are you wanting to support this defence by reference to statements outside -

MR. MCHUGH: We submit that we are not confined in supporting the comment, the proper material for comment, to support the comment to show that an honest man, if you like, or the comment was supportable we are not confined to the particular facts alleged in the article.

SAMUELS, J.A.: You are confined to your particulars, aren't you?

MR. MCHUGH: Only in the sense -

SAMUELS, J.A.: You never attempted to amend them.

MR. MCHUGH: But there is material in terms of cross-examination, facts drawn out at the trial which, if I remember rightly, I did rely on, in fact I did rely on them before the trial judge so I relied on those facts on the argument.

MR. HUGHES: Yes but they related to the match.

MR. MCHUGH: I do not run away from that point. I was just going to take the Court to Kemsley v. Foote (1952) A.C. 345. At 354 he says, "It is not as I understand contended.....undesirable way". Over on 356 his Lordship says, point 5, "The question therefore....in Hodges." Over on p.357, the last sentence in the second paragraph about point 3, "Is there subject matter...might take", and then point 6 on the page, "All I desire to say..."

So here the bases of the comment are the various things set out in the particulars just as the basis of the comment there was that Lord Kemsley is the active proprietor of and responsible for the Kemsley press and the facts

which support the comment are outside that material and here we would say that the only facts needed to support the comment in this particular case were that the West Indies had lost a match to Australia who were the under-dogs and that was proved at appeal book 38C; if the West Indies had won there would have been a W@est Indies-Pakistan final, and that is at 45 of the book; thirdly, West Indies-Pakistan drew far smaller crowds than a West Indies-Australia match.

GLASS, J.A.: Have you gone away from your basis of particulars?

MR. MCHUGH: Bases of comment are different from the facts you rely on to support it, your Honour. That was the very point that was made in -

GLASS, J.A.: I was putting to you earlier that that common law defence has gone, it has been replaced by a new statutory defence which states its own condition and I would have thought it requires statements of fact relied on as proper material could be matters of substantial truth.

MR. MCHUGH: With respect not because if your Honour reads section 30(1) it says, "For the purposes of this section...public interest." It says a statement of fact which is a matter of substantial truth is proper material for comment for the purposes of this section "whether or not...public interest." So what it says is if you prove a fact is true, whether or not it relates to a subject of public interest, that can be proper material for a comment.

GLASS, J.A.: Even if it is totally false?

MR. MCHUGH: Not if it is totally false, your Honour, but it does not have to relate to a matter of public interest.

SAMUELS, J.A.: The point put now is it has to be substantially true.

MR. MCHUGH: That does but that does not mean - sub-section (2) does not qualify sub-section (1) but explains it.

GLASS, J.A.: It is hard to see why it does not. You see, to be a proper comment under (1) or (2) it has to be a statement of fact or a protected report. If it is a protected report you can publish it with impunity, if it is a statement of fact you would be liable in defamation, if it happened to be false and (2) has taken up the common law which said to prove a defence comment it must be based on facts proved to be true.

MR. MCHUGH: No because for a start sub-section (3) overcomes the necessity to have all the facts true because it says that the comments based on proper material for comment or the defence available, "if but only if...to which it is."

SAMUELS, J.A.: Do you say because of sub-section (1) of s.30 you can base comment on statements of fact which are untrue?

MR. MCHUGH: Well, you certainly can if they are a protected report.

SAMUELS, J.A.: Looking at sub-section (1) proper material for comment means "material which..."

MR. MCHUGH: We are at cross-purposes. His Honour Glass, J.A. was putting something to me -

GLASS, J.A. : Are you submitting that a statement of fact which is not shown to be substantially true can be a proper material for comment?

MR. MCHUGH: Only if it is within a protected report but that is not this case at all.

GLASS, J.A.: If it is not a protected report then any statement of fact will not be proper material unless it is substantially true?

MR. MCHUGH: Yes but this case has got nothing to do, in our submission, or is not necessarily covered by the first limb that it consists of statements of fact. In other words, let us test Kemsley v. Foote -

GLASS, J.A.: You are saying it is based on a protected report?

MR. MCHUGH: No, your Honour, is to be put against me that s.30 upholds the decision in Kemsley v. Foote? Let it be assumed that Kemsley v. Foote was to be decided here today. The only words in the article referring to the plaintiff are "lower than Kemsley".

GLASS, J.A.: I think I can answer the question that it was not put against you and I do not think it could be soundly put against you that all of the statements of fact relied on as proper material for the comment must be in the article complained of. If they are, as in Kemsley v. Foote, notorious facts likely to be known to the readers of the article and that is good enough. I say to that extent, speaking for myself, I would be with you but I would think that the onus would be on your to prove that those statements of fact, whether internal to the article or external to it, are substantially true in the course of proving that they are proper material for comment.

MR. MCHUGH: Comment has got to be on proper material for comment but the point is that proper material for comment may fall into one of three categories, it may be that it is made of statements of fact, those statements of fact whether they are in or without the article are facts that have got to be proven true and secondly it may be for the reason it is a protected report within the meaning of s.24.

GLASS, J.A.: You just have to prove it is protected?

MR. MCHUGH: Or for some other reason which would have attracted the defence of fair comment on a matter of public interest at common law.

PRIESTLEY, J.A.: That is your third category?

MR. MCHUGH: Yes. Now in our submission the third category covers the Kemsley v. Foote-type of situation and that the first situation, that is statements of fact, probably only consists of those statements of fact that are in the article.

PRIESTLEY, J.A.: Why wouldn't the Kemsley v. Foote situation be in the first category in 30 sub-s.(1)?

MR. MCHUGH: Well, if that is meant only to mean no more than this that it is proper material if you finally prove one out of your 25 facts which would support the comment, if it means that then I have got no quarrel with it.

PRIESTLEY, J.A.: I do not think it disposes of the question I am asking.

MR. MCHUGH: Well, we would submit it does for this reason, that if a person who has just made a comment but by implication has referred to a sub-stratum of fact and he particularises 25 facts he does not have to prove those 25 facts are true to have proper material for comment, it is sufficient he proves one of them which supports the comment.

PRIESTLEY: And that would be a statement of fact within the first category?

MR. MCHUGH: If that view is taken we have got no problem.

(Further hearing adjourned to 9.15 a.m. Monday, 10th September 1984.)

IN THE SUPREME COURT)
OF NEW SOUTH WALES) NO. C.A. 181 OF 1984
COURT OF APPEAL) C.L. 9702 OF 1982

IN THE COURT OF APPEAL

NO. 15

(McHugh)

CORAM: GLASS, J.A.
SAMUELS, J.A.
PRIESTLEY, J.A.

DAVID SYME & COMPANY LIMITED -v- LLOYD
THIRD DAY: MONDAY, 10TH SEPTEMBER, 1984

MR. MCHUGH: Your Honours, at the adjournment I was dealing with Kemsley v. Foote which in our submission decides that a matter can be defended as comment even though the specific facts relied on to support the comment are not in the article. It is enough that the comment identifies or indicates the factual matter or the subject matter or, as I think was put in that case, the substratum of fact upon which the comment is based. In Kemsley the substratum of fact on which the comment was based was that Lord Kemsley was the active proprietor of and responsible for the Kemsley Press (p.358). Their Lordships said any fact sufficient to justify the comment lower than comment entitled the defendant to succeed.

So they draw a distinction between the substratum of fact or the subject matter, that being that Lord Kemsley was the active proprietor of and responsible for the Kemsley Press, that was the subject matter or substratum of fact, and the facts which were delivered by particulars which made that an appropriate comment.

The question then arises as to whether in New South Wales the defendant must prove the particular facts which make comment appropriate, or whether it is now sufficient in a Kemsley v. Foote type case to simply point to subject matter. In other words, does the defendant, because of s.30(2), have to prove the truth of

sufficient facts or all the facts or any of the facts which he had in mind; or is it enough that he simply indicates subject matter upon which the comment is based in a Kemsley v. Foote type case, leaving it to the plaintiff to prove under sub-s.2 of the relevant sections that he did not have the appropriate opinion?

If s.30(2) governs the Kemsley v. Foote type case, the substratum of fact clearly does not have to be a subject of public interest. Because s.30(2) provides "A statement of fact which is a matter of substantial truth.....a matter of public interest." If in a Kemsley v. Foote type of situation where there are no facts the basis of the comment in the article, if s.30(2) applies to it, there will be an extraordinary widening of the law even though the comment must itself relate to the public interest. (Reads s.30(1)). Because what it means

your Honours, is that if the defendant must point in a Kemsley v. Foote type case to the truth of facts outside the article, then it will enable the comment to be defended by proof of defamatory facts not related to the public interest and which would be unpublishable, and which is really contrary to the spirit of s.15 of the Defamation Act which provides that a defence of truth alone is not a sufficient defence but the imputation must relate to a matter of public interest or be published under qualified privilege.

GLASS, J.A.: These are all perplexing possibilities, Mr. McHugh. What is the particular submission you are putting to us now?

MR. MCHUGH: The submission I want to put to the court is that the defendant in the present case does not have to point to facts in the article as to the basis of the comment, but simply has to point to subject matter. The alternative submission I am going to put is that if you have to point to facts, because of s.30(2), and prove the truth of them, nevertheless in the present case we would satisfy that alternative test.

But pursuing the point I was putting about whether or not Kemsley v. Foote type comment requires proof of the substantial truth pursuant to s.30(2), may I give two illustrations as to how or what the law of comment would become if the Kemsley v. Foote type case may be made simply of facts which have no relationship to the public interest.

Supposing you had a comment which said "The plaintiff's performance as a professional sportsman has been unsatisfactory in my opinion because of his unsatisfactory home life." The comment relates to a matter of public interest. It is a comment on his performance as a professional sportsman. But the substratum of fact upon which it is based, namely his domestic situation, is not itself a subject of public interest, and if a defendant could justify that sort of comment under s.30(2) simply by proving the substantial truth of the facts he is relying on, then he is entitled to make that comment even though the subject matter of it does not relate to the public interest, and only the comment relates to the public interest.

SAMUELS, J.A.: It is your submission that he can?

MR. MCHUGH: No, your Honour, it is my submission that in that sort of situation he could not, and the reason he could not is in our submission the better view is that s.30(2) only applies to statements of fact set out in the article. In that sort of case, if you have set out the facts in the article, then if they are substantially true you may comment on them provided your comment relates to a matter of public interest. But if your facts in the article are defamatory, then you have no defence to those facts unless you can rely on s.15 or some other section.

That is made plain by s.35 which says "Where a matter complained of includes comment.....upon which the comment is based." So what s.35 is doing is this - and it seeks to answer in a side note

the problem of Orr v. Isles which goes back to Goldsborough v. John Fairfax 34 S.R. - if the facts are set out in the article upon which the comment is based, and if they are defamatory facts, you cannot defend those facts under a plea of fair comment. You have to rely on one or other of the facts.

Your Honours will recall that the majority in Orr v. Isles took the view that you could defend those facts under a plea of fair comment even though the publication was not for the public benefit. Section 35 overcomes that. But in our submission the better view of s.30(2) is that it is dealing only with statements of fact which are set out in the article, and the Kemsley v. Foote type case is really covered by the words "for some other reason be material on which comment might be based for the purposes of the defence.....on a matter of public interest."

So in the Kemsley v. Foote type of situation your comment has to be a comment on a subject of public interest; and if it is, and it is a comment on that subject which sufficiently indicates the substratum of fact or the subject matter, then prima facie you have made out your case subject to the defeasance provisions in ss.32, 33 and 34.

SAMUELS, J.A.: So the facts upon which the comment can be made can be facts set out in the article which must be matters of substantial truth, although not a matter of public interest?

MR. MCHUGH: Yes.

SAMUELS, J.A.: And facts external to the article to which the article points, which do not have to be proved to be substantially true, do have to be matters of public interest?

MR. MCHUGH: Exactly. Section 35 takes up the case where the facts are set out in the article and says you have no defence as to those facts

under Division 7 dealing with comment. Those facts have to be defended under other provisions of the Act such as fair report, justification, qualified privilege and so on.

GLASS, J.A.: What do you want to get out of this? Some of the matters of fact external to the article have not been proved to be substantially true and you did not have to prove them?

MR. MCHUGH: What we submit is that this case is a Kemsley v. Foote type case in which the comment is made on the series, on the results of the game and so on. That indicates the subject matter of the comment. Under the common law it would have been sufficient for us to deliver particulars to support those comments. Since the enactment of the Defamation Act and the insertion of sub-s.2 in ss.32, 33 and 34, in our submission it is no longer necessary for us in a Kemsley v. Foote type case to bring along facts to justify the comment. It is enough that there is comment on proper material which is proper material within s.13, namely a subject matter which under the previous law would have been a fair comment on a matter of public interest. Having done that, in a Kemsley v. Foote type situation the defendant succeeds, subject to the defeasance provisions about the holding of the opinion represented by that comment.

98.

GLASS, J.A.: It was always basic doctrine at common law that a defence of comment could not succeed unless the factual basis for the comment was shown to be true.

MR. MCHUGH: No, because Kemsley v. Foote denies it in terms.

GLASS, J.A.: Let us go back beyond that. Was not that axiomatic to Sir Frederick Jordan?

MR. MCHUGH: Yes, and he was, with great respect, in error because Sir Frederick Jordan in the

Goldsborough case seemed to take the view that you could not have fair comment unless all the facts were in the article.

GLASS, J.A.: We have two questions wrapped up here: whether the basis has to be published to give you a comment and, if it is not, whether the external factual basis has to be proved to be true. Is there anything in Kemsley that says that, so far as the basis for comment is external, it does not have to be justified?

MR. MCHUGH: Your Honour, we are on different wavelengths. It is very important to understand what Kemsley v. Foot says. It draws a distinction between three things and it is important to keep them all in mind - comment, subject matter or substratum of fact which must be indicated or implied, and the third matter is the facts which make the comment an appropriate comment or, to use Lord Porter's expression, justified.

PRIESTLEY, J.A.: What is the difference between the second and the third?

MR. MCHUGH: The second is that it is just the subject matter. It is a description. In Kemsley v. Foote it was that the subject matter was that Lord Kemsley was the active proprietor of and responsible for the Kemsley Press, which was a public document. That was the subject matter of public interest upon which the comment could be made. To justify at common law (and I use the word "justify" in inverted commas) the defendant was entitled to give particulars of 50 facts which would support the comment, and he may have had those 50 facts in mind. But, as Lord Porter says, as long as one of those facts would justify the comment at common law, the defence was made out.

At p.357.3 of Kemsley v. Foote it is said "Indeed it was ultimately admitted on the behalf of the appellant....". So the distinction is made between subject matter which is indicated

with sufficient clarity to justify the comment made, and the next question is: is the comment made such that an honest though prejudiced man might make? At the foot of p.357 his Lordship said, "One further matter on which some discussion took place.....".

GLASS, J.A.: Therefore there has to be to some extent proof of the truth of the basis for the comment.

99.

MR. MCHUGH: At common law. So the question then arises whether, by reason of the terminology of the New South Wales Defamation Act, it is now necessary for the defendant to prove that the comment was such as an honest but prejudiced man might make on those particular facts.

GLASS, J.A.: Are you submitting, so I understand it, that the proper conclusion to reach in construing the comment section is that the common law, as set out in Kemsley v. Foote, has been abrogated, and if the material for comment is external then you do not have to prove it to be true?

MR. MCHUGH: Exactly.

SAMUELS, J.A.: The relevant substratum of fact in Kemsley was that Lord Kemsley was the active proprietor of and responsible for the Kemsley Press.

MR. MCHUGH: Yes.

SAMUELS, J.A.: It was not stated in the article; it was implied.

MR.MC.HUGH: Implied.

SAMUELS, J.A.: It was not necessary to prove that was the fact.

MR. MCHUGH: You had to prove there was a subject matter. You would have to prove that was the subject matter, no doubt.

SAMUELS, J.A.: Therefore you do have to prove the truth of facts external to the article?

MR. MCHUGH: No, it is implied in the article. What you have to prove is that he was the active proprietor of and responsible for the press.

SAMUELS, J.A.: But that is the fact implied in the article but external to it.

MR. MCHUGH: For my purposes I am happy to accept that.

SAMUELS, J.A.: I thought you were not, that you were rejecting that. Because the formulation I put to you is that in a Kemsley type of case where the substratum of fact upon which the comment is based is not set out in the article - it is to point out or pick up by reference - you do not have to prove that it is true. I do not see how that can be right because otherwise it would be possible to mount comment upon the most fanciful statements.

MR. MCHUGH: But there is a difference, and obviously I have not made myself clear.

SAMUELS, J.A.: Not to me.

MR. MCHUGH: I clearly have not.

GLASS, J.A.: It is a radical change in the law of defamation for which you are contending?

100.

MR. MCHUGH: No, not at all.

GLASS, J.A.: You certainly have not made it clear to me. I thought you were saying if the common law still applied, the external substratum of fact would have to be shown to be true, at any rate enough to justify the comment?

MR. MCHUGH: Yes.

GLASS, J.A.: Now is that the position under the 1974 Act or not, according to you.

MR. MCHUGH: It is. But there is a further factor which your Honour and Mr. Justice Samuels have not taken into account, with respect.

GLASS, J.A.: What is that?

MR. MCHUGH: That there is a distinction between the substratum of fact or subject matter and the facts which are alleged to justify the comment.

GLASS, J.A.: Maybe that is all so, or as a matter of argument. But where is the material here?

SAMUELS, J.A.: Could you make that clearer to me?

MR. MCHUGH: In Kemsley v. Foote the defendant (and we would say under the Defamation Act) having pointed to comment and having shown that Lord Kemsley was the active proprietor of and responsible for the Kemsley Press, has pointed to subject matter and proved that subject matter and he has pointed to his comment. But at common law he had to go one step further. He then had to point to the facts which would justify the comment that it was a low press. Therefore he would have to bring into existence proof of articles, other material which justified the material that it was a low press. It is that third aspect, the facts alleged to justify that comment (to use Lord Porter's expression at p. 358) which in our submission no longer has to be proved under Division 7.

GLASS, J.A.: Because of which language?

MR. MCHUGH: Because of the language that first of all it has to be comment on proper material for comment, and proper material for comment may be statements of fact, a protected report or for some other reason. That is s.30(1). We say statements of fact mean statements of fact set

out in the article. A protected report within the meaning of s.24 can include a reference to some protected report but it could be in the article. "For some other reason" covers the Kemsley v. Foote type situation.

GLASS, J.A.: Sub-s.2 then, by your construction, is limited to statements of fact contained in the article complained of?

MR. MCHUGH: Yes, which are the basis of the comment. Protected report may be in the article or it may not be in the article. It may be on yesterday's report of a court case.

GLASS, J.A.: Can you throw any light on that? What at common law would provide another reason for supporting comment additional to statements of fact and a protected report?

MR. MCHUGH: "Or for some other reason"?

GLASS, J.A.: Yes.

MR. MCHUGH: "For some other reason the material on which comment might be placed....on a matter of public interest." We would submit it is a case where the substratum of fact is implied in the article, so you have got just not bare comment but comment which implies the subject matter upon which it is based.

In sub-s.2 those statements of fact do not have to be a matter of public interest. They may be but they do not have to be. Under s.30(1) the comment has to be a matter of public interest.

But to go back to my illustration, if you said for instance "A man in my opinion will not be a competent politician because his work as a clerk at the XY company has been very poor", the comment there clearly relates to a matter of public interest, namely his performance as a politician; but the facts you rely on to support

that, if you have to prove them, would be an investigation of what he does in a private capacity.

That could not be what the legislature intended. What the legislature has said is that you can comment on statements of fact which are not public interest if they are set out in the article. But if they are defamatory then you are going to have to rely on other parts of the Act to justify that, as s.35 makes it plain.

PRIESTLEY, J.A.: Why should a distinction be drawn between implied statements of fact and express ones?

MR. MCHUGH: Because it is not so much implied statements of fact but implied subject matter or implied substratum of fact.

PRIESTLEY, J.A.: But that is the same thing, is it not?

MR. MCHUGH: No, with respect, it is not. That is what Lord Porter is at pains to point out in Kemsley. There are three different things - comment, subject matter or substratum of fact -

PRIESTLEY, J.A.: Equals facts, in my estimation.

MR. MCHUGH: No, your Honour.

PRIESTLY, J.A.: What else can substatum of fact or subject matter consist of other than a collection of facts?

MR. MCHUGH: Yes, but it is a subject matter of public interest which is different to the facts which justify the comment.

PRIESTLY, J.A.: I understand that. But that is a different distinction, it seems to me.

102.

MR. MCHUGH: That is the distinction which Lord Porter makes. He distinguishes at p. 358 and

says "In the present case.....a plea of fair comment".

GLASS, J.A.: It is obvious, is it not, that the factual substratum is not indicated by the article, then it can only be indicated by means of a subject matter, a heading?

MR. MCHUGH: Yes.

GLASS, J.A.: Otherwise it would be in the article.

MR. MCHUGH: Yes.

GLASS, J.A.: So it would mean that with a comment"I do not think so and so is fit to hold judicial office because of the disgraceful way in which he has been conducting himself at trials in this State" you would not have to prove that he had been conducting himself in a disgraceful way.

MR. MCHUGH: Yes, at common law.

GLASS, J.A.: No, under this Act?

MR. MCHUGH: No, under this Act you would not.

SAMUELS, J.A.: You would have to prove he was a Judge who presided at a trial.

MR. MCHUGH: Yes, you would have to prove he was a Judge and that he presided at a trial.

GLASS, J.A.: What about the immunity of a man who had an unblemished record as a Judge in point of fact?

SAMUELS, J.A.: If you seek to show the opinion is not held - it is held, the defendent believes this. He has an obsession.

GLASS, J.A.: Prejudice, but there is nothing to base the prejudiced opionion on. According to you, if he hugs it to his breast and just indicates it in the general way, the defence

would be made out without proving the truth of the external basis of fact.

