GB 40/1

IN THE PRIVY COUNSEL No. 42 1985

40/85

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 THE PROCEEDINGS 9702 OF 1982

BETWEEN

CLIVE HUBERT LLOYD
Appellant (Plaintiff)

AND

DAVID SYME & COMPANY LIMITED
Respondent (Defendant)

CASE FOR THE RESPONDENT

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CASE FOR THE RESPONDENT

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1. This appeal arises out of an action for defamation commenced by Clive Hubert Lloyd, the appellant, against David Syme & Company Limited, the respondent, in respect of an article which appeared in "The Age" newspaper on 21 January 1982.

pp.1-3, 507-512

2. The appellant was awarded a verdict of $100,000.00 after a trial before Mr. Justice Begg in the Common Law Division of the Supreme Court of New South Wales in April 1984. The verdict was subsequently set aside by the Court of Appeal of the Supreme Court of New South Wales on 21 December 1984 and an order made that judgment be entered for the respondent with costs.

p.238, L1.19-21

p.442

3. The appellant obtained conditional leave to appeal to Her Majesty in Council pursuant to the Privy Council Appeal Rules, 1909, but this

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conditional leave lapsed when the appellant failed to comply with time limits attached to the conditional leave.

pp.475-501

4. The appellant thereafter sought special leave to appeal to Her Majesty in Council and an order granting that leave was made on 31 July 1985.

p.503

5. On 21 January 1982 the respondent published, on the feature page of The Age, an article ("the matter complained of") entitled "Come On Dollar Come On".

pp.1-3, 507-512

6. On 8 February 1982 the appellant, by Statement of Claim filed in the Supreme Court of New South Wales, commenced proceedings to recover damages for defamation alleged to arise out of the matter complained of. The Statement of Claim set out the matter complained of in full and, as required by Part 67 Rule 11(2) of the Rules of the Supreme Court of New South Wales, pleaded four imputations

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said to arise from the natural and ordinary meaning of the matter complained of.

7. The article was in the following terms:

"1. COME ON DOLLAR, COME ON

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

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

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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.

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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.

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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 relected in television audiences, with

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

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

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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.

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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. "

8. The imputations pleaded 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

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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. "

9. The matter complained of did not name the plaintiff. The Statement of Claim included particulars of identification and further particulars were set forth in a letter of 12 April 1984. The particulars of identification were:

p.3, L1.30-36

p.23, L1.13-17

"A. The Plaintiff is and was at all material times a

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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.

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. "

10. A separate trial as to the capacity of the matter complained of to sustain the four imputations pleaded took place before Mr. Justice Maxwell on 1 June 1982. His Honour held that the matter complained of was capable of conveying the imputations pleaded.

pp.8-17

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11. The trial took place before Mr. Justice Begg and a jury of four in April 1984. The defences relied upon

pp.24-26 are set out in the Amended Defence filed on 16 April 1984.

p.91, L.43 12. On the appellant's application, the trial judge removed the defence of

pp.240-245 comment from the jury on the basis that there was no evidence that the comment was that of the respondent's servant or agent: cf. Section 33, Defamation Act, 1974 (N.S.W.).

13. The imputations were put to the jury en bloc, imputation 1 being put as an alternative to imputation 2 and imputation 3 being put as an alternative to imputation 4. The jury's verdict did not identify any particular imputation in respect of which and upon which the jury founded its verdict.

p.246 14. The respondent appealed to the Court of Appeal of the Supreme Court of New South Wales from the decision of

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Mr. Justice Maxwell, decisions of the trial judge during the course of the trial, the trial judge's summing up and the verdict of the jury.

15. The first ground of appeal was that the imputations were not capable of arising from the matter complained of. This ground involved a question of law, solely the province of the judge and not the jury: Jones v. Skelton [1963] 1 W.L.R. 1362 at 1370; 63 S.R.(N.S.W.) 644 at 650; Lewis v. Daily Telegraph [1964] A.C. 234 at 258, 259, 260, 264, 265, 271 and 286; Love v. Mirror Newspapers Limited & Ors. [1980] 2 N.S.W.L.R. 112; Farquhar v. Bottom [1980] 2 N.S.W.L.R. 380 at 385.

16. The Court of Appeal (Glass and Samuels JJ.A., Priestley J.A. dissenting) held that the matter complained of was not capable of sustaining the imputations pleaded by the appellant and accordingly that a verdict ought be

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p.443 entered for the respondent. Glass J.A. also dealt with the defence of

p.458, L1.9-12 comment and concluded that he would have allowed it to go to the jury.

p.463 Samuels J.A. agreed with Glass J.A.'s conclusion concerning the capacity question and did not consider any other questions. Priestley J.A.

pp.464-474 considered all the grounds of appeal.

