

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2012-485-839
[2013] NZHC 371**

BETWEEN ERIC HAYWOOD
 Plaintiff

AND IAN ROY BRAY
 Defendant

Hearing: 21 February 2013

Counsel: M F McClelland and P D Tancock for Plaintiff
 R J Fowler and K J Hamill for Defendant

Judgment: 1 March 2013

In accordance with r 11.5 I direct that the delivery time of this judgment is 9.30am on the 1st day of March 2013.

RESERVED JUDGMENT OF MACKENZIE J

[1] There are before the Court several evidential pre-trial issues for resolution in this defamation proceeding, which is set for jury trial.

Admissibility of hearsay statement

[2] The plaintiff and the defendant were each living on their boats at the Chaffers Marina in Wellington when the relevant events happened there in February 2012. Ms Campbell-Board had been the manager of the marina. She had resigned due to ill health in September 2