

ISLAND TIFAGA LIMITED ET AL

v

SAMOA PRINTING & PUBLISHING COMPANY LIMITED ET AL

High Court Apia
19, 20, 21, 29 January 1932
Luxford CJ

DEFAMATION (of corporation) - Statement prima facie defamatory - Onus on plaintiff to prove damage to business - Defence of fair comment on a matter of public interest - Onus of proof on defendant as to truth of statements of facts - Standard of proof - Whether sufficient to prove fact 'substantially' correct - Onus on plaintiff to prove mala fides.

Defendant newspaper published a letter to the effect that plaintiff Company had informed "quite a number" of interested persons that a boxing match of special importance would take place on a particular date (although it made no public announcement to that effect) for the purpose of attracting a larger attendance at the matches actually billed and staged on that date.

Held: Plaintiffs had discharged their onus of proving damages by a reduction in their business, but the defence of fair comment succeeded, and Judgment was entered for the defendants with costs. All of the facts asserted in the letter were strictly proved by the evidence except the statement that, "Quite a number of people rang up", which referred to telephone enquiries to plaintiffs' offices as to whether the match was on. The evidence proved that only two people had telephoned, but that another four had been informed personally that it was on, and since the essence of the statement was that quite a number of the public had been so informed, it was substantially correct considering the number of others those six would have told in normal concourse. The staging of the match was certainly a matter of public interest that could be commented on, and the plaintiffs had failed to prove mala fides.

Klinkmueller for plaintiffs.
Andrews for defendants.

Cur adv vult

LUXFORD CJ. The plaintiffs seek to recover from the defendants the sum of £500 by way of damages for and in respect of a letter published by the defendants in the "Samoa Herald" on the 18th day of September, 1931. The plaintiffs allege that this letter constitutes a libel upon each of them.

The plaintiff Company is the proprietor of the Tifaga Playhouse in Apia. Mr. Moors is its Managing Director and Mr. Dean its Secretary. The ordinary business of the plaintiff Company is to exhibit publicly moving pictures and to promote other forms of public entertainment. Some time last year its management decided to promote a boxing tournament among the local European and Samoan young men. The scheme met with general approval with the result that a full evening's programme was carried out each week (with one or two exceptions) between the months of June and December before the finals of the different divisions could be determined.

It was inevitable in such a tournament that some particular contestant would become a popular hero among the members of the public, or some section of it. From the evidence adduced before me, it would

appear that a European lad named Alfonso Philipp had impressed many boxing enthusiasts with his prowess. I do not know whether he was regarded by some as an invincible, but whatever reputation he had acquired was sufficient to bring out an opponent, who would try to wrest the honours from him.

I gathered from the evidence that the championship bouts proper were confined to the Samoan boys, and that the bouts between the Europeans were separate or special contests not connected with any championship.

The news that a lad named Stowers had been matched to fight Philipp on Wednesday, 16th September last became current in Apia somewhere about 12th of September last, but no public announcement to this effect was made by the management of the plaintiff Company. The programme for Wednesday, 16th September was published in the usual way - by a screen notice at the picture show on Saturday, 12th September, and by a big poster affixed to a board outside the Company's office in the Tifaga Arcade. Nevertheless, some people went to the tournament on the Wednesday, who would not have gone if they had not thought that the Philipp/Stowers fight would take place that evening. Others went, who would have gone in any event, but were in expectation of witnessing this particular fight.

The fight did not take place that evening. The disappointment of one enthusiast caused him to write a letter to the Editor of the defendant Company, which was published in the issue of the "Samoa Herald" on the 18th September, and which is now the subject-matter of the present proceedings. The letter is prefaced by the usual announcement that the Editor does not necessarily endorse the opinions expressed by correspondents, and then proceeds:-

Sir:

Many of the boxing enthusiasts were disappointed on Wednesday night. A bout between two of the local boys was arranged and the management of the Playhouse promised to stage the bout last Wednesday night. Quite a number of people rang up the office of the Tifaga Playhouse to make sure whether the contest was to be staged and were told that it was to be put on that night.

Is it fair on the management's part to get people to attend under a false impression. The management's excuse was that the contest was not billed: then why tell people that the bout was to be staged.

Signed "Fan".

The plaintiffs have pleaded in paragraph 5 of the Statement of Claim the defamatory sense which they attribute to this letter, but as I am of opinion that the statement is prima facie defamatory, it is not necessary to consider whether they have proved the innuendo alleged by them.

The letter in substance charges the plaintiff Company with having deceived a number of people concerning the date on which a certain boxing bout would be held. The third paragraph of the letter specifically says that, "quite a number of people rang up the office of the Tifaga Playhouse to make sure whether the contest was to be staged and were told that it was to be put on that night. Then the fourth and fifth paragraphs say:-

Is it fair on the management's part to get people to attend under a false impression. The management's excuse was that the contest was not billed: then why tell people that the bout was to be staged.

