artist lacked skill or competence in executing this particular work - or a criticism may impute that the artist's work is generally of a poor standard - this case shows that it is a slippery slope for a critic from conveying the former opinion to conveying the latter. There is arguably uncertainty as to whether remarks directed wholly to a particular work of art (or performance or whatever) can be regarded as capable of giving rise to such general imputations as "the artist is an inferior artist" and, if so, such imputations should not be left to the jury without some qualification.

I Mean What I Say

Criticism of artworks is commonly defended as "fair comment", that is, that it represented the honest opinion of the speaker on a matter of public interest (the latter point generally being presumed in the case of identified art works).

Capon raised the defence of comment in response to the claim against him on the basis that he meant what he said. From his testimony it is clear that he believed his criticism of the portrait was well founded. However, during the proceedings Justice Christie ruled that the defence was no longer available after Capon gave evidence in cross-examination that:

- he did not intend to say anything about Meskenas as a painter, his comments were directed towards the painting;
- he did not intend by his statements to say anything derogatory about Meskenas as distinct from the painting;
- he did not intend to say, nor was it his opinion, that Meskenas was an inferior artist or so incompetent that he painted a second rate picture.

Under Section 32(2) of the Defamation Act 1974 (NSW) the defence of comment is defeated if *"at the time when the comment was made, the comment did not represent the opinion of the defendant"*. There has been some judicial debate about whether the defence of comment under the NSW Act addresses the words of the comment itself or the imputations drafted by the plaintiff.

Support for the former view has been expressed in the NSW Supreme Court and the Court of Appeal. In *Petritus -v- Hellenic Herald Pty Ltd (1978)* Samuels JA expressed the view that the defence "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... In my opinion, a defence of comment under the 1974 Act must be directed, not to the imputations specified in the statement of claim but to the matter as defined in S.9(1)."

By contrast, the Privy Council in *Lloyd -v- David Symes & Co. Limited (1986)* held that the defence of comment must be directed to the imputations and, further, that if the defendant did not intend the imputations found by the jury, then those imputations *cannot* have represented the defendant's opinion. Judge Christie applied the Privy Council's ruling in the Capon case as follows:

> "As a result of the view I took of that decision and the manner in which it appeared to me to affect the decision of the NSW Court of Appeal in *David Symes & Co. Limited -v- Lloyd* and the manner in which that decision affected previous decisions on the question of comment, I came to the view... that there is no defence of comment available to the defendant in these proceedings. *(The Judge noted the defendant's evidence outlined above and continued).* In those circumstances, it would seem to me not possible for the defendant to successfully plead comment, which must be at the very least congruent with the imputations".

There is strong argument in favour of the approach taken in Lloyd's case on the basis that the cause of action under the NSW Act lies in each imputation published by the defendant and, if the jury finds such an imputation has been made out, then that is what must be defended, but the application of Lloyd's case considerably erodes the protection available to defendants seeking to express opinions on matters of public interest. Words often convey meanings which the speaker may not intend (or reasonably foresee) and applying Lloyd's case the defendant has no option to say - "I didn't intend to say it but if that was what was conveyed it did represent my opinion." This would not have assisted Capon, who did no hold the opinion imputed, but could be a reasonable response from other defendants whose opinion was in fact congruent with the unintended imputations.

Not The Same Thing

Saying what you mean and meaning what you say is not the same thing in the law of defamation because the law looks to the effect of the words on the ordinary, reasonable reader not the intention of the speaker. Comment is not a watertight defence for those expressing opinions on matters of public interest because unintended meanings may be conveyed which may be left to the jury as capable of arising even though the speaker could not have reasonably foreseen those meanings and which, on the authority of *Lloyd's* case, the speaker is precluded from arguing represented his or her opinions.

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Recent ACT defamation cases

True Innuendo

In *Graham Charles Evans -v- John Fairfax & Sons Limited and Alan Ramsey and John Alexander*, the plaintiff, a Senior Commonwealth Public Servant sued for defamation in the ACT Supreme court over an article published in the Sydney Morning Herald on 14 April 1990 titled *"Cosy in the Corridors of Power"*. The plaintiff alleged that the article conveyed in its natural and ordinary meaning imputations that:

(a) The plaintiff's career advancement in the Commonwealth Public Service was only the result of the patronage from the Prime Minister;

(b) The plaintiff in his capacity as secretary of the Department of Primary Industry & Energy lacked the confidence of his Minister, Mr John Kerin;

(c) The plaintiff was a person whose successful career in the Public Service was due more to his enjoyment of a nasty system of patronage that to anything else;

(d) The plaintiff was prepared to advance his career through cronyism rather

than on the merits of the performance of his duties.

