Supreme Court Notes

by Anita Del Medico

BAILMENT - onus of proof in action for bailment

Barton & Davidson v McHours & J & M Trucking Pty Ltd (28/5/93) Angel J

The plaintiffs claimed, inter alia, damages for injury to and loss of, goods on the grounds of breach of contract of carriage, negligence and breach of bailment. The first defendant was the driver of a road train carrying goods owned by the plaintiffs. The road train ran off the road after an unexpected tyre blow-out, causing its two trailers carrying the plaintiffs' goods to overturn. The road train was owned and maintained by the second defendant company. The trial judge found that the plaintiff's case for breach of contract and negligence was not made out. He held that there was no negligence in the manner of driving of the first defendant in light of the sudden emergency caused by the unexpected tyre blow-out. The plaintiffs failed to establish that a reasonable person would have acted any differently from the first defendant. It was not proved by the plaintiffs that worn tyres on a trailer and a broken front spring hanger on the rear trailer dolly caused or contributed to the mishap. Liability therefore hinged on the issue of bailment.

Held, dismissing the plaintiffs' claims against the first defendant, judgment for the plaintiffs against the second defendant on the grounds of breach of bailment: (1) The first defendant was not a bailee, but acted as agent for the defendant company. The defendant company as bailee of the plaintiffs' goods bore an onus to prove it had taken reasonable care for the safety of the plaintiffs' goods. The question was whether the mishap had occurred without any negligent act or omission of the defendant company as a bailee for reward. As a bailee, the defendant company was not under an absolute duty to deliver. Its duty to deliver would not be broken if it were disabled from delivery through destruction or loss of the goods which reasonable care and skill on its part could not avoid. The defendant company as carrier was not an insurer.

Hobbs v Petersham Transport Co Pty Ltd (1971) 45 ALJR 356; *John F Goulding Pty Ltd v The Victorian Railways Commrs* (1932) 48 CLR 157 at 166, followed.

(2) The proven unroadworthiness of the trailer tyres and broken hanger were sufficient to show that the defendant company had failed to exclude lack of reasonable care for the safety of the plaintiffs' goods on its part as a cause of the mishap.

(3) Although the plaintiffs proved default on the part of the defendant company in failing to properly maintain the road train and had shown loss, they had not proved the defendant company's default caused the loss. They had proved the possibility, but that, in law, is not enough. However, the defendant company carrier as bailee failed to prove on the balance of probabilities that the plaintiffs' loss was without fault on its part and it therefore follows that the plaintiffs' claim succeeds against the defendant company carrier for breach of bailment.

St George Club Ltd v Hines (1961) 35 ALJR 106 at 107; *Hobbs* (supra), followed.

(4) Damages assessed.

Claim for damages for injury to and loss of goods in action for breach of contract, negligence and breach of bailment.

A Wyvill, instructed by Cridlands, for the plaintiffs.

G Watkins, instructed by Morgan Buckley, for the defendants.

LEGAL PRACTITIONERS - ss 11, 13 *Legal Practitioners Act* - whether applicant who has not undergone a term of "pupillage" at English Bar may be admitted to practice in the NT

William Lau (28/7/93) Full Court: Martin CJ, Angel and Mildren JJ

The applicant sought a declaration that he was a person who had been admitted to practice as a legal practitioner in England in accordance with the provisions of s 13(1) of the *Legal Practitioners Act* ("the Act"); in the alternative, that he was to be regarded as a person entitled to apply under s 11 of the Act to be admitted to practice. Mr Lau was an advocate of the High Court of Borneo in the Malaysian States of Sarawak and Sabbah and an advocate in the State of Brunei. He had not been admitted to practice in any state or territory of the Commonwealth or in the High Court of Australia. He was a graduate of the London School of Economics and Political Science, having obtained an LLB in 1973 and an LLM in 1974. He completed the required examinations conducted by the Council of Legal Education at the Inns of Court School of Law and was "called to the Bar" at Lincoln's Inn in July 1975. Mr Lau did not go on to complete pupillage in England, but pursued his profession in Sarawak, Sabbah and Borneo.