The only meaning which the letter could convey to the public to whom it was published is that the plaintiff Company, for the purpose of encouraging attendance or stimulating interest in the boxing tournament on the 16th September, falsely informed a substantial number of the public that a bout, which was creating a great deal of interest, was

to be held that evening.

The suggestion of deception is somewhat intensified by the writer stating what appears to be plaintiff Company's only excuse for not putting on the bout that "the contest was not billed", leaving the public to assume that it did not deny that quite a number of people had been told by the management that the contest would be held.

When a body corporate is defamed the same rules apply as if the body corporate were an individual with this additional rule: the body corporate must prove that the defamatory statement has caused, or has a tendency to cause damage to its business or property.

The evidence discloses that immediately following upon the publication of the letter on the 18th September, there was a marked falling off in the plaintiff Company's takings at the boxing competitions. It may be that economic conditions were partly responsible for this, but I am satisfied that part at least of the decline was directly brought about by the statements contained in the letter, the subject-matter of this action.

The plaintiffs therefore have proved that the defendants published in the issue of the "Samoa Herald" of the 18th September, 1931 a letter under the nom de plume "Fan", which contained defamatory statements, and which refer to the plaintiffs. The plaintiff Company has also proved that it has suffered actual damage by reason of the publication. The plaintiffs have, therefore, discharged the onus of proof which rested upon them. The defendants, however, have pleaded that the statements about which the plaintiffs complain are true in substance and in fact, and further that the statements are a fair and bona fide comment upon a matter of public interest.

The letter, the subject-matter of this action, can be divided into two parts. The first part comprises statements of fact. The second part comprises comments on those facts. It is an elementary rule of the law of defamation that comment, in order to be fair, must be based upon facts, and if a defendant fails to show that there are no misstatements of fact in his comments he cannot prove the defence of fair comment.

The statements of fact contained in the letter are these:-

- (a) The management of the plaintiff Company promised to stage in the Tifaga Playhouse, Apia, on Wednesday, 16th September, 1931 a boxing bout, which had been arranged between two local boys.
- (b) Quite a number of people rang up the office of the plaintiff Company to make sure whether the contest was to be staged and were told that it was to be put on that night (Wednesday, 16th September).
- (c) The bout was not put on as promised to the disappointment of many boxing enthusiasts.
- (d) Notification of the staging of the bout on the evening of the 16th September had not been advertised publicly by the plaintiff Company.

The onus is on the defendants to prove that these statements are true in substance and in fact.

The evidence shows that the first intimation that the fight would take place on 16th September was when Iosefo, who was Stowers's trainer, came to Philipp on Saturday, 12th September and asked him if he would be ready to fight Stowers on the following Wednesday, (16th September), saying that he had just come from the Tifaga Playhouse. Unfortunately, Iosefo was not called as a witness, and as neither Dean nor Moors were questioned about Iosefo's interview with them, (if it ever took place), it is impossible to say what was said at it. Philipp would not give Iosefo a reply until he had conferred with his own trainer John Harris. He got in touch with Harris, received his consent to fight on the proposed date, and later informed Iosefo that he would be ready. Iosefo left Philipp telling him that he would let him know definitely on the Monday if everything was set for the 16th. On the Monday, Philipp sent one Keki to Iosefo to ascertain if anything definite had been arranged, and received a verbal reply that the fight was to take place on the 16th.

Soon after Harris had received Philipp's message he called on Dean

at the plaintiff Company's office and asked him if he was going to stage the fight between Philipp and Stowers, and he alleges that Dean replied, "Sure we will. We will stage it next Wednesday if it can be arranged".

On the following Tuesday, Harris received a telephone message to meet Dean at Morris Hedstrom's Copra Shed. He went there at once, and after discussing something about a wager with Dean, said to him, "Is the fight all set?" and Dean replied, "Yes. It is all set for Wednesday night".

On the Wednesday, Harris again saw Dean at the plaintiff Company's office when he went there to book seats for that evening's tournament, and said to Dean, "Is the fight all set for tonight?", to which Dean replied in the affirmative.

The material portions of these conversations were denied by Dean, but I accept Harris's account of what took place. The evidence satisfied me that Dean honestly thought the bout would take place that evening, and did not hesitate so to inform any enquirer. Indeed, he volunteered the information to Constable Irwin on the previous Monday. According to this Constable's evidence, Dean met him just outside the Court House and said to him, "Don't forget to come along on Wednesday night. There is a good scrap coming off". Irwin replied, "Who is fighting?", and Dean replied, "Philipp and Stowers". Although Dean denied the material parts of this conversation, I accept without hesitation the Constable's evidence.

