

40/85

IN THE PRIVY COUNCIL

No. 42 of 1985

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)

CASE FOR THE APPELLANT

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 3BH

Telephone: (01) 379 3456

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)

CASE FOR THE APPELLANT

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 3BH

Telephone: (01) 379 3456

CASE FOR THE APPELLANT

1. This is an appeal by special leave of Her Majesty-in-Council from a majority judgment of the Supreme Court of New South Wales (Court of Appeal Division) given on 21st December 1984. By that judgment the Court allowed an appeal by the Defendant, David Syme Limited ("the Respondent") from a verdict of \$100,000 awarded to the Plaintiff, Clive Hubert Lloyd ("the Appellant"), by a jury in a defamation action. The Court of Appeal set aside the judgment which the trial judge (Begg C.J.) had entered in the Appellant's favour and entered judgment in the action for the Respondent.

10

2. The action was tried before Mr Justice Begg in the Common Law Division of the Supreme Court over three days in April 1984.

pp.507-512

3. The Appellant's claim arose from an article ("the article") published in the Respondent's metropolitan daily newspaper, "The Age" on 21st January 1982. The text of the article is set out hereunder, each paragraph being separately numbered for ease of reference.

20

'1. COME ON DOLLAR, COME ON

2. 'I remembered, of course, that the World's Series had been fixed in 1919... it never occurred to me

that one man could start to play with the faith of 50 million people - with the single mindedness of a burglar blowing a safe.' -- The Great Gatsby by F. Scott Fitzgerald.

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

10

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.

20

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 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.

10

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.

20

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

10. 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.

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.

20

12. These figures will be reflected in television audiences, with a corresponding difference in advertising revenue (rival stations would counter-attack had Channel 9's flanks been so exposed). So while cricket-loving Australians were barracking for their country out of normal sporting patriotism, Mr Kerry Packer's cheers had a strident 10 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 pressure or crowds, gate money, sponsorship - bring about an unstated thought: 'It doesn't matter if we lose'? 20
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 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.

10

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.

20

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

4. The article was published in a particular factual
 matrix, an awareness of which would have been
 attributable to the reasonable reader as part of
 his or her general knowledge:-

First: The Benson and Hedges World Cup Series
 was a cricket competition played in
 Australia during the season of 10
 1981-1982 between three international
 teams - Australia, West Indies and
 Pakistan.

Second: There was a preliminary series of
 one-day matches to determine, on a
 points system, which two of those three
 teams would enter the final series of
 five one-day matches; and the winner
 of the final series would take the
 World Cup. 20

Third: The wording of the headlines was an
 allusion to a well known song, "Come on
 Aussie Come on", associated with the
 1981/1982

p.64

11.1-9

cricket series in Australia. This allusion was referred to by counsel for the Appellant in his opening speech to the jury.

5. In New South Wales, the Defamation Act, 1974 ("the Act") operates to qualify or abrogate some of the common law principles in this field of law: see sub-section 4(2). A print of the Act is supplied with this Case.

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

10

pp.1-7

7. Part 67 Rule 11 (2) of the Rules of the Supreme Court requires that a statement of claim in an action for defamation shall specify each imputation on which the Plaintiff relies and shall allege that the imputation was defamatory of the Plaintiff. Accordingly the Appellant in his statement of claim (paragraphs 4 and 5) alleged that the words of the article in their natural and ordinary meaning conveyed the following defamatory imputations of and concerning him:

20

"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.

10

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."

20

8. Imputations (1) and (2) were treated by the trial judge and by the parties as alternatives; so also were imputations (3) and (4).

p.3
11.31-34

9. Because the article did not mention the Appellant by name, the statement of claim included particulars of identification, which were simply as follows:-

"A. The Plaintiff is and was at all material times a cricketer and the Captain of the West Indies cricket team.

B. The Plaintiff was from time to time the Captain of and played in the West Indies Team in the Benson and Hedges World Cup Series." 10

p.23
pp.27-28

10. To these particulars, a third matter was added by letter to the Respondent's solicitors dated 12th April 1984:-

C. The Plaintiff, as captain of the West Indies cricket team touring Australia during the cricket season of 1981/1982, was one of the persons responsible for the management of the said team and was the person principally and ultimately responsible for the said team on the field of play." 20

- p.19 11. In its defence the Respondent:-
- 11.1-3 (a) Said it did not admit that the article made of and concerning the Appellant any of the imputations relied upon by him; and
- p.19 (b) Denied that any of such imputations was
11. 10-15 or were defamatory of the Appellant.
- pp.8-17 12. On the application of the Respondent, there was a separate trial pursuant to part 31 of the Rules of the Supreme Court of a preliminary issue, namely, 10 whether the article in its natural and ordinary meaning was capable as a matter of law of conveying the imputations pleaded by the Appellant. Maxwell J. tried this issue and resolved it in favour of the Appellant in relation to each of such imputations. The Respondent did not seek leave to appeal against this decision before going to trial.
13. The learned trial judge (Begg C. J.) rightly regarded himself as bound by the ruling of 20 Maxwell J.
- p.46 14. At the trial, which began on 16th April 1984, the
- 11.31-43 Appellant called three witnesses each of whom
- p.47 testified that he had read the article and that at
- 11.1-39 the time of doing so he knew the Appellant as

p.49 captain of the West Indies touring team; and that
11.4-45 as captain the Appellant had the overall
p.50 responsibility for the control and performance of
11.1-9 that team both on and off the field. This
p.63 evidence was given without objection and was not
11.21-46 the subject of any cross-examination. It was and
is the Appellant's submission that if in the
circumstances in which the article was published
express evidence of identification was necessary,
the evidence of these three witnesses supplied 10
it. On the issue of identification, however, the
Appellant also relied upon the Respondent's
admission, in answer to an interrogatory (Exhibit
p.520 "E") that it intended, in the article complained,
to refer to the Appellant as a member of the West
Indies cricket team: Hayward v. Thompson (1982)
QB 47; Lee v. Wilson (1934) 51 C.L.R. 276 per Sir
Owen Dixon at pp.288-9. Exhibit "E" was admitted
p. 472 into evidence against objection. Priestley JA was
11.8-28 the only member of the Court of Appeal to deal 20
with its admissibility, holding in favour of the
Appellant on this point, correctly it is
submitted.

pp.444-445 15. The Court of Appeal held unanimously
p.464 that the Respondent was not precluded by its
11.19-20 failure before the trial to seek leave to appeal
against the decision of Maxwell J. from contending
in support of its appeal that the article was not

capable of conveying any of the imputations pleaded by the Appellant as being defamatory of him. It is not proposed to contend that this part of the Court's decision was wrong.

16. It will be convenient first to consider the primary issue in this appeal, namely the capacity of the article to convey the imputations of and concerning the Appellant as pleaded, before passing to the issues which arise on other matters of defence raised by the Respondent. Evidentiary facts relevant to such matter will be summarised later in this case, rather than presently, because the capacity of the article in the relevant sense depends solely on its wording, including the factual information contained in it, as it might be understood by the reasonable reader knowing the particularised facts relevant to the identification of the Appellant and equipped with such general knowledge as is properly imputable to such a reader.

10

20

17. It is submitted that on the primary issue, the reasoning contained in the dissenting judgment of Priestley JA is correct: it accords with the principles established in a line of decisions of the highest authority including Lewis v. Daily Telegraph (1964) A.C. 235; Jones v. Skelton (1963) 1 W.L.R. 1362; and, in the High Court of

Australia, Harrison v. Mirror Newspapers Ltd.
(1982) 149 C.L.R. 293, in which that Court makes
it clear that it accepts Lewis as an authoritative
statement of the law for Australia. While it is
difficult to single out any particular passage in
the speeches in Lewis as being of predominant or
transcendent significance for the purposes of the
present appeal, it will be seen that Priestley JA
followed, without actually citing the passage, the
line of thought expressed by Lord Devlin at 1964
A.C., P. 285: "... it is the broad impression
conveyed by the libel that has to be considered
and not the meaning of each word under analysis."
This proposition justifies the conclusion that, to
use His Honour's composite adjective, the
"one-time" reasonable reader would attach
particular significance to the paragraphs numbered
2, 3 and 18, as setting the tone or thrust of the
article by suggesting at the very least a
suspicion that each of the members of the two
opposing sides had been, and would in the future
be, engaged, for financial gain, in "fixing" the
results of matches in the Benson & Hedges series.
In reality, the references to "playing with the
faith of the people" in the context of a reference
to a single-minded burglar intent on blowing a
safe carries the imputations to the higher case of
imputations Nos. 1 and 3 as pleaded. True it is
that the article hits at Mr Packer as the

10

20

p.451

11.15-30

principal actor. Without doubt he is designated as a "fixer" of matches. Glass JA recognized that this was so. A leading actor, however, cannot perform a play alone: he needs the conscious and active assistance of a supporting cast. In this case the members of the two opposing teams, and by necessary inference the two captains, whether or not the latter were playing in any particular match, are designated generally as the supporting cast. Pre-arrangement of the result of a match cannot depend on unilateral action.