17. The first question in this appeal is whether the Court of Appeal was correct in concluding that the matter complained of was not capable of sustaining the pleaded imputations. The respondent contends that it was.

18. Pursuant to the Defamation Act, 1974 (N.S.W.) the tort of defamation is the making of a defamatory imputation by means of the publication of matter: Section 9(2)).

19. The plaintiff selects the imputations, true or false, upon which he seeks to rely. He must state "... categorically, explicitly or

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particularly the defamatory meaning or meanings upon which he relies". Feros v. West Sydney Radio Pty. Limited (N.S.W. Court of Appeal, 22 June 1982, unreported) referred to in Hepburn v. TCN Channel Nine Pty. Limited [1984] 1 N.S.W.L.R. 386, 389.

20. At the trial, the plaintiff cannot rely upon imputations other than those pleaded. Thus, although an article may clearly bear a defamatory meaning, that meaning cannot be relied upon unless pleaded as an imputation. The jury is directed to bring in a verdict only in respect of the imputations pleaded, even though the matter may clearly be defamatory in some sense other than the imputations pleaded. The imputations pleaded affect not only the plaintiff's case but the pleading and conduct of the defendant's case.

21. The question for the Court of Appeal was not whether the article was capable of being defamatory of the

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appellant but whether the actual imputations pleaded by the appellant were capable of arising from the article.

22. If a plaintiff pitches his case too high in pleading his imputations and fails, he is not barred from bringing a second action based on a lesser imputation. The plaintiff needs the leave of the Court to bring a further action (Section 9(3), Defamation Act, 1974).

p.452, Ll.16-19

23. In determining the capacity of the matter complained of to sustain the imputations it is proper, it is submitted, to consider the mode and manner of publication: Morgan v. Odhams Press Limited [1971] 1 W.L.R. 1239 at 1254 and 1269; Farquhar v. Bottom (supra) at 386D-E.

p40,Ll.25-30
p137,Ll.29-35
p150,Ll.7-8
p169, Ll.13-21
31-33

24. It was common ground that The Age is a serious newspaper. The article was published not on the sports page but on the features page.

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25. The article commences by giving three examples of acts which played upon the faith of the people in the United States of America. It then asserts that it is an article of faith in Australia that contestants in major sporting contests compete in good faith, i.e. they are both trying to win. But it points out that there are degrees of trying to win. It gives two examples of where one contestant, expected to win, nonetheless loses because it "is missing a vital cog in its incentive machine". It then turns to the World Cup Series and describes the commercial pressures involved, and considers whether they bring about "an unstated thought: 'It doesn't matter if we lose'?" and states that "This thought edges perilously close to the concept of taking a dive".

p.451 L1.23-30

26. Glass J.A. concluded that:

> " The only imputation against them which is reasonably open is that they are responding mutely to the dollar

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> 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. "

It is submitted this was clearly correct.

27. It may be legitimate for a reader to "read between the lines" where an article is ambiguous or uncertain or invites the reader to draw his own conclusions. If however an article clearly expresses a particular theme, it is not legitimate to assume that the reasonable reader will ignore the clear language of the article or attribute to the article a conclusion contrary to the theme expressed.

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28. The remainder of the article discusses the future final series and considers whether the same "unstated thought" may not result in a "mutely arranged and prolonged charade". The last sentence in the article "Somebody is playing with the faith of the people - with the single mindedness of a burglar blowing a safe", is a clear reference to Mr. Packer. The thrust of the article read as a whole is that there are events which play with the faith of the people of a nation. Three instances involving the people of America are stated, one involving the people of Australia - namely the nature of the World Series cricket - is examined. The whole article portrays Mr. Packer on the one hand as the entrepreneur whose "cheers have a strident dollar-desparation note about them: 'Come on dollars, come on'" and the players on the other hand who are subject to the pressures of commercialism introduced by Mr. Packer into World Series cricket, pressures which result in "unstated thought" and

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events "mutely arranged". However, at no point is it said expressly, and nor could it reasonably be inferred, that the nature of that event in Australia involves Mr. Packer and the players conspiring to enter into fraudulent pre-arrangements to fix the matches. It is, nonetheless, the consequence of Mr. Packer's activities which plays with the faith of the people of Australia.