Justice Higgins in his decision of 12 February 1993 was satisfied from the evidence in the case that the public servant would have inferred from the article ".....that proper merit procedures for promotion had been either by-passed or degraded by reason either of political influence or of the empire-building machinations of the Secretary, Prime Minister and Cabinet", and that the statement in the article that the plaintiff and Mr Kerin did not 'get on' seemed to convey to public servants ".....an implication that Mr Kerin lacked confidence in the plaintiff's capacity to carry out his duties to the Minister's satisfaction".

His Honour noted that Counsel for the defendants had not seriously disputed that the article imputed that the plaintiff had benefited from 'patronage', and had conceded that the reference to Mr Kerin had been factually incorrect. Justice Higgins went as far as to say "Of course, what was said of the relationship between the plaintiff and Mr Kerin was a lie. It lacked any foundation other than that Mr Kerin had expressed and, indeed, maintained a personal preference for Mr Miller as his Departmental Head. It was a lie that was no doubt hurtful to both the persons referred to. Notwithstanding that its falsity was demonstrated to the defendants, they refused to correct it. That attitude was in my opinion, gravely reprehensible. A quality journal, such as the Sydney Morning Herald, should have had the good grace to apologise for a proven inaccuracy, particularly one perceived to be both hurtful and damaging."

Although, in his decision as to costs Justice Higgins stated that he could make no finding as to whether the reference to Mr Kerin's relationship with the plaintiff was known to be a lie to the author of the article or any responsible officer of the first defendant at the time of publication.

Because the plaintiff had expressly rested his case on the contention that the article conveyed the defamatory imputations pleaded in its natural and ordinary meaning, and had not relied on a true innuendo, it was held that the test to be applied was whether the article conveyed the imputations pleaded to the ordinary reasonable reader. Justice Higgins found that none of the imputations pleaded were made out, and entered verdict for the defendants, but found that had any of the defamatory imputations been made out he would have awarded damages of $25,000 for hurt to the Plaintiff's feelings, $30,000 for damage to his reputations within the Public Service, and $15,000 by way of aggravated damages.

In his decision as to costs of 23 April 1993, his Honour commented that "The entire litigation may have been avoided, in my view, had the defendants responded reasonably to the plaintiff's letter of demand and complaint and provided, by a published correction, as suitable and timely vindication of the plaintiff's reputation", but also noted that it was the Plaintiff's choice to proceed on the imputations as pleaded, and ordered that there be no order as to the costs of any party.

(An appeal against this decision was heard by the Federal Court in August, and the Court has reserved its decision).

Identification

In the case of *Raymond Johnston -v- Australian Broadcasting Corporation*, the plaintiff was awarded $17,500 damages for defamation arising out of an edition of the 7.30 Report broadcast on 27 July 1987. The plaintiff, a worker employed at the New Parliament House site, was shown in close up during the broadcast and depicted as being one of a group of workers taking an unauthorised early lunch break. Justice Higgins in his judgment of 7 April 1993 when discussing the issue of identification found that the plaintiff had been recognised by persons in NSW and the ACT, and did not need to call a witness who had actually seen the broadcast in Queensland, South Australia, Western Australia and the Northern Territory, as he was satisfied that it was probable that at least one person in each of those jurisdictions had viewed the program and recognised the plaintiff.

In the case of *Allworth -v- John Fairfax Group & Ors*, the plaintiff sued in the ACT Supreme Court over an article published in the Sydney Morning Herald on 3 August 1991 criticising the plaintiff's conduct in the management of the Canberra Raiders Rugby League team. In an interlocutory decision given on 25 March 1993 Justice Higgins considered and compared the "contextual imputations" defence of section 16 of the *Defamation Act 1974 (NSW)*, the *"Polly Peck"* defence, and the "truth and public benefit" defence of section 6 of the Defamation Act 1901 (ACT, formerly NSW).

His Honour held that a defence pleaded under section 16 *Defamation Act 1974 (NSW)* is only to those imputations pleaded by the plaintiff which are proved to arise from the matter complained of and to be defamatory of the plaintiff. The contextual imputations alleged "....must, alone or in combination, insofar as they can be combined, differ in substance from the imputation or imputations pleaded by the plaintiff," and be capable of "reaching" the sting of the plaintiff's imputation. Further, Justice Higgins commented that the section 16 and *"Polly Peck"* defences are not entirely co-extensive and that "The s.16 defence is to the pleaded imputations. The *"Polly Peck"* defence is to the matter complained of which is alleged to convey some or all of the imputations particularised.". The concepts of "public interest" under section 16 of the *Defamation Act 1974 (NSW)* and the requirement of "public benefit" under section 6 of the Defamation Act 1974 (ACT) were discussed and his Honour concluded that substantively, a defendant is entitled to plead the same contextual defences to alleged publication in the ACT as to alleged publication in New South Wales.

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