10

18. It is also submitted that the reasoning of Glass JA., with whom Samuels JA concurred, is open to at least the following criticisms:-

- (a) His Honour placed altogether too much weight upon the word "mutely" in paragraph 17 of the article. In the reasonable reader's "broad impression", that word would be submerged in the unmistakable reference elsewhere to conspiratorial pre-arrangement. Furthermore, His Honour failed to attach significance to the use of the word "charade". This word is used loosely; but in its setting it connotes "pretence". One asks how there can be a prolonged pretence

20

involving two teams, and by corollary their respective captains, without explicit agreement.

- (b) His Honour ignores the fact that in paragraph 13 the article calls in question the "sporting honesty" of the West Indies and the further fact that in paragraph 14 there is a reference to the idea of "taking a dive". The questions asked in paragraph 13 and the words in paragraph 14 "edges perilously close" invite the reader to adopt at least a suspicious approach to the assessment of the player's past and likely future conduct: cf. Jones v. Skelton (supra at p.1372).

10

p.449

These factors His Honour overlooked.

- (c) His Honour's approach to the interpretation of the article was more literalistic than is permissible under the relevant principles. It pays insufficient attention to the overall tendency of the written material.

20

- (d) His Honour's reasoning ignores the impact of the reference in paragraph 16 to "contrived spectacle with unsavory commercial connotations".

p.449

11.25-29

(e) His Honour, with respect, misunderstood the argument presented to the Court of Appeal on behalf of the Appellant in taking from it an acknowledgement, attributed to senior counsel, that "the language in paragraphs 9 to 14 did not rise higher than the imputation that 'their'" (scil. the West Indies) "determination to win had been sapped and that they were not trying their hardest".

10

(f) His Honour failed to appreciate the significance of the distinction drawn in the context of the article between on the one hand, factors which operate unconsciously or unintentionally in the minds of sportsmen to sap their will to win and, on the other hand, factors which induce them deliberately to lose a particular contest. In that setting, the references to criminal conduct in the opening and closing paragraphs of the article, in collocation with the inference of a lack of "sporting honesty", and the references to "taking a dive", a "charade" and "contrived spectacle" would all combine to induce the reasonable reader to derive the impression that the writer of the

20

article intended to convey the imputations pleaded.

19. The following passage in the judgment of Holroyd Pearce L.J. (as His Lordship then was) in Lewis v. Daily Telegraph Ltd. (1963) 2 Q.B. 340 at p.374 may be of assistance in resolving the primary question in this appeal:

"When persons publish words that are imprecise, ambiguous, loose, fanciful and unusual, there is room for a wide variation of reasonable opinion on what the words mean or connote. The publisher can hardly complain in such a case if he is reasonably understood as having said something that he did not mean."

10

It is legitimate to apply this passage to the task of a trial judge or of a Court of Appeal in resolving the question whether the words of the article are reasonably capable of conveying any of the defamatory imputations upon which the Appellant relies as giving him a cause of action. The article contains nuances which fit the descriptive words used by Holroyd Pearce L.J.: see for example paragraphs 10, 13, 14, 15, 16, 17.

20

20. The Respondent contended at the trial that the Appellant had failed to prove that the article was published "of and concerning him". On this ground there was, at the end of the Appellant's case, an unsuccessful motion for a verdict by direction.

pp.470-472

In the Court of Appeal, only Priestley JA dealt with this point; His Honour decided it, correctly it is submitted, adversely to the Respondent. The Appellant relies upon the reasoning of Priestley JA. It is also submitted that this was not a case in which specific evidence of identification, although it was adduced, was necessary at all. There would have been amongst the readers of the article a multitude of persons - the newspaper had an admitted circulation of about 265,000 - within whose general knowledge was the fact that the Appellant was the captain of the West Indies touring team. Readers having such knowledge would have been likely to understand the article as referring to him. In the context of the article, a reference to the team was necessarily a reference to the Appellant: Knupffer v. London Express Newspaper Limited (1944) AC 116.

10

20

21. If the majority judgment of the Court of Appeal as to the incapacity of the article to convey to reasonable readers any of the pleaded imputations is wrong, the next question is whether the verdict of the jury should be restored or whether, on the

other hand, there should be a new trial. It is submitted, for the reasons set out hereunder, that the former course is appropriate in the circumstances.

- p.19
11.16-30
p.20
11.1-4
22. Apart from the defences already alluded to [see paragraph 11 of this Case], the Respondent pleaded a defence of comment based on certain provisions contained in Division 7 of Part III of the Act: see in particular sections 29, 30, 31 and 33 of the Act. One of the essential features of this defence as pleaded was that the matter complained of was comment based either on proper material for comment or on material which was to some extent proper material for comment; and in the latter alternative represented an opinion which might reasonably be based on that material insofar as it was proper material for comment; and in either case was the comment of the servant or agent of the Respondent. 10
23. The trial judge refused to submit these defences to the jury on the ground that the Respondent, which did not go into evidence, had failed to establish a necessary ingredient of each of them, namely, that the comment was the comment of a servant or agent of the Respondent. In the Court of Appeal, Glass JA and Priestley JA each dealt with this point adversely to the Appellant, 20

holding that certain answers to interrogatories tendered by the Appellant provided prima facie proof that the author of the article was a servant or agent of the Respondent. It is not proposed to submit that their Honours were wrong on this aspect of the case.

24. There are, however, other reasons why the comment defences should not have been left to the jury. If these reasons are well founded, and if the primary issue is resolved in favour of the Appellant, then the appropriate result is that the verdict of the jury should be restored.

10

25. Certain matters should now be mentioned as relevant to the defences of comment.

26. The Respondent supplied particulars indicating which of the statements in the article were comment and fact respectively. The whole of the article was said to be comment except paragraphs 4, 9 and 11 and the first sentence of paragraph 12, which were said to be statements of fact.

20

p.25
11.3-17

27. In its defence, the Respondent itemised, as required by Part 67 Rule 17(3) of the Rules of the Supreme Court, the material upon which the alleged comment was based:-

- "(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. re. match
10 m
19/1/82
- (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." 20

pp.522-526

28.

The evidence (see Exhibits "G", "H", "J" and "K") disclosed that the author of the article, who was, as above indicated, in the opinion of the Court of Appeal shown by the evidence to have been the servant or agent of the Respondent, used, and relied upon as part of his research material for writing the article, two stories published in "The Age" of 20th January 1982 about the match played between Australia and the West Indies at the Sydney Cricket Ground during

30

pp.527-529

the afternoon and evening of 19th January 1982. This was the match referred to in paragraph 9 of the article. A copy of "The Age" newspaper containing those two accounts as tendered in evidence (see Exhibits "L" and "M"). So, putting the contents of these exhibits alongside particulars (ii) and (iv) as set out in paragraph 27 (supra), one sees that part of the material for any comment on the match contained in the article consisted of factual accounts, published by the Respondent, describing Australia's upset win in a headline as "a gift from the heavens", caused by "the ultimate gift from the gods, unexpected rain squalls". The West Indies had batted first, scoring 189 runs. "Australia seemingly headed for defeat at 7/168 off 43.1 overs" when rain stopped further play, won the match because under the rules of the competition its run rate was superior to that of the West Indies. "The Age's" descriptions of the match made it clear that Australia entered the final series because of a fortuitous win in no way due to any lack of resolution or fighting spirit on the part of the West Indies. All this simply means that the essential facts relied upon to support any comment contained in the article were quite incapable of doing so.

