

LOGAN v. WEST AUSTRALIAN NEWSPAPERS LTD.

A Criminal Code Defence to Civil Defamation.

I

Of *Logan v. West Australian Newspapers Ltd.*,¹ the last, one suspects, has not been heard. Not because of the amount involved in the judgment,² nor because of the difficulties experienced in deciding the effect of the jury's answers to the questions put to them, but because one wonders how long newspapers in Western Australia are prepared to continue publishing without knowing the exact range of the defences available to them in defamation actions.³ One would have thought it would have been imperative for a newspaper to have this knowledge, and yet the surprising thing is that until *Logan's* case this problem, which has been in existence since 1902, had never been squarely placed before the courts of Western Australia.

The specific and rather intricate question of law raised in the case was whether section 357 of the Criminal Code provides defences to *civil* actions for defamation. This was a question about which there had been a good deal of speculation, fostered, no doubt, not only by the absence of a decision specifically in point, but also by the paucity and inconclusiveness of the judicial and academic references to the problem in the past.

In the published material notice appears to have been first drawn to the question in an article written by Professor Brett in this Review in 1951, which dealt with the general effect of the Criminal Code on civil defamation. On this particular point Brett indicated that in his view the section probably was applicable to civil actions, but admitted that the point was arguable.⁴ Subsequently, until the decision in *Logan*, the question appears to have been adverted to in only two reported decisions. Firstly, in 1958 in *Mitchell v. A.B.C. and Middleton*,⁵ Jackson J. noted that the second defendant pleaded fair comment and 'three other pleas of a similar nature but based on the

1 1966. A decision of the Supreme Court of Western Australia (Virtue J.), as yet unreported.

2 \$1,000.

3 The corollary—for how long are the members of the general public content to remain ignorant of the range of statements that can be made about them with impunity—is not quite so apt. Whereas a newspaper must be constantly concerned with the law of defamation, the average individual is not.

4 Brett, *Civil and Criminal Defamation in Western Australia*, (1951) 2 U. WEST. AUST. ANN. L. REV. 43, 51.

5 (1958) 60 W.A.L.R. 38.

statutory defences afforded by sections 355(8), 357(3) and 357(8) of the Criminal Code.⁶ No further reference was made in the judgment to these "statutory defences", so it would be unwarranted to draw from this passing, but nevertheless tantalizing, observation any inference as to the considered opinion of the Judge.⁷

Secondly, in 1960, in *Antonovitch v. West Australian Newspapers*,⁸ defences based upon section 357 were again pleaded. On that occasion the question was not so lightly passed over. Virtue J., after noting that the equivalent section of the Queensland Criminal Code had been held by the High Court, in *Telegraph Newspapers Co. Ltd. v. Bedford*,⁹ to be applicable to civil actions in that State, went on to say:

There is no doubt that the history of the law relating to defamation in Queensland is somewhat different from the history of that tort in Western Australia, and it is suggested that there would be an argument that, notwithstanding the applicability of the Queensland Code to the civil action there, it might well be that the Criminal Code of Western Australia would not apply to an action for civil defamation in this State.¹⁰

But at the trial the plaintiff's counsel conceded that it was not open to the court to depart from the decision in *Bedford's* case¹¹ with the result that the case proceeded, apparently, on the basis that the Code defences were available. In the event, however, Virtue J. found that the defences relied upon were not, in fact, established.¹²

The law remained in this unsettled state for another six years until the question was raised once more—in *Logan*. Virtue J. again happened to be the trial judge, and, pursuing the suggestion he had made in *Antonovitch's* case, he distinguished the cases arising in the Queensland setting, and held that section 357 of the Code did not provide defences to civil defamation in Western Australia.

⁶ *Id.* at 42.

⁷ Of the three provisions referred to it will be submitted that s. 355(8) clearly provides a defence; but whether ss. 357(3) and (8) provide defences is a matter of considerable doubt. However, in *Mitchell's* case, as it was found that the defence of fair comment failed because the comment was based upon incorrect statements of fact, it would appear that defences based upon ss. 355(8) and 357(8) would likewise have failed. S. 357(3) seems inapplicable to the facts of the case.

⁸ [1960] W.A.R. 176.

⁹ (1934) 50 C.L.R. 632.

¹⁰ [1960] W.A.R. 176, 181.

¹¹ But he reserved the right to argue to the contrary before a higher court should the matter have been taken on appeal.

¹² They were those contained in ss. 357(3) and (5).