Privy Council Appeal No. 42 of 1985

Clive Hubert Lloyd *Appellant*

v.

David Syme & Company Limited *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH NOVEMBER 1985

Present at the Hearing:

LORD KEITH OF KINKEL
LORD ELWYN-JONES
LORD ROSKILL
LORD GRIFFITHS

*[Delivered by **Lord Keith of Kinkel**]*

This is an appeal from a judgment of the Court of Appeal of New South Wales which by a majority (Glass and Samuels JJ.A., Priestley J.A. dissenting) set aside the verdict of a jury in an action tried before Begg C.J. in the Common Law Division of the Supreme Court by which damages of $100,000 were awarded to the well-known West Indian cricketer, Clive Lloyd, for defamatory imputations made in an article published on 21st January 1982 in the Melbourne newspaper, "The Age", of which the defendant company is the proprietor. The Court of Appeal ordered judgment to be entered for the defendant.

The ground on which the majority of the Court of Appeal relied as justifying setting aside the jury's verdict was that the words of the article complained of were incapable of being understood as making any of the defamatory imputations pleaded by the plaintiff. In New South Wales under the Defamation Act 1974 this is a question to be ruled on by the judge; just as in actions for defamation at common law, the analagous question whether the words complained of are capable of bearing any defamatory meaning is a question for the judge, not for the jury. Under the Defamation Act 1974, the jury's role arises if, but only if, the judge rules, whether on a

[40] preliminary issue or in his summing-up to the jury,

that the words were capable of being understood as making one or more of the defamatory imputations pleaded. It is then for the jury to determine whether the words would in fact be understood as conveying that imputation. They are not concerned whether the article makes some other defamatory imputation that differs in substance from imputations which the plaintiff elects to specify in his pleading.

In the instant case the question whether the words of the article were capable of being understood as bearing the defamatory imputations pleaded was decided as a preliminary issue in an interlocutory judgment by Maxwell J. sitting alone. He ruled that they were so capable; the defendant did not appeal against this judgment. So when, some two years later, the action came on for hearing before Begg C.J. and a jury, this preliminary question had become *res judicata* so far as the trial of the action at first instance was concerned. Begg C.J., quite properly, expressed no views of his own upon the matter. In what their Lordships would respectfully describe as a succinct and model summing-up commendable for its clarity and brevity he instructed the jury on the way in which they should approach the question whether the words would in fact be understood by those or some of those reading the article as making the defamatory imputations alleged by the plaintiff.

The article complained of comprises eighteen short paragraphs under the headline "Come on dollar, come on". It is reproduced verbatim in the judgments of Maxwell J. and Glass J.A.; but to make their advice to Her Majesty self-contained without requiring repeated reference back to the reports of the case below, their Lordships will set it out again, numbering its paragraphs for ease of reference, because it states the majority of the facts on which was based the comment relied on by the plaintiff in his statement of claim as conveying the defamatory imputations that he had pleaded.

"1. <u>COME ON DOLLAR, COME ON</u>

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

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

three events, to borrow Scott Fitzgerald's thought, played with the faith of the people.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

After a lapse of three and a half years since the article appeared it may be helpful to recall that the cricket season in Australia in 1981/2 saw the inaugural promotion by a Mr. Kerry Packer for financial profit to companies which he controlled of a so-called "World Cup Series" between national cricket teams in which the only three participants were Australia, the West Indies (of which Clive Lloyd, the plaintiff, was the captain) and Pakistan. The series consisted of two rounds in which each team first played the best of five matches limited to

fifty overs each against one another, their respective degrees of success being measured by a points system. This was followed by a final round in which the two best teams in the first round played against one another a further set of limited fifty over matches. The team which won the best of five matches became the winners of the World Cup. All matches were one day matches and in the event of weather conditions preventing completion of the fifty overs by the team which batted second the team whose rate of scoring runs per over was superior was adjudged the winner.