Held, per curiam, declarations refused, and motion seeking admission to the Court dismissed: (1) The applicant had never been "admitted to practice" in England so as to satisfy the provisions of s 13(1) of the Act because he had not undertaken a requisite term of pupillage in England. As of 1972, consolidated regulations governing the right to practice at the English Bar as a barrister of one of the four Inns of Court stipulated that a period of pupillage is a requirement of admission to practice in itself. [Halsbury Vol 3 para 1115] A call to the Bar does not mean a call to the bar of any

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Court; it only means a call to the bar of a particular Inn. So far as the right to practice as a barrister and to have the right of an audience before any Court, the applicant, by not having completed any part of his pupillage, never had a right to practice as a barrister in general practice in England and Wales and never had a right of audience in any of the Courts of England and Wales, and does not have any of those rights now. It would not be correct to describe pupillage as a "post-admission" requirement, such as professional indemnity insurance, payment of bar subscriptions and membership charges - these are a condition of a right of admission already conferred. History of pupillage and self-regulation of the Inns of Court, discussed.

In re S (A Barrister) [1970] 1 QB 160, applied.

A-G of Gambier v N'Jie [1961] AC 617, referred to.

In re: Palmer [1955] Tas SR 79, not applied.

(2) The applicant did not have the relevant educational qualifications required by s 11(1)(c) of the Act. The reference in s 11(1)(c) to a "Territory of the Commonwealth" refers to a law of a Territory of the Commonwealth, other than the NT. The argument that the applicant's educational qualifications had been implicitly recognised by s 13(1) of the Act and that therefore his educational qualifications were "recognised by...a law in force...in a...Territory of the Commonwealth", namely the Northern Territory, must fail. Section 11(1)(c) of the Act was intended to give recognition to such other level of education in law as was recognised elsewhere than in the NT as sufficient for the purpose of gaining admission either to the High Court of Australia or to the Supreme Court of a State or Territory, other than the NT. Furthermore, s 13 is not aimed at prescribing or recognising a level of education in law for the purpose of s 11. It is directed towards allowing people who are already admitted to practice in one of the jurisdictions referred to in that section to apply to be admitted to practice in the NT. Even if s 11(1)(c) could be so read as the applicant desires his application would still fail as pupillage is part of the educational requirements for admission to practice at the Bar in England, and as the applicant has never undergone pupillage, he is unable to bring himself within s 11(1)(c).

Application for declarations and motion seeking admission to practice in the Supreme Court of the NT

J Reeves, instructed by Ward Keller, for the applicant.

N Henwood, for the Law Society/ respondent.

DEFAMATION - defence of qualified privilege - scope as a defence - whether reciprocity of interest or duty is a necessary ingredient - balance between right of reputation and freedom of speech.

Toyne & Johnston v Everingham (29/7/93) Angel J.

Both plaintiffs claimed aggravated and punitive damages on the grounds that the defendant was responsible for four separate defamatory publications in 1985 - a Public Telex transmitted to the media Australia-wide, an ABC Radio (NT) interview broadcast, a speech broadcast on 8HA Alice Springs and an excerpt from an edition of The Weekend Australian. The defamatory imputations said to arise from the publications related to the plaintiffs' roles as legal adviser and community co-ordinator respectively of the Mutitjulu community - that the plaintiffs had acted with gross impropriety in their positions by deliberately manipulating the Aboriginal people for their "own party political purposes", contrary to the best interests of the Aboriginal people; that each plaintiff had preferred "his own party political interests" to the Aboriginal people of whom he was an adviser; that each plaintiff was not a fit person to advise the Aboriginal people; and that each plaintiff had deliberately participated in the deception of the Australian Federal Government, the NT Government and Aboriginal people to procure land rights for Ayers Rock for a group of Aboriginal people who had no claim to it. The plaintiff Toyne also claimed a further defamatory innuendo - that he had behaved with gross impropriety in his capacity as a barrister and solicitor, in that he had placed himself in a position where his own duty and interest were in conflict with those of his clients and further, that he had acted in bad faith.