MR. MCHUGH: Except that in the illustration your Honour is giving you would have to prove the Judge was a Judge, that he presided at a trial and that it was comment, and recognisable as comment.

SAMUELS, J.A.: The comment is "In my considered opinion this Judge is totally unfit to try any sort of dispute whatever".

MR. MCHUGH: Yes, because it is comment, and one can understand what the policy of it was, that honestly held comment is to be protected.

GLASS, J.A.: Only if it is based on fact, and it seems to be whether the fact is internal or external it has to be shown to be true, and you are trying to get out of s.30(2) a revolution subversive of the common law.

MR. MCHUGH: No, I do not seek to get it out of sub-s.2. I just call that in aid. We get it out of s.30.

GLASS, J.A.: I think we have got the weight of that, Mr. McHugh, and you can lead on to something else.

MR. MCHUGH: On the assumption that it is necessary to point to the facts outside the article and prove the facts, then the matters we would rely on to justify the comment (and I use the word "justify" in inverted commas) are these, and I put these matters to the trial Judge.

GLASS, J.A.: You have listed some in your defence.

MR. MCHUGH: That is subject matter. That is the basis of comment.

GLASS, J.A: Additional to those six heads, whatever they are.

MR. MCHUGH: But that is only subject matter.

GLASS, J.A.: It is the material.

MR. MCHUGH: But it is not the facts that you rely on to support the comment. "The material upon which the comment was made consisted of" etc. etc. We then rely on these matters. First of all the West Indies had lost a match to Australia (p.38C [58.5]) and Australia were the underdogs. Secondly, if the West Indies won, there would be a West Indies-Pakistan final (p.45H-O [69.7-70.3]). The West Indies-Pakistan matches draw crowds very much smaller than a West Indies-Australia match (pp.40Q-S [62.8-.9], 51S 80.2] and 52D-F [80.7-.9]). Fourthly, the factors of crowds, gate money and sponsorship play a relevant part in the World Series Cricket (pp.39U-40I [61.4-62.2] and 40Q-S [62.8-.9]). The fifth fact is that P.B.L. was in charge of the marketing or the promotion of the cricket and it was the principal shareholder in TCN-9 which televised the cricket (p.39H-P [60.4-61.2], p.41E [63.4] and p.42K-T [64.8-65.5]). In our submission on those facts -

GLASS, J.A.: Which are proved to be true by evidence, capable of being proved?

MR. MCHUGH: Yes, either under s.30(a) or (b).....(reads). My learned friend said again and again during his argument that no honest person could make the comment that the West Indies threw the match. Now that is not the test at all. My learned friend took the imputations and said you could not make a comment in terms of those. That is not the issue. Comment and imputations may be identical; they may not be. In other words s.15 for example makes it clear that under truth what you have to defend is the imputation. Section 15(2) says "It is a defence as to any imputation complained of....".

GLASS, J.A.: But, Mr. McHugh, must not the contrary submission be right? If you get to the point where you are relying on your defence of comment, it is because some or all of the imputations have been supported.

MR. MCHUGH: Exactly.

GLASS, J.A.: And therefore you have to say what is imputed as a comment can be properly based upon these matters.

MR. MCHUGH: No, what you have to justify under Division 7 is the comment, which forms the basis of the imputations, is defendable under the Division 7. You may not have intended the imputation but that does not mean that you did not honestly hold the opinion which is contained in the comment. Let me give your Honours an illustration. Supposing I say "That Judge's summing-up was as bad a summing-up as I have seen or heard". I may honestly believe that and an honest man may have made that comment. But the plaintiff may plead and jury may find that that imputes that he was not fit to hold office as a Judge.

GLASS, J.A.: Mr. McHugh, that is true. But here the plaintiff submits that there is an imputation that the match was fixed in advance. Now if you want to defend that as comment, do you not have to prove that there is a factual basis for holding the opinion that the match was fixed in advance, because that is what you have to defend?

MR. MCHUGH: No, with great respect, that is not correct at all. The comment is a comment that an honest man could hold or that you held the opinion. To make good the proposition, let me go through the material and make good the distinction. You start off "I remembered, of course, that the World Series had been fixed.....plagued with the faith of the people":- That is put forward as comment and let me assume that it is. Could an honest man have held that view at that stage? Over the page "In Australia it is an article of faith.....". Again he is commenting and the question is: could an honest man have held that view? "Let us consider

the delicate unfathomable mechanism....". Again could an honest man hold that view?

GLASS, J.A.: It would certainly be a reasonable conclusion that the author was expressing opinions, not making statements of fact.

MR. MCHUGH: Yes.

GLASS, J.A.: However, and this is what I put to you, if the material is in law capable of supporting the imputations, and the jury finds that it did bear those imputations, then your defence of comment must show that those imputations involve a comment which was properly based on material. It is no good justifying any lower comment.

MR. MCHUGH: No, it is not a question of lower comment at all. It is justifying the comment.

GLASS, J.A.: The comment, in the forensic context which we are considering, is imputation 1.

MR. MCHUGH: No, your Honour.

GLASS, J.A.: Which you are saying was only a comment.

MR. MCHUGH: With great respect, it is not. That is the comment, that is the imputation.

105.

GLASS, J.A.: You did not seek to justify the imputation by proving it is true.

MR. MCHUGH: No.

GLASS, J.A.: If you do not prove it as comment, it seems to me you have no defence.

MR. MCHUGH: What is comment are the words from which the imputation is derived. There is no necessary congruency between comment and imputation.

GLASS, J.A.: I cannot see that. That would mean you could go to the jury and say "I am prepared to admit that the plaintiff has proved this imputation but we made a comment - not that one but another one - which I ask you to accept, and that is a defence."

MR McHUGH: That is what the legislature has said. In s.15(2) it says "It is a defence as to any imputation complained of .... a matter of substantial truth". When it turns to s.30, in sub-s.1 it says that the defences under this Division are not available as to any comment, and in sub-s.2 it says "It is a defence as to comment ....". The Act itself draws the clearest distinction between comment and imputation, and that is what this court held in Petritsis v. Hellenic Herald.

PRIESTLEY, J.A.: Is not the theory that under the Act the cause of action is the imputation itself?

MR McHUGH: Yes.

PRIESTLEY, J.A.: So when you get to s.30(1) and you are talking about defence, you are talking about a defence to a cause of action consisting of the imputation?

MR McHUGH: You are talking about a defence to the material which contains the imputation. That does not mean it is a defence as to the imputation. Take a case of fair report. You do not have to say it is a fair report of the imputation. It is sufficient if it is a fair report of the proceedings.

GLASS, J.A.: That is true. That carries all imputations that might be drawn from it.

MR McHUGH: It may. But the important thing is what you show is that the proceedings are a fair report.

GLASS, J.A.: But what was your reason to my brother Priestley? How can comment be a defence to a cause of action unless it meets the cause of action as set out in the imputation?

MR. MCHUGH: Because when you get to comment, it has not got the slightest interest in what the imputation is. It is interested in the words as comment.

SAMUELS, J.A.: This is what we said in Petritsis.

MR. MCHUGH: Exactly, and that is what Reynolds, J.A. says ((1978) 2 N.S.W.L.R. 174). It is sufficient for my purposes just to read

106.

the top of p.184 "The defamatory imputation may be conveyed....quite wrong".

PRIESTLEY, J.A.: That was the question I asked you and you agreed with my proposition that the theory of the Act is that the imputation is the cause of action. Now I am quite open to be convinced that that is not a proper theory. But are there not cases since then which have based themselves upon that theory?

MR. MCHUGH: I am not aware of them if there are.

PRIESTLEY, J.A.: I remember it being vigorously submitted to us earlier this year.

GLASS, J.A.: Section 9(2) seems to say that the imputation is the cause of action.
MR. MCHUGH: Yes, at p.192B in the judgment of your Honour Mr. Justice Samuels, "It is beyond doubt the defendant who seeks to justify....as well as by another means". Let us go back to the illustration I gave earlier.

GLASS, J.A.: Would you like to deal with s.9(2) before you get to your illustration?

SAMUELS, J.A.: I think I expressed the view that each imputation does constitute a cause of action. I differed in that respect from Reynolds, J.A.

MR. MCHUGH: Yes. Sub-s.2 says "Where a person publishes any matter....against the publication of that matter to the recipient". For my purposes I am quite happy to accept that the view of your Honour Mr. Justice Samuels in Petritsis is correct, that the imputation is the cause of action.

GLASS, J.A.: If you have a cause of action as a plaintiff and the defendant does not seek to met it by a plea of justification or protective report but only by comment, how can the comment defence answer the imputation which is the cause of action, unless it shows that a comment in terms of the imputation was properly based and honestly held?

MR. MCHUGH: Because it is only sufficient that the person honestly had that opinion.

GLASS, J.A.: Which opinion is this?

MR. MCHUGH: The opinion expressed in the comment, or a reasonable man could have made that comment. He does not have to have an opinion as to the meaning of those words. That would really hold him hostage to what some jury later found as to what the words mean.

GLASS, J.A.: This is absolutely a fundamental question, is it not?

107.

MR. MCHUGH: It is. So if I make a comment which I honestly believe and I say "McEnroe played poorly yesterday", that is an expression of opinion by me which I honestly hold. But the plaintiff may plead that it means that he is one of the worst players in professional tennis; and

if a jury holds that imputation, I do not have have an opinion about that particular imputation. It is sufficient that I have an opinion or honestly believe my comment.

GLASS, J.A.: What happens to the plaintiff's cause of action?

MR. MCHUGH: It is defeated because it is based on comment. As to comment, the Act says in s.30(2) that it is a defence as to comment that the comment is the comment of the defendant. Likewise through the whole of that Act. Section 22 talks about matter. It says "Where in respect of matter published to any person". You have s.15 talking about imputations. You have to defend the imputation. You have got s.22, the qualified privilege plea, taking matter. You look at the matter. That is another illustration of it. In s.22 you do not look at the imputation. You look at the matter. and you say "Where in respect of matter published" and so on. Likewise in s.27 there is a defence for the publication of a notice. You just look at the notice. In s.24 there is a defence for the publication of a fair protected report. You look and see whether it is a fair report of the proceedings. In s.32 it is a defence as to comment. All the defendant has to say is that is comment, it is comment that an honest man could have made, and the onus then moves to the plaintiff to prove that the comment did not represent the opinion of the defendant.

So the only relevant comment you consider is the comment which forms the basis of the imputation. But if you come within ss.32, 33 or 34 then if you satisfy those sections, or any of them, you have a defence as to that comment and it does not matter what imputations it gives rise to.

PRIESTLEY, J.A.: At pp.192-3 of Petritsis Mr. Justice Samuels has set out in some detail an argument which seems to be identical with your argument, if my hasty reading of this is correct.

MR. MCHUGH: Yes.

PRIESTLEY, J.A.: So it may be that it is unnecessary for you to seek to persuade us of this if what is said on those pages was part of the ratio decidendi of Petritsis.

MR. MCHUGH: It clearly was.

PRIESTLEY, J.A.: I am not particularly familiar with this. Is there a corresponding passage or agreement from Mahoney, J.A.?

MR. MCHUGH: He dissented.

PRIESTLEY, J.A.: What is the passage then that is relevant in the decision of Reynolds, J.A.?

MR. MCHUGH: The ratio of Mr. Justice Samuels is at p.193B-C. It may be that in the judgment of Reynolds, J.A. it was not material.

GLASS, J.A.: At p.184A "The defamatory imputation may be conveyed by either a statement of fact or an expression of opinion". Would you quarrel with that?

MR. MCHUGH: No, we accept that.

GLASS, J.A.: Now if it is a statement of fact the defence must justify it.

MR. MCHUGH: Correct.

GLASS, J.A.: If it is an expression of opinion the imputation which is held to be defamatory is an expression of opinion. Would it not be the opinion embodied in the imputation which has to be defended as comment?

MR. MCHUGH: No, because the Act says it is comment, "As to comment".

GLASS, J.A.: This is an interesting point, Mr. McHugh. Is there anything else you can add to it?

MR. MCHUGH: No, except to say that in Butler's case the Court talked about this question of incongruency between the two.

GLASS, J.A.: But did it come to any conclusion?

MR. MCHUGH: Yes, it did not really decide this point but what it did say was this is the 1974 Act - (1981) 2 N.S.W.L.R. 503 - in that particular case the imputation which went to the jury is found at the top of p.504, "The plaintiff acted unjudicially and was motivated....the defendant was an Aborigine". That was the imputation and at p.504E counsel had asked the writer what he meant. "What did you intend by the words...". So he said what he intended was clearly different to what the imputation was and this Court said at p.506D "Now it is true that the comment for which the defendant was contending was different from the sense of the imputation...". At p.507 they say it would have been an intriguing acrobatic exercise to ask the jury to reject the evidence.

GLASS, J.A.: They say if the opinion conveyed was congruent with the imputation charged and found, then a defence of comment must have failed.

MR. MCHUGH: Yes, it is true Mr. Justice Samuels says that.

GLASS, J.A.: Obviously no one knows except the jury which opinion they say was conveyed. But if the defendant persuades them the only opinion he expressed is the one he seeks to defend, then he will win. But if the jury end up agreeing with the plaintiff that there was a different and more adverse opinion expressed, which the defendant does not seek to justify as comment, then the plaintiff must win.

MR. MCHUGH: With respect, that is not a correct construction of the Act.

GLASS, J.A.: We will have to think about that very carefully.

MR. MCHUGH: Yes. We would submit in any event that if the view is which has just been expressed, or the view put by the plaintiff that you can only rely on comment which is congruent with the imputation, nevertheless we would submit on the material we have put that an honest man could have made a comment to that effect

108A

on the material we have referred to.

GLASS, J.A.: Actually you do not have to prove that now. He has to prove you did not hold the opinion. You have to prove it was a comment only, not an allegation of fact, and was properly founded.

MR. MCHUGH: Yes, but if there is an onus on us, we would say we met it. If there is not, as we put, the onus is on him to say that we did not. My learned friend relied on the terms of the apologies. Might I just make these short submissions about that. First of all they are not Mr. Thorpe's document. In any event the plaintiff carries the onus that he did not hold the opinion. There are many reasons why such a document may be made. It is not conclusive that that opinion was not held at the time. So in our submission Exs.B and C, and particular Ex.C, do not assist my learned friend.

Could I just deal shortly with the imputations. My learned friend said that the foundation stone of the article was the allegation of criminality. In our submission the foundation stone is not criminality but one man. That is the foundation. The opening words are directed to one man. "It never occurred to me that one man...".

GLASS, J.A.: You link that up with somebody.

MR. MCHUGH: Yes, and Mr. Packer at an earlier stage. My learned friend's submissions refuse to face up to the words "Unstated thought, the unfathomable mechanism that gives one team a moral edge over another, an edge perilously close to the concept of taking a dive" and so on. You just cannot do what my friend says, or you just disregard those words.

GLASS, J.A.: You say the author never goes beyond suggesting the possibility that the players might take a dive?

MR. MCHUGH: Yes. And likewise with the imputation concerning suspicion. There can be no suspicion that they took a dive because he never says that.

108B

PRIESTLEY, J.A.: Now I have read this article quite a number of times I can see force in what I think you are saying. What the author has got out of the quotation which begins the article and in which he makes his view and upon which he concludes, is one person playing with the fate of the people.

MR. MCHUGH: Yes.

PRIESTLEY, J.A.: Now I have been forced to consider the article in a highly analytical fashion on a number of occasions I can see the strength of that. It is the word "fixed" in the very first sentence of the quotation that causes me to have some resistance to your very plausible explanation of the whole of the article. How do you get away from that word "fixed" which means more that one person?

MR. MCHUGH: Firstly, there can be many ways of fixing things. Secondly, that happens to be part of a quotation. I suppose it would make some sense if it said it never occurred to me that one man could start a play with the fate of 500 people.

GLASS, A.P.: The genus is one man playing with the fate of the people, the abuse of the public confidence that things are only conducted. There were three illustrations of that: Fixing the World Series was one, Vietnam was said to be another, and Nixon the third. The link is made in the end to playing with the fate of the people of which fixing is only one example. The other two do not involve fixing.

MR. MCHUGH: Exactly. We submit the article has to be read as a whole. When you read the article as a whole you cannot just stop at the word "fixed" and say obviously the match is fixed. You have to go on. You see the question about unstated thoughts, missing cogs and so on.

In our submission the appeal should be allowed and a verdict entered for the defendant, or alternatively a new trial.

MR. HUGHES: It became apparent in our respectful submission that in the interpretation my learned friend wishes to place on relevant sections of Divison 7 of Pt.III of the Act, he is really attempting a drastic change in the law as to fair comment. I am not going to read sections of the Law Reform Commission to your Honours, but I would ask your Honours to read for yourselves that part of the report which commences at p.122.

GLASS, A.P.: L.R.C.?

MR. HUGHES: L.R.C. No. 11. The relevant part starts at p.122, par.161, and runs through to par.206. That is the part dealing with general principle. The Commissioners start off by saying: "Division 7 of Pt.3 of the bill leaves untouched.....subject to three qualifications, s.30(2), (3) and (4)." The division is intended to take the place of the common law as to fair comment and the place of s.15 of the Act.

There is another paragraph of particular importance to this argument. It is under the heading "Functions of Judge and jury". (Pars. 164 and 166 read) It is that principle that is found expressed in the judgment of Hunt J. in Bickel's case which I referred to in my argument on Friday. It is in 1981 vol.2 N.S.W.L.R. p.474 at p.490.

GLASS, A.P.: What do you say to the submission of Mr McHugh, that under the Act also you can base your comment on statements of facts external to the argument.

MR HUGHES: That is not a complete statement of what Kemsley v. Foot decided. What Kemsley v. Foot decided is a defence of comment may run if the facts are referred to in the article or otherwise sufficiently indicated. The question always is whether there is a sufficient indication of the subject matter in the article that is defended as comment.

GLASS, A.P.: Could I narrow the inquiry for us in this way: Would you say that these five matters of fact that Mr McHugh listed here were referred to or sufficiently indicated by the article?

MR HUGHES: No. We also say even if they are, the comment expressed in the article is not one which could be rationally expressed by any person, howsoever prejudiced upon that material. In other words, we rely upon the second statement in Mr Justice Hunt's formulation at p.490.

SAMUELS, J.A.: You jump over Austin?

MR HUGHES: We do not, with respect. Austin does not say anything about the invalidity of Hunt J.'s formulation.

GLASS, A.P.: I do not think Bickel was referred to in the argument in Austin.

MR HUGHES: The bulk of the argument in Austin turned on the vitiating effect of Mr Justice Lusher's error.

GLASS, A.P.: Do no we have to do it for ourselves?

MR. HUGHES: Yes, but there is nothing in your Honour's treatment of s.30 which vitiates Hunt. J's formulation of the elements of the effects of commerce.

GLASS, A.P.: I think that part which says whether the opinion is one which an honest man might have on that material is contrary.

MR. HUGHES: I have read it but I cannot find that. If it were there, it would with respect be obiter. It was not necessary to my argument or the other side's argument in that case to challenge Hunt. J.'s formulation.

GLASS, A.P.: It is a very tricky part of the Act. We are going to have to think about it. Is there anything else you wish to put to us? We can read Austin and Bickel for ourselves.

MR. HUGHES: If the comment is said to be a comment on the match and on the series, then to make good the defence the defendant, in our submission, has to prove some facts which could rationally

support an opinion that the plaintiff participated in fixing the match.

GLASS, A.P.: You do not agree with Mr. McHugh's submission that he can defend by proving some lesser comment?

MR. HUGHES: No I do not. One has to look at the evidence in the case as it is adduced, there being no evidence for the defendant for the purpose of determining whether it is shown that there is anything in the match or in the way the series was played which could support a comment in terms of the imputation as found by the jury.

If my learned friend is right, and we submit he is not, in his theory, that you can take any bit of comment that the article might yield regardless of the imputations and ask "Could an honest man have held that opinion?" our answer is at the very least the article yields a comment, if it was comment, and we dispute it was comment, that the plaintiff participated in fixing the match. That concept is expressed in our first and second imputation, as is the concept of the same conduct in relation to the future in the third and the fourth. There is nothing in the evidence that can support a rational basis or provide a rational basis for that comment.

I won't weary your Honours with the importance of the disclaimers in that regard.

GLASS, A.P.: You say every allegation of fact is fully supported by what is in the article.

MR. HUGHES: The allegation if fact is made but it is not justified.

GLASS, A.P.: You say that the plaintiff fixed the match is something that the article reasonably supports?

MR. HUGHES: Yes.

GLASS, A.P.: Mr. McHugh simply says "If it does, which I dispute, it was only a comment."

MR. HUGHES: It was not only a comment because there is nothing in the way the match was played as revealed by the evidence that could rationally underpin that as a comment. Therefore it has to be defended as a statement of fact.

Your Honours will obviously have to look at Petritsis' case.

GLASS, A.P.: Yes, we will.

MR. HUGHES: And also at Bickel and Butler. In our submission there is not on analysis a congruency of reasoning between your Honour

Samuels, J.A. and his Honour Reynolds J.A. on this question, so perhaps the matter has to be reconsidered afresh. We say simply if the defendant says all this is comment in relation to the article sued on, and we satisfied the jury that this much is defended as comment, conveys these imputations, then the comment that has to be defended consists of the imputations.

111.

Then one comes to apply the common law tests which the Law Reform Commission evidently wished to keep on foot.

I do not wish to weary your Honours by citing cases antecedent to the Law Reform Commission's report. Your Honours will find in Jones v. Skelton 63 State Reports and in London Artists v. Littler (1969) 2 Q.B. p.375 adherence to the concept when a defence of comment is raised the defendant has to satisfy the trial judge before the matter can go to the jury that the matter is capable as being regarded as comment and secondly that, if so, it is a comment that can be rationally related to the stated or indicated facts.

Any lesser comment is really foreclosed to the defendant by the disclaimers.

Those are the submissions we would wish to put to the court.