The first promotion of such a series in 1981/2 was a matter of notoriety and excited controversy, particularly among cricket enthusiasts in Australia; but at the time, as their Lordships can recall, it also spread half-way across the globe to England. The match referred to in the article complained of as "last Tuesday's game" had been played on 19th January 1982. It was the fifth and last of the matches in the first round series between Australia and the West Indies, each team having won two of the previous four matches. The result of the other two first round series, between Australia and Pakistan and between the West Indies and Pakistan respectively, had been such that it was clear that the final round would be between Pakistan and the West Indies unless Australia was the winner of its fifth match against the West Indies held on 19th January.

In fact what happened was that the West Indies batted first and were all out for 189 runs. Australia then went in but rain stopped play for the remainder of the day when they had completed just over forty-three overs and scored 168 runs for the loss of seven wickets. In the view of the sporting critics writing in "The Age" Australia had little chance of exceeding the West Indian score before their final wicket fell or before all fifty overs had been bowled, if it had been possible to continue with the game. Indeed, an article in "The Age" on 20th January 1982 reporting the outcome of the game bore the headlines "Rain enables Australia to qualify for finals on fractionally better run rate"; "Win a gift from the heavens". But since play could not be resumed, the result was decided by the respective rates of runs scored per over by each side. Australia had scored slightly faster and for this reason was adjudged the winner. This meant that the contestants in the final round of matches would be not the West Indies and Pakistan but the West Indies and Australia, a result likely to attract much more interest among Australian viewers and spectators.

The Defamation Act 1974 breaks new ground; it does not merely tinker with the topic of defamation as it had developed at common law. By section 9 it

confines the cause of action in defamation to an imputation defamatory of another person made by means of the publication to a recipient of a report, article, letter, note, picture, oral utterance or other thing. In his pleading the plaintiff must state in words every defamatory imputation upon which he relies as being conveyed by the matter published. The parties, the court and jury are alike tied to the imputations set out by the plaintiff in his pleadings; it is not for the court or jury to consider whether the matter bears or is capable of bearing some other defamatory imputation. The onus lies upon the plaintiff in a jury trial to satisfy the jury that the matter published would convey to the recipients of it, or some of them, one or more of the defamatory imputations pleaded; if he fails to do so he loses that action although he may have a separate cause of action in respect of some other defamatory meaning which he has not pleaded. The Act, however requires him to obtain the leave of the court before proceeding with a fresh action based on the same matter.

The defamatory imputations made by the article on which the plaintiff in his pleading chose to rely were four in number viz:-

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

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

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

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

The first two deal with comments on the match played on 19th January 1982 and are stronger and milder versions of the same imputation. Similarly imputations 3 and 4 are stronger and milder versions of imputations alleged to be conveyed by comments on the way in which in the opinion of the writer of the article the matches in the final round between Australia and the West Indies were likely to be played.

Throughout these proceedings it has been common ground that the only source of the defamatory imputations relied upon by the plaintiff is comment. So in New South Wales the defence is governed exclusively by Division 7 of the Defamation Act 1974 which constitutes a self-contained legal code which replaced the common law dealing with the defence of fair comment on a matter of public interest.