29. It is submitted that the reasoning of Priestley J.A. is open to the following criticisms:

p.466, Ll.5-7

(a) His Honour regarded the word "fixed" at the beginning of the article as fatal to the respondent's submission as to how the article should be read, on the view that the use of this word would pervade the readers' understanding of the rest of the article. The appropriate approach is to consider the meaning which the reasonable reader would derive

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from reading the whole of the article.

p.466 L1.17-23 (b) His Honour stated that the article was capable of conveying two ideas, one that the West Indies team had joined in fixing the game, "the other for which the appellant (respondent) contends. They are not mutually exclusive, nor in any event would a reasonable reader worry if they were ...". It is submitted that the two ideas are clearly mutually exclusive. Either the article conveys that there was a deliberate pre-arrangement fix or it does not. The reasonable reader should not be assumed to be indifferent to what he reads to the point where he is not concerned about the meaning conveyed.

30. The respondent contends, further, that it was entitled to a verdict by direction at the trial because the

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plaintiff did not establish that the matter complained of was published "of and concerning him".

31. Where the matter complained of does not refer by name to the person alleged to be defamed and the description of persons in the matter complained of does not plainly reveal the persons to whom it refers, then the onus lies on the plaintiff, in order to prove publication "of and concerning him", to prove that the matter complained of was published to a person or persons who identified the plaintiff as being a person referred to therein: Consolidated Trust Company Limited v. Browne (1948) 49 S.R.(N.S.W.) 86; Cross v. Denley (1952) 52 S.R.(N.S.W.) 112 at 115-6; Steele v. Mirror Newspapers Limited [1974] 2 N.S.W.L.R. 348 at 364-5, 371-4.

32. There was no evidence that any person identified the plaintiff as referred to in the article.

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33. Further, it is the respondent's contention that the learned trial judge erred in admitting into

p.520 evidence, over objection, Exhibit E. Exhibit E was an interrogatory delivered by the plaintiff and the answer thereto in these terms:

" 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. "

The respondent's intention to refer to the appellant was not relevant in determining whether or not reasonable readers were aware of extrinsic circumstances which would identify the plaintiff: see Hulton v. Jones [1910] A.C. 20 at 24, 26; Cassidy v. Daily Mirror Newspapers [1929] 2 K.B. 331 at 341 and 354; Kear v. Consolidated Press Limited (1956) 73

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W.N.(N.S.W.) 387 at 388; Slim v. Daily Telegraph Limited [1968] 2 Q.B. 157 at 172D-F. To the extent that the judgments in Hayward v. Thompson [1982] 1 Q.B. 47 at 60B and Lee v. Wilson & Anor. (1934) 51 C.L.R. 277 at 288-289 assert the contrary proposition it is submitted, with respect, that they are wrong.

p.145, L1.20-35 p.146, L1.1-5 p.235, L.30

34. The appellant relied on Exhibit E as evidence that the matter complained of referred to the plaintiff. The trial judge rejected a request for a direction "that intention is irrelevant on the issue of identification". The admission of this evidence may have been critical to the jury's verdict in circumstances where there was no other direct evidence that the article referred to the appellant.

35. Further it is the respondent's contention that the appellant's case was really one of a true innuendo. The plaintiff did not play in the

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match. It was necessary for the plaintiff to prove extrinsic facts from which the reasonable reader would nonetheless conclude that the plaintiff was involved in any pre-match fix. The matters upon which the appellant sought to rely at the trial were not matters of identification, but were extrinsic facts giving the matter complained of a different meaning to the natural and ordinary meaning. As no case of true innuendo was pleaded, the case ought not to have been allowed to go to the jury.

36. Further, it is the respondent's contention that it is entitled to a new trial upon the basis that the defence of comment based on Section 33 of the Defamation Act, 1974 (N.S.W.) ought to have gone to the jury. The trial judge removed this defence on

pp.240-245

the ground that "there was no evidence, direct or inferential, of the classification of the author of that comment". In the Court of Appeal

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Glass J.A. (with whom Priestley J.A. concurred, Samuels J.A. not deciding)

p.453 concluded that the learned trial judge erred in this ruling and held that a jury could reasonably deduce from statements appearing in Exhibits G, H, J and K that the author was a servant or agent of the respondent. The appellant does not challenge this ruling.