10

20

29. The defences of comment therefore failed at the first hurdle: there was no evidence to establish that any expression of opinion in the article was capable of being construed as a comment, capable, that is, in the sense that any such expression was an opinion that could possibly be held by an honest person on the material indicated as its basis: Bickel v. John Fairfax & Sons Ltd. (1981)2 NSWLR 474 at pp.490-491, where, it is submitted, Hunt J. accurately propounded the legal and factual issues arising under a defence of comment. To put the point in the form of a rhetorical question: How could an opinion that the West Indies lost a match by deliberately "throwing" it possibly be held when the relevant facts, said to be the basis of the opinion and admitted by the Respondent's own accounts of the event, demonstrated that the touring side, when in a winning position, had the match snatched from its grasp by the sudden and unexpected onset of heavy rain.

10

20

p.467
11.4-32
p.468
p.469
11.1-12

30. It is submitted that Priestley JA was right in his conclusion that the defence of comment was not open.

31. There is a further ground upon which the defence of comment was as a matter of law bound to fail. In an answer to interrogatories (Exhibit "N") the Respondent denied that it had any intention of conveying any of the imputations pleaded by the Appellant. Moreover, the Respondent, in the issue of "The Age" dated 27th January 1982 published a conditional expression of regret relating to the article. In that statement the Respondent said in effect that the substance of the imputations pleaded by the Appellant would be "completely and utterly false, and would have no foundation in fact whatsoever". If, as it is submitted to have been, the comment in the article was congruent with such imputations, the Respondent's denial of any intention of making them and its voluntary assertion that they had no factual basis must of necessity dispose of any suggestion that the comment represented the honest opinion of the writer of the article: Illawarra Newspapers Ltd. v. Butler (1981)2 NSWLR 502.

p.530

pp.517-518

10

20

p.458

11.13-28

pp.459-461

32. As appears from the reasons of Glass JA and Priestley JA, there is a difference of judicial opinion in New South Wales on an

p. 462
11.1-25
p. 469
11.13-19

important question relating to the statutory defences of comment contained in Division 7 of Part III of the Act. Are the defences properly pleaded to the Appellant's imputations or to the published matter from which they are derived? Their Honours opted for the first alternative, whereas in Petritsis v. Hellenic Herald Pty. Limited (1978)2 NSWLR 174 Reynolds JA and Samuels JA preferred the second. Recently, in Bob Kay Real Estate v. Amalgamated Television Services Pty. Limited (1985, unreported), Hunt J. has followed Petritsis, treating the contrary opinions expressed by Glass JA and Priestley JA as obiter. It is submitted, however, that the Board will not need, for the purposes of this appeal, to decide which of the competing views is right. If it be necessary to do so, the Appellant would support the first alternative. But the reality of the situation in the present case is that any comment in the article, whether or not congruent or co-extensive with the imputations pleaded, could not possibly be based on the material indicated in the relevant particulars. In truth, if there is any comment in the present article it is capable only of being regarded as congruent

10

20

or co-extensive with the imputations pleaded, and as Priestley JA has rightly held, there is no rational connection between such comment and the material indicated as its basis.

33. The Appellant therefore respectfully submits that this Appeal be allowed and that the verdict of the jury and judgment thereon in his favour be restored for the following

REASONS

10

- A. That the article was capable of conveying the imputations pleaded;
 - B. That the defence of comment should not have been submitted to the jury;
 - C. That the verdict of the jury was not vitiated by any material error on the part of the trial judge;
 - D. That the damages, contrary to the submission of the Respondent to the Court of Appeal, were not excessive;
- and
- E. The several reasons set out in the numbered paragraphs of this Case.

20

K.F. Hughes
Blackor

DEFAMATION ACT, 1974, No. 18
Reprinted under the Reprints Act, 1972

[Reprinted as at 25th February, 1982]

New South Wales



ANNO VICESIMO TERTIO

ELIZABETHÆ II REGINÆ

Act No. 18, 1974 (1), as amended by Act No. 68, 1974 (2); Act No. 37, 1975 (3); Act No. 95, 1976 (4); Act No. 48, 1977 (5); Act No. 79, 1978 (6); Act No. 125, 1978 (7); Act No. 80, 1979 (8); Act No. 68, 1980 (9); and Act No. 16, 1981 (10).

Note.—This Act is reprinted with the omission of all amending provisions authorised to be omitted under sec. 6 of the Reprints Act, 1972.

p 99715J—A

(1) Defamation Act, 1974, No. 18. Assented to, 10th April, 1974. Date of commencement, 1st July, 1974, sec. 2 and Gazette No. 79 of 28th June, 1974, p. 2381.

(2) Ombudsman Act, 1974, No. 68. Assented to, 18th October, 1974. Date of commencement of sec. 40, 18th October, 1974, sec. 2 (1).

(3) Privacy Committee Act, 1975, No. 37. Assented to, 16th April, 1975. Date of commencement of sec. 25, 2nd May, 1975, sec. 2 (2) and Gazette No. 63 of 2nd May, 1975, p. 1752.

(4) Public Hospitals (Amendment) Act, 1976, No. 95. Assented to, 8th December, 1976. Date of commencement of Sch. 6, 9th December, 1977, sec. 2 (5) and Gazette No. 150 of 9th December, 1977, p. 5385.

(5) Anti-Discrimination Act, 1977, No. 48. Assented to, 28th April, 1977. Date of commencement of sec. 128 (2), 1st June, 1977, sec. 2 (2) and Gazettes No. 54 of 31st May, 1977, p. 2139, and No. 54 of 17th June, 1977, p. 2452.

(6) Defamation (Amendment) Act, 1978, No. 79. Assented to, 11th September, 1978. Date of commencement of sec. 3, 19th February, 1979, sec. 2 (2) and Gazette No. 27 of 16th February, 1979, p. 705.

(7) Defamation (Trotting Authority) Amendment Act, 1978, No. 125. Assented to, 21st December, 1978.

(8) Defamation (Legal Services Commission) Amendment Act, 1979, No. 80. Assented to, 16th May, 1979. Date of commencement of sec. 3, 28th May, 1979, sec. 2 (2) and Gazette No. 71 of 25th May, 1979, p. 2471.

(9) Defamation (Anti-Discrimination) Amendment Act, 1980, No. 68. Assented to, 28th April, 1980.

(10) Defamation (Anti-Discrimination) Amendment Act, 1981, No. 16. Assented to, 22nd April, 1981. Date of commencement of sec. 3, 18th September, 1981, sec. 2 (2) and Gazette No. 139 of 18th September, 1981, p. 4891.

Defamation.

An Act to make provisions with respect to civil proceedings for defamation including the measure of damages for defamation, with respect to offer of amends in case of innocent publication of defamatory matter, with respect to criminal liability for the publication of defamatory matter, and with respect to damages in case of failure of a prosecution for the publication of defamatory matter; to repeal the Defamation Act, 1958; to amend the Crimes Act 1900 and certain other Acts; and for purposes connected therewith.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.**PRELIMINARY.****Short title.**

1. This Act may be cited as the "Defamation Act, 1974".

Commencement.

2. This Act shall commence upon such day as may be appointed by the Governor and as may be notified by proclamation published in the *Gazette*.

Division of Act.

3. This Act is divided as follows :—

PART I.—PRELIMINARY—ss. 1–7.

PART II.—GENERAL—ss. 8–9.

PART III.—DEFENCE IN CIVIL PROCEEDINGS—ss. 10–45.

DIVISION 1.—General—ss. 10–13.

DIVISION 2.—Truth—ss. 14–16.

DIVISION 3.—Absolute Privilege—ss. 17–19.

Defamation.

DIVISION 4.—*Qualified Privilege*—ss. 20–23.

DIVISION 5.—*Protected Reports, etc.*—ss. 24–26.

DIVISION 6.—*Court Notices, Official Notices, etc.*—
ss. 27, 28.