Their Lordships have already indicated that in a trial by judge and jury in New South Wales the preliminary question whether comment relied upon by a plaintiff as conveying the defamatory imputations that he alleges is capable of being so understood by a reasonable recipient of the comment is a question for the judge. This means, in effect, that it is for the judge to say whether a jury acting reasonably could properly hold that ordinary readers would understand the comment in the defamatory sense pleaded. This was the test correctly enunciated by Glass J.A. in the course of his judgment in the present case, under reference to *Jones v. Skelton* [1963] S.R. (N.S.W.) 644. Exactly the same test is applicable where the issue of defamation or no defamation has been placed before the jury, resulting in a verdict for the plaintiff, and the verdict is attacked as having been perverse. The question is not strictly speaking one of law. It is simply the familiar one as to whether or not there was evidence before the jury upon which they could properly come to the conclusion they did. The attributes of mind which the ordinary reader is to be taken to possess have been set out in a large number of reported cases. They are accurately summarised by Maxwell J. in his interlocutory judgment and also alluded to by Glass J.A. It is unnecessary for their Lordships to rehearse them. Their Lordships are much impressed by the circumstance that two New South Wales judges had no difficulty in concluding that the defamatory imputations pleaded, or some of them, were capable of being drawn by the ordinary reader from the respondents' article, and that a New South Wales jury had a similar lack of difficulty, judging by the short time for which they retired, in holding that the ordinary reader would in fact draw such imputations from it. Their Lordships are entirely satisfied that the decision of Maxwell J. was correct and that the jury were entitled to reach the verdict they did. The whole tone of the article seems to them to suggest or imply that the West Indies were not only not keenly inspired to win the match in question because they were already assured of a place in the final, but also motivated to lose because that would have financially desirable results for them. Paragraph 14 appears clearly calculated to put the idea into the mind of a reader that the West Indies did "take a dive", i.e. that they lost the match on purpose, necessarily involving a concerted plan.

Paragraph 16 clearly implies that the West Indies, as one of the sides, did want a five game series and therefore for commercial reasons would make the final series not a contest but a contrived spectacle, again involving a concerted plan. Paragraph 17 plainly implies that the West Indies as one of the opposing teams would not be competing in good faith, but, since money was running the incentive machine, would be putting on an arranged charade. In the circumstances the article contained ample material capable of supporting the pleaded imputations.

Glass J.A., in his judgment concurred in by Samuels J.A., reached an opposite conclusion. His reason for doing so is encapsulated in one sentence:-

> "I have concluded that, after full allowance is made for the lay reader's proneness to loose thinking and extended capacity for implication, the words are not capable of supporting the first or third imputation since they involve an adverse reflection upon the players which the author was at pains to disclaim and achieve this by founding upon words which cannot reasonably be applied to them."

It does not appear that any specific consideration is given to the second and fourth imputations. Counsel for the respondents could not suggest any basis for the words "at pains to disclaim" other than the references in paragraph 13 to "unstated thought" and in paragraph 17 to "mutely arranged". These references may perhaps modify to some extent the bluntness of the imputations which the article as a whole is capable of conveying, but they cannot reasonably, in their Lordships' view, be regarded as a disclaimer of these imputations. They would rather convey the impression that the author is anxious to wound but fearful to strike too obviously. As Lord Morris of Borth-y-Gest said in *Jones v. Skelton*, *supra*, at page 651:-

> "The reader, a jury might conclude, was invited to adopt a suspicious approach and so to be guided as to the real explanation of what had taken place - an explanation which the writer ... did not care or did not dare to express in direct terms."

Glass J.A. appears to have taken the view that the thrust of the article was directed at Mr. Packer solely, and would be so taken by the ordinary reader, having regard to the reference to "one man" in paragraph 2 and to "somebody" in paragraph 18. The ordinary reader however might well be disposed to wonder whether one man could fix either the World Series in 1919 or the World Cup Series in 1981/82 without the co-operation of some at least of the players. Their Lordships therefore consider the

reasons given by Glass J.A. for allowing the respondents' appeal on this branch of the case to have been unsound.

It was maintained for the respondents that they were entitled at the trial to a verdict by direction because the appellant did not then adduce evidence fit to go before the jury that the matter was published of and concerning him. In particular, there was no evidence that any reader of the article identified the appellant as referred to in it, which was of special importance because the appellant, though captain of the West Indies touring side, happened to have been prevented by illness from playing in the match in question. It was further contended that the learned trial judge erred in admitting as evidence an interrogatory and the answer thereto whereby the respondents admitted that they intended in the article to refer to the appellant as a member of the cricket team therein described as "the West Indies". This ground of appeal was not dealt with in the judgment of Glass J.A., as he found it unnecessary to do so in view of his decision on the primary issue. It was, however, dealt with in the judgment of Priestley J.A., who dismissed it. Their Lordships are satisfied, for the same reasons as appealed to Priestley J.A., to which they find it unnecessary to add, that there is no substance in this contention.