GLASS, A.P.: We will reserve our decision. We are indebted to counsel.

112.

In the Supreme Court, Court of Appeal
No. 16 - Reasons for Judgment of Glass J.A. 21 December, 1984

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
COURT OF APPEAL)

C.A. 181 of 1984
C.L. 9702 of 1982

CORAM : GLASS, J.A.
SAMUELS, J.A.
PRIESTLEY, J.A.

Friday, 21st December 1984

DAVID SYME & COMPANY LIMITED v. LLOYD

Appeal - Defamation - Jury verdict for plaintiff - Imputations the subject of a separate trial under Supreme Court Rules Pt. 31 - Ruling that imputations capable of defaming plaintiff - No appeal against that ruling - Whether defendant can later challenge that ruling on appeal against jury verdict - Held ruling interlocutory only and open to challenge - Defendant entitled to appeal upon ground that jury verdict wrong in law - Four imputations relied upon considered - text of article examined for reasonable implications - Held imputations cannot reasonably be supported by article - Defence of comment under Defamation Act 1974 Division 7 - Whether evidence capable of proving that author was defendant's servant or agent - Whether necessary for defendant to prove that the comment could have been held by honest person on the relevant material - Bickel v. John Fairfax & Sons Ltd. (1981) 2 N.S.W.L.R. 474 at 490 so affirms - Bickel doubted - Elements of statutory defence of comment - Common law defence of fair comment reshaped -

Whether defence of comment is pleaded to imputations or published material - Petritsis v. Hellenic Herald Pty. Ltd. (1978) 2 N.S.W.L.R. 174 open to doubt.

O R D E R

Appeal allowed with costs. Judgment below set aside. In lieu thereof judgment to be entered for the defendant with costs. Respondent to have a certificate under Suitors' Fund Act.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) C.A. 181 of 1984
) C.L. 9702 of 1982
COURT OF APPEAL)

CORAM : GLASS, J.A.
SAMUELS, J.A.
PRIESTLEY, J.A.

FRIDAY, 21ST DECEMBER, , 1984.

DAVID SYME & COMPANY LIMITED v. LLOYD

JUDGMENT

GLASS, J.A. : The plaintiff was the captain of the West Indies cricket team which toured Australia during the cricket season 1981-2. During that season a series of cricket matches called the Benson & Hedges World Cup Series was staged involving teams from West Indies, Pakistan and Australia. On 21st January, 1982, the defendant published an article in the Age newspaper which related to that series and to a particular match in it which had been played between West Indies and Australia at the Sydney Cricket Ground two days earlier viz. 19th January. The plaintiff sued for damages claiming that the article had defamed him and the proceeding came on for hearing before Begg C.J. at C.L. and a jury on 16 - 18 April, 1984. The jury found for the plaintiff and assessed his damages in the sum of $100,000.00. The defendant on appeal submits that the trial judge fell into a number of errors of law and that the jury's assessment was excessive to the point of perversity.

The first ground taken in the appellant's argument was that the words used were incapable of supporting

any of the four defamatory imputations left by the judge for jury consideration. A preliminary objection had to be overcome before this point became open to debate. The defendant had at an early stage of the proceeding secured a separate trial under the Supreme Court Rules Pt. 31 of the question whether the article published was capable of bearing the four defamatory imputations pleaded. Maxwell J. ruled that they were and his ruling was not canvassed at the trial although Mr. McHugh Q.C., for the defendant, formally reserved his position. The objection now taken by Mr. Hughes Q.C., for the plaintiff, is that the defendant, having elected not to appeal against the ruling of Maxwell J., was bound by it and cannot impugn it in the present appeal. Mr. McHugh contends that no leave is needed because he is entitled to challenge the judgment below upon the ground that it is based upon a jury verdict which is wrong in law and, failing that, seeks leave to appeal against the decision of Maxwell J. and also an extension of time for bringing such an application. Mr. Hughes counters with the argument that no explanation has been offered to account for the failure to apply for leave earlier and no cause is shown which might justify the indulgence sought.

In support of his argument Mr. McHugh submits that he has under s.101 of the Supreme Court Act an appeal as of right from the judgment below to the extent that it is based upon a jury verdict which for want of evidence cannot in law be supported. He also points to Supreme Court Rules Pt. 51 r.15 which provides that the Court of Appeal may exercise its powers under the Act and under the rules

notwithstanding that there has been no appeal from some other decision in the proceedings. Mr. Hughes contends that the order of Maxwell J. being interlocutory, an appeal can only be brought against it by leave, s.102(e). He also argues that the procedure of challenging imputations in a separate trial will become pointless if the issue decided is open to reconsideration in an appeal from the final judgment. In my view the two positions can be reconciled and the charge of pointlessness rebutted in the following manner. If a defendant to a defamation proceeding succeeds in having all the plaintiff's imputations ruled out he is entitled to final judgment and the plaintiff can appeal from that judgment as of right. If the defendant (as here) fails to have any of the plaintiff's imputations ruled out, the order made is interlocutory, but this Court would ordinarily decline to grant leave to appeal preferring to await the result of the trial. After jury verdict the present defendant is entitled to appeal as of right against the judgment entered against it upon the ground that the plaintiff's evidence is insufficient to establish the claim and that the jury verdict was therefore wrong in law. If the judge at the separate trial rules out some imputations and not others, the Court would again be inclined to refuse leave save in exceptional circumstances. A policy of this kind in relation to leave to appeal against interlocutory orders made in the defamation list would accord with the views expressed by Hutley J.A. in Hepburn v. TCN Channel Nine Pty. Ltd. (1983) 2 N.S.W.L.R. 682 at 692 (which I share) that the separate trial procedure should not be employed for the resolution of disputes of this kind which are best left to be dealt with at the trial.

The four imputations pleaded in the statement of claim and left by his Honour to the jury were:-

"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."

The article complained of, divided by the statement of claim into numbered paragraphs for ease of reference, was in the following terms:

"1. <u>COME ON DOLLAR, COME ON</u>

2. 'I remembered, of course, that the World's Series had been fixed in 1919 ... it never occurred tome 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 differences 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."

It is unnecessary to dilate unduly upon the nature of the function performed by the Court, whether at the trial or on appeal, in judging whether the words sued upon are reasonably capable of bearing the suggested defamatory imputations. The capacity of the words to defame is a convenient ellipsis for the question whether a jury acting reasonably could hold that ordinary readers would understand the article in the defamatory sense pleaded, Jones v. Skelton (1963) 63 S.R. (N.S.W.) 644 at 650. The habits of mind of the ordinary newspaper reader have been the subject of elaborate exegis upon which judges no less than juries should be instructed. He is a person of fair average intelligence who is not avid for scandal and is neither unusually suspicious on the one hand nor unusually naive on the other. He reads between the lines, engages in a certain amount of loose thinking and has a capacity for implication greater than a lawyer reading the same material. The case citations for these predicated qualities are collected in Farquhar v. Bottom (1980) 2 N.S.W.L.R. 380. He will not, however, adopt a meaning "which can only emerge as the product of some strained forced or utterly unreasonable interpretation", Jones v. Skelton at 650, and a jury cannot reasonably ascribe to him such a construction of the article.

It is accordingly necessary to examine the capacity of the article to defame having regard to all these considerations. In particular it is requisite to steer a delicate course between accepting any meaning which could be conveyed by implication to the mind of the layman reader (although it goes beyond what is conveyed to the legally trained mind) and rejecting all meanings which can only be produced by a strained interpretation of the language employed.

The four imputations were left to the jury as two pairs of imputations, the second and fourth expressed as suspicions being available as alternatives if the first and third formulated as facts were not accepted. There is an equally clear line of cleavage between the first imputation which related to the West Indies/Australia match already played and the third which was directed to matches to be played in the future. The article itself also falls naturally into three divisions. The opening paragraphs 1 - 8 and the concluding paragraph 18 could reasonably be taken to have a general application both to the past match and the matches yet to be played, paragraphs 9 - 14 are directed to the West Indies-Australia match and paragraphs 15 - 17 to the future series.

It follows that the capacity of the article to support the first imputation is to be sought in those paragraphs dealing with the match already played when understood in the light of the general observations. Mr. Hughes acknowledged that, so far as the West Indies players were concerned, the language in paragraphs 9 - 14 did not rise higher than the imputation that their determination to win had been sapped and that they were not trying their hardest.

He submitted, however, that reasonable support for the first imputation can be derived from the juxtaposition of paragraphs 2, 3 and 18 and the flavour they impart to what is said about the match recently played. The argument proceeds along the following lines. The author opens by saying that the result of the World Series in 1919 was fixed and the reference to the safeblowing burglar imputes that it was done by criminal means. The author returns to the theme of criminality in the concluding paragraph. So it is a reasonable implication that the West Indies-Australia match was also fixed criminally and the imputation that the result had been fraudulently prearranged is made out. Further colour can be derived from the phrase "mutely arranged and prolonged charade". A jury could reasonably think that the ordinary reader would take the word "arranged" to support the first imputation and would discard "mutely" (admittedly antipathic to arrangement) because it contradicts the pervading notion of fixing. The suggestion of fixing brings in the players as well as the promoter Mr. Packer because a fix can only be arranged with the co-operation of some of the players, a group which would certainly include the captain. The first three paragraphs and the final paragraph taken together with paragraphs 15 - 17 will for similar reasons support the third imputation that the players were prepared to fix the results of the future series.

The opposing argument advanced by Mr. McHugh took the following form. Excluding paragraphs 1 - 3 and 18, the author first discusses the ordinary incentive mechanism operating in the minds of players who are strictly observing the code of sporting honesty. He considers the way in which

financial considerations may influence the incentive machine. He explicitly denies that players harbouring the thought that "it doesn't matter if we lose" were "taking a dive" in the past match. He then asks whether the same considerations may influence the future series. Accordingly paragraphs 4 - 17 are incapable of conveying the idea of a meeting of minds only the existence of minds with unstated thoughts due to the pressure of financial inducements. In this there can be no suggestion of fraudulent prearrangement procuring a particular sporting result. Further the insinuation cannot be reasonably extracted from paragraphs 1 - 3 and 18. The introductory paragraphs refer to three examples of the faith of the people being played with by persons in the United States. The final paragraph charges as a fact that somebody in Australia is doing the same. An ordinary reader, however, would not overlook the numerous references to Mr. Packer throughout the article. He is singled out as the person manipulating the dollar incentives. This insistence as well as the use of the singular pronoun "somebody" and its link to "one man" in paragraph 1 show that the charge of abusing the trust of the sporting public is preferred against him alone. It is not a reasonable inference that the cricketers are playing with the faith of the people. The only imputation against them which is reasonably open is that they are responding mutely to the dollar incentive, and are not trying their level best to win, although their conduct falls short of taking a dive. It is therefore a strained interpretation that some or all of them have entered into a fraudulent arrangement with Mr. Packer to fix the past match and are prepared similarly to fix the future series.

I am satisfied that the defendant's construction goes the full distance with respect to the implication in which a legally trained mind would engage. I have asked myself whether the plaintiff's construction is a reasonable exercise of the more extensive capacity for implication ascribed to the lay reader or whether it is the product of a strained and unreasonable interpretation of the language used. I have concluded that, after full allowance is made for the lay reader's proneness to loose thinking and extended capa;city for implication, the words are not capable of supporting the first or third imputation since they involve an adverse reflection upon the players which the author was at pains to disclaim and achieve this by founding upon words which cannot reasonably be applied to them.

The conclusion I have reached that the plaintiff's imputations cannot reasonably be supported necessarily leads to the result that the defendant is entitled to judgment, the plaintiff retaining the right to sue on other less disparaging imputations. Accordingly the remaining questions debated before us do not strictly arise for consideration. In view, however, of the importance of some of the questions of principle raised during the argument I propose to express my views upon them.

The defendant pleaded a defence of comment under Division 7 of the 1974 Act by alleging 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". The trial judge ruled that this defence could not be submitted to the jury because there was no evidence capable of proving that the author identified by the name David Thorpe at the head of the article was a servant or agent of the defendant (s.33) as opposed to a stranger with respect to whose comments the defence has different ingredients (s.34). In my opinion his Honour erred in giving this ruling since there was evidence reasonably capable of proving that the author was a servant or agent of the defendant. This evidence is to be found in the defendant's answers to interrogatories 6B, 7B, 8B and 11B tendered by the plaintiff which refer to the material to which the defendant had access (6B) state that the defendant's research in the preparation of the article was confined to the said material (7B), that the defendant made no other enquiry apart from the above research (8B) and that the author read all the material and used it as source material for the preparation of the article complained of. A jury could in my view reasonably deduce from these statements that the inference that the author was the defendant's servant or agent enjoyed a higher degree of probability than the competing inference that he was a stranger external to the defendant's organisation.

By notice of contention Mr. Hughes sought to uphold the ruling withdrawing the defence of comment from the jury on the ground inter alia "that the learned trial judge should have held that the matter complained of was incapable of being regarded as comment". Before considering the submission

11.

it is necessary to see what matters of fact were relied on by the defendant as proper material. The defence identified six heads of material viz.:

"(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."

It also furnished particulars at the plaintiff's request in which it was alleged that paragraphs 4, 9, 11 and the first sentence of paragraph 12 were matters of fact and that the balance of the article contained matters of comment. Mr. McHugh listed in argument five heads of proper material for comment which in his submission had been shown to be substantially true.

(1) West Indies lost to Australia the underdogs (Para. 9).

(2) Had West Indies won the final series would have been played between West Indies and Pakistan (Para. 11).

(3) A West Indies - Pakistan series would draw smaller crowds (Para. 9).

(4) The factors of crowds, gate money and sponsorship play a relevant part in World Series Cricket.

(5) PBL Marketing Pty. Limited promoted the World Series and was a principal shareholder in TCN Channel 9 which televised the cricket matches.

Item (4) was partly external and Item (5) was wholly external to the article.

I am of opinion that the statements identified by the defendant as comment were capable of being regarded by the jury as (a) expressions of opinion, (b) relating to a matter of public interest and (c) based upon proper materials shown to be substantially true.

In support of his notice of contention Mr. Hughes put a number of submissions including the proposition that the defence of comment pleaded was not fully made out by proof that the impugned statement was a comment of the defendant (s.32) based upon proper material (s.30) relating to a matter of public interest (s.31). It was necessary for the defendant additionally to prove that the comment was one which an honest man might have held on that material and that there was no evidence capable of proving that element of the defence. He relied upon a statement to that effect by Hunt J. in Bickel v. John Fairfax & Sons Ltd. (1981) 2 N.S.W.L.R. 474 at 490.

With great respect to the learned judge I am unable to agree. In my opinion the Act itself and the Report of the Law Reform Commission on Defamation (L.R.C. 11), so far as it is available as an aid to construction, demonstrate clearly that under the Act the question no longer arises whether the opinion is one which an honest person might have held on the designated material. It is legitimate to resort to those parts of L.R.C. 11 which identify the mischief to be remedied and expound the law as it was then understood to be but not to have regard to the recommendations of the report or its comments on the draft Bill, Black-Clawson Ltd. v. Papierwerke A.G. (1975) A.C. 591 at 614, 629, 638. Limiting the assistance to be derived from L.R.C. 11 to those parts which isolate the law as it was and the shortcomings found in it the first relevant

observation is that the law as to fair comment is described as defective in several respects (L.R.C. para. 162). The nominated defects include uncertainty as to the test of fairness and uncertainty as to the onus of proof on questions arising under the heading of fairness. The defects in the common law are further elaborated in paragraphs 196-199. The elusive notion of "fairress" at common law is there fragmented into three elements. The first concerns the material on which the comment is based. The comment cannot be fair if the alleged basis for it involves misstatement of fact. The second element is described as follows:-

> "198. A second aspect is, we think, no more than an emphasis that the matter defended as comment must have the character of comment. The matter so defended has that character if it purports to be the expression of an opinion based on some other material, and if the opinion is one which an honest man might hold on the basis of that material. Here we adopt the view preferred by Jacobs and Mason JJ.A. in O'Shaugnessy v. Mirror Newspapers Ltd. (1970) 91 W.N. 738, 750 C-E). Since we think that this aspect of fairness is mere emphasis ..."

The third element of fairness at common law concerns the mental state of the defendant when he published the comment. The defence is defeated if the plaintiff shows that the comment was not an honest expression of the opinion of the defendant (para. 199).

From an examination of Division 7 of the 1974 Act it is not difficult to see how the law has been reshaped to give effect to these views and to eliminate uncertainty as to the elements of "fairness". In the first place the common law defence of fair comment is replaced by the statutory defence of comment and those elements of the common

law not incorporated in the statutory defence are explicitly abrogated (s.29). In this way the notion of "fairness" with all the confusion it engendered is decently interred together with the vexed argument whether it was for the defendant to prove fairness or the plaintiff to prove unfairness, Gardiner v. John Fairfax & Sons Pty. Ltd. 42 S.R. (N.S.W.) 171 at 173. Two of the elements in the common law notion of fairness are preserved in point of principle but under a different nomenclature from which "fairness" has been extruded. The first element, the necessity that the factual material be free from misstatement is subsumed under the test of proper material in s.30. The third element, the defendant's actual state of mind with respect to the comment pleaded is governed by s.32(2) and s.33(2). The second element whether an honest man could hold the opinion is described as mere tautological emphasis and finds no place in the Act. It is absorbed in the proof by the defendant that the alleged comment had the character of comment i.e. purported to be the expression of an opinion as required by ss.32-4. Furthermore the Act requires that the comment be based on proper material for comment (s.30(3)). If it is not expressed as an opinion or not properly based, it cannot be comment and must be defended as an allegation of fact. The inquiry which was necessary under the common law defence of fair comment viz. whether the hypothetical honest man, however prejudiced, could base on the indicated material the opinion expressed by the defendant, O'Shaughnessy v. Mirror Newspapers Ltd. (supra), is deliberately and for valid reasons omitted from the statutory defence of comment. In the face of such clear indications of legislative intention, the question should not be disinterred and reinstated as part of that defence by a process of judicial construction.

It was doubtless a sound policy decision that needless confusion would be inflicted upon a jury if the plaintiff was seeking to prove that the comment was not an honest expression of the defendant's opinion while the defendant was endeavouring to persuade it that it might be the opinion of an honest person.

For these reasons I am of opinion that the ruling given by the trial judge regarding the defence of comment cannot be supported on other grounds. Had the defendant in my view not been entitled to judgment, it would have been entitled to a new trial of the proceeding in which it could submit to the jury a defence of comment by its servant.

In the course of the argument Mr. McHugh also put a submission of law with respect to the defence of comment which raises a matter of general importance and requires some discussion. He contended that a defence of comment is directed not to the imputations specified by the plaintiff but to the published matter from which they are derived. So much was decided by Reynolds J.A. and Samuels J.A. in this Court in Petritsis v. Hellenic Herald Pty. Ltd. (1978) 2 N.S.W.L.R. 174. Mr. Hughes submitted in answer that the two learned judges were brought to this conclusion by inconsistent trains of reasoning and that the question ought to be reconsidered. In my respectful opinion there is a lack of congruity between the two judgments in an important respect which makes it proper to reconsider the whole matter.

The argument turns in the first place upon s.9 of the Act which provides as follows:

"9. (1) Where a person publishes any report, article, letter, note, picture, oral utterance or other thing, by means of which or by means of any part of which, and its publication, the publisher makes an imputation defamatory of another person, whether by innuendo or otherwise, then, for the purposes of this section -

(a) that report, article, letter, note, picture, oral utterance of thing is a 'matter'; and

(b) the imputation is made by means of the publication of that matter.

(2) Where a person publishes any matter to any recipient and by means of that publication makes an imputation defamatory of another person, the person defamed has, in respect of that imputation, a cause of action against the publisher for the publication of that matter to that recipient -

(a) in addition to any cause of action which the person defamed may have against the publisher for the publication of that matter to that recipient in respect of any other defamatory imputation made by means of that publication; and

(b) in addition to any cause of action which the person defamed may have against the publisher for any publication of that matter to any other recipient."

Reynolds J.A. considered that the provision of s.9(2) had not altered the common law, that the tort of defamation consists in the publication of the matter which makes an imputation defamatory of the plaintiff and that it was wrong to submit that the imputation had become the cause of action (183-4). Samuels J.A., on the other hand, examined the same section and concluded that s.9 provides a separate cause of action for each defamatory imputation conveyed by the same matter and that the Supreme Court Rules viz. Part 67 r.11(2)(a) and r.13(2) adopt such a construction (190). I should interpolate that these rules were amended in 1979 to accommodate the Petritsis decision. Since, according to Reynolds J.A., it is the matter published which constitutes the cause of action it may be defended either as a statement of fact or as a comment and the question of pleading comment to the imputation does not arise.

Samuels J.A., on the other hand, treats the cause of action as the imputation and notes that a defence of justification according to the Act and the Rules (s.15(2), Pt.67 r.13(2), Pt.67 r.15) is directed to the imputation and not the matter. He then continues:

> "But it does not follow that every defence pleaded must be directed to an imputation so specified. For example, defences under Div. 3 (absolute privilege), Div. 5 (protected reports etc.) or Div. 6 (court notices, official notices etc.) would properly be directed to the matter and not to the imputations; because, where the criteria of those defences exist, it is the matter which attracts protection or exemption from liability, whatever the defamtory imputations which the matter may convey.
>
> ...
>
> ... a defence of comment, accepting that the comment is defamatory, is not concerned with the precise nature of the defamatory meaning or imputation. It asserts that, whatever the defamatory character of the matter - or so much of it as is alleged to be defamatory - the words complained of are comment (within Div. 7) and are, therefore, not actionable. The defence does not challenge that the matter has a defamatory meaning, or defamatory meanings; or what those meanings are. It is directed to the character of the vehicle by which those meanings, whatever they are, are conveyed; that is by a statement of fact or by a statement of opinion. It must, therefore, penetrate beyond the alleged meanings to the raw material of the actual words employed.
>
> In my opinion, a defence of comment under the 1974 Act must be directed, not to the imputations specified in the statement of claim, but to the matter as defined in s.9(1)."