DIVISION 7.—*Comment*—ss. 29–35.

DIVISION 8.—*Offer of Amends*—ss. 36–45.

PART IV.—DAMAGES—ss. 46–48.

PART V.—CRIMINAL DEFAMATION—ss. 49–53.

PART VI.—SUPPLEMENTAL—ss. 54–57.

SCHEDULE 1.—AMENDMENTS OF ACTS.

SCHEDULE 2.—PROCEEDINGS OF PUBLIC CONCERN AND
OFFICIAL AND PUBLIC DOCUMENTS AND RECORDS.

Repeal of Defamation Act, 1958.

4. (1) The Defamation Act, 1958, is repealed.

(2) The law relating to defamation, in respect of matter published after the commencement of this Act, shall be as if the Defamation Act, 1958, had not been passed and the common law and the enacted law (except that Act and any enactments repealed by that Act) shall have effect accordingly.

Amendments—Schedule 1.

5. Each Act specified in Column 1 of Schedule 1 is amended in the manner specified opposite that Act in Column 2 of that Schedule.

Act binds Crown.

6. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Defamation.

Interpretation.

7. (1) In this Act, "Territory of the Commonwealth" includes a territory governed by the Commonwealth under a trusteeship agreement.

(2) For the purposes of this Act, an imputation or other matter is a matter of substantial truth if, but only if, in substance it is true or in substance it is not materially different from the truth.

(3) Where any right or liability of any person in respect of defamation passes to the executor of his will or to the administrator of his estate or to any other person, a reference in this Act which applies to the first-mentioned person extends, except in so far as the context or subject-matter otherwise indicates or requires, to that executor, administrator or other person.

(4) Where by this Act an expression used in this Act is given a meaning or has a modified meaning, that expression has a corresponding meaning in any rules of court, pleading or other document in respect of proceedings to which this Act applies, except in so far as the context or subject-matter otherwise indicates or requires.

PART II.**GENERAL.****Slander actionable without special damage.**

8. Slander is actionable without special damage in the same way and to the same extent as libel is actionable without special damage.

Defamation.

Causes of action.

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 or 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 that publisher for any publication of that matter to any other recipient.

(3) Where a person has brought proceedings (whether in New South Wales or elsewhere) for defamation against any person in respect of the publication of any matter, that person shall not bring further proceedings for defamation against the same defendant in respect of the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought.

(4) Rules of court may prohibit or regulate the reliance by a plaintiff in proceedings for defamation on several imputations alleged to be made by means of the same matter published by the defendant, where the several imputations do not differ in substance.

Defamation.

(5) Notwithstanding subsection (2), where proceedings for defamation in respect of the publication of any matter are tried before a jury, the jury shall, unless the court otherwise directs—

- (a) give a single verdict in respect of all the causes of action on which the plaintiff relies; and
- (b) if they find for the plaintiff as to more than one cause of action, assess damages in a single sum.

(6) This section does not affect—

- (a) any law or practice relating to special verdicts; or
- (b) the powers of any court in case of vexatious proceedings or abuse of process.

PART III.

DEFENCE IN CIVIL PROCEEDINGS.

DIVISION 1.—*General.*

Application.

10. This Part deals with defences in civil proceedings for defamation, but not with defences in other proceedings.

Common law defence, etc.

11. The provision of a defence by this Part does not of itself vitiate, diminish or abrogate any defence or exclusion of liability available apart from this Act.

Act No. 18, 1974.

Defamation.

Public interest a question for the court.

12. Where proceedings for defamation are tried before a jury, and, on the facts, there is a question whether any comment or other imputation, or any notice, proceedings or report is or relates to a matter of public interest for the purposes of this Act, that question is to be determined by the court and not by the jury.

Unlikelihood of harm.

13. It is a defence that the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer harm.

DIVISION 2.—*Truth.*

Interpretation.

14. (1) For the purposes of this Division, an imputation is published under qualified privilege if, but only if—

- (a) the imputation is published on an occasion of qualified privilege and is relevant to the occasion; and
- (b) the manner of the publication is reasonable having regard to the imputation and to the occasion of qualified privilege.

(2) For the purposes of subsection (1), an occasion is one of qualified privilege if, but only if—

- (a) it is such an occasion under the law apart from this Act;
or
- (b) the circumstances of the publication afford a defence of qualified privilege under Division 4.

Truth generally.

15. (1) Notwithstanding section 11, the truth of any imputation complained of is not a defence as to that imputation except as mentioned in this section.

Defamation.

(2) It is a defence as to any imputation complained of that—

- (a) the imputation is a matter of substantial truth; and
- (b) the imputation either relates to a matter of public interest or is published under qualified privilege.

Truth: contextual imputations.

16. (1) Where an imputation complained of is made by the publication of any report, article, letter, note, picture, oral utterance or other thing and another imputation is made by the same publication, the latter imputation is, for the purposes of this section, contextual to the imputation complained of.

(2) It is a defence to any imputation complained of that—

- (a) the imputation relates to a matter of public interest or is published under qualified privilege;
- (b) one or more imputations contextual to the imputation complained of—
 - (i) relate to a matter of public interest or are published under qualified privilege; and
 - (ii) are matters of substantial truth; and
- (c) by reason that those contextual imputations are matters of substantial truth, the imputation complained of does not further injure the reputation of the plaintiff.

DIVISION 3.—*Absolute Privilege.*

Parliamentary papers.

17. (1) There is a defence of absolute privilege for the publication of a document by order or under the authority of either House or both Houses of Parliament.

(2) There is a defence of absolute privilege for the publication by the Government Printer of the debates and proceedings of either House or both Houses of Parliament.

Defamation.

(3) There is a defence for absolute privilege for the publication of—

- (a) a document previously published as mentioned in subsection (1) or a copy of a document so published; and
- (b) debates and proceedings previously published as mentioned in subsection (2) or a copy of debates and proceedings so published.

Matters relating to the Ombudsman, etc.

Ins. 1974 No. 68, s. 40 (a). Am. 1978 No. 79, s. 3.

17A. (1) There is a defence of absolute privilege for a publication to or by the Ombudsman, as Ombudsman, or to any officer of the Ombudsman, as such an officer.

(2) Subsection (1) applies in relation to an acting Ombudsman, the Deputy Ombudsman and a special officer of the Ombudsman in the same way as it applies in relation to the Ombudsman.

(3) There is a defence of absolute privilege for a publication to a member of Parliament for the purposes of section 12 (2) of the Ombudsman Act, 1974, or section 6 (2) of the Police Regulation (Allegations of Misconduct) Act, 1978.

(4) There is a defence of absolute privilege for the publication under section 31 (3) of the Ombudsman Act, 1974, or under section 32 (3) or 45 (5) of the Police Regulation (Allegations of Misconduct) Act, 1978, of a report.

(5) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the Ombudsman Act, 1974, of a copy of a report previously made public under section 31 (3) of that Act.

(6) There is a defence of absolute privilege for the publication, under the authority of the Minister for the time being administering the Police Regulation (Allegations of Misconduct) Act, 1978, of a copy of a report previously made public under section 32 (3) or 45 (5) of that Act.

*Defamation.***Matters arising under Privacy Committee Act, 1975.**

Ins. 1975 No. 37, s. 25 (a).

17B. (1) There is a defence of absolute privilege for a publication to a member of the Privacy Committee constituted under the Privacy Committee Act, 1975, a member of a subcommittee of that Committee or an officer of that Committee for the purpose of the execution or administration of that Act or, for that purpose, by that Committee, by a subcommittee of that Committee to that Committee or by such a member or officer.

(2) There is a defence of absolute privilege for the publication under section 18 (3) of the Privacy Committee Act, 1975, of a report under that Act.

(3) There is a defence of absolute privilege for the publication under the authority of the Minister for the time being administering the Privacy Committee Act, 1975, of a copy of a report previously made public under section 18 (3) of that Act.

Certain decisions of hospital boards under Public Hospitals Act, 1929.

Ins. 1976 No. 95, Sch. 6.

17C. There is a defence of absolute privilege for the publication under section 33H of the Public Hospitals Act, 1929, of a decision and the reasons for that decision of a board of directors of a hospital.