Their Lordships now turn to deal with the respondents' pleaded defence of comment. As mentioned above, the nature of this defence is dealt with by Division 7 of the Defamation Act 1974, which entirely supersedes the rules of common law upon the kindred topic of fair comment on a matter of public interest. For present purposes the only directly relevant section of Division 7 is section 33, which provides:-

> **"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."

The learned trial judge ruled that there was no evidence sufficient to go before the jury tending to establish that the comment contained in the article was the comment of a servant or agent of the respondents. In the Court of Appeal both Glass J.A. and Priestley J.A. took the view that he erred in so

ruling, and the appellant does not now dispute this matter. It was maintained on his behalf, however, that accepting that Mr. David Thorpe, the author of the article, was the servant or agent of the respondents, the only conclusion which would have been open to the jury upon the evidence was that Mr. Thorpe did not have the opinion represented by the comment contained in the article, that the defence of comment should accordingly have been withheld from the jury on that ground, and that section 33(2) necessarily applied to the effect of defeating the defence.

The argument, which does not appear to have been considered by the Court of Appeal, is founded upon the respondents' answers to Interrogatory 5A, whereby they stated that they did not by the publication of the matter complained of intend to convey any of the four imputations pleaded by the appellant. These imputations, so it was contended, constituted the relevant comment, and the respondents' answers to the interrogatory amounted to an admission that Mr. Thorpe, the author of the article complained of, did not have the opinion represented by that comment. Mr. Thorpe did not himself give evidence, so that the respondents' admission had the effect, it was maintained, of discharging the onus upon the appellant of establishing that he did not have that opinion.

Section 33(2) of the 1974 Act provides that a defence of comment is defeated if it is shown that the servant or agent whose comment it is did not have the opinion represented by the comment. Is the comment referred to that which is embodied in the imputations pleaded by the plaintiff, or is it actual words employed, no defamatory meaning being necessarily attributed to them? The defence of comment can only become a live issue if the comment is found to be defamatory. Therefore it appears to their Lordships that a jury must necessarily approach a defence of comment on the basis that the comment conveys such of the defamatory imputations pleaded as the jury find to have been established. The question they have to consider, where section 33(2) is pleaded, is whether or not the servant or agent of the defendant had the opinion represented by these defamatory imputations. There is no such thing as comment in the air. Comment must have a meaning, and *ex hypothesi* the jury are proceeding on the footing that its meaning is defamatory in the sense of the pleaded imputations which have been found established.

The next question is whether the appellant is right in the contention that the respondents' answer to Interrogatory 5A necessarily concedes that their servant or agent Mr. Thorpe did not have the opinion

represented by the relevant defamatory imputations. It is clear enough that a person who states that he did not intend to convey a particular defamatory imputation cannot reasonably be taken to have held the opinion represented by that imputation. That was the view rightly taken by Hunt J. in *Bickel v. John Fairfax & Sons Ltd and Another* [1981] 2 NSWLR 474 at page 486. But the respondents argue that the answer to Interrogatory 5A is indicative only of their own state of mind, not that of Mr. Thorpe. In *Bickel v. John Fairfax & Sons Ltd and Another*, *supra*, Hunt J. dealt with a similar argument concerned with the admissibility in evidence of an answer by the defendant corporation, where the state of mind of its servant or agent was in issue, to an interrogatory which disclosed that it had no belief as to the truth of statements in matter complained of. He held the answer to be admissible on the ground (at page 488) that the officer of a corporation who answers interrogatories on its behalf has a duty to make proper inquiries of the corporation's servants and agents who have personal knowledge of the facts in issue, and that the answer then constitutes an admission against the corporation. He accepted the plaintiff's argument that the statement by the company in answer to the interrogatory that it had no belief as to the truth of the statements in the matter complained of was thus probative of the fact that the relevant servant or agent of the defendant responsible for the matter did not honestly hold whatever opinion they conveyed. Their Lordships agree with this reasoning. A corporation as such can have no opinions, because it has no mind. But there can be attributed to it the opinion of its servant or agent. Here the relevant servant or agent of the respondents was Mr. Thorpe, and the opinion of the respondents in the circumstances can only be that of Mr. Thorpe. By stating that they did not intend to convey the imputations alleged the respondents must necessarily be taken to be saying that Mr. Thorpe did not intend to do so. The position might be different if the respondents were a natural person having a mind of his own. Their Lordships therefore reject the respondents' argument.