At the time of the alleged defamatory publications, Toyne was a barrister and solicitor of the Supreme Court of the NT, and, inter alia, a legal adviser to the Mutitjulu community, an Aboriginal community located near Ayers Rock. He had been involved since 1977 in Aboriginal Land Claims in the NT and in 1979 appeared as Counsel before the Toohey Commission on behalf of the Pitjantjatjara Council Inc in relation to a claim to the area surrounding and including the Ayers Rock area. At that time, the defendant was Chief Minister of the NT and the NT government a party to these proceedings. The claim relating to the area of Ayers Rock National Park failed, as it was held by the Commissioner not to be "unalienated Crown land" and therefore not able to be claimed pursuant to the Act. In the course of the next six years, Toyne and the defendant met and clashed on the political stage over, amongst other things, the issue of land rights to Uluru. Toyne organised a protest in June 1982 at the celebratory dinner for the opening of Connellan Airport by the then Prime Minister, Malcolm Fraser. There was a further clash between the two men, captured on video, at a meet-

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ing by interested parties following this protest.

Johnston had been the community co-ordinator with the Mutitjulu community since 1984. He had worked as a ranger and as a manager of pastoral properties under Aboriginal ownership in WA. After the "hand-over" of Ayers Rock in October 1985, he worked as Park Liaison Officer for the Uluru Board of Management.

In 1985, the defendant was the Federal Member of Parliament for the NT, having resigned as Chief Minister in November 1984. In 1983-4, there had been much political debate in the NT, with Messrs Toyne and Everingham at opposite ends of the political bargaining table, over the Hawke Government's decision to pass title and control of Ayers Rock to the Mutitjulu community. It was the formal public announcement in March 1985 by Mr Clyde Holding, Federal Minister for Aboriginal Affairs, that the hand-over would take place, that prompted the defendant to make the publications the subject of these actions.

By amended defence, the defendant pleaded inter alia qualified privilege and plaintiffs replied by pleading express malice.

Held, dismissing both actions and finding in favour of the defendant that the publications were made on occasions of qualified privilege and in the absence of express malice: (1) The publications, as a matter of law were capable of being defamatory. As a matter of fact, the publications were defamatory of each plaintiff. However, to the extent that Toyne pleaded that the publications inferred that he "had behaved with gross impropriety as a barrister and solicitor", held that the publications were not in fact taken to carry that imputation. The public perception of Toyne at the relevant time was that he was a lobbyist or political adviser, and on the whole of the evidence, the defendant's publications were taken to refer to his conduct in that capacity rather than in his professional capacity as a barrister and solicitor.

(2) A defendant is liable for a defamatory publication "unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his affairs, in matters where his interest is concerned...If fairly warranted by some reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits" (per Parke B in *Toogood v Spyring* (1834) 1 CR M & R 181 at 193). It is encumbent upon the defendant to prove facts upon which the Court, as a matter of law, may find the defamatory matter was published on an occasion of qualified privilege. The general principle of qualified privilege is not narrow and rigid and the circumstances that constitute a privileged occasion cannot be circumscribed.

London Assocn for the Protection of Trade v Greenlands Ltd [1916] 2 AC 15 at 22; *Toogood v Spyring* (1834) 1 CRM & R 181 at 193; *Macintosh v Dun* [1908] AC 390 at 399; *Adam v Ward* [1917] AC 309 at 334, applied.

(3) On occasions of qualified privilege, in the absence of malice, a person is entitled to make defamatory statements of another. On such occasions the right of freedom of speech prevails over the right of reputation.

Horrocks v Lowe [1975] AC 135 at 149, applied.