Matters arising under Anti-Discrimination Act, 1977.

Ins. 1977 No. 48, s. 128 (2) (a); Am. 1980 No. 68, s. 2 (a); 1981 No. 16, s. 3 (a).

17D. (1) There is a defence of absolute privilege for a publication to or by the Counsellor for Equal Opportunity appointed under the Anti-Discrimination Act, 1977, to or by a member of the Equal Opportunity Tribunal constituted under that Act, to or by a member of the Anti-Discrimination Board constituted under that Act, to any officer of that Counsellor, to the Registrar of that Tribunal, to any officer of the Public Service appointed or employed to assist in the execution or administration of that Act or to or by the Director of Equal Opportunity in Public Employment appointed under that Act, if the publication is made for the purpose of the execution or administration of that Act.

Defamation.

(2) There is a defence of absolute privilege for the publication of a report—

- (a) referred to in section 91 (2) or 94 (1) of the Anti-Discrimination Act, 1977, of the Counsellor for Equal Opportunity appointed under that Act made to the Equal Opportunity Tribunal constituted under that Act; or
- (b) referred to in section 120 (2), 121, 122 (1) or 122R (b) of that Act to the Minister administering that Act.

Appeals under Trotting Authority Act, 1977.

Ins. 1978 No. 125, s. 2 (a).

17E. There is a defence of absolute privilege—

- (a) for a publication in the course of an appeal under Part V of the Trotting Authority Act, 1977; and
- (b) for a publication by the Trotting Authority of New South Wales or the Trotting Appeals Tribunal in an official report of its decision in respect of any such appeal and of the reasons for that decision.

Matters arising under Legal Services Commission Act, 1979.

Ins. 1979 No. 80, s. 3.

17F. There is a defence of absolute privilege for a publication to or by the Legal Services Commission of New South Wales constituted under the Legal Services Commission Act, 1979, an officer of that Commission or a committee established under that Act if the publication is made for the purpose of the execution or administration of that Act.

Proceedings of inquiry.

18. There is a defence of absolute privilege for a publication in the course of an inquiry made under the authority of an Act or Imperial Act or under the authority of Her Majesty, of the Governor, or of either House or both Houses of Parliament.

Report of inquiry.

19. Where a person is appointed under the authority of an Act or Imperial Act or under the authority of Her Majesty, of the Governor or of either House or both Houses of Parliament to hold an inquiry, there is a defence of absolute privilege for a publication by him in an official report of the result of the inquiry.

*Defamation.*DIVISION 4.—*Qualified Privilege.***Multiple publication.**

20. (1) For the purposes of this section—

- (a) “multiple publication” means publication of the same or like matter or of copies of any matter to two or more recipients—
 - (i) at the same time;
 - (ii) by means of the publication in the ordinary course of affairs of numerous copies of a newspaper or other writing; or
 - (iii) otherwise in the course of the one transaction;
- (b) matter is published under qualified privilege if, but only if, the matter—
 - (i) is published on an occasion of qualified privilege; and
 - (ii) is relevant to the occasion; and
- (c) an occasion is one of qualified privilege if, but only if—
 - (i) it is an occasion of qualified privilege under the law apart from this Act; or
 - (ii) the circumstances of the publication afford a defence of qualified privilege under section 21 or section 22.

(2) Where—

- (a) a person makes a multiple publication; and
- (b) the matter published would if published to one or more, but not all, of the recipients be published under qualified privilege as regards that recipient or those recipients,

there is a defence of qualified privilege for the publication to that recipient or those recipients, notwithstanding that the publication is not made under qualified privilege as regards any other recipient.

Defamation.

(3) Where—

- (a) a person makes a multiple publication;
- (b) the matter published would if published to one or more, but not all, of the recipients be published under qualified privilege as regards that recipient or those recipients; and
- (c) the extent of publication is reasonable having regard to the matter published and to the occasion of qualified privilege,

there is a defence of qualified privilege as regards all of the recipients.

Mistaken character of recipient.**21. Where—**

- (a) a publication complained of is made in the course of a communication by the publisher to any person;
- (b) the publication is made in circumstances in which there would be a defence of qualified privilege for that publication if that person bore some character; and
- (c) the publisher believes, at the time of the communication, on reasonable grounds, that that person bears that character,

there is a defence of qualified privilege for that publication.

Information.**22. (1) Where, in respect of matter published to any person—**

- (a) the recipient has an interest or apparent interest in having information on some subject;

Defamation.

- (b) the matter is published to the recipient in the course of giving to him information on that subject; and
- (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,

there is a defence of qualified privilege for that publication.

(2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest.

(3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is for reward.

Qualified privilege a question for the court.

23. Where proceedings for defamation are tried before a jury and, on the facts, there is a question whether there is a defence of qualified privilege under this Division, that question is to be determined by the court and not by the jury.

*DIVISION 5.—Protected Reports, etc.***Protected reports—Schedule 2.**

24. (1) In this section, "protected report" means a report of proceedings specified in clause 2 of Schedule 2 as proceedings for the purposes of this definition.

(2) There is a defence for the publication of a fair protected report.

(3) Where a protected report is published by any person, there is a defence for a later publication by another person of the protected report or a copy of the protected report, or of a fair

Act No. 18, 1974.

Defamation.

extract or fair abstract from, or fair summary of, the protected report, if the second person does not, at the time of the later publication, have knowledge which should make him aware that the protected report is not fair.

(4) Where material purporting to be a protected report is published by any person, there is a defence for a later publication by another person of the material or a copy of the material or of a fair extract or fair abstract from, or fair summary of, the material, if the second person does not, at the time of the later publication, have knowledge which should make him aware that the material is not a protected report or is not fair.

Copies, etc., of official and public documents and records.

25. There is a defence for the publication of—

- (a) a document or record specified in clause 3 of Schedule 2 as a document or record to which this section applies or a copy of such a document or record; and
- (b) a fair extract or fair abstract from, or fair summary of, any such document or record.

Defeat of defence under secs. 24, 25.

26. Where a defence is established under section 24 or section 25, the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for public information or the advancement of education.

DIVISION 6.—*Court Notices, Official Notices, etc.***Court notices.**

27. (1) There is a defence for the publication of a notice in accordance with the direction of a court of any country.

(2) Where a defence is established under subsection (1), the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the purpose of giving effect to the direction.

*Defamation.***Official notices, etc.**

28. (1) There is a defence for the publication of any notice or report in accordance with an official request.

(2) Where a defence is established under subsection (1), the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the purpose of giving effect to the request.

(3) Where there is an original request that any notice or report be published to the public generally or to any section of the public, and the notice or report is or relates to a matter of public interest, there is a defence for a publication of the notice or report, or a fair extract or fair abstract from, or a fair report or summary of, the notice or report.

(4) Where a defence is established under subsection (3), the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the information of the public.

(5) This section does not affect the liability (if any) in defamation of a person making an official request.

(6) In this section, "official request" means a request by—

- (a) an officer of the government (including a member of a police force) of any Australian State, or of the Commonwealth, or of any Territory of the Commonwealth; or
- (b) a council, board or other authority or person constituted or appointed for public purposes under the legislation of any Australian State, or of the Commonwealth, or of any Territory of the Commonwealth.

Defamation.

extract or fair abstract from, or fair summary of, the protected report, if the second person does not, at the time of the later publication, have knowledge which should make him aware that the protected report is not fair.

(4) Where material purporting to be a protected report is published by any person, there is a defence for a later publication by another person of the material or a copy of the material or of a fair extract or fair abstract from, or fair summary of, the material, if the second person does not, at the time of the later publication, have knowledge which should make him aware that the material is not a protected report or is not fair.

Copies, etc., of official and public documents and records.

25. There is a defence for the publication of—

- (a) a document or record specified in clause 3 of Schedule 2 as a document or record to which this section applies or a copy of such a document or record; and
- (b) a fair extract or fair abstract from, or fair summary of, any such document or record.

Defeat of defence under secs. 24, 25.

26. Where a defence is established under section 24 or section 25, the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for public information or the advancement of education.

DIVISION 6.—*Court Notices, Official Notices, etc.*

Court notices.