The remaining question is whether a new trial should be ordered, so that the respondents may have the opportunity of having their defence of comment considered by the jury. In *Illawarra Newspapers Pty. Ltd. v. Butler* [1981] 2 NSWLR 502 the Court of Appeal in New South Wales held that the trial judge had been mistaken in the grounds upon which he had refused to leave a defence of comment to the jury, but nevertheless exercised their discretion so as to refuse a new trial. The circumstances were that the matter complained of was capable of giving rise to two different defamatory imputations, one more serious and the other less serious. The two servants

of the defendants responsible for the authorship of the matter had given evidence that at the time of publication they had held the opinion represented by the less serious imputation, but not that represented by the more serious. The jury found the more serious imputation to have been established. The Court of Appeal's decision to refuse a new trial proceeded upon the basis of the Supreme Court Rules 1970, part 51, r. 16, requiring that a new trial should not be ordered upon the ground of wrongful admission or rejection of evidence or of misdirection unless it appears that a substantial wrong or miscarriage has thereby been occasioned. Samuels J.A., delivering the judgment of the Court, said at page 507:-

> "... in this connection it is material to bear in mind that the jury in fact found the imputation for which the plaintiff contended. This is not surprising, because it is the more plausible of the two which were before them for decision. Upon a new trial it must be supposed that Newell and Richardson would give the same evidence as they gave before; it would be scarcely consistent with the integrity which we must and do willingly accord to them to presume that they would contradict their previous testimony, and any such volte face, if it did occur, would involve them in serious practical forensic difficulties. Hence it would be necessary for the defendant to put the alternative to which Mr. Shand referred.
>
> In substance, as my brother Glass observed during the argument, the defendant would then approach the jury in this fashion: We ask you to say that the plaintiff was motivated by prejudice against the poor; but, if you reject this and find that he was motivated by racist prejudice, we ask you to say that that is what the defendant's people believed, and that that was their opinion, although they swore that they never intended to say it.
>
> We do not consider that the demands of justice require us to enable the defendant to have the opportunity of re-litigating an issue already once determined against it, or of repudiating the essential basis of its case."

In the instant case the respondents in a new trial would continue to be faced with the difficulty presented by their answer to Interrogatory 5A. It is barely conceivable that Mr. Thorpe would give evidence to the effect that he held the opinions represented by the imputations pleaded by the appellant, or any of them. It is in any event not to be expected that the respondents would be prepared to abandon the primary basis of their case at the previous trial, namely that the matter published did

not convey the imputations alleged by the appellant, and that is not an issue which it is desirable should be re-litigated. The interests of justice appear to their Lordships to be overwhelmingly against allowing a new trial for the purpose of enabling the defence of comment to be put in issue.

It was further maintained on behalf of the respondents that there should be a new trial on the ground that the learned trial judge misdirected the jury by telling them that in the assessment of damages they were entitled to take into account any recklessness of which they found the respondents to have been guilty in the publication of the matter complained of, and on the further ground that the damages awarded were in any event excessive. In the Court of Appeal these contentions were considered only by Priestley J.A. He took the view that they were without substance. Their Lordships respectfully agree, and reject them accordingly.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, and the verdict of the jury and judgment following thereon restored. The respondents must pay the appellant's costs here and in the Court of Appeal.