On the Wednesday a law clerk named Arthur Meredith called at the Tifaga Office and asked Dean, "Is it true that the bout between Philipp and Stowers is coming off this evening?", to which Dean replied, "Yes". Again, Dean denied this part of the conversation, but I accept Meredith's evidence. Although Meredith attended the boxing tournaments regularly, he would not have gone there that particular evening if he had not been told that the Philipp/Stowers fight would take place.

Lloyd Pearman was also told by Dean on the Tuesday that the fight would take place the following evening.

It will be noted that the statements of fact contained in the letter, the subject-matter of this action, do not specifically refer to personal enquiries made concerning the date of the Philipp/Stowers fight, but allege that, "Quite a number of people rang up the office . . . to make sure whether the contest was to be staged and were told that it was to be put on that night".

The evidence discloses that certainly one person, and probably another person rang up the plaintiff Company's Office during the Wednesday, and were told in answer to an enquiry that the fight would take place that evening. Stanley, a young lad who works at the Observatory, was very definite on this point, and equally definite that it was Dean who gave him the information. The other witness was Constable Heise. He was at the Tulaele Police Post when Constable Gozar rang up the Tifaga Playhouse on 16th September to ascertain if the Philipp/Stowers fight was on that evening. However Gozar left this country a short while after that, and his account of what was said at the telephone is not before the Court. Constable Heise, however, deposed that after the telephonic conversation, Gozar intimated his intention of going to see the Philipp/Stowers fight that evening, that he left the Police Post for that purpose, and that he returned disappointed because it had not taken place.

The evidence which I have referred to discloses and establishes that Dean told at least four people that the fight would take place on the Wednesday night; also, he told Stanley the same thing in answer to direct enquiry made over the telephone. In addition to this, I am satisfied that the Managing Director of the Company also told Harris and Pearman that the fight would be held at that time.

The evidence also established that a number of people who went to the tournament went under that impression. I am entitled to infer, and I do infer, that the people, who were told that the fight would take place, passed on that information with the result that until shortly before the tournament commenced a substantial number of Europeans present were quite certain about it.

The Managing Director knew before the opening bout that some at least of the audience were expecting to witness the Philipp/Stowers fight.

Alfonso Philipp had gone to the Playhouse all prepared to fight, and was then told that it would not take place. When Philipp's father heard this, he demanded and received a return of his admission money from the Managing Director. The defendant Mr. Tarr told the Managing Director that he had heard outside that the fight was to take place. It seems a pity that the management did not then and there announce that either there had been a mistake, or a change of plans.

The evidence strongly suggests, and I was impressed with this point of view at the hearing, that both Moors and Dean fully intended the fight to take place on the 16th September, but changed their minds at the last moment because Stowers was not ready. Stowers was asked in examination-in-chief, "When did you first know that a definite date had been fixed for the fight?", and he answered, "I told Mr. Moors that I would be ready for 30th September. I told him that about 16th September".

I have now reviewed fully the material facts of the case, and have expressed my views upon their correctness. It will be seen from my findings that the only statement of fact appearing in the letter, which is not strictly accurate, is the statement that, "Quite a number of people rang up the office . . . to make sure whether the contest was to be staged, etc." The evidence discloses that only two people rang up for that purpose. The gravamen of the allegation does not rest upon the method by which the enquiries were made, but rather upon the number of people the information given by the management reached. It matters not whether the enquiries were made personally or telephonically. I have already stated that the information was given to six people. Having regard to all the circumstances of the present case, it is substantially correct to speak of six people as "quite a number of persons" without taking into consideration the other persons to whom the six would, in the natural order of local things, pass the information.

It only remains to consider whether the comment upon the proved facts was made unfairly or mala fide.

The unfairness, or the mala fides of comment is a question of fact, and the onus of proof is on the plaintiffs. But before determining this question of fact, I must first determine as a matter of law; (1) whether the subject is one which is open in law to comment; and (2) whether there is any reasonable evidence that the comment is unfair, or has been made mala fide. There can be no doubt on the first point. The conduct of public entertainments is one in which the public as a whole is interested, and so it is a subject open to comment.

The plaintiffs did not lead any evidence to show that the comment was unfair, but relied on a small incident which took place on the stage between the plaintiff, Mr. Moors, and the defendant, Mr. Tarr, to establish that Tarr published the letter maliciously.

When Mr. Tarr heard Moors ask Dean whether he had told any one that the Philipp/Stowers fight would be held that evening, Mr. Tarr interposing that he had heard it outside, Moors replied to Tarr very sharply, and thought because of that Tarr appeared angry and later published the letter.

Standing alone, this might be evidence of malice, but I am quite satisfied from Tarr's evidence that he had no improper motives in publishing the letter, and that he did so only in the ordinary course of journalism.

The plaintiffs have not discharged the onus of proving that the comment was unfair or mala fide. I will, therefore, enter Judgment for the defendants with costs.