27. (1) There is a defence for the publication of a notice in accordance with the direction of a court of any country.

(2) Where a defence is established under subsection (1), the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the purpose of giving effect to the direction.

*Defamation.***Official notices, etc.**

28. (1) There is a defence for the publication of any notice or report in accordance with an official request.

(2) Where a defence is established under subsection (1), the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the purpose of giving effect to the request.

(3) Where there is an original request that any notice or report be published to the public generally or to any section of the public, and the notice or report is or relates to a matter of public interest, there is a defence for a publication of the notice or report, or a fair extract or fair abstract from, or a fair report or summary of, the notice or report.

(4) Where a defence is established under subsection (3), the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for the information of the public.

(5) This section does not affect the liability (if any) in defamation of a person making an official request.

(6) In this section, "official request" means a request by—

- (a) an officer of the government (including a member of a police force) of any Australian State, or of the Commonwealth, or of any Territory of the Commonwealth; or
- (b) a council, board or other authority or person constituted or appointed for public purposes under the legislation of any Australian State, or of the Commonwealth, or of any Territory of the Commonwealth.

Defamation.

DIVISION 7.—Comment.

General.

29. (1) The defence or exclusion of liability in cases of fair comment on a matter of public interest—

- (a) is modified as appears in this Division; and
- (b) is not available except in accordance with this Division.

(2) This Division has effect notwithstanding section 11.

Proper material.

30. (1) For the purposes of this section, but subject to subsection (2), “proper material for comment” means material which, if this Division had not been enacted, would, by reason that it consists of statements of fact, or by reason that it is a protected report within the meaning of section 24, or for some other reason, be material on which comment might be based for the purposes of the defence or exclusion of liability in cases of fair comment on a matter of public interest.

(2) 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 the statement relates to a matter of public interest.

(3) The defences under this Division are available as to any comment if, but only if—

- (a) the comment is based on proper material for comment;
or
- (b) the material on which the comment is based is to some extent proper material for comment and the comment represents an opinion which might reasonably be based on that material to the extent to which it is proper material for comment.

B

Defamation.

(4) There is no special rule governing the nature of the material which may be the basis of comment imputing a dishonourable motive or governing the degree of foundation or justification which comment imputing a dishonourable motive must have in the material on which the comment is based.

Public interest.

31. The defences under this Division are not available to any comment unless the comment relates to a matter of public interest.

Comment of defendant.

32. (1) Subject to sections 30 and 31, it is a defence as to comment that the comment is the comment of the defendant.

(2) A defence under subsection (1) as to any comment is defeated if, but only if, it is shown that, at the time when the comment was made, the comment did not represent the opinion of the defendant.

Comment of servant or agent of defendant.

33. (1) Subject to sections 30 and 31, it is a defence as to comment that the comment is the comment of a servant or agent of the defendant.

(2) A defence under subsection (1) as to any comment is defeated if, but only if, it is shown that, at the time when the comment was made, any person whose comment it is, being a servant or agent of the defendant, did not have the opinion represented by the comment.

Comment of stranger.

34. (1) Subject to sections 30 and 31, it is a defence as to comment that the comment is not, and in its context and in the circumstances of the publication complained of did not purport to be, the comment of the defendant or of any servant or agent of his.

(2) A defence under subsection (1) is defeated if, but only if, it is shown that the publication complained of was not in good faith for public information or the advancement of education.

*Defamation.***Effect of defence.**

35. Where the matter complained of includes comment and includes material upon which the comment is based, a defence under this Division as to the comment is not a defence as to the material upon which the comment is based.

DIVISION 8.—*Offer of Amends.***Innocent publication: meaning.**

36. For the purposes of this Division, where any matter is published by any person, and the matter is or may be defamatory of another person, the publication is innocent in relation to that other person if, but only if, at and before the time of publication, each of them, the publisher and his servants and agents concerned with the matter in question or its publication—

- (a) exercises reasonable care in relation to the matter in question and its publication;
- (b) does not intend the matter in question to be defamatory of that person; and
- (c) does not know of circumstances by reason of which the matter in question is or may be defamatory of that person.

Offer of amends.

37. (1) Where any matter is published by any person and the matter is or may be defamatory of any other person but the publisher claims that his publication of that matter is innocent in relation to that other person, the publisher may make to that other person an offer of amends in accordance with this Division.

(2) An offer of amends made pursuant to this Division—

- (a) must be expressed to be so made;
- (b) must include an offer to publish, or join in publishing—
 - (i) such correction, if any, of the matter in question as is reasonable; and

Defamation.

- (ii) such apology, if any, to the offeree as is reasonable; and
 - (c) where material containing the matter in question has been delivered to any person by the publisher or with his knowledge, must include an offer to take, or join in taking, such steps, if any, as are reasonable for the purpose of notifying the recipient that the matter in question is or may be defamatory of the offeree.
- (3) In determining whether any, and if so, what correction, apology or steps are reasonable for the purposes of subsection (2), regard shall be had to any correction or apology published, or steps taken, by the publisher or any other person at any time before the occasion for determination arises.

Particulars in support of offer.

38. (1) An offer made pursuant to this Division must be accompanied by—

- (a) particulars of the facts on which the publisher relies to show that his publication of the matter in question is innocent in relation to the offeree;
 - (b) particulars of any correction or apology made or steps taken, before the date of the offer, upon which the publisher relies for the purposes of section 37 (3); and
 - (c) a statutory declaration verifying the particulars mentioned in paragraphs (a) and (b).
- (2) The statutory declaration mentioned in subsection (1) (c) must be made—
- (a) by the publisher;
 - (b) where the publisher is a corporation aggregate, by an officer of the corporation having knowledge of the facts; or
 - (c) where, upon facts appearing in the statutory declaration, it is impracticable to comply with paragraph (a) or (b), by a person authorised by the publisher and having knowledge of the facts.

Defamation.

Determination of questions.

15 & 16 Geo. 6 and 1 Eliz. 2, c. 66, s. 4 (4) (a).

39. (1) Where an offer of amends made pursuant to this Division is accepted, the court may, on application by a party to the offer, determine any question as to the steps to be taken in performance of the agreement arising by acceptance of the offer.

(2) An appeal does not lie from a determination under this section.

Effect of acceptance and performance.

15 & 16 Geo. 6 and 1 Eliz. 2, c. 66, s. 4 (1) (a).

40. Where an offer made pursuant to this Division is accepted and the agreement arising by acceptance of the offer is performed, the offeree shall not commence or continue any proceedings against the offeror for damages for defamation in respect of the matter in question.

Costs and expenses.

15 & 16 Geo. 6 and 1 Eliz. 2, c. 66, s. 4 (4) (b).

41. Where an offer made pursuant to this Division is accepted, the court may make an order for payment by the offeror to the offeree of—

- (a) the costs of the offeree of and incidental to the acceptance and of the offer and the performance of the agreement arising by acceptance of the offer, including costs on an indemnity basis; and
- (b) the expenses of the offeree incurred in consequence of the publication of the matter in question.

Courts with powers under secs. 39, 41.

15 & 16 Geo. 6 and 1 Eliz. 2, c. 66, s. 4 (4).

42. The powers given by section 39 or section 41 to a court are exercisable—

- (a) if the offeree has brought proceedings against the offeror in any court for damages for defamation in respect of the matter in question, by that court in those proceedings; and

Defamation.

- (b) except as provided in paragraph (a), by the Supreme Court.

Offer not accepted.

43. (1) Where an offer is made pursuant to this Division and the offeree does not accept the offer, it is a defence to proceedings by the offeree against the offeror for damages for defamation in respect of the matter in question that—

- (a) the publication by the offeror of the matter in question was innocent in relation to the offeree;
- (b) the offeror made the offer as soon as practicable after becoming aware that the matter in question is or may be defamatory of the offeree;
- (c) the offeror is ready and willing to perform an agreement arising by the acceptance of the offer upon acceptance by the offeree at any time before the commencement of the trial upon issues arising on a defence under this section; and
- (d) if the offeror is not the author of the matter in question, that the author was not actuated by ill will to the offeree.