I do agree with my learned brother that defences by way of absolute privilege, protected report and official notices are directed to the matter not to the imputations. It is, as he says, the matter published which attracts protection or exemption from liability regardless of the defamatory imputations it may communicate. The matter is protected either because of the occasion on which it was originally published or because it is a secondary publication of matter.

the original publication of which is protected. But, with the utmost respect for the contrary opinion, the defence of comment in my view is properly to be classed not with these defences but with the defence of justification. I would deduce this from the fact that each imputation distilled from the published matter is a separate cause of action and that a defamatory imputation expressed as a fact must, if it is to be defended, be justified whereas an imputation expressed as an opinion may be defended as comment. There can be no doubt that a defence of justification, if it is to succeed, must answer each defamatory imputation individually by satisfying the conditions of s.17(2). If the defendant elects not to justify an imputation but to defend it as comment, I do not see how it can escape the burden of meeting each defamatory imputation individually by proving the elements of that defence as set out in ss.30-34. If, for example, it is defended as the comment of a servant, this involves proof that each defamatory imputation was expressed as an opinion, was properly based and related to a matter of public interest.

Let it be assumed in the present case for the sake of demonstration that the article was capable of bearing the imputation that certain West Indies cricketers (including the plaintiff) were parties to a fraudulent pre-arrangement of the result of the match in question and that the jury so found. The only defence pleaded was comment. I cannot see that the liability which the defendant would incur for publishing such an injurious imputation is excluded by convincing the jury that a defence of comment had been established in relation to an opinion that the players did

not stretch their cricketing capacity to the limit. The jury might find for example that the designated factual substratum provided a basis for the latter comment but not for the former. In such event the defence would fail because the imputation established by the plaintiff had no basis in the indicated material, could not therefore be a comment and could only be treated as an unjustified allegation of fact. A further possibility is that the jury might find that the lower comment represented the opinion of the defendant's servant but the higher comment did not. In such event the defence of comment would have been defeated and the imputation would be left standing as in unjustified allegation of fact.

In other words I am of opinion that the statutory defence of comment on the proper construction of Division 7 requires that the comment established by the defendant should be congruent with the imputation to which it is pleaded. If a comment is established which falls short of such congruency the defence is not made out. It is true that Supreme Court Rules Pt.67 r.17 having been revised after Petritsis do not accord with this construction of the Act. The Rules, however, cannot alter the constituents of a statutory defence. If the construction I have attempted to support is sound, the Rules are ultra vires the Act and should be recast in their original form which required the defence to allege that the imputation in question was comment.

In the result the orders I would propose are as follows. The appeal is allowed with costs. The judgment below is set aside. In lieu thereof judgment should be entered for the defendant with costs.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) C.A. 181 of 1984
) C.L. 9702 of 1982
COURT OF APPEAL)

CORAM: GLASS, J.A.
SAMUELS, J.A.
PRIESTLEY, J.A.

FRIDAY, 21ST DECEMBER 1984

DAVID SYME & COMPANY LIMITED v. LLOYD

JUDGMENT

SAMUELS, J.A.: I have had the advantage of reading in draft the judgment prepared by Glass J.A.

I agree with him that it was open to the defendant on the appeal to challenge the ruling of Maxwell J. I do not, however, join in the view expressed about the employment of the separate trial procedure. Upon the main question I agree, for the reasons he states, that the matter published was incapable of sustaining any of the imputations left to the jury.

I propose to reserve my opinion upon the other matters argued which do not now arise. The appeal should be allowed with costs and the further orders proposed by Glass J.A. should be made.

IN THE SUPREME COURT)
) C.A. 181 of 1984
OF NEW SOUTH WALES) C.L. 9702 of 1982
)
COURT OF APPEAL)

CORAM: GLASS, J.A.
SAMUELS, J.A.
PRIESTLEY, J.A.

FRIDAY, 21ST DECEMBER, 1984

DAVID SYME & COMPANY LIMITED v. LLOYD

JUDGMENT

PRIESTLEY, J.A.: I will take advantage of the benefit I have had from being able to read Glass J.A.'s reasons for judgment before delivery by relying on the materials he has set out, indicating the points upon which I agree with him, and stating my own reasons on other points.

Preliminary objection to appellant arguing that imputations relied on were not capable of defamatory meaning

For the reasons given by Glass J.A. I think it was open to the appellant to argue this question.

Was the publication reasonably capable of bearing the defamatory imputations relied on?

Counsel for the appellant presented a very attractive argument on this point. It was based on the chain of reasoning in the article and was as follows. The theme of the article was stated in the quotation from Fitzgerald, that one man could play with the faith of the people. The article then developed

the argument that the way the rules of the World Cup Series were arranged was likely to induce a state of mind in the West Indians both in the game just played and in the remaining games of the Series (except presumably the fifth match of the finals if a fifth match was reached) which would prevent or inhibit them from playing their hardest to win. The rules would bring it about that they would not be able to exclude from their minds the commercial loss they and others would suffer by beating the Australians in the match just played or by winning the final series too soon. On this view of the article the only person it was criticising was the person responsible for framing the rules. That person alone was the person playing with the faith of the people.

When I first read the article the foregoing interpretation of it did not occur to me. Upon considering it more analytically, and after hearing it exhaustively dissected by counsel in this appeal I can see that many people, after careful consideration, could take from it the meaning the appellant wants to place upon it. Indeed I am inclined to think that the appellant's submitted meaning is the one the writer of the article intended to convey.

I do not think however that it follows that the article is not reasonably capable of bearing the imputations relied on. The reason for this is that although the author took as his theme the latter part of the Fitzgerald quotation dealing with one man playing with the faith of the people, the first thing that takes a reader's attention after the article's heading is the reference to the World's Series having been "fixed" in 1919. It seems to me that many, perhaps most,

readers of the article in the newspaper would read it without particular analysis and with the idea in mind, put there by the opening words of the quotation, that it was talking about the possibility of the Benson & Hedges World Cup Series being fixed in a similar way to the fixing of the World Series in 1919. The word "fixed" at the beginning of the article is in my opinion fatal to the appellant's submission. In ordinary language the fixing of a sporting contest is something that can only happen if the contestants or some of them corruptly try to help bring about the result wanted by the "fixer".

To use the time honoured test of the reasonable reader, I do not think he would read the article a second time to check whether the quotation had been placed at the head of the article only as a lead into the theme of the one man playing with the faith of the people and to decide that the reference to "fixing" was irrelevant to the meaning the writer was intending to convey. I think the article is more than capable of conveying to the one-time reasonable reader two ideas, one that the West Indian team had joined in fixing the game just played and would do so again in future games, and the other the one for which the appellant contends. They are not mutually exclusive nor in any event would a reasonable reader worry about it if they were. Unlike a judge who is obliged to try to read statutes so that the words are all logical parts of a clear and unambiguous whole, the reasonable reader of a newspaper is reasonably allowed more realistic canons of interpretation.

Defence of comment - was there evidence upon which the jury could find the author of the article was a servant or agent of

the defendant?

I agree with what has been said by Glass J.A. on this point.

Was the matter complained of incapable of being regarded as comment, so that the defence of comment was not open to the defendant?

The five heads of material on which the appellant relied as proper material for comment are stated in Glass J.A.'s judgment. I can not see any rational relationship between that material and the imputations relied on by the plaintiff. This is a necessary element of the defence of fair comment on a matter of public interest as preserved and modified by s.29 of the Defamation Act 1974. This element of the defence is inherent in the word 'comment' itself. In O'Shaughnessy v. Mirror Newspapers 91 W.N. 738, Jacobs and Mason JJ.A when members of this Court, in a joint judgment expressed the point as follows (at 750):

> "... defamatory matter which appears to be a comment on facts stated or known but is not an inference or conclusion which an honest man, however biased or prejudiced, might reasonably draw from the facts so stated or known, will not be treated as comment, but, because it simply does not flow and is not capable of being regarded as flowing from the facts, will be treated as an independent allegation of fact."

The decision was reversed in the High Court, (O'Shaughnessy v. Mirror Newspapers 125 C.L.R. 166) but not in a way that was critical of the above passage. In fact, at 176, in the joint judgment of Barwick C.J., McTiernan, Menzies and Owen JJ. they made the same point:

> "The imputation ... made, if it were to be regarded as fair comment, would have to appear as the writer's honest expression of opinion upon facts truly stated and as an inference open to a fair minded person." (My underlining.)

I take the words underlined as making the same point as made by Jacobs and Mason JJ.A. in the passage earlier set out, with the substitution of fair minded for honest. I do not understand Part III Division 7 of the Defamation Act 1974 to have displaced or modified this fundamental requirement of "a defence or exclusion of liability in cases of fair comment on a matter of public interest". The elements of that common law defence (going more to the "fair" aspect of "fair comment" than the "comment" aspect) which are restated in ss.30, 32 and 33 of the Act arise for consideration in respect of a comment which could be based by an honest (or fair minded) man upon the material upon which the comment was based. The word "comment" throughout Division 7 seems to me to assume that it is a comment conceivably based upon the relevant material.

I do not think the five heads of material relied upon by the appellant support the formation of opinion by any honest man, no matter how biased or prejudiced (to take in favour of the appellant the more difficult of the two tests I have mentioned) that the plaintiff had joined in the fixing of the game the subject of the early part of the article, or would join in the fixing of later games. The five heads of material can be more briefly stated as two, the first that the West Indies, the team favoured to win the game specifically commented on, lost, and the second that it was to the advantage

of the West Indies team and others concerned with the Series that the favoured team should lose. A prejudiced, cynical and irrational man might form the opinion on that bare foundation that the West Indies corruptly helped to bring about their loss. I do not think a rational man could, no matter how suspicious through prejudice, bias or cynicism he might be.

If the actual circumstances of the game were part of the material upon which the comment was based the foregoing conclusion would become even more obvious. To bring about the result the conspirators needed God as a co-fixer.

For the foregoing reasons it is my opinion that the comment defences were correctly not left to the jury.

Is a defence of comment directed to the imputations relied on by the plaintiff or the published matter from which they are derived?

I agree with the reasoning of Glass J.A. for reaching the conclusion that for a defence of comment to succeed, it must be directed to the imputations rather than the published matter from which they are derived.

Other grounds relied on by the appellant

To this point I have not thought that any of the grounds of appeal dealt with by Glass J.A. should result either in judgment for the appellant or a new trial. Because he was of the view that the appellant was right in saying the material relied on by the plaintiff could not support the alleged imputations it was unnecessary for him to deal with a number of other grounds relied on by the appellant, which because of the different view I take it is necessary for me to consider.

Identification

The plaintiff was not named in the article, which was published on the 21st January, 1982. The game referred to in the earlier part of the article was played two days earlier, on the 19th January. The appellant's newspaper had in its editions on the day of the match named the plaintiff as one of the team to play in the match. He did not in fact play, because of illness. The judge allowed into evidence before the jury the following interrogatory to and answer by the appellant.

> "Q. Did not the defendant intend to refer to the plaintiff [in the article] as a member of the cricket team referred to ... as West Indies? A. Yes."

No witness expressly said that he thought the plaintiff was referred to in the article. Two witnesses, Mr. P.R.Thorpe and Mr.L.G.Taylor, said that they knew the plaintiff as the captain of the West Indies and that as captain he had the overall responsibility for the control and performance of the team on and off the field. This statement which is to some extent ambiguous in that it appears to cover games both when Mr. Lloyd was playing and when he was not, was not objected to and was not the subject of cross-examination. Mr.G.S.Chappell said much the same thing, also without objection and without being cross-examined about it.

The appellant's major submission related to identification was that the imputations in regard to the game that had been played were directed at the actual players in that game and that if the plaintiff, not having been a player wanted to claim the imputations applied to him also because he was responsible for the control of the team on the field, a

true innuendo should have been pleaded, which was not done. This argument would be a powerful one if the plaintiff needed to put his case in the way suggested by counsel for the appellant. This does not seem to me to have been the way in which it was basically put. The article, in dealing with the match of 19th January spoke of "the West Indies" (par.9), of "the West Indians" (par.10), of "the West Indians" in that game playing in the final series (par.11) and "the collective state of mind of the West Indians" (par.13). It was thus dealing throughout with the West Indians as a touring party, without distinguishing between the different elevens from within that party which would play from match to match. It may be that the reasonable reader would not regard players who although members of the touring party were not regular members of the team as being referred to by the article, but it seems to me close to inevitable that the captain would be so regarded, whether he played or not, and that the reasonable reader would take such a view simply upon reading the article itself, without recourse to extrinsic materials. It also seems to me quite undoubted that the reasonable reader of the article, having any knowledge of cricket at all would know the plaintiff was the captain of the West Indies touring party. I therefore do not accept the proposition that this was, as regarded the plaintiff, a true innuendo case in the way argued for by the appellant.

A further submission was that it was necessary for a witness to say that he took the article to refer to the plaintiff. As far as I can see there is no authority that supports this as a universally applicable proposition. If it appears as an inference from the materials before the jury the

same position is reached as if a witness had directly said it. It seems to me plain that the inference was open to the jury that, for instance, Mr.Thorpe and Mr. Taylor thought that the article referred to the plaintiff. If that appears from their evidence it does not seem to me to matter whether they said it in so many words (as the appellant conceded they could do) or by necessary implication.

A further submission was that the interrogatory and answer set out above should not have been admitted in evidence. It was argued that whether the article was intended to refer to the plaintiff or not was irrelevant. The only relevant question was whether or not it might reasonably be regarded as referring to him. There are observations of Dixon J. to the contrary of this proposition, Lee v. Wilson (1934) 51 C.L.R. 276 at 288-9. Although there is some force in the appellant's submission as a matter of reason, Dixon J. appears both to have recognised but not been persuaded by it. He said:

> "Indeed, where the words are capable of relating to the plaintiff, but it is uncertain whether they actually do, the fact that they are used with him in view appears to be decisive. The reason may be that if words are capable of being read as referring to the plaintiff and are intended to be so read, it must be presumed in his favour that they actually were so read."

On the basis of this statement, the interrogatory and answer were, in my opinion, admissible.

In my opinion there was properly before the jury evidence upon which they could conclude that the material complained of was published "of and concerning" the plaintiff amongst others. I do not think any of the appellant's

submissions concerning identification should succeed. This includes a submission which related both to identification and damages. It was contended that even if there were evidence capable of proving identification other than that of people who had mistakenly thought the plaintiff played in the Tuesday match,the trial judge was bound to exclude this later evidence in relation to damages. I think this submission fails because it does not accommodate the fact that it was open to the jury, in my opinion, to approach their damages verdict on the footing that all readers of the defamatory material thought the imputations referred to the plaintiff, amongst others.

Damages - taking into account of falsity of imputations.

Notwithstanding the submission that there was no evidence that the plaintiff was affected by the falsity of the imputations and the trial judge should have directed the jury not to take the falsity of the imputations into account, I think the plaintiff's evidence of having been incensed upon reading the article was of itself sufficient for the matter to be left to the jury as it was.

Damages - the leaving of recklessness to the jury.

As with the preceding submission I am of opinion that this matter was properly left to the jury. Once it is accepted that the material complained of was capable of conveying the defamatory imputations alleged and, amongst other evidence there was before the jury the appellant's own article, published the day before the material complained of, entitled "Win a gift from the heavens", it seems to me it cannot have been wrong for the question of recklessness in the publication of the material complained of to have been left as a matter for

the jury's consideration in assessing damages.

On the question whether the recklessness of the publication affected the relevant harm (s.46(3)(b)) I accept the submission of the plaintiff's case that Andrews v. John Fairfax & Sons Ltd (1980) 2 N.S.W.L.R. 225 adequately supports the way in which the matter was left to the jury in the present case.

Were the damages excessive?

The principles governing the approach of an appellate court to this question, when the damages have been awarded by a jury were recently discussed in this Court: Andrews v. John Fairfax & Sons Ltd. (1980) 2 N.S.W.L.R. 225 at 244-246. The Court has jurisdiction to award a new trial, but there are very few guides as to what is excessive and the Court is very reluctant to conclude that a verdict has been grossly excessive: Triggell v. Pheeney (1951) 82 C.L.R. 497 at 517. On the basis of this approach to damages, although here they are very high, they were awarded to a man pre-eminent in his occupation in respect of defamatory material accepted by the jury as imparting behaviour to him which would be extremely damaging to him in that occupation and I do not think they should be interfered with by the Court.

Conclusions

I would dismiss the appeal with costs.

IN THE SUPREME COURT)
) CA 181 of 1984
OF NEW SOUTH WALES)
) CL 9702 of 1982
COURT OF APPEAL)

CORAM : KIRBY, P
HOPE, JA
PRIESTLEY, JA

MONDAY, 25 MARCH 1985

DAVID SYME & CO LTD v LLOYD

PRIVY COUNCIL - conditional leave to appeal - unsuccessful party appeals as of right - successful party's purported appeal - 'final judgment' meaning - whether appeal necessary - facilities of cross-appeal and notice of contention - whether reasons constitute 'decision' - discretionary appeal - dual system of legal authority - public policy - no jurisdiction to make orders - discretion refused - power of Privy Council to cure procedural defect if necessary.

APPEAL - successful respondent's rights on - entitlement to support of judgment on grounds of law - matters not argued or finally determined - purpose of notice of contention - common law entitlement of respondent - whether applicable to Privy Council appeals.

PRACTICE AND PROCEDURE - notice of issues for appeal - Privy Council practice - written case and argument - risk of surprise diminished - provisions of Privy Council Appeal Rules.

HIGH COURT - leave to appeal from Court of Appeal - amendments to Judiciary Act requiring leave - circumvention by Privy Council appeals as of right - policy considerations - function of Court of Appeal in conditional leave applications

- appearance of discretion - undesirability.

The Judicial Committee Act 1833 (Imp), s3

Privy Council Appeal Rules 1909 RR 1, 2(a), 2(b), 3, 5, 15

Judicial Committee (General Appellate Jurisdiction) Rules Order 1982

ORDER

Application for leave to appeal dismissed with costs.

IN THE SUPREME COURT)
) CA 181 of 1984
OF NEW SOUTH WALES)
) CL 9702 of 1982
COURT OF APPEAL)

CORAM : KIRBY, P
HOPE, JA
PRIESTLEY, JA

MONDAY, 25 MARCH 1985

DAVID SYME & CO LTD v LLOYD

JUDGMENT

KIRBY, P : Clive Hubert Lloyd ('the Opponent') is a cricketer. He claims that he was defamed in an article in the Age newspaper. That newspaper is published by the claimant, David Syme & Co Ltd. On 18 April 1984, Mr Lloyd recovered a verdict of $100,000 following a jury trial in the Court. The claimant appealed to this Court. At the hearing of the appeal the Court comprised Glass, Samuels and Priestley JJA. On 21 December 1984 the appeal was by majority allowed, Priestley JA dissenting.

Mr Lloyd thereupon appealed as of right to Her Majesty in Council. On 29 January 1985, the Court being told that there was no relevant reason which would disqualify the opponent from appealing as of right to the Judicial Committee of the Privy Council, ('the Privy Council') made the usual orders granting conditional leave to appeal. It has been implied by a series of decisions that the application for leave to appeal as of right, which satisfies the monetary threshold of five hundred pounds sterling, contained in the Privy Council Appeal Rules 1909 ('the Rules'), is merely a procedural formality and that this Court has no jurisdiction to refuse the application, provided

the requirements of the Rules are satisfied. Jalsard Pty Limited v Commercial Banking Co of Sydney Limited [1970] 2 NSWR 82; Wattz v Northey (No 2) [1971] VR 136. The parties have proceeded on this basis and that is the way in which I approach the issue before me.

After the Court made the usual orders for conditional leave for Mr Lloyd to appeal against the judgment of the Court of 21 December 1984, it proceeded to consider a second notice of motion filed on behalf of the opponent. The Court dealing with this motion included Priestley JA. However, at the outset of the hearing of the two applications, counsel for both parties indicated that they raised no objection to the participation of Priestley JA, the matter for decision being severable and relating solely to procedure.

The claimant sought conditional leave to appeal to the Privy Council against that part of the judgment of the Court of Appeal in which, it is said, the Court held that the defence of comment in an action for defamation is pleaded to the imputations rather than to the published material complained of in the proceedings. Remarks to this effect are contained in the judgments of Glass JA and Priestley JA. The claimant seeks conditional leave to appeal in respect of those observations, whilst not appealing from the judgment of the Court. Mr Lloyd did not consent to the granting of leave by the Court. However, he submitted to the order of the Court and at the invitation of the Court provided written submissions. These suggest that the Court has no jurisdiction to grant conditional leave to appeal under Rule 2(a) of the Rules.

Rules governing Privy Council Appeals

The prerogative of the Queen to decide appeals on the basis of law, statute or custom was regulated by the enactment in 1833 by the Imperial Parliament of the Judicial Committee Act 1833. By s3 of that Act:

> All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, law or order of any court, judge or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of his Privy Council ...

In Australian Consolidated Press Ltd v Uren (1967) 117 CLR 221, the Privy Council had to consider whether the Judicial Committee Act 1833 exhausted the prerogative right of the Sovereign to entertain appeals, so that only the range of appeals provided for in the Act would be heard by that court. The Privy Council held that, although the word 'determination' in the Act was a wide one, the section did not purport to be an exclusive definition of the range of appeals that would be entertained in the exercise of the prerogative.

It is not in question that, subject to any disqualifying provisions in the Australian Constitution or legislation, appeals may be brought to the Queen in Council pursuant to the prerogative. What is in doubt is the jurisdiction of this Court under Rule 2(a) of the Rules to grant leave to appeal against part of the reasons for a decision, where the judgment itself and the orders which followed it, are not complained of and where the opposing party has already secured conditional leave to appeal from that

judgment.