37. (a) The respondent's defence of comment was conducted on the basis that paragraphs 4, 9, 11 and the first sentence of paragraph 12 were fact and the remainder of the article was comment.

p25, Ll.6-17 (b) The respondent identified the basis for comment as:

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

(ii) The results of the games between the contestants to the Benson & Hedges World

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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

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the Benson & Hedges World Cup Cricket Series. "

(c) At the trial, the respondent established the following as proper material for comment (cf. Section 30(3)(a), Defamation Act, 1974:

p.425 L1.8-24

(i) The West Indies team had lost a match to Australia and Australia were the underdogs.

(ii) If the West Indies won, there would be a West Indies-Pakistan final.

(iii) The West Indies-Pakistan matches draw crowds very much smaller than West Indies- Australia matches.

(iv) The factors of crowds, gate money and sponsorship plays a relevant part in World Series cricket.

(v) P.B.L. Marketing Pty. Limited was in charge of

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the marketing or promotion of the cricket and was the principal shareholder in TCN 9 which televised the cricket.

38. There was a divergence of opinion in the Court of Appeal on whether, notwithstanding the conclusion referred to in paragraph 35, the defence of comment of servant or agent ought have been allowed to go to the jury. Glass J.A. concluded that it ought to have gone to the jury and that, furthermore, had the respondent not been entitled to judgment, it would have been entitled to a new trial of the proceedings in which it could submit to the jury the defence of comment by its servant. It is submitted that his Honour's conclusion in this respect was correct.

p.458

39 Priestley J.A. rejected the availability of a defence of comment

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p.467 L1.9-11

on the ground that there was no rational relationship between the material relied upon by the respondent as proper material for comment and the imputations relied upon by the appellant. This approach required that the opinion expressed must be fair comment, an opinion which could be formed by any honest man, no matter how biased or prejudiced. It is submitted that his Honour was in error in importing this requirement into Division 7 of the Defamation Act. The Act eschews the use of the word "fair" as qualifying "comment" in any part of the Act. It is submitted that the reasoning of Glass J.A. as to the legislative intention to exclude common law doctrines of "fairness" from the defendant provided by Division 7 is compelling. The Defamation Act, 1974 replaced the Defamation Act, 1958, Section 15 of which provided that it should be lawful to publish a "fair comment".

p.453, L.23 to p.458, L.12

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40. Further, it is the respondent's contention that, contrary to Priestley J.A.'s conclusion, the defendant did establish that there was proper material for comment for the purposes of Section 30(3)(a) of the Defamation Act, 1974 (N.S.W.) even if the notion of fairness is to be imported into Division 7 of the Act.

pp.458-462 p.469

41. Glass and Priestley JJ.A. expressed the view that the defence of comment under Part III, Division 7 of the Defamation Act, 1974 (N.S.W.) is directed to the imputations relied upon by a plaintiff rather than to the matter complained of. Further, they concluded that the comment should be congruent with the imputations pleaded by the appellant. The respondent seeks to challenge those conclusions.

42. It is submitted that the correct view is that of Samuels J.A. in Petritsis v. Hellenic Herald Pty. Limited [1978] 2 N.S.W.L.R. 174 at 193A-B that the defence of comment:

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"... 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 meaning to the raw material of the actual words employed. "

and, further that:

" ... 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. "

See also Bob Kay Real Estate Pty. Limited & Anor. v. Amalgamated Television Services Pty. Limited [1985] 1 N.S.W.L.R. 505.

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43. Further, the respondent contends that the learned trial judge misdirected the jury on the issue of damages and, in particular:

(a) He directed the jury that they could take into account the recklessness of the respondent in publishing the article. There was no evidence that any recklessness on the part of the respondent affected the relevant harm pursuant to Section 46, Defamation Act, 1974.

(b) The trial judge failed to direct the jury that in assessing damages no account should be taken of those readers who mistakenly believed that the plaintiff had played in the match in question.

44. Further, the respondent contends that the damages were manifestly excessive.

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CONCLUSION:

The respondent submits that this appeal should be dismissed for the following:

REASONS

(i) Because the matter complained of was not capable of conveying the imputations pleaded.

(ii) Because the appellant failed to establish that the matter complained of was published "of and concerning him".

(iii) Because the appellant's case depended on a true innuendo which was neither pleaded nor put to the jury.

Alternatively the respondent submits that it is entitled to a new trial for the following:

REASONS

(i) Because the defence of comment of servant or agent of the defendant ought to have been left to the jury.

(ii) Because the trial judge misdirected the jury on the relevance of intention to the issue of identification.

(iii) Because the trial judge wrongly admitted Exhibit E.

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(iv) Because the trial judge misdirected the jury on the issue of damages.

(v) Because the damages were manifestly excessive.