(2) For the purposes of a defence under this section, evidence of facts other than facts of which particulars are given under section 38 is not admissible on behalf of the offeror, except with the leave of the court, to prove that the publication by the offeror of the matter in question is innocent in relation to the offeree.

Other publishers.

44. (1) Where there are two or more publishers, whether joint or otherwise, of any matter, and one or more but not all of them make an offer pursuant to this Division, this Division does not, by virtue of that offer, affect the liability of the other or others of them.

(2) Subsection (1) does not affect the admissibility in mitigation of damages of any correction, apology or other thing

Defamation.

Limited effect of agreement.

45. An agreement arising by the acceptance of an offer made pursuant to this Division does not have any effect in law except as specified in this Division and except so far as a contrary intention appears by the agreement.

PART IV.

DAMAGES.

General.

46. (1) In this section "relevant harm" means, in relation to damages for defamation—

- (a) harm suffered by the person defamed; or
- (b) where the person defamed dies before damages are assessed, harm suffered by the person defamed by way of injury to property or financial loss.

(2) Damages for defamation shall be the damages recoverable in accordance with the common law, but limited to damages for relevant harm.

(3) In particular, damages for defamation—

- (a) shall not include exemplary damages; and
- (b) shall not be affected by the malice or other state of mind of the publisher at the time of the publication complained of or at any other time, except so far as that malice or other state of mind affects the relevant harm.

*Defamation.***Truth or falsity of imputation.**

47. On the question of the amount of damages where it is relevant to that question that the imputation complained of was or was not true or a matter of substantial truth—

- (a) there is no presumption as to whether the imputation was or was not true or a matter of substantial truth; and
- (b) evidence as to whether the imputation was or was not true or a matter of substantial truth may be adduced by any party (whether or not evidence on the subject is adduced by any other party).

Other recoveries.

48. In proceedings for damages for defamation in respect of the publication of any matter, evidence is admissible on behalf of the defendant, in mitigation of damages, that the plaintiff—

- (a) has already recovered damages;
- (b) has brought proceedings for damages; or
- (c) has received or agreed to receive compensation,

for defamation in respect of any other publication of matter to the same purport or effect as the matter complained of in the proceedings.

PART V.
CRIMINAL DEFAMATION.**Common law criminal libel abolished.**

49. (1) The common law misdemeanour of criminal libel is abolished.

(2) This section does not affect the law relating to blasphemous, seditious or obscene libel.

Defamation.

Offence.

50. (1) A person shall not, without lawful excuse, publish matter defamatory of another living person—

- (a) with intent to cause serious harm to any person (whether the person defamed or not); or
- (b) where it is probable that the publication of the defamatory matter will cause serious harm to any person (whether the person defamed or not) with knowledge of that probability.

Penalty : Imprisonment for a term not exceeding three years or a fine of such amount as the court may impose or both.

(2) In subsection (1), “publish” has the meaning which it has in the law of tort relating to defamation.

(3) An offence under this section is an indictable misdemeanour.

Lawful excuse.

51. (1) A person accused of an offence under section 50 in respect of the publication of matter defamatory of another person has lawful excuse for the publication where, but only where, if that other person brought proceedings against the accused for damages for defamation in respect of the publication of that matter, the accused would be entitled to succeed in those proceedings, having regard only to the events happening before and at the time of the publication.

(2) Where an information or other statement of a charge of an offence under section 50 alleges that the accused published the matter in question without lawful excuse, it is not necessary to negative, in the information or other statement, any thing which would amount to lawful excuse under subsection (1).

(3) At the trial of a person accused of an offence under section 50, it is not necessary for the prosecution to negative any thing which would amount to lawful excuse under subsection (1) unless an issue respecting that thing is raised by evidence at the trial.

*Defamation.***Criminal informations excluded.**

52. Section 6 of the Imperial Act called The Australian Courts Act, 1828, does not apply to an offence under section 50.

Defamatory meaning; verdict.

53. On a trial before a jury of an information for an offence under section 50, where it appears to the judge that the matter complained of is capable of bearing a defamatory meaning—

- (a) the question whether the matter complained of does bear a defamatory meaning is a question for the jury; and
- (b) the jury may give a general verdict of guilty or not guilty on the issues as a whole in like manner as in other cases.

PART VI.**SUPPLEMENTAL.****Evidence of publication, etc.**

54. (1) This section applies to civil proceedings for defamation and to proceedings for an offence under section 50.

(2) Where a document appears to be printed or otherwise produced by a means adapted for the production of numerous copies, and there is in the document a statement to the effect that the document is printed, produced, published or distributed by or for any person, the statement is evidence that the document is so printed, produced, published or distributed.

(3) Evidence that a number or part of a document appearing to be a periodical is printed, produced, published or distributed by or for any person is evidence that a document appearing to be another number or part of the periodical is so printed, produced, published or distributed.

Defamation.

(4) In subsection (3), "periodical" includes any newspaper, review, magazine, or other printed document of which numbers or parts are published periodically.

Evidence of criminal offence.

55. (1) This section applies to civil proceedings for defamation and to proceedings for an offence under section 50.

(2) Subject to subsection (4), where there is a question of the truth of an imputation concerning any person, and the commission by that person of a criminal offence is relevant to that question, proof of the conviction by a court of that person for that offence is—

- (a) if the conviction is by a court of an Australian State or of the Commonwealth or of a Territory of the Commonwealth, conclusive evidence that he committed the offence; and
- (b) if the conviction is by a court of any other country, evidence that he committed the offence.

(3) For the purposes of subsection (2)—

- (a) an issue whether an imputation was a matter of substantial truth; or
- (b) a question whether an imputation was true or a matter of substantial truth, being a question arising in relation to damages for defamation,

is a question of the truth of the imputation, but no other question is a question of the truth of an imputation.

(4) Subsection (2) does not have effect if it is shown that the conviction has been set aside.

Defamation.

(5) For the purposes of this section, the contents of a document which is evidence of conviction of an offence, and the contents of an information, complaint, indictment, charge sheet or similar document on which a person is convicted of an offence, are admissible in evidence to identify the facts on which the conviction is based.

(6) Subsection (5) does not affect the admissibility of other evidence to identify the facts on which the conviction is based.

(7) In this section "conviction" includes—

- (a) in the case of a court-martial within the meaning of the Courts-Martial Appeals Act 1955 of the Commonwealth a conviction which is or is deemed to be a conviction of a court-martial for the purposes of that Act;
- (b) in the case of the Courts-Martial Appeals Tribunal constituted under that Act, a finding of guilty under section 25, 26 or 27 of that Act;
- (c) in the case of a court-martial constituted under the Imperial Act called the Army Act, 1955, or under the Imperial Act called the Air Force Act, 1955, a finding of guilty which is, or falls to be treated as, a finding of the court duly confirmed; and
- (d) in the case of a court-martial constituted under the Imperial Act called the Naval Discipline Act, 1957, a finding of guilty which is, or falls to be treated as, the finding of the court.

Criminating answer, etc.

56. (1) Where, in civil proceedings for or in respect of the publication of defamatory matter, a question is put to any person or any person is ordered to discover or produce any document or thing, he is not excused from answering that question, or from discovering or producing that document or thing, by reason that to do so may criminate him or his spouse of an offence under section 50 in respect of the publication of that matter.

Defamation.

(2) The answer made by a person to any question, or the discovery or production by a person of any document or thing pursuant to an order, in civil proceedings for or in respect of the publication of defamatory matter, is not admissible in evidence on a prosecution of him or his spouse for an offence under section 50 in respect of the publication of that matter.

(3) In this section, in relation to an answer, discovery or production by any person, "spouse" means his spouse at the time of the answer, discovery or production, as the case requires.

Damages on failure of a prosecution under section 50.

57. Damages in respect of a cause of action arising by reason of the failure of a prosecution under section 50 shall not include exemplary damages but shall otherwise be the damages recoverable in accordance with the common law.

SCHEDULE 1.

(Sec. 5.)

AMENDMENTS OF ACTS.

(The amending provisions relating to various Acts are not reprinted: Reprints Act, 1972, s. 6.)

Defamation.

SCHEDULE 2.

(Secs. 24, 25.)