Rule 5 of the Rules is in mandatory language. It provides that leave to appeal under Rule 2 'shall only be granted by the Court in the first instance' upon certain conditions. The power is therefore controlled by the events specified in Rule 2. Rule 2(a), which is the provision first in question here, provides:

> 2. Subject to the provisions of these Rules, an Appeal shall lie:-
> (a) as of right, from any final judgment of the Court where the matter in dispute on the Appeal amounts to or is of the value of £ 500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £ 500 sterling or upwards.

The claimant, having been successful in this Court, does not seek to appeal from the judgment of the Court as such. However, it relies upon the extended definition of 'judgment' contained in Rule 1 of the Rules. That Rule provides that 'judgment' includes 'decree, order, sentence or decision'. The claimant asserts a right to appeal pursuant to Rule 2(a) on the basis that the conclusion by Glass JA and Priestley JA previously referred to formed 'part' of the judgment so defined and that it is open to the claimant to appeal from that part of the judgment which it seeks to challenge whether as a principal appellant or, as in the present case, by way of cross-appeal. The claimant acknowledges that there is no express reference to a cross-appeal in the Privy Council Appeal Rules. In this regard, the Rules governing appeals to the Privy Council can be contrasted both with the Rules of the Supreme Court of New South Wales (Part 51 Rule 13) and the English Rules (Order 59

Rule 6(1)(c)). It is pointed out that Rule 15 of the Privy Council Appeal Rules contemplates that there will sometimes be 'two or more applications for leave to appeal arising out of the same matter'. It is suggested that this provision and the power of the Court to consolidate the appeals suggests that the facility of cross-appeal was assumed in the provisions of Rule 2(a). I do not believe that this was the intention of Rule 15. It appears to be a Rule addressed to the issue of consolidation where a number of parties are affected and wish to appeal against an adverse judgment. In any case, the jurisdiction of this Court must be found, relevantly, in the word 'judgment' and the provisions of Rule 15 cast no light on that question.

Approach to interpretation

It is appropriate to mention the approach I take to the interpretation of the Rules. In the course of this century important moves have occurred, both as a result of Rules of Court and judicial decisions, to reduce the risk of surprise which has been a feature of litigation conducted in accordance with the continuous oral trial tradition. That risk is reduced by the procedures adopted in civil law countries, where the function of oral evidence and argument is limited by the provision of written depositions and submissions. The move to a more informative system of pleading and the judicial alert to the risks of injustice that may arise from so-called 'trial by ambush' have led to significant reforms in the procedures of our courts. It is desirable that parties approaching the trial of an action or the hearing of an appeal should have adequate notice of the matters in contention, so that they can prepare and assist the court with relevant evidence or, in the case of

appeal, argument based on legal authority. If two interpretations of the Rules were equally open, I would favour that interpretation which permitted (including by notice of appeal) the prior notification of points intended to be raised, so that the risk of surprise would be diminished and the assistance to the court enhanced.

In the present case, however, two considerations must be borne in mind. The first is one of general principle affecting all appeals. The second is a consideration peculiar to appeals to the Privy Council.

It is clearly established that a respondent to an appeal, such as the present claimant, is entitled at the hearing of the appeal, to rely on any ground to support the decision of the court appealed against. There is a long line of authority, both in England and Australia, which makes it plain that where a respondent is content with the judgment appealed from, he may on an appeal, without filing appeal process himself, support the judgment on a ground different to that relied upon by the court below, even if that court has not adverted to the alternative basis for its decision at all. See eg Waller & Son Ltd v Thomas [1921] 1 KB 541; Simpson & Anor v Crowle & Ors [1921] 3 KB 243 and In Re Two Solicitors [1938] 1 KB 616, 627. In Australia, the point was made clearly in this Court by Jordan CJ in NRMA Insurance Ltd v B & B Shipping and Marine Salvage Co Pty Ltd & Anor (1947) 47 SR (NSW) 273, 282. Giving the judgment of the Full Court, Jordan CJ said, in respect of a ground of appeal raised during argument by a successful respondent:

> It is true that this ground was not relied upon by the defendants below; but they are the respondents in the appeal and it has been repeatedly held that a respondent can support the judgment which he obtained below on any good legal ground appearing upon the evidence, although he did not present it to the court below.

Mindful of the problem of surprise and of the need to ensure fair procedures, courts reserve the possibility of imposing conditions. See Waller & Son Ltd v Thomas above at p548. However, the common law is plain. A respondent to an appeal, not seeking a variation of the judgment, order or determination appealed from, is not obliged to file court process but can support the judgment under attack by reference to additional or alternative arguments of law. Accordingly, in the present case, the claimant is adequately protected by this principle. No question arises as to a qualification on this protection by reason of the conduct of the proceedings, the issue having been thoroughly argued in this Court and adverted to in the judgments of Glass JA and Priestley JA. It is perhaps worth noting that the width of the common law rule was implicitly recognised in the reform of the Rules of the Supreme Court of New South Wales by the introduction of the procedure for a notice of contention (see Part 51 Rule 14). Far from being a procedure designed to permit the respondent to an appeal to raise, in argument, alternative bases for supporting the decision appealed against, this facility was introduced precisely to control what was presumably considered to be the too ample entitlement of a respondent at common law and to ensure that the court and the parties to the appeal had due notice of any alternative basis upon which it was contended

that the judgment under appeal could be sustained.

There is no specific facility for cross-appeal or notices of contention in the Rules governing appeals to the Privy Council. However, the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI 1982 No 1676) contain detailed provisions for the lodging of a written case stating 'as concisely as possible the circumstances out of which the appeal arises, the contentions to be urged by the party lodging it and the reasons of appeal'. Provision is made for the exchange of cases and for the lodgment of a written list of authorities to be cited at the hearing no less than three clear days before the hearing of an appeal. These and other procedures, including some fixed by Practice Directions, reduce, in a wholly beneficial way, any risk of surprise or disadvantage in any party appearing before the Privy Council. Indeed, long before the beneficial introduction of procedures for written argument in the Australian courts, the Privy Council have adopted admirable procedures for the exchange of written contentions.

The procedures for the exchange of written cases, combined with the principle of the common law which I have mentioned, provide an ample opportunity for the identification by the claimant of the passages in the judgments complained of and the alternative bases upon which it asserts an entitlement to succeed on the appeal from this Court, although on an alternative ground.

The judgment under appeal

I now return to the language of the Rules and a consideration of whether there is an ambiguity which should be

resolved in the light of the considerations I have just mentioned. This Court must satisfy itself as to its jurisdiction. That jurisdiction is to be found in the Rules. The appeal which the claimant seeks to mount is not 'from any final judgment of the Court' except to the extent that the 'judgment' of the Court is the formal basis or reference of the appeal or unless the word 'judgment', in its extended meaning under Rule 1, imports a facility of appeal against part only of the reasons for judgment.

I do not believe that the expression 'from any final judgment of the Court' in Rule 2(a) of the Rules is purely descriptive of the formal order upon which the appeal is based. The fact that the subrule proceeds to refer to 'the matter in dispute' and exists to govern appeals as of right from judgments under challenge, suggests to me that it is the judgment which activates the appeal. The claimant has no complaint with the judgment, at least insofar as the judgment is constituted by the formal orders made. But if the extended meaning in Rule 1 is called in aid, the reference to 'decree, order, sentence or decision' does not assist the claimant. The word 'decision' used in the context of 'decree, order' and 'sentence' clearly means something in the nature of a formal curial pronouncement. The genus defined by these words is not the reasons for judgment or the detailed process of decision-making revealed by the court but the formal indication of the court's determination.The definition of 'judgment' is inclusive. It does not purport to exclude other, wider, expressions. Insofar as the definition gives an indication of the draftsman's intent, it is confirmatory of the primary

meaning of the word 'judgment', not expansive of it.

In these circumstances, absent a specific facility for cross-appeal or for notices of contention, and given the common law facility protective of the position of a respondent to an appeal described above, the Rules must be given a meaning which is faithful to the language given its apparent intent. This is that a party disaffected by a judgment, in the sense of a final order of a court, may, if he satisfies the monetary preconditions, appeal as of right.He may do so whether the decision complained of is in the form of a final judgment or a decree, order, sentence or decision.

I do not believe that the word 'decision' in this context means the reason for decision. Nor does it mean part of the reasons for decision given by some judges only of the court. Especially, it does not mean part of the reason given by some judges of the court where the reasoning is not essential to their conclusion and to the judgment entered as a consequence and, at least in one case here (the judgment of Glass JA) may not even have represented the concluded opinion of the judge on the issue in question, precisely because he was not called upon finally to pass upon it.

The observations of Deane J in Caltex Oil (Aust) v XL Petroleum (NSW) Pty Ltd (1984) 58 ALJR 38 to which the claimant referred are not in point. In that case Deane J pointed out that the Privy Council and the High Court of Australia can 'uphold or dismiss an appeal on a point not raised in the appeal papers' and 'make orders on the hearing of the appeal different from the orders sought by any of the parties'. Such a power is not in dispute. Moreover, that was a case dealing with

an application for conditional leave. In the present proceedings, the claimant is not seeking conditional leave to appeal from part of a judgment which directly affects the order of the court but, content with the judgment and order of the court, is seeking simply to protect itself in respect of an alternative basis available to it to defend that judgment. Whilst this precaution is understandable, it is unnecessary. More importantly, it is not warranted by the provisions of the Rules which constitute the only basis upon which this Court has jurisdiction to grant conditional leave to appeal where this is asserted to be as of right.

Matters of discretion

The claimant contended that if the Court was of the view that no appeal lay as of right under Rule 2(a) it should exercise its discretion under Rule 2(b). This subrule provides that an appeal shall lie at the discretion of the Court where the question involved is one which, by reason of its great general or public importance or otherwise, ought to be submitted to the Queen in Council for decision. The claimant contends that the issue in question involves a 'fundamental question as to the law relating to fair comment in New South Wales'. It contends that the issue may arise in any case in which a defence is pleaded, that there is a difference of view within this Court on the question and that in the event of a retrial the question would arise again and of necessity be the subject matter of a decision by the trial judge. The spectre of a second appeal to the Privy Council was raised and it was contended that it would be in the interests of the

administration of justice that the question should be resolved by the Privy Council in the present proceeding, once and for all.

There are a number of reasons why, if I have a discretion, I would not exercise it in favour of the claimant. First, the insistent reduction by successive Federal Parliaments of the residual facility of appeal to the Privy Council has resulted in confining the jurisdiction of that court to a narrow field of Australian cases. The Privy Council is no longer a general court of appellate jurisdiction for Australia, as once it was outside the narrow class of case originally excluded by s74 of the Constitution. The pre-eminence in Australia of the High Court and the difficulty which is created for the administration of justice by the provision, in a coherent legal system, of two ultimate courts of appeal are important reasons of public policy to which judges in this country may have regard in deciding whether to exercise the discretion to grant leave to appeal. It is one thing for the courts of Australia to have to comply with the law of this country as propounded by the High Court of Australia and the Privy Council where the latter secures its jurisdiction by appeals that are brought to it as of right. It is another for those courts to invite the uncertainty and potential confusion and conflict in ultimate legal authority by facilitating appeals to the Privy Council where there is discretion to deny that facility. See Moffitt P in National Employers' Mutual & General Association Limited v Waind & Hill (No 2) [1978] 1 NSWLR 466, 476-7; Harrison v Law Society of South Australia Incorporated (1981) 27 SASR 387; The Queen v

District Council of Berri; ex parte Eudunda Farmers Co-operative Society Ltd & Ors (No 2) (1983) 32 SASR 111, 119.

Secondly, in the present case the same difficulty arises for the claimant in that the appeal lies under Rule 2(b) of the Rules only from 'any other judgment of the Court'. Although it is made plain by the subrule that this judgment may be 'final or interlocutory', there is no doubt in the present case that the judgment in question is final. The claimant's objection is not to the judgment of the Court, which was entirely favourable to it, but to certain passages in the reasoning of two of the judges who constituted the Court.

Thirdly, even if this view of the word 'judgment' in Rule 2(b) were wrong, the exercise of discretion should be denied on the grounds that it is unnecessary. Absent any restricting provisions in the Privy Council Appeal Rules, something that has not been contended in the present case, the common law will permit the claimant, on the appeal already brought from the judgment of the court by Mr Lloyd, to raise the matters the claimant wishes to raise in support of the judgment it has won. The discretion should not be exercised on the ground that a matter of great general or public importance or otherwise should be submitted 'to the Privy Council' in favour of the claimant, where the matter is already before their Lordships by reason of the appeal brought by Mr Lloyd and the rights of the claimant to resist that appeal upon any ground of law or at least upon the grounds argued before this Court and of which full notice has been given.

Fourthly, it is entirely open to the Privy Council itself to decide that it will permit the claimant to raise a

matter. The ample nature of the prerogative and of the powers of the Privy Council in this respect were made plain in Australian Consolidated Press Ltd v Uren (1967) 117 CLR 221 at p230. Should the issue of comment become relevant to the determination of Mr Lloyd's appeal to the Privy Council, it is scarcely realistic to suggest that the Privy Council itself would raise a technical and procedural barrier to the argument by the claimant, notwithstanding the pleadings, the argument at the trial, the argument before this Court, passages in the judgments of two of the judges of this Court, the principle of common law and the procedures for written argument adopted by the Privy Council to reduce the risk of surprise. If any procedural impediment is thought to arise, notwithstanding these considerations and the stance taken, quite properly, by Mr Lloyd's representatives, there is ample authority in the Privy Council itself to suggest that their Lordships will cure the impediment and ensure that no such defect prevents the resolution of the important issues on the appeal. Cf Toronto Railway Co v King & Anor [1908] AC 260. In any case, it is preferable, there being no complaint by the claimant against the final judgment itself, that such a procedural matter should be dealt with by the Privy Council and not by this Court; assuming, contrary to what I have said, that this Court has the jurisdiction to do so. See also Davis v Shaugnessy [1932] AC 106.

Residential appeals to the Privy Council

These observations are sufficient to dispose of the present motion. However, it is appropriate to note a matter of importance which is called to attention by the appeal and

purported cross-appeal in this case. In June 1984, by virtue of the amendments to the Judiciary Act 1903, (Cth) made by s 3(1)(a) of the Judiciary Amendment Act (No 2) 1984, which came into operation on 1 June 1984, appeals from this Court to the High Court of Australia lie henceforth only pursuant to the leave of the High Court. The previously existing provisions for appeals as of right in circumstances where the appellant could establish a monetary threshold, have been abolished. That abolition has significance both for the function of the High Court of Australia and for the authority of the judgments of this Court. In the twelve months before the amendment to the Judiciary Act came into operation in June 1984, there were three applications for conditional leave to appeal to the Privy Council from this Court. In little more than six months since the amendment, nine applications for conditional leave to appeal have been made and others are pending. The result is that legislation which was designed to affect the number and procedures of appeals in the courts of Australia is being circumvented by the residual facility which exists for appeal to the Privy Council in London. Whilst that facility remains, the public policy of limiting a further avenue of appeal from decisions of this Court to cases where leave is granted, as on some ground of general or public importance, is undermined by the simple expedient of redirecting the appeal from the High Court of Australia to the Privy Council. Inevitably a number of such appeals to the Privy Council have been filed defensively, against the possibility that leave to appeal to the High Court will be denied. This development, which cuts across the Australian legislation governing further appeals

from this Court, adds urgency to the resolution of the division of ultimate Australian legal authority which exists, so long as the appeal to the Privy Council remains available. In this connection the recent decision of the High Court in Shawar Kirmani v Captain Cook Cruises Pty Ltd, unreported, 27 February 1985 may suggest means by which residual appeals to the Privy Council, or some of them, can be terminated by valid Federal legislation.

These remarks leave open a further question. It was not argued by either party in this matter, each of whom was equal in enthusiasm to take the respective appeals to the Privy Council. This is whether, under the Australian Constitution, appeals may still be brought to Her Majesty in Council (Cf Murphy J in Caltex Oil (Aust) Pty Ltd v XL Petroleum (NSW) Pty Ltd (1984) 58 ALJR 38 at p42). In a series of cases, Zelling J in the Supreme Court of South Australia, has suggested that since Her Majesty the Queen, by her own consent, became Queen of Australia, a "legal revolution" occurred affecting the prerogative of the Sovereign in Australia, so that appeals to Her Majesty's Privy Council in London are no longer available. See Zelling J in Harrison v Magarey & Ors (1983) 32 SASR 27, 29; The Queen v District Court of Berri; ex parte Eudunda Farmers Co-operative Society Limited & Ors (No 2) (1983) 32 SASR 111, 119; Harrison v Law Society of South Australia Inc (1981) 27 SASR 387, 391; Ronecast Caterers Pty Ltd v Davis (No. 2) (1981) 27 SASR 392, 396.

Nor was there any argument concerning the existence of any relevant disqualification by virtue of the Australian legislation limiting appeals and the fact that the parties do

not, or one of them does not, reside in New South Wales. The matter has been dealt with by the Court on the basis on which it was argued by the parties. I expressly reserve to an appropriate case the more fundamental questions that affect the continuance of Privy Council appeals and the involvement of this Court in that continuance where the Court's function is apparently to grant leave to appeal but in substance (discretionary cases apart) to determine certain machinery conditions, most of which are already dealt with in terms under Rule 5 of the Rules. This procedure leaves this Court with the appearance of facilitating appeals to the Privy Council but the actuality, in cases of appeal as of right, of doing no more than subscribing its name to standard conditions of appeal. If Privy Council appeals are to endure, it would be desirable that this function of the Court should be removed as it involves the Court in the appearance of the exercise of a discretion and the facilitation of appeals which I, at least, would wish to reconsider, if a true discretion, beyond machinery questions, were being exercised.

Orders

In the result, the Court having no jurisdiction to grant the applicant conditional or other leave to appeal as it seeks, the application should be dismissed.

Insofar as the Court is asked to exercise any discretion it may have under Subrule 2(b) of the Rules, I would propose that any such discretion be exercised against granting leave to appeal.

The claimant must pay the opponent's costs.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
COURT OF APPEAL)

C.A. 181 of 1984
C.L. 9702 of 1982

CORAM: KIRBY, P.
HOPE, J.A.
PRIESTLEY, J.A.

Monday 25th March, 1985

DAVID SYME & COMPANY LIMITED v. LLOYD

JUDGMENT

HOPE, J.A.: The opponent Clive Hubert Lloyd was the successful plaintiff in an action for defamation against the claimant David Syme & Company Limited. Following the verdict of a jury, judgment was entered in his favour in the sum of $100,000. The claimant appealed to this Court which on 21st December, 1984, allowed the appeal and directed that judgment be entered in its favour. The opponent is entitled to appeal as of right to the Privy Council and on 29th January, 1985, orders were made in the usual form granting conditional leave to appeal.

In their reasons Glass, J.A., and Priestley, J.A., each concluded that the defence of comment in an action for defamation is pleaded to the imputations rather than to the published material the subject of the proceedings. The claimant submits that it is entitled to appeal as of right from these conclusions and it has formally lodged an application for conditional leave to cross appeal in respect of them. The occasion for its taking this course is not that it wishes to vary or reverse the order of the Court of Appeal or any part of it, but it wishes to obtain a ruling from the Privy Council in relation to the conclusions

of Glass, J.A., and Priestley, J.A., which have been referred to so that, in the event of a new trial being ordered, the presiding Judge will direct the jury in what the claimant hopes will be a different way from that which would follow if those conclusions were not touched on by the Privy Council.

The application is made under r. 2 of the Privy Council Appeal Rules 1909. That rule limits the power of this Court to deal with the application to cases where the appeal or the application for leave to appeal is in respect of a judgment of the Supreme Court. "Judgment" is defined in r. 1 to include "decree, order, sentence or decision". It is submitted that the relevant conclusions of law by Glass, J.A., and Priestley, J.A., were decisions within the meaning of the word as used in the definition.

It is well established that, although the Rules do not expressly refer to cross appeals, if one party to proceedings appeals to the Privy Council and another party wishes to have varied or reversed the whole or some part of the judgment appealed from, that party must lodge a cross appeal: Nana Narain Rao v. Hurree Punt Bhao ((1856) 11 Moore 36; 14 E.R. 608); Omanath Chowdry & Ors. v. Sheikh Nujeeb Chowdry & Ors. ((1861) 8 Moore Ind. App. 498; 19 E.R. 619); Myna Boyee & Ors. v. Ootaram & Ors. ((1861)8 Moore Ind. App. 400; 19 E.R. 582); Toronto Railway Company v. King ((1908) A.C. 260). However the claimant does not wish to appeal from any part of the orders made by this Court; it wishes to appeal against the conclusions of two of the members of the Court as to one aspect of the relevant law. That a respondent to an appeal is entitled to rely on any argument to support the order appealed from, without filing any cross appeal, is clear. As Jordan, C.J., said in N.R.M.A Insurance Limited v. B. & B. Shipping and Marine Salvage Co. Pty. Limited ((1947) 47 S.R. (N.S.W.) 273 at p. 282,

in giving the judgment of the Full Court:-

> " It is true that this ground was not relied on by the defendants below; but they are respondents in the appeal and it has been repeatedly held that a respondent can support the judgment which he obtained below on any good legal ground appearing upon the evidence, although he did not present it in the Court below: Waller v. Thomas ((1921) 1 K.B. 541 at pp. 547-8); Simpson v. Crowle ((1921) 3 K.B. 243 at p. 253); In re the Solicitors' Act ((1938) 1 K.B. 616 at p. 627)."

It may be that the conduct of the respondent in the Court below may impose qualifications upon the generality of this principle: see Waller v. Thomas (supra at p. 548), but no such issue arises in the present case. It will therefore be open to the claimant to rely upon and to argue the contested question upon the hearing of the appeal by the Privy Council.