(4) Reciprocity of interest or duty ("..an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and person to whom it is so make has a corresponding interest or duty to receive it...", per Lord Atkinson in *Adam v Ward* [1917] AC 309 at 334), is not a universally necessary ingredient of the defence of qualified privilege. Its presence or absence is nevertheless a relevant factor in deciding whether the occasion of publication is privileged.

Toogood v Spyring (supra); *Horrocks v Lowe* (supra); *London Assocn for Protection of Trade v Greenlands Ltd* (supra), followed.

Mowlds v Fergusson (1940) 64 CLR 206 at 215; *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 101, referred to.

Adam v Ward (supra) at 334, disapproved.

(5) A defamatory publication has no claim to privilege merely because it deals with a matter of public interest. There is no defence of freedom of information on matters of public interest and no principle of law which entitles a newspaper to publish a defamatory statement about an individual under the protection of qualified privilege merely because the statement is made in the course of dealing with a matter of general public interest. Nor is there a general principle that defamatory statements published by Ministers to the world at large are protected by qualified privilege simply because they are made by Ministers and relate to matters falling within the general area of their Ministerial duties. Ministerial statements like any other, are only protected by qualified privilege when the circumstances of the case justify that protection.

Truth (NZ) Ltd v Holloway [1960] 1 WLR 997 (PC); *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749; *Nationwide News Pty Ltd v Wiese* (1990) 4 WAR, referred to.

(6) In each case the Court must hold the balance between the right of free speech and the right of reputation and must look at who published the libel and why and to whom and in what circumstances, to decide whether it is for the welfare of society that such a communication, honestly made, should be protected by clothing the occasion of the publication with

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privilege. A publication to the general public may be such a privileged occasion.

London Assocn for the Protection of Trade v Greenlands Ltd (supra), applied.

Smith's Newspapers Ltd v Becker (1932) 47 CLR 279 at 304; *The Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 658; *Nationwide News Pty Ltd v Wiese* (supra); *Morosi v Mirror Newspapers Ltd* (supra), applied.

(7) The extent of the publication was not, in this case, greater than justified by the occasion of the privilege. This was a question of law.

Adam v Ward (supra); *Horrocks v Lowe* (supra), applied.

(8) If, contrary to (4), reciprocity of interest is a necessary ingredient of the defence of qualified privilege, in the present case the public had a legitimate interest in the publications. The questions of ownership and control of Uluru and Katatjuta were the subject of opposing political campaigns in both Territory and Federal elections, and were matters of great interest and concern to people in the NT and throughout Australia. So far as the recipients of the defendant's publications were concerned, it was not insubstantial interest. It was not simply a matter of curiosity but a matter of substance apart from its mere quality as news.

(9) "Express malice", that is, a desire to injure the plaintiffs, was now shown by the plaintiffs to be the dominant motive for the defendant's defamatory publications. The defendant acted impulsively and illogically and perhaps irrationally in arriving at the belief he did. To some degree he leapt to conclusions on inadequate evidence but nevertheless it was held that at the relevant time, he believed the truth of what he published - the law demands no more. The defendant's dominant motive was not to harm the plaintiffs but to inform the public as to how the Uluru hand-over came about and to protect what he honestly saw to be the NT's interest and the general public's interest in the ownership and administration of Uluru. His strong language was indicative of indignation and conviction rather than malice and an intent to injure.

Action for damages for defamation.

G Watkins, instructed by Waters James McCormack, for the plaintiffs.

AJH Morris, instructed by Greves Creswick (NT), for the defendant.

d'ja hear the one about...

Counsel: Directing your attention to Nov 6 1976 in the evening hours, do you recall being at Rose Chapel in Paradise?
Witness: Yes.
Counsel: Do you recall examining a person by the name of RE at the funer chapel?
Witness: Yes.
Counsel: Do you recall approximately the time that you examined the body of Mr E at the Rose Chapel?
Witness: It was in the evening. The autopsy started at about 8.30pm.
Counsel: And Mr E was dead at that time, is that correct?
Witness: No, you dumb _ss__le. He was sitting on the table wondering why I was doing an autopsy.