PROCEEDINGS OF PUBLIC CONCERN AND OFFICIAL AND PUBLIC DOCUMENTS
AND RECORDS.*Preliminary.*

1. In this Schedule—

“country” includes a federation, and a state, province or other part of a federation, and includes a territory governed under a trusteeship agreement;

“court” means a court of any country;

“parliamentary body” means—

- (a) a parliament or legislature of any country;
- (b) a house of a parliament or legislature of any country;
- (c) a committee of a parliament or legislature of any country;
and
- (d) a committee of a house or houses of a parliament or legislature of any country.

Proceedings of Public Concern.

Am. 1974 No. 68, s. 40 (b); 1975 No. 37, s. 25 (b); 1977 No. 48, s. 128 (2) (b); 1978 No. 125, s. 2 (b); 1978 No. 79, s. 3 (d); 1980 No. 68, s. 2 (b); 1981 No. 16, s. 3 (b).

2. The following proceedings are specified for the purposes of the definition of “protected report” in section 24 (1):—

- (1) proceedings in public of a parliamentary body;
- (2) proceedings in public of an international organisation of any countries or of governments of any countries;
- (3) proceedings in public of an international conference at which governments of any countries are represented;

Defamation.

SCHEDULE 2—*continued.*

- (4) proceedings in public of the International Court of Justice or of any other judicial or arbitral tribunal for the decision of any matter in dispute between nations or of any other international judicial or arbitral tribunal;
- (5) proceedings in public of a court;
- (6) proceedings in public of an inquiry held under the legislation of any country or held under the authority of the government of any country;
- (7) so much of the proceedings of an association or of a committee or governing body of an association (being proceedings pursuant to the specified objects) as comprises a finding or decision relating to a member of the association or to a person subject by contract or otherwise by law to control by the association, being a finding or decision—
- (a) made in Australia or in a Territory of the Commonwealth;
or
 - (b) having effect, by law or custom or otherwise, in any part of Australia or of a Territory of the Commonwealth,
- where the association, whether incorporated or not and wherever formed, is—
- (c) an association —
 - (i) having amongst its objects the following objects (in this subclause called the specified objects), namely, the advancement of any art, science or religion or the advancement of learning in any field; and
 - (ii) empowered by its constitution to control or adjudicate upon matters connected with the specified objects;

Defamation.

SCHEDULE 2—*continued.***(d) an association—**

- (i) having amongst its objects the following objects (in this subclause called the specified objects), namely, the promotion of any calling, that is to say, any trade, business, industry or profession or the promotion or protection of the interests of persons engaged in any calling; and
- (ii) empowered by its constitution to control or adjudicate upon matters connected with the calling, or the conduct of persons engaged in the calling; or

(e) an association—

- (i) having amongst its objects the following objects (in this subclause called the specified objects), namely, the promotion of any game, sport or pastime to the playing or exercise of which the public is admitted as spectators or otherwise or the promotion or protection of the interests of persons connected with the game, sport or pastime; and
 - (ii) empowered by its constitution to control or adjudicate upon matters connected with the game, sport or pastime;
- (8) without limiting the operation of any other subclause, proceedings on an appeal to the Committee of the Australian Jockey Club under section 32 of the Australian Jockey Club Act 1873;**
- (9) proceedings of a public meeting, being a meeting which is open to the public, whether with or without restriction, held in Australia or in a Territory of the Commonwealth, so far as the proceedings relate to a matter of public interest including the advocacy or candidature of any person for a public office;**

Defamation.

SCHEDULE 2—*continued.*

- (10) proceedings of the Ombudsman, so far as those proceedings are included in a report previously made public under section 31 (3) of the Ombudsman Act, 1974, or under section 32 (3) or 45 (5) of the Police Regulation (Allegations of Misconduct) Act, 1978;

- (11) proceedings of the Privacy Committee constituted under the Privacy Committee Act, 1975, so far as those proceedings are included in a report previously made public under section 18 (3) of that Act;

- (12) proceedings at an inquiry conducted by the Equal Opportunity Tribunal constituted under the Anti-Discrimination Act, 1977, or an investigation conducted by the Anti-Discrimination Board constituted under that Act; or

- (13) without limiting the operation of any other subclause, proceedings on an appeal to the Trotting Authority of New South Wales or to the Trotting Appeals Tribunal under Part V of the Trotting Authority Act, 1977.

Official and Public Documents and Records.

3. Section 25 applies to the following documents and records:—

- (1) any report, paper, votes or proceedings published in any country by order or under the authority of a parliamentary body for that country;
- (2) the debates and proceedings of either House of Parliament published by the Government Printer;
- (3) a document which is—
 - (a) a judgment, being a judgment, decree or order in civil proceedings, of a court; or

Defamation.

SCHEDULE 2—*continued.*

- (b) a record of a court relating to—
 - (i) such a judgment; or
 - (ii) the enforcement or satisfaction of such a judgment; or

 - (4) a record or document kept by a government or statutory authority or court of any Australian State or of the Commonwealth or of a Territory of the Commonwealth or kept in pursuance of the legislation of any Australian State or of the Commonwealth or of a Territory of the Commonwealth, being a record or document which is open to inspection by the public.
-

*Defamation.***INDEX.**

	Section.	Page.
Act—		
commencement	2	2
Crown bound by	6	3
division	3	2
short title	1	2
Amends, offer of	37	19
costs and expenses	41, 42	21
determination of questions	39, 42	21
effect of acceptance and performance	40	21
innocent publication	36	19
limited effect of agreement	45	23
offer not accepted	43	22
other publishers	44	22
particulars in support of	38	20
Comment	29	17
comment by defendant	32	18
servant or agent	33	18
stranger	34	18
effect of defence	35	19
proper material	30	17
public interest	31	18
Criminal defamation	50	25
criminal informations excluded	52	26
libel, abolition of	49	24
offence, evidence	55	27
damages on failure of prosecution	57	29
defamatory meaning, verdict	53	26
lawful excuse	51	25
publication, evidence of	54	26
Criminal offence, evidence of	55	27
Damages	46	23
other recoveries, evidence of	45	23
truth or falsity of imputation	47	24

*Defamation.*INDEX—*continued.*

	Section.	Page.
Defamation—		
absolute privilege	17-19	8-11
amends, offer of	36-45	19-23
causes of action	9	5
comment	29-35	17-19
court notices	27	15
criminal defamation	49-53	24-26
offence, evidence of	55	27
criminating answer	56	28
damages	46-48	23-24
failure of prosecution for criminal defa- mation	57	29
defences to action for	10-16	6-8
official and public documents and records	25, 26, Sch. 2	15, 30
official notices, etc.	28	16
protected reports	24, 26, Sch. 2	14, 15, 30
publication, evidence of	54	26
qualified privilege	20-23	12-14
slander	8	4
Defamation Act, 1958, repealed	4 (1)	3
Defences—		
civil proceedings—		
amends, offer of	36-45	19-23
application of provisions	10	6
comment	29-35	17-19
common law defence	11	6
court notices	27	15
official notices	28	16
privilege—		
absolute	17-19	8-11
qualified	20-23	12-14
protected reports, etc.	24-26	14-15
public interest	12	7
truth—		
contextual imputations	16	8
generally	15	7
interpretation	14	7
unlikelihood of harm	13	7
criminal proceedings	51	25
Director of Equal Opportunity in Public Employment	17D	10
Equal Opportunity Tribunal	17D	10
Interpretation	7	4

*Defamation.*INDEX—*continued.*

	Section.	Page.
Privilege—		
absolute—		
inquiry—		
proceedings of	18	11
report on	19	11
matters under Anti-Discrimination Act, 1977	17D	10
Ombudsman Act, 1974 ..	17A	9
Police Regulation (Allegations of Misconduct) Act, 1978	17A	9
Privacy Committee Act, 1975	17B	10
Public Hospitals Act, 1929 ..	17C	10
Trotting Authority Act, 1977	17E	11
parliamentary papers	17	8
qualified—		
a question for court	23	14
information	22	13
mistaken character of recipient	21	13
multiple publication	20	12
Publication, evidence of	54	26
Slander	8	4
Truth, civil proceedings	14-16	7-8

BY AUTHORITY

D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1982