Notwithstanding their right to have the question argued, the claimant, presumably in order to make sure that the matter is dealt with by the Privy Council, submits that it is entitled as of right to cross appeal, and for this purpose submits that the word "decision" in the definition of "judgment" in r. 1 is wide enough to cover the relevant conclusions by Glass, J.A., and Priestley, J.A. I do not think that this submission can be sustained. In Commonwealth of Australia v. Bank of New South Wales ((1950) A.C. 235), the Privy Council considered the meaning of the word "decision" in s. 74 of the Australian Constitution. So far as relevant that section provides:-

> "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

In discussing the construction of this provision, Lord Porter,

in delivering the reasons of the Privy Council, said at p. 294:-

> " As its opening words show, the section deals with 'appeals' to His Majesty in Council and, as already observed, an appeal is the formal proceeding by which an unsuccessful party seeks to have the formal order of a court set aside or varied in his favour by an appellate court. It is only from such an order that an appeal can be brought. In s. 74 the appeal is described as an appeal 'from a decision of the High Court' and so far no difficulty arises. 'Decision' is an apt compendious word to cover 'judgments, decrees, orders, and sentences,' an expression that occurs in s. 73. It was used in the comparable context of the Judicial Committee Acts of 1833 and 1844 as a generic term to cover 'determination, sentence, rule or order' and 'order, sentence or decree.' Further, though it is not necessarily a word of art, there is high authority for saying that even without such a context the 'natural, obvious, and prima facie meaning of the word "decision" is decision of the suit by the court': see Rajah Tasadduq Rasul Khan v. Manik Chand ((1902) L.R. 30 I.A. 35, 39), where the question was whether in the Indian Civil Procedure Code 'decision' meant the formal expression of an adjudication in a suit or the statement given by the judge of the grounds of a decree or order, and Lord Davey, delivering the opinion of this Board, used the words that have been cited above."

This construction was applied by the Privy Council in Australian Consolidated Press Limited v. Uren ((1969) 1 A.C. 590; 117 C.L.R. 221. Having regard to the context and to these decisions, I have no doubt that the "decision" referred to in the definition of "judgment" must be a formal decision of a court disposing of some matter before it, and not a conclusion of law included in the reasons for the making of that order.

The claimant relies on Australian Consolidated Press Limited v. Uren (supra) as authority for its submission that this court has jurisdiction to grant leave in the present case. There Australian Consolidated Press Limited had successfully appealed to the High Court in respect of a verdict given against it in a defamation action. The High Court, in allowing the appeal, directed a new trial on all issues. In its reasons the High Court held that exemplary damages for defamation may be awarded in cases outside the categories defined in Rookes v. Barnard

((1964) A.C. 1129). Australian Consolidated Press Limited sought leave from the Privy Council to appeal from so much of the decision of the High Court as determined whether it was competent to award exemplary damages. It did not seek to vary any part of the order that the High Court had made but sought the Privy Council's ruling on the High Court's conclusion as to exemplary damages. The Privy Council considered its jurisdiction to give leave to appeal, and held that, although the leave was not sought to appeal from "any decision" within the meaning of the Judicial Committee Act 1833 (Imp.), it had jurisdiction in the exercise of what it described as "the ample powers of the prerogative" to grant leave; and it accordingly did so, pointing out that the circumstances were special and not often likely to arise.

The power of the Privy Council to grant leave in the exercise of the prerogative, outside the scope of any statute and in particular outside the scope of the Privy Council Appeal Rules, is not a power which this Court has; it is a power vested only in the Privy Council. If for some reason the claimant feels that it is or may be unable to have the correctness of the conclusions of Glass, J.A., and Priestley, J.A., tested before the Privy Council, its remedy is to apply to the Privy Council for leave in accordance with the principle applied in Australian Consolidated Press Limited v. Uren (supra).

Since writing my reasons I have had the opportunity of reading the reasons of the President. I agree with him that urgent steps should be taken to abolish appeals to the Privy Council. Apart from being a legal anachronism, the existence of a dual final appeal system in many important areas of the law is inefficient, expensive and embarrassing, and results in confusion in lawyers and laymen alike. It also diminishes

the authority of what inevitably will be, and should be, the sole final Australian court of appeal, the High Court.

This Court having no jurisdiction to grant the applicant conditional or other leave to cross appeal as it seeks, the application should in my opinion be dismissed with costs.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) C.A. 181 of 1984
) C.L. 9702 of 1982
COURT OF APPEAL)

CORAM: KIRBY, P.
HOPE, J.A.
PRIESTLEY, J.A.

MONDAY, 25TH MARCH, 1985

DAVID SYME & CO. LTD. v. LLOYD

JUDGMENT

PRIESTLEY, J.A.: I agree with the reasons given in the preceding judgments for reaching the conclusion that the application made by David Syme & Company Ltd must be dismissed. I also agree with the proposed orders.

In their judgments both the learned President and Hope J.A. drew attention to the present melancholy state of the law in New South Wales whose judicial system has two separate places where litigation may be finally decided: one in Australia and one in England. I would add to what they have said a reference to the earlier decision in this court, consisting of a bench of five judges, in National Employers Mutual General Association Ltd v. Waind & Hill (No.2) (1978) 1 N.S.W.L.R. 466. The Court's decision in that case attempted, in light of the guidance provided by the High Court in Viro v. R. 141 C.L.R. 88, to indicate orderly solutions to the problems caused by a two-headed system. Notwithstanding those suggested solutions "potential confusion and uncertainty" were foreseen, (at 473). The judgment in Waind also drew attention to a passage in Viro

where it was pointed out that the Australian Constitution made the High Court the court of appeal from the Supreme Courts of the States (at 470).

The defects in the system pointed out in Waind would have vanished if in 1984, when appeals as of right to the High Court came to an end, the remaining rights of appeal from State courts to the Privy Council had also ended. Presumably this was intended. (For the history, see W.L. Morison: The System of Law and Courts Governing New South Wales (2nd ed.) 1984 esp. at par.2.31.) However it was not done and the situation has become worse from a legal point of view than it was at the time of Waind's case. There is now an incentive for proportionately more appeals to go to the Privy Council for decision than to the High Court. This incentive may well already be causing the result that, compared with the position before 1984, New South Wales case law is growing relatively more quickly in London than in Canberra. This positive regression towards the position as it was in colonial times is no doubt a political matter and not for me to comment on in a judicial capacity. It is, however, accompanied by matters proper for a judge to point out, viz. the detriments to the working of the legal system in New South Wales that I have already touched upon: uncertainty, confusion, delay and expense. These qualities are to some degree present in any legal system, but for them to be unnecessarily multiplied can only be harmful to the efficient conduct of litigation by citizens of the State.

IN THE SUPREME COURT OF APPEAL

COURT OF APPEAL

C.A. 181 of 1984

CLIVE HUBERT LLOYD

Claimant(Respondent) (Plaintiff)

DAVID SYME & COMPANY LIMITED

Respondent (Appellant) (Defendant)

I CERTIFY that the Index herein was settled subject to a final draft being submitted on 7. 5.85. The Final Draft which required an inconsequential amendment was submitted on 15. 5.85. Both dates being after the expiration of 3 months from the date of the order granting conditional leave, namely 29 January, 1985.

On 6. 5.85 the sum of $1,000.00 was paid into court (see order 2(a) on 29. 1.85). On 26. 3.85 the sum of $100.00 was paid into Court (see order 2(b) of order of 29. 1.85).

DAted 30 May 1985

REGISTRAR'S CERTIFICATE

.....
A. W. ASHE
REGISTRAR

L.S.

AT THE COURT AT BUCKINGHAM PALACE

The 31st day of July 1985

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 11th day of July 1985 in the words following viz:-

"**Whereas** by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Clive Hubert Lloyd in the matter of an Appeal from The Court of Appeal of New South Wales between the Petitioner (Appellant) and David Syme & Co. Ltd. (Respondent) setting forth that the Petitioner prays for special leave to appeal from a Judgment of the Court of Appeal of New South Wales dated 21st December 1984 allowing an Appeal by the Respondent from a Judgment of the Supreme Court dated 18th April 1984 in a libel action: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the said Judgment of the Court of Appeal of New South Wales 21st December 1984 and for further or other relief:

"**The Lords of the Committee** in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the said Judgment of the Court of Appeal of New South Wales of 21st December 1984 upon depositing in the Registry of the Privy Council the sum of £5,000 as security for costs:

"**And** Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same:

[1]

"And in case Your Majesty should be pleased to approve of this Report then Their Lordships do direct that there be paid by the Petitioner to the Respondent in any event its costs of opposing the said Petition."

Her Majesty having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the State of New South Wales and its Dependencies in the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

G. I. de DENEY.

In the Supreme Court, Court of Appeal
No. 24 - Certificate of Registrar verifying Transcript Record

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 181 of 1984
COURT OF APPEAL)

CLIVE HUBERT LLOYD

Plaintiff

DAVID SYME & CO. LIMITED

Defendant

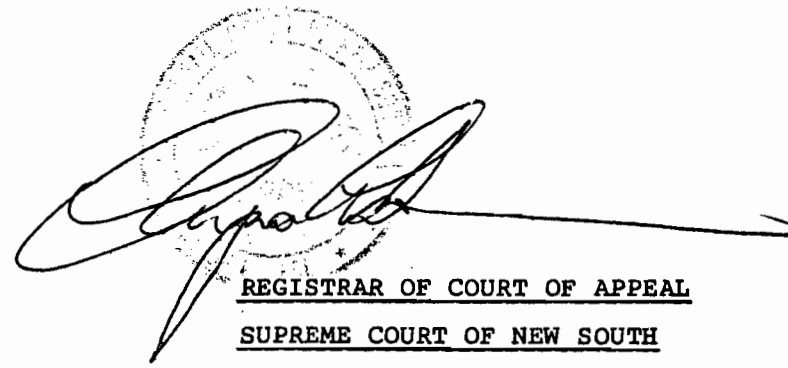
CERTIFICATE OF REGISTRAR VERIFYING TRANSCRIPT RECORD

I, ALYSON WENDY ASHE of Sydney, New South Wales, Registrar of the Court of Appeal of the Supreme Court of the said State do hereby certify that the sheets contained in the 2 volumes of the Record herein being pages numbered 1 to 530 inclusive contain a true copy of all the documents relevant to the appeal by the appellant Clive Hubert Lloyd to Her Majesty in Her Majesty's Privy Council from the Judgment and Order given and made in the abovementioned proceedings by of the Court of Appeal of the said Supreme Court of 21 December 1984 and that the said sheets so far as the same have relation to the matters of the said Appeal together with the reasons for the said Judgment given by the said Judges and an Index of all the papers, documents and exhibits in the said suit are included in that said Transcript Record which true copy is remitted to the Privy Council pursuant to the Order of His Majesty in Council on 2 May, 1925.

In the Supreme Court, Court of Appeal
No. 24 - Certificate of Registrar verifying Transcript Record

IN FAITH AND TESTIMONY whereof I hereunto set my hand and caused the seal of the said Court of Appeal of the Supreme Court to be affixed on

16 August, 1985



REGISTRAR OF COURT OF APPEAL
SUPREME COURT OF NEW SOUTH WALES

Exhibit "A" - Article from the Age 21 January, 1982

THE EVERGREEN ATHLETE

Twenty four years ago Helen Searle won her first international athletics medal: today she is still one of the top long jumpers in NSW. RON CARTER reports. — 22

AGE SPORT

Rancher should not be the only horse in the limelight at Caulfield on Saturday. TONY BOURKE reports. — 23

Hell on the Hill, or at least Stone Age

Curator bars MCG

Pitch trouble flares again

by MIKE COWARD and PETER McFARLINE

Melbourne Cricket Ground wicket controversy, ently solved a week ago, has erupted again...

Regal Tambo (Kerry Hoitens) wins the Tooti Welter at Mornington yesterday.

A veteran with a difference

By GLENN LESTER

Roman Chief destroyed

The one-day wonder still faces Test

By PETER McFARLINE

Financial savior

Adjunct to Tests

Popular Alm misses

By RAY HURLEY

Exhibit "A" - Article from the Age 21 January, 1982

THE AGE, Thursday 21 January 1982 11

AGE FEATURES

The private man behind law reform

Mr Justice Kirby: shunning the personality cult

From DEIRDRE MACKEN in Sydney

JUSTICE MICHAEL KIRBY was perched be[illegible] bench-like desk, framed [illegible] of legal journals in [illegible] mahogany office, [illegible] suitably judicial ap[illegible] — at least until he [illegible] pen his pin-striped [illegible] reveal a pair of gaily [illegible] braces.

[illegible] have become something [illegible] mark, although I must [illegible] are a bit bright, aren't [illegible] the judge with an [illegible], which betrayed his [illegible] before the subject could [illegible], the coat was but[illegible] grin disappeared and [illegible] cloistered in a business[illegible]. The judicial robes [illegible].

[illegible] of gaiety is about [illegible] most see of the judge's [illegible] humor, opinions or per[illegible] idiosyncrasies. Like his [illegible] Justice Michael Donald [illegible] hidden behind the staff [illegible] law reform.

[illegible] age of 42, Australia's [illegible] reformer shuns the [illegible] "personality cult" syndrome, pre[illegible] present himself as one[illegible] [illegible] band for reform [illegible] criminal law, de facto rela[illegible] test-tube babies, class [illegible] police interviews.

[illegible] is well that the judge [illegible] to popularise his per[illegible] because with 14-hour [illegible] six-day weeks, there is [illegible] opportunity for hob[illegible] social events, leisure, or, it [illegible] a domestic life.

[illegible] to have one of the [illegible] interesting jobs in the [illegible] and I enjoy it thoroughly. [illegible] I am missing some of [illegible] affections but work is [illegible] and my fulfil[illegible].

[illegible] Kirby (who was ap[illegible] the Conciliation and [illegible] Commission) has [illegible] and his reputation [illegible], that some former [illegible] at the bar comment [illegible] got out of bed at 7.30 [illegible] the unpleasant know[illegible] Kirby had been work[illegible] chambers for at least [illegible].

[illegible] years at the bar well [illegible], Mr Justice Kirby has [illegible] past seven years as [illegible] of the Australian Law [illegible] Commission and next [illegible] another three-year term. By 1985, at the age of 45, he will have presided over a decade of law reform.

But while the commission's reports have been debated in countless column inches and broadcasting bulletins in the media, some have questioned whether it is achieving the task of bringing the 800-year-old institution of common law into the age of computer technology and test-tube reproduction.

"As far as success rates are concerned, we have a far better rate than the average law reform bodies or Royal Commissions, especially considering that our reports have not been concerned with boring, technical issues but with controversial matters upon which a large majority of people have strong opinions.

"The controversial subjects that we have been referred to are much more difficult and liable to failure and, in that respect, the response from Governments has been pleasing. So if the criterion of success is the implementation of reports, we're doing well."

Indeed, the commission's first report on complaints against police was wholly implemented in the act, substantially introduced in NSW and, as Mr Justice Kirby says "no-one could say that was so easy, or non-controversial project."

The second report dealing with the tape-recording of police interviews, the rights of arrest, search and seizure and the rights of Aborigines and children to have another person present at police interviews is still before Parliament but is likely to result in several changes.

[illegible] organ transplantation and the definition of death, has been adopted in Queensland, will be implemented in NSW and is now before the Victorian Parliament.

With one big loss — the report dealing with insurance brokers and insurance contracts — Mr Justice Kirby is not worried about his success rate. But with every law that is upgraded several other challenges to Australia's legal system arise, and the law is seen to be lagging.

"The law does lag behind the social and moral modes of society and I think people expect it to lag to some extent. It's often difficult to find a consensus with issues such as in vitro fertilisation, so you need some time to get the experts together, to promote public debate and find a consensus. Otherwise you run the risk of building laws on shifting sands".

To appreciate the difficulty of the task facing Mr Justice Kirby, one must remember that he is working with a legal frame-work that was born in England almost 1000 years ago and one which the Australian colony adopted virtually without change.

When William the Conqueror first raised the concept of common law, England was a homogeneous society with little government interference, a mercantile economy, a family moral code and a range of primitive medicines, sciences and technology, that rarely touched on the common man.

Those same laws are now used to regulate a multi-cultural society with interfering Governments, multi-national companies and a population which is affected daily by computers, medical advances, space technology and shifting moral codes.

As Mr Justice Kirby says: "The law exists to serve society, to resolve disputes, to lay down rules and educate the community on the accepted norms. In a society such as Australia, there is bound to be some quite rapid changes in the law to keep up with the rapid changes in society."

Australia, he says, is not as "hidebound as England or imprisoned in English ideas" as it used to be and with the increasing influence of Europeans on the society, the law-makers are looking to the European legal system.

Two such European legal customs, which Mr Justice Kirby is examining, concern defamation and the judiciary. "In Europe, for example, they do not have the obsession with money damages for defamation but are more interested in the person's rights of reply and correction.

"Again, in England, judges are supposed to be neutral, whereas in Europe they take an active role, initiating questions and calling for evidence. The role of the neutral judge works well if you have legal representation, but the European system works better if there is no legal representation."

Mr Justice Kirby may have hundreds of revolutionary thoughts churning over in his 150 IQ brain but he is not deluding himself with dreams of a legal utopia. As he says: "We stand half-way between principle and pragmatism".

His method is very much one of bringing the public to the law and the law to the public. His public inquiries, media coverage and opinion polls ensure that the public has a say in its laws. "People are no longer content to leave lawmaking to experts behind closed doors in Canberra".

Bringing the law to the public has proved more difficult. Cumbersome legal procedures and professional ethics have kept the law and the public apart but Mr Justice Kirby sees these barriers breaking down and the law opening itself up to public scrutiny.

"I believe a more visual legal system and judiciary will stand up to scrutiny and bring home to people both the advantages and disadvantages of the legal system without suffering a loss of dignity".

Mr Justice Kirby [illegible] gives his reports up for public debate, but not himself.

The man who was born in Sydney's working class western suburbs and vows never to forget his origins, proffers little of his personal life, except for schooling and academic achievements.

He attended Sydney's Fort Street High, a school for gifted children of poorer means, which can boast such former pupils as the NSW Premier, Mr Wran, Dr Evatt, Sir Garfield Barwick, Sir John Kerr, Bob Ellicott, Sir Percy Spender and three of the last four appointments to Sydney's Federal Court.

"I got on the train of education at the early age of seven and kept on it. In fact I kept on it for a bit too long", he says, referring to the fact that he won a bachelor of economics, bachelor of laws, bachelor of arts and a master of laws with first class honors.

The man who gained success at such an early stage of his life is uncertain what the future holds after he concludes a decade on law reform. He may wish to stay on the Law Reform Commission, he may "return to the orthodox tasks of the judiciary". But, despite murmurings around legal circles, he is unlikely to enter politics.

Judges, he says, are not supposed to be ambitious. Indeed, it is difficult, some say impossible, for a judge to enter a public office after sitting on the bench. Hence, although it is unlikely that Michael Donald Kirby will achieve a childhood ambition of becoming Prime Minister, he has the satisfaction of knowing that "much of the work that's being done here can achieve a lot more than many political officers could hope to achieve".

Come on, dollar, come on

By DAVID THORPE

"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

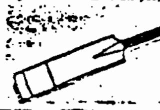
THE only crises of conscience America has suffered this century have concerned President Nixon's blatant indiscretions, the Vietnam war and the fixing of the World Series baseball championship in 1919. All three events, to borrow Scott Fitzgerald's thought, played with the faith of the people.

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, ie, 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.

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 precepts of sporting honesty are being strictly observed. Nobody is playing with the faith of the people.

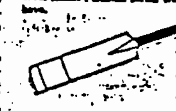


Let us consider the delicate, unfathomable mechanism that gives one team a moral edge over another in the context of the current Benson and Hedges World Cup series.

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 muddied 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-desperation note about them. Come on dollars, come on.

One wonders about the collective state of mind of the West Indians. Was it sportingly honest, that 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"?

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

It is conceivable that the same pressures will influence the thinking of both teams in the forthcoming 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 (ironically 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.

Two opposing teams with a common goal cannot be said to be competing in good faith to win each game on its merits, but rather indulging in a mildly 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.

The Swiss eagle has landed in Skibbereen

From PETER SMARK, chief European correspondent

[illegible] how sadly defenceless [illegible] Skibbereen Eagle" in west [illegible] fleeting interna[illegible] and a place in [illegible] of all newspapers [illegible] an editorial start[illegible] and again we have [illegible] Czar" and went on [illegible] notice that it was [illegible] the Czar of all the [illegible] good thoughts [illegible].

[illegible]

Swiss troops on alpine patrol

[illegible] between France and Spain whose defence budget is about $18 a year. Not a bit of it.

Colonel Bachmann decided, when the Irish plans were in place, to send one of his intelligence agents, a certain Lieutenant Kurt Schilling, to Austria to evaluate the Austrian army's [illegible] ability.

[illegible]

[illegible] can be mobilised, and the national policy is not just neutrality but "armed neutrality".

Although the standing Swiss army is tiny (just 1500 professional soldiers, none over the rank of brigadier) the CMF demands are heavy. Every Swiss male has to do four months' training [illegible].

[illegible]

they have the ultimate deterrent. Switzerland is the most expensive country in Europe to visit for a weekend, let alone to occupy on any long-term basis. Indeed, one theory behind the great Skibbereen plan is that it won't be a threat of Soviet invasion which will drive the Swiss Cabinet out but because they can no longer afford to stay in Switzerland and be plundered by their own countrymen.

Sweden is very different. Although, like Switzerland, Sweden depends for defence on its ability to mobilise part-time forces quickly (about three million adults out of a population of eight million) there are 25,000 full-time members of the armed forces, the navy and air force are expensively armed (25 squadrons of fighter and attack aircraft, three destroyers and 12 submarines as well as large fleets of torpedo boats and minesweepers) and mainly staffed by full-time military members.

Just how seriously Sweden takes its neutrality and how fiercely it is prepared to defend its territory was shown to Moscow by the treatment of the Soviet submarine which was caught spying on a naval base last month. Even anti-American student groups could be heard [illegible].

[illegible]

Exhibit "A" - Article from the Age
21 January, 1982

COME ON. DOLLAR, COME ON

'I remembered, of course, that the World's Series had been fixed in 1919.... it never occured 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

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 championships 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, ie, they are both trying to win.

Exhibit "A" - Article from the
Age 21 January, 1982

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

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 precepts of sporting honest 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 on 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 final 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-desperation 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, sponsorship - 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 pressures will influence the thinking of both teams in the imminent finals series. Mr. Packer would prefer a thrilling fifth match decider to 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 no being made as a contest but as a contrived spectacle with unsavory commercial connotations.

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.

Exhibit "B" - Article from the Age
22 January, 1982

Windies, Paks sour on tour cut

By PETER McFARLINE

The West Indies cricket team, a major reason for the financial success of the 1981-82 international season, is unhappy about the money it is receiving.


Walker: blocked

So, too, are the Pakistanis who flew out of Melbourne yesterday, disappointed at miss a place in the finals of the lucrative Benson and Hedges World Series Cup.

Pakistan manager Ijaz Butt made no secret of his feelings about the financial set-up of Australian cricket.

But the West Indies, including manager Steve Camacho, were unavailable for comment last night.

However, there is a chance that the West Indies, through Camacho or their Cricket Board of Control, will demand a bigger cut out of the huge gate takings generated by international cricket this season.

By the time the finals of the Benson and Hedges Cup and the third Test between the two countries are finished, gate takings around the country are expected to exceed $2 million.

The West Indies are believed to have been guaranteed just over $600,000 for the tour here. In addition, the team has already won $35,000 in prizemoney provided by sponsors Benson and Hedges, with the prospect of much more. If it is successful in the limited-over finals, the team will collect $32,000 and another $12,000 if it wins the third Test.

There were protracted negotiations between the boards of the two countries before the tour, with the West Indies threatening at several stages to call off the tour. In the event, they settled differences with the 16-man squad receiving an average of $14,000 for four and half months here.

Australian Cricket Board officials said yesterday they had no indication of unhappiness about money from the West Indies. I believe an approach for renewed talks on the tour guarantee is unlikely at this stage. But the feeling in the West Indies camp is that future tours of Australia will only be accomplished with much higher guarantees.

Criticism of the Australian board over tour money is largely unjustified. Australia is the only country at present to offer an equable distribution of prizemoney between the home and visiting sides.

Sponsors Benson and Hedges have made available $300,000 in prizemoney this season. For the first time, New Zealand's cricket's sponsors, Rothmans, will make available $NZ250,000 in prizemoney for the three Tests and three one-day internationals against Australia in February and March.

The West Indies and Pakistanis, who attract huge audiences to games in their countries, cannot offer anything at all. But both sides here this summer have watched the large crowds, especially in limited-over matches, with increasing envy.

Pakistan manager Ijaz Butt said yesterday: "By the time everything connected with the tour is finalised, we will just about end up square."

Butt indicated his report to the Pakistan board about financial terms of the Australian tour would be hard-hitting.

Although the Pakistanis won $49,000 in prizemoney, it is the off-field finances which have bothered them most. "I personally feel that the boys are not getting a fair deal and will make this point strongly to my report," he said.

"It is something that needs to be taken up in the long run," he said. [illegible]

Butt said the ACB, Benson and Hedges and the National Nine network would reap huge benefits from the season, benefits that were not passed on to the other competing countries.

Walker set to stand out of District

By PATRICK SMITH

[illegible]

Macpowa — prince among maidens

They reckon Drongo was the most revered maiden in Australian racing history. We have found one who, until three weeks ago, gave the title a magnificent shake.

His name is Macpowa and someone remarked that when he won his first race at the age of nine — after almost seven years of trying — the Merton picnic racecourse almost flooded with tears of joy.

And, true to the great traditions of horse racing, once Macpowa broke through to terminate his dubious tenure as the prince of maidens he took on a new image. Like Reckless, only on a more modest scale.

He won at Yea eight days later, and last Saturday was considered by connections to be most unlucky when fourth at Woolamai. Tomorrow, at Healesville, he could make it three wins from his past four starts.

Owner-trainer Julie Spark received the photo of Macpowa's Merton win yesterday. "I haven't stopped looking at it," she told Track Talk last night.

Mrs Spark can see the humorous side to Macpowa's struggle for a win. Any win. "Merton (between Yea and Mansfield) was the weakest place he could go. If he couldn't win there . . .

"A lot of people asked why I didn't get rid of him. He's just a mediocre horse, but there is a lot of sentimentality attached to him, and I'll keep him if he lives to 100," she said.

Mrs Spark's late father, Gordon Taylor, bought Macpowa as a present for her 21st birthday, earlier in the gelding's racing career (he first raced in April 1975).

Macpowa, a son of Hotroy and Dailytra, twice went within half a head of winning — in 1976 and 1977. But victory eluded him, and by the time he had his 51st start at Merton he had run 14 seconds and 10 thirds.

The old warrior has had several lengthy spells, which may explain why he is making this his best season (and his last). He was a rogue in the early days. Said Mrs Spark: "It took seven people to saddle him up for his first run, he was so bad. Now he's as quiet as a lamb."

Macpowa, you may not have run placings in the Victoria Derby, VRC St Leger and AJC St Leger like Drongo, but you were a great maiden all the same.

This is no laughing matter, but after the praise showered on the new Tote-All on-course tote system in this column last week, a gremlin or two became a nuisance for the "Magic Machine". Perhaps it was inevitable after the friendly publicity.

In fact, the past few days have been somewhat nightmarish for ATL Pty Ltd, the contractor which operates the system for Tote All Clubs Pty Ltd.

There was the 70-minute Tote-All breakdown at Moonee Valley last Saturday. Barely had that matter been discussed at the Tote-All executives meeting on Monday than a minor computer fault cut off the on-course tote at Flemington on Tuesday for five minutes.

Tote-All was not operating at Mornington on Wednesday, but ATL was. Alas, what has been called an electronic fault caused the trifecta dividend on race six to be declared at $5.60 instead of $94.50.

The original gross investment on the trifecta was $2733. But a winning box trifecta bet was multiplied by mistake, giving a gross pool of $11,145.

The error was not discovered in time to stop payment of the incorrect dividend, although there were mutterings of shock when it was announced because the winner Tynong Heights paid $6.80 for 60 cents on the win tote.

ATL and Mornington Racing Club yesterday announced the mistake, and asked winning bettors on the race six trifecta to complete a statutory declaration stating where the ticket was bought, the number of units and where it was paid.

The declarations should be sent to ATL Pty Ltd, Box 2401E, GPO Melbourne. The hot conditions are thought to have affected a components in the tote.

It was hot in other areas of the Mornington course, as well. Racegoers were sent rushing to their cars when it was announced a grass fire had started in one of the car parks. The fire was quickly put out without apparent damage to any vehicles.

And in the betting ring, the heat was on bookmakers when a demonstrative punter challenged the bagmen to lengthen their odds. He performed with great gusto, and found quite a following. "Weak," he called the bookies. And other things.

They had a guessing game at the VRC offices this week . . . when did Rancher and Birchwood clash in a race. We were sensibly puzzled, remembering one horse was a two-year-old and the other a three-year-old.

The answer was 31 March, 1962, when Birchwood beat Rancher in an encourage handicap at Rosehill. But their namesakes have been considerably more successful than those two steeds.

The earlier Rancher, a son of Pan and First Row, was as unspectacular as a two-year-old as the present Rancher is brilliant. He had four starts, and was unplaced in each. In the next four seasons, he won two out of 52 starts.

Birchwood, by Bob Major from Apropos, was a little better, but a few lengths below the present three-year-old of the same name who is one of the country's best young stayers.

Birchwood's name was taken almost as soon as it was available after the usual 20-year period when names cannot be copied (40 for ASB stallions and broodmares). Rancher was a little longer being used again.


Craig Coombe and Addington cruising to victory by three lengths yesterday.

Two leave nothing to chance

By PETER BERRY

For apprentice Craig Coombe it was the first chance to win a race in Victoria. For Addington, the last.

Combining well, they emerged successful in yesterday's Three-Year-Old aiden (1000 metres) at Werribee, saving the latter from a loss of masculinity.

Addington, a Bletchingly colt, was on his last chance to win, or perhaps more accurately jump cleanly, else he would face the knife and rob the breeding industry to some degree.

He had shown great potential at five previous starts despite always missing the start. Trainer Angus Armanasco decided yesterday was his last chance. Miss the start and you'll be missing something else when next you race.

For Coombe it was a difficult initiation, but one he handled well. Not only did Addington jump, he jumped in front.

Coombe, 19, came from Western Australia with a good reputation, having won 36 metropolitan races, to ride Sovereign Ghost in the Oakleigh Plate and lead-up races, starting with the Barton Handicap at Caulfield tomorrow.

He was regular rider of the WA sprinter, and trainer Roy Edwards decided to keep the partnership going. He sent both Coombe and Sovereign Ghost to Armanasco and will join them in the next few weeks.

Addington had to survive a protest by Steven Smillie, rider of runner-up Tarbisc, for interference at the 400-metres mark. One bookmaker offered 33/1 about it being upheld but attracted little interest.

A strong move for Pride Of Place never looked likely to succeed as Addington ran his rivals ragged.


Craig Coombe: first-up

Addington (6/1 to 9/2) beat Tarbisc (13/4) by three lengths with Pride Of Place (6/4 to 8/11 fav.) two lengths away third.

Grosvenor a tough test for Rancher

By TONY BOURKE

Geoff Murphy will be at the Wellington Cup meeting in New Zealand tomorrow, but there's no doubt his main interest will be at Caulfield, more specifically in Rancher's return to racing.

Murphy has put Grosvenor up against Rancher in the Gothic Handicap (1000 metres) and the outcome will be the highlight of the Caulfield meeting.

The early [illegible] the other two [illegible] are [illegible] long double figure odds.

Murphy will be the least surprised person if Grosvenor beats Rancher tomorrow although he is too astute a trainer to think he has very much in his favor.

What he does have is a high opinion of Grosvenor who has got within three lengths of Rancher, the narrowest margin of his four wins.

Murphy, in NZ for the yearling sales where he bought Grosvenor last year, is quite definite the Sir Tristram colt will trouble Rancher in any race beyond 1000 metres.

Rancher's four wins, over 900 metres and 1000 metres (three times), have been superb and there has been no indication that the strongly built colt will not be able to handle longer distances.

There is a nagging doubt, however, about his breeding. The Brave Lad progeny have been noted for their early brilliance and then failing to train on, as have the stock of Virginia Gentleman, sire of Awakening, the dam of Rancher.

Of course, the record books are full of the deeds of the exceptions to the rules of breeding.

Rancher and Grosvenor are both outstanding individuals, easily the pick of the two-year-olds so far produced in Melbourne this season.

Apart from a barrier trial, which Grosvenor won, their only meeting was in the Debutant Stakes, over tomorrow's course, last spring.

At level weights Grosvenor was no match for Rancher that day. Rancher led all the way and simply ran the others of their legs, but Grosvenor was still running on gamely at the finish.

"I can see the same thing happening tomorrow although Rancher, with 61.5 kg, has to give Grosvenor 5 kg."

Whether that 5 kg represents [illegible] since the spring.

Charlie Waymouth has said Rancher will improve tremendously on whatever he does tomorrow.

Murphy believes Grosvenor is ready to fulfil the potential he showed in the spring, if not tomorrow then certainly in the near future.

It makes for a fascinating contest that should draw a good crowd to Caulfield. If there are any chinks in Rancher's armor, then Grosvenor will find them.

The VATC has been fortunate enough to have an excellent supporting act in the form of the Barton Handicap (1000 metres).

Apart from the top class sprinters involved, the race also sees the return of the perennial warhorse Hyperno and a potential star in Pride Of Century.

The Barton is one of the most open betting races of the day with three-year-old Copper Rocket the 4/1 favorite, just shading Gleaming Waters and Habana at 5s.

The Perth sprinter Sovereign Ghost, a brilliant 1000-metre horse but with his share of weight, is next best fancied at 6/1. Pride Of Century is being kept safe at 7/1, while Hyperno worry the sprinters over 1000 metres.

Another interesting runner is three-year-old Impulsor, who hasn't raced since an impressive win with 57 kilograms over 1400 metres at Flemington last August.

Brent Thomson, breezing along at the top of the Flemington jockeys' premiership, is on a swag of top fancies again tomorrow.

Apart from Copper Rocket for Angus Armanasco, Thomson is on five Colin Hayes-trained favorites or equal favorites. They are: Mysterious Wave (9/4), Zamenhof (3/1), McCabe (7/4), Music House (4/1) and Glarsdale (3/1).

New talks over MCG hitch

By MIKE COWARD

MCC and VCA chiefs will have further talks on the MCG square, but not before the excavators have started their much-publicised task.

MCC president Sir Bernard Callinan and Victorian Cricket Association president Ray Steele will meet at the MCG on Monday at noon — at least two hours after the reconstruction programme has started.

VCA and Australian Cricket Board executives are angry that the project is going ahead without noted curator John Maley in charge.

Maley does not wholeheartedly support the MCC's plans for the square and has declined the club's invitation to supervise the operation.

The MCC was not prepared to give Maley complete authority to carry out the intricate work.

It is known Maley is prepared to come to Melbourne for 11th hour talks, but will only make the trip if the MCC extends the invitation.

That is considered unlikely now that the club has appointed Peter Semos to supervise the reconstruction.

"They (the MCC) are doing what they think is right. There is nothing more we can do. It's their job to reconstruct the square," Steele said last night.

Semos, 32, a technical officer of the horticultural services unit of the City Parks Administration of the Department of Capital Territories, said he thought the first stage of the project could be completed within 10 days.

On Monday he will be assisted by Canberra soils physicist Don McIntyre — one of three experts commissioned by the MCC to study the square — and Keith McIntyre (no relation) also of the City Parks Administration, Department of Capital Territories.

MCC secretary Ian Johnson was in Canberra on Monday to speak with the experts and inspect the soil-warming cable system installed at the Manuka Oval 20 years ago.

Semos, who in recent years has helped to establish many pitches in the Canberra area, is now the department's troubleshooter, attending to the maintenance of 13 pitches in Canberra. He also has been responsible for pitches in Goulburn, NSW.

He said he could not detail the work that would be carried out on Monday as he would have to examine levels and make some calculations before half the square was dug up.


Vitas Gerulaitis: temper

$15,000 fine on Vitas

NEW YORK, 21 Jan. — Vitas Gerulaitis has been fined a record $US15,000 ($A13,455) by the men's International Professional Tennis Council for two major offences.

The group penalised the American $US5000 for two incidents during the United States Open last September and $US10,000 for having walked out of the Melbourne Indoor final in Australia last October.

Gerulaitis has the right to take the penalties to arbitration, and council administrator Marshall Happer said he would have no comment until Gerulaitis had decided to pay the fines or appeal.

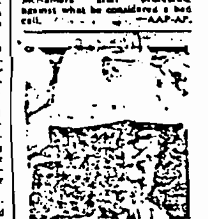
The council acted in Gerulaitis's case during meetings last week in New York and informed Gerulaitis of its decision in a letter to the tennis player and his management firm earlier this week.

Gerulaitis was not available for comment.

His $5000 fine at the US Open was the result of displays of temper during matches with Ivan Lendl and John McEnroe. On one occasion he hit a ball at a linesman close call and, according to the stands and hit a spectator.

The second incident occurred when Gerulaitis protested at a close call and, according to the council's report, threatened umpire Lena Lisa.

The $10,000 fine was assessed after Gerulaitis had angrily walked off the court in the last set of the Melbourne final with Peter McNamara after protesting against what he considered a bad call. — AAP-AP.


Billy Dunk: 68

Dunk runs hot in SA Open

ADELAIDE. — Evergreen New South Wales golfer Bill Dunk, with a morning score of 68, leads after the first round of the South Australian Open at Kooyonga yesterday.

Trailing Dunk by one stroke is Victorian Mike Clayton, the only other player to break 70 in the pressure-cooker weather that trimmed the afternoon galleries to a handful. Clayton shot five birdies and two bogeys.

Only nine players in the big field broke par 72 with Lindsay Stephen (WA), the title-holder, Frank Nobilo (NZ), Doug Meers (NSW), and Wayne Grace (Qld) all on 70.

They are followed by Graham Marsh (WA) and Ian Stanley (Vic.) on 71.

Considering the torrid heat which tested the concentration of the players to the limit, scoring was reasonable for the opening day but another scorcher is forecast today.

Dunk played great golf for his 68, only one stroke outside the record of held by Greg Norman and Guy Wolstenholme.

Dunk was four under after the first nine but faltered on the next three holes when he was back to one under par.

From that point, however, Dunk birdied three holes in succession and parred through to the last.

Victorian Bob Shearer was caught by the late afternoon heat and only bogies at the last three holes gave him a 74.

[illegible]

Cyclist dies

BRUSSELS, 21 Jan. — Belgian cycling champion Marc de Meyer has died of a heart attack at his home at Merelbeke near Ghent last night, aged 31.

De Meyer began his cycling career in 1966. His main successes were as winner of the Paris-Brussels race and the Grand Prix de L'Escaut in 1974, and the Paris-Roubaix event in 1976. — AAP-Reuter

Exhibit "B" - Article from the Age
22 January, 1982

WINDIES, PAKS SOUR ON TOUR CUT.

The West Indies cricket team, a major reason for the financial success of the 1981-82 international season, is unhapPy about the money it is receiving.

So, too, are the Pakistanis who flew out of Melbourne yesterday, disappointed at missing a place in the finals of the lucrative Benson and Hedges World Series Cup.

Pakistan manager Ijaz Butt made no secret of his feelings about the financial set-up of Australian cricket.

But the West Indies, including manager Steve Camacho, were unavailable for comment last night.

However, there is a chance that the West Indies, through Camacho or their Cricket Board of Control, will demand a bigger cut out of the huge gate takings generated by international cricket this season.

By the time the finals of Benson & Hedges Cup and the third Test between the two countries are finished, gate takings around the country are expected to exceed $2 million.

The West Indies are believed to have been guaranteed just over $600,000 of the tour here. In additon, the team has already won here $35,000 in prizemoney provided by sponsors Benson & Hedges, with the prospect of much more. If it is successful in the limited-over final the team will collect $32,000 and another $12,000 if it wins the third Test.

There were protracted negotiations between the boards of the two countries before the tour, with the West Indies threatening at several stages to call off the tour. In the event, they settled differences with 16-man squad receiving an average of $14,000 for four and half months here.

Australian Cricket Board officials said yesterday they had no indication of unhappiness about money from the West Indies. I beleive an approach for renewed talks on the tour guarantee is unlikely at this stage. But the feeling in the West Indies camp is that future tours of Australia will only be accomplished with much higher guarantees.

Critisism of the Australian board over tour money is largely unjustified. Australia is the only country at present to offer an equable distribution of prizemoney between the home and visiting sides.

Sponsors Benson & Hedges have made available $300,000 in prizemoney this season. For the first time, New Zealand's cricket's sponsors, Rothmans, will make available $NZ50,000 in prizemoney for the three Tests and three one-day internationals against Australia in February and March.

The West Indies and Pakistanis, who attract huge audiences to games in their countries, cannot offer anything at all. But both sides here this summer have watched the large crowds especially in limited-over matches with increasing envy.

Pakistan manager Ijaz Butt said yesterday: "By the time everything connected with the tour is finalised, we will just about end up square". 10

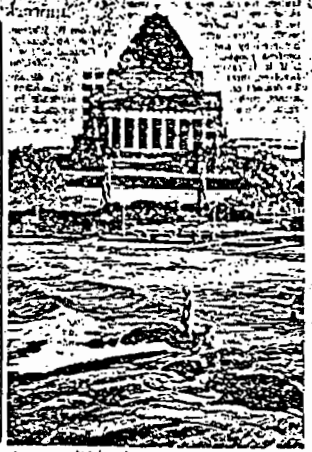
Butt indicated his report to the Pakistan board about financial terms of the Australian tour would be hard-hitting.

Although the Pakistanis won $49,000 in prizemoney, it is the off-field finances which have bothered them most. "I personally feel that the boys are not getting a fair deal and will make this point strongly to my report," he said.

"It is something that needs to be taken up in the long run," he said, forecasting tough negotiations for the six-Test series in Australia in 1983-4.

Butt said the ACB, Benson & Hedges and the National Nine network would 20 reap huge benefits from the season, benefits that were not passed on to the other competing countries.

Turning the tide for dull old Melbourne



How the sea would create a new Melbourne: the dotted line is the high water line today. RIGHT: The new St Kilda Road beach.

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 affect 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.

Understanding our heritage will create national identity

Dr Herbert Cole "Nugget" Coombs, 76 next month, was governor of the Reserve Bank for 19 years and, before that, director-general of post-war reconstruction. He has become known as a champion of the Aboriginal cause. This is an edited text of his address to the Australia Day Council at the National Press Club in Canberra yesterday.

MR. PAKER, PLAYERS, AND THE CRICKET.

'The Age', on 21 January, 1982 published an article in the 'Age' feature section under the hearing "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 suggestion would, of course, be completely and utterly false and would have no foundations 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 perosn as suggested, then 'The Age' sincerely regrets that, and apologises to Mr. Packer and the members of the two teams.

1A. Did not the Defendant publish the matter complained of in the edition of "The Age" bearing date Thursday, 21 January 1982?

1B. Yes.

2A. If the answer to Interrogatory 1 is "yes", state approximately the number of copies of the newspaper "The Age" bearing that date which were printed, distributed, offered for sale and sold as the case may be in each and which of the States and Territories of Australia.

2B. The number of copies of "The Age" bearing date 21st January 1982 distributed was:

Victoria	257974
N.S.W.	1222
Queensland	690
W.A.	249
S.A.	981
Tasmania	1190
A.C.T.	2276
N.T.	245
	264827

FULL BENCH, G.J. at C.L.
Lloyd v Syme
16 APR 1984
Plaintiff EXHIBIT D
G. Seaton
ASSOCIATE

4A. Look at the matter complained of. Did not the Defendant intend to refer to the Plaintiff therein as a member of the cricket team referred to in each and which of paragraphs 9, 10, 11 and 13 as "West Indies"?

4B. Yes.

LLOYD, C.J. at C.L.
Lloyd v Syme

16 APR 1984

Plaintiff EXHIBIT E
G. Seaton
ASSOCIATE

5A. Did the Defendant intend by the publication of the matter complained of to convey any (and, if so, which) of 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.

5B. 1. No.
2. No.
3. No.
4. No.

COURT: DOYLE, C.J. at C.L.
Lloyd v Syme
17 APR 1984
Plaintiff EXHIBIT F
G. Seaton
ASSOCIATE

6A Before the publication of the matter complained of, did the Defendant have any information with respect to any and which of the statements contained in any and which of the numbered paragraphs of the matter complained of, and if so:

(i) with respect to which statement or statements did the Defendant have such information;

(ii) state what information it was that the Defendant had in relation to each such statement, and

(a) when
(b) where; and
(c) from whom

that information was obtained; and

(iii) identify all documents included within that information.

6B The defendant had access to the material contained in the following articles and documents:

(i)	"The Great Gatsby" by F. Scott Fitzgerald.		
(ii)	"Up Where Cazaly?" by Sandercock & Turner.		
(iii)	30.4.1981	The Age	"Boots and gall" - "Up Where Cazaly"
(iv)	17.11.1981	The Age	"Eye worry no bar to Viv"
(v)	23.11.1981	The Age	"Pakistanis hit back in cup"
(vi)	24.11.1981	The Age	"Test today for Yallop"
(vii)	26.11.1981	The Age	"Playing five quick bowlers leaves them vulnerable"
(viii)	25.11.1981	The Age	"SCG alight"
(ix)	5.12.1981	The Age	"Windies pick 5 quicks, 2 keepers"
(x)	7.12.1981	The Age	"Win for spin"
(xi)	7.12.1981	The Age	"Chappel, Miandad in war of words"
(xii)	7.12.1981	The Age	"Bowlers save the one-day"
(xiii)	9.12.1981	The Age	"Decision today on night match"
(xvi)	10.12.1981	The Age	"New one-day date upsets Pakistan"
(xv)	10.12.1981	The Age	"Thursday bid for lost night match"

(xvi)	11.12.1981	The Age	"Lost' game - new date"
(xvii)	16.12.1981	The Age	"Dyson in for Cup"
(xviii)	17.12.1981	The Age	"Australia seeks revenge"
(xxix)	18.12.1981	The Age	"Whitney, Malone on call"
(xx)	19.12.1981	The Age	"Time for Action - Lloyd"
(xxi)	21.12.1981	The Age	"Windies belt out a warning for Test"
(xxii)	21.12.1981	The Age	"Australia Trounced"
(xxiii)	7.1.1982	The Age	"Wood's chance to prove fitness"
(xxiv)	9.1.1981	The Age	"Five openers in last ditch stand"
(xxv)	11.1.1982	The Age	"Two decisive losses put us o--Australia"
(xxvi)	11.1.1982	The Age	"78,142 - world one-day record"
(xxvii)	11.1.1982	The Age	"Record Crowd"
(xxviii)	11.1.1982	The Age	"Chappell demanded game be called off"
(xxix)	11.1.1982	The Age	"Dujon: rare talent with a golden touch"
(xxx)	11.1.1982	The Age	"Tour over for Murray?"
(xxxi)	12.1.1982	The Age	"Yardley and Darling dopped, imbalance retained"
(xxxii)	13.1.1982	The Age	"tonic for Australia"
(xxxiii)	15.1.1982	The Age	"Australians crush Paks"
(xxxiv)	16.1.9182	The Age	"It's make or break for Aussies"
(xxxv)	18.1.1982	The Age	"Showdown in Sydney"
(xxxvi)	19.1.1982	The Age	"C'mon Aussie the promoters' plea"
(xxxvii)	20.1.1982	The Age	"Win a gift from the heavens"
(xxxviii)	20.1.1982	The Age	"Australian slips into cup finals"
(xxxix)	20.1.1982	The Age	"Fall kills Boy, 15 at SCG"
(xl)	20.1.1982	The Age	"Record SCG cup crown of 52,053"

7A. Before the publication of the matter complained of, did the Defendant take any steps to verify the truth of any of the statements contained in any and which of the numbered paragraphs of that matter, and if so,

(i) with respect to which statements did the Defendant take such steps;

(ii) what steps did the Defendant take in relation to each such statement;

(iii) when and where did the Defendant take such steps; and

(iv) what was the result of such steps?

7B. The defendant's research in the preparation of the article was confined to the above material.

COR/M BEGG, C.J. at C.L.
Lloyd v Syme

17 APR 1984

Plaintiff EXHIBIT H
G Seaton
ASSOCIATE

Exhibit "H" - Interrogatory 7
and answer thereto

8A. Before the publication of the matter complained of, did the Defendant make any enquiry with a view to ascertaining whether any and which of the statements contained in any and which of the numbered paragraphs of that matter were true or not, and if so,

(i) with respect to which statement or statements did the Defendant make any enquiries;

(ii) what enquiries did the Defendant make; and

(iii) (a) when

(b) where; and

(c) of whom

did the Defendant make each such enquiry, and to what effect; and

(iv) insofar as any enquiry was made in writing, identify that writing.

8B. Apart from the abovementioned research the defendant made no other enquiry with a view to ascertaining whether any and which of the statements were true.

11A. As to each document in the Defendant's List of Documents, which was referred to or used for in relation to the composition, or publication of the matter complained of, state:

(a) When, where and in what circumstances did the Defendant obtain possession of that document;

(b) From whom did the Defendant obtain possession of that document;

(c) State what reference or use was made of that document in relation to the writing, composition or publication of the matter complained of, and when, where, by whom and to what effect.

11B. The Defendant relied upon each of the articles particularised in the answer to interrogatory numbered 6 above. The author obtained and/or read each such article on or about the date specified in the answer. The author used the articles as source material and background information for the preparation of the matter complained of.

COURT OF C.J. at C.L.
Lloyd v Syme

17 APR 1984

Plaintiff EXHIBIT K
G Seaton
ASSOCIATE

Exhibit "K" - Interrogatory 11
and answer thereto

ın enables Australia to qualify for finals on fractionally better run rate

vın a gift from the heavens

SYDNEY. — The ultimate gift from the gods, unexpected rain squalls, gave Australia a sensational victory over the West Indies in the final Benson and Hedges World Series Cup qualifying match at the Sydney Cricket Ground last night.

Australia, seemingly headed for defeat at 7/168 off 43.1 overs, qualified for the $50,000 finals series because of its superior run rate.

When the rain came Australia was fractionally ahead of the 3.8 run rate required. It needed 164 from 43 completed overs and was 7/168.

Only a flurry of blows by left-hander Allan Border — 11 runs came from each of the last two overs — despairing that the cause was lost, enabled Australia to edge ahead.

And, in retrospect, four overthrows at a critical moment by Sylvester Clarke may have been the decisive moment which cost Pakistan the chance of playing in the best-of-five finals worth $32,000 to the winner and $16,000 to the runner-up.

Two points ahead of Australia, but with a significantly inferior run rate, the West Indies had to win last night for Javed Miandad's men to have a chance at the big purse.

A record crowd of 52,053 cheered wildly when Australia's marginal advantage was announced over the public address system.

There was confusion when umpires Robin Bailhache and Mel Johnson decided the rain was too heavy to permit play to continue. They ran from the ground with the players and immediately conferred with match referee Tim Caldwell, a high ranking officer of the Australian Cricket Board.

Their difficult decision had to allow for the fact that by law the powerful lights at the ground must be turned off by 10.30 pm. After 15 minutes of consultation it was announced that Australia was the victor.

Only 10 minutes after the decision was announced the rain stopped as abruptly as it started and the covers were taken off the pitch.

In all the drama and confusion, yet another failure by Australian captain Greg Chappell was virtually forgotten.

Chappell made his sixth duck for the season — and his fourth in limited over matches — when he was trapped lbw by veteran paceman Andy Roberts.

Roberts was judged man of the match for his outstanding performance of 3/15 from 10 overs, plus a fine catch on the fine leg fence to remove opening batsman Graeme Wood.

After a splendid second wicket partnership of 51 in 68 minutes by Rick Darling and John Dyson, Australia lost its way in its quest to reach the West Indies' total of 189.

Had West Indies' acting captain Vivian Richards not surrendered his innings at 64 the West Indies would almost certainly have exceeded the 200 mark against an able Australian attack which would have expected more support in the field.

Darling, still on cloud nine following his seventh first-class century — for South Australia against Victoria at Geelong on Sunday — played skilfully to provide the Australian innings with the impetus it needed.

Despite the early loss of Wood hooking, Darling remained composed and seemed poised to take control of the innings when he fell to a marvellous catch by Clarke at mid-off.

Dyson, not particularly well suited to the peculiar demands of limited-over cricket, played well for his 37 from 75 deliveries.

He was bowled by Joel Garner immediately after an incident with the giant West Indian paceman. Garner appeared to deliberately impede Dyson as he was running between the wickets and Dyson seemed upset at the incident.

Australia seemed to lose all chance of victory when hard-hitting wicketkeeper Rod Marsh fell to an extraordinary catch by Gordon Greenidge off Malcolm Marshall.

Marsh and Border had added 19 runs in 22 minutes for the sixth wicket and seemed likely to rekindle Australia's hopes.

But in the end, and with the intervention of the gods, it was the blazing Border, with his unbeaten 30, who picked up the run rate to the level required for victory when rain began to fall.

Whether or not it was the added responsibility of the captaincy — Clive Lloyd was laid low by heavy flu — Richards regained form when it was most required.

Following the departure of Gordon Greenidge — bowled off his glove to the third ball of the match — and Desmond Haynes who unluckily played on to Mick Malone's first delivery, Richards produced some wonderful offerings from his vast repertoire.

A mid wicket drive off Jeff Thomson and an extraordinary drive over cover executed from outside the leg stump against Malone were strokes of a master batsman who has been strangely subdued this season.

When the tourists' most consistent player Larry Gomes was acrobatically caught by Rod Marsh off Len Pascoe for four, Richards had to take all the responsibility for the innings.

He did it beautifully unleashing several stunning drives to reach his half century in 111 minutes from 80 balls. However his innings of controlled aggression came to a halt when, with customary arrogance, he moved to leg and attempted to hit Thompson to the cover fence. He failed to reach the straight, fast delivery and had his off stump uprooted.

He had contributed a fine 64 — from 94 balls with six boundaries — of the total of 103.

The only noteworthy assistance he received came from Jeff Dujon, who has made remarkable head-

It never rains but pours. And that it did for the Pakistan team in Melbourne who saw on TV this gloomy end at the SCG to its chances of qualifying for the limited over finals.

Wood had victory figured out

SYDNEY. — A glance at the score sheet doesn't suggest it, but Australian opening batsman Graeme Wood made an immeasurable contribution to the incredible match against the West Indies at the SCG last night.

Wood, 24, who made just one run, sat in the front row of the Australian players' dressingroom with calculator in hand.

As if sensing rain, Wood made progressive calculations of Australia's run rate from the 29th over.

As 26-year-old left-hander Allan Border, began to open his shoulders Wood made rapid fire calculations and with the help of team mates signalled frantically for Border to maintain the tempo.

The Australians danced about after the 43rd over when for the first time Australia had achieved a superior run rate.

At 9.58 pm — 17 minutes before the scheduled finish time — it began to rain, and Wood, using technique learned in his days as a public relations officer in Perth, indicated in no uncertain terms that it was time for Border and Len Pascoe to retreat to the dressing rooms.

Border said that he had no idea that the rain was coming. "But when I knew we were in front it was time to head for home", he said smiling broadly.

The only question that remains unanswered after the freakish events of the night is just how well connected is Australian captain Greg Chappell?

A record crowd of 52,053 jammed the ground to watch Australia battle the West Indies for the right to play in the lucrative finals of the limited over competition which starts in Melbourne on Saturday.

FOOTNOTE: On 10 January a world record crowd of 78,142 saw Australia and the West Indies play a qualifying cup match at the Melbourne Cricket Ground.

Exhibit "L" - Articles from the Age 20 January, 1982

way this season, and Malcolm Marshall, who despite the pain of a persistant back ailment played very well for 32 from just 43 balls.

Between them Richards, Marshall and Dujon (30) scored 126 of a team total of 189.

Marshall played with considerable poise and with a sensible mix of "bunting" and belting was able to steer the West Indies away from potential disaster at 8/156.

The Australian bowlers, encouraged that they had restricted the West Indies to just 78 from the first 25 overs, worked zealously at their task on a humid afternoon. Again Malone was the most impressive

SCORES

WEST INDIES

G. GREENIDGE b Lillee	1
D. HAYNES b Malone	3
V. RICHARDS b Thomson	64
L. GOMES c Marsh, b Pascoe	3
F. BACCHUS c Hughes, b Malone	20
J. DUJON b Thomson	30
M. MARSHALL, not out	32
A. ROBERTS c Wood b Pascoe	9
M. HOLDING, c Marsh, b Pascoe	0
S. CLARKE b Lillee	16
J. GARNER run out	2
Sundries (5 LB, 1 W, 1 NB)	7
TOTAL	189

Fall: 7, 23, 40, 79, 103, 137, 155, 156, 182, 189

BOWLING: D. Lillee, 10-0-47-2; J. Thomson, 10-1-36-2; L. Pascoe, 10-0-44-3; M. Malone, 10-1-27-2; G. Chappell, 10-0-21-0.

Batting time 210 min. Overs: 50

AUSTRALIA

G. WOOD c Roberts, b Holding	1
R. DARLING, c Clarke, b Roberts	34
J. DYSON b Garner	37
G. CHAPPELL, lbw, b Roberts	0
K. HUGHES b Roberts	25
A. BORDER not out	30
R. MARSH, c Greenidge, b Marshall	12
D. LILLEE, b Holding	6
L. PASCOE, not out	0
Sundries (16 lb, 5 w, 2 nb)	23
TOTAL (for seven wickets)	168

FALL. — 8, 37, 61, 97, 125, 144, 157

BOWLING — M. Holding 8.1-0-34-2; S. Clarke 10-1-20-0; M. Marshall 10-0-43-1; A. Roberts 10-3-15-3; J. Garner 7-0-33-1

Batting time: 193 mins. Overs: 43.1.

Player of Match: A. Roberts

Final Cup table

Australia won on superior run rate

	P	W	L	Pts.
West Indies	10	7	3	14
Australia	10	4	6	8
Pakistan	10	4	6	8

(Australia qualified for the final series ahead of Pakistan on a superior run rate.)

Exhibit "L" - Articles from
the Age 20 January, 1982

Exhibit "M" - Articles from the Age 20 January, 1982

Australia slips into cup finals

20 JAN 1982

SYDNEY. — A typical summer rain storm and inspired batting by Allan Border last night gave the Australian cricket team the chance to play in the finals of the one-day international competition against the West Indies.

Australia seemed beaten, with only three wickets in hand and 22 runs to make when rain ended play in last night's game at the SCG, giving the home team victory on the run rate.

When rain stopped play it was the first time during the match that the Australian team had been ahead on the run rate (3.89 per over versus 3.78) after 11 runs were hit off each of the last two overs.

The Australian team had to win the match to play off in the finals against the West Indies. The best of five finals series begins in Melbourne this weekend.

In last night's game the West Indies made 189 runs off the full 50 overs, Viv Richards top-scoring with 64. The game ended after Australia had faced 43.1 overs, with John Dyson hitting 37 and Rick Darling 34.

West Indian bowler Andy Roberts was man of the match, with three wickets for 15 runs.

One of the stars of the Australian team was opening batsman Graeme Wood. Although he only made one run, Wood worked feverishly over a calculator for the last 15 overs of the Australian innings, and signalled to his team mates in the middle to step up the rate.

As the 43rd over begun, and the Australian run rate hit the front for the first time, the Australian players danced with joy. Then, as rain fell, they gestured desperately for Border and his partner Len Pascoe to leave the field.

Richards, the acting captain of the West Indies team, said after the game he was "very disappointed" with the result. "We did not come here to throw the match away," he said. "We came to try our very best."

But the result will be a relief to promoters of the one-day games, who could have expected much less public interest in a finals series between the West Indies and Pakistan, which would have happened had Australia not won last night's game.

A record crowd of 52,053 packed into the Sydney Cricket Ground for last night's match and officials are now confident of a strong turnout for the finals series.

PAGE 32: Mike Coward reports from Sydney.

COURT EXHIBIT, C. J. at C. L.
Lloyd v Syme
17 APR 1984
Plaintiff EXHIBIT M
G. Seaton
ASSOCIATE

Fall kills boy, 15, at SCG

SYDNEY. — A 15-year-old boy died after falling 20 metres from a building near the Sydney Cricket Ground while watching the WSC cricket last night.

Police said the boy was watching from the roof of the manufacturers' pavilion in the Sydney Showgrounds, next to the SCG, when he fell about 8 pm. He was taken to St Vincent's Hospital with head and back injuries and several broken bones. He died late last night.

More than 52,000 people watched the game inside the ground. A police spokesman said about 40 children watched the game from the roof of the manufacturers' pavilion. They had clambered up several ladders to the roof.

The spokesman said the boy apparently tried to jump from one section to another, but fell through the pavilion's fibro-cement roof.

Mr Greg Singe, 20, of Blacktown, was watching the cricket from another vantage point outside the arena when he heard the youth fall. "We heard a dull thud and we broke into the pavilion. The boy was lying on the concrete floor," he said.

The police rescue squad men cleared the roof of all spectators.

Record SCG cup crowd of 52,053

20 JAN 1982

From MIKE COWARD

'DNEY. — Flustered cricket icials closed the Sydney icket Ground gates an hour er the start of the Austra--West Indies Cup match e yesterday.

A record crowd of 52,053 med the ground to watch Aus-lia battle the West Indies for right to play in the lucrative ls of the limited over competi-n which start in Melbourne on urday.

he previous best attended one-day game in Sydney under the control of the Australian Cricket Board was on 3 February last year when 29,171 people watched the fourth final between Australia and New Zealand.

Last night's crowd was only 5000 fewer than that which attended the rugby league grand final between Parramatta and Newtown last September.

The record attendance for any one-day of cricket at the ground was established on 15 December 1928 when 58,446 people witnessed play during the second Australia-England Test.

The record for the ground — before health and police authorities set a limit — was 78,056 who crammed every available space to see the 1965 rugby league grand final between St George and South Sydney.

A spokesman for the Bass booking agency said yesterday that the advance booking sales for last night's match — more tha 18,000 tickets — was a compar record for a sporting fixture New South Wales.

The ground was heavily poli ed and there were only a few di turbances — some scuffles an can throwing — on the famou hill.

FOOTNOTE: On 10 January world record crowd of 78,142 sa Australia and the West Indi play a qualifying cup match the Melbourne Cricket Ground.

C'mon Aussie the promoters' plea

19 JAN 1982

By PETER McFARLINE

The promoters of cricket in this country — the Australian Cricket Board and PBL Marketing — are even more interested than the competitors in the result of today's match between Australia and the West Indies.

And it's just not parochialism that has the promoters desperate to see Australia win and thus gain a place in the Benson and Hedges World Series Cup finals.

The defference in gate receipts if Australia makes the finals will be well over $1½ million at a time when cricket needs every possible hint of improving spectator support.

The West Indies versus Australia, even if only three of the best-of-five matches are played, will average at least 30,000 a match.

But that average would be down to about 10,000 if Pakistan holds second place on the competition table after the day/night encounter, at the SCG.

On form, Australia has little chance of winning its way to the finals but stranger things have happened.

The West Indians, plagued by injuries to several key players, are assured of a chance at the $35,000 first prize in the finals, and might not be as keyed up as their opponents.

Captain Clive Lloyd has influenza — he stood aside from leadership duties on Sunday in Brisbane — batsman Gordon Greenidge (knee), Gus Logie (broken nose) and Jeff Dujon (strained shoulder) are far from 100 per cent fit and fast bowler Malcolm Marshall has been troubled for weeks by muscle damage in the back.

Rick Darling: in

Rick McCosker: out

The Australian selectors have decided on positive action for this final preliminary.

Injured fast bowler Terry Alderman (strained ankle ligaments) has gone home to Perth to rest in an attempt to be fit for the third Test on 30 January. And it has been decided, belatedly, that Rick McCosker is not an inspiring limited-over batsman.

Replacing them are fiery New South Wales paceman Len Pascoe — making his international debut this season after a series of leg and knee injuries — and dashing South Australian Rick Darling, who should not have lost his place in the side.

Darling made his point with innings of 46 and 134 against Victoria at Geelong. What's more, Darling is one of the country's best outfielders, the side's main weakness in one-day cricket this season.

There is no suggestion that Australia could beat a full-strength, fully fit West Indian side at this particular style of cricket. This afternoon and tonight, in front of an emotional and parochial crowd, the improbable could be achieved.

History has little to do with the result of limited-over matches, but the West Indies have never beaten Australia under the SCG lights.

Australian squad

Greg Chappell, Kim Hughes, Allan Border, Graeme Wood, Bruce Laird, Rick Darling, John Dyson, Rod Marsh, Denis Lillee, Geoff Lawson, Mick Malone, Jeff Thomson, Len Pascoe.

WEST INDIES: Gordon Greenidge, Desmond Haynes, Viv Richards, Larry Gomes, Clive Lloyd (c.), Faoud Bacchus, Jeff Dujon, Andy Roberts, Michael Holding, Sylvester Clark, Joel Garner, Colin Croft. 12th man to be named.

CCF/M BEGG, C.J. at C.L.
Lloyd v Syme

17 APR 1984

Plaintiff EXHIBIT N
G Seaton
ASSOCIATE

Exhibit "N" - Article from
the Age 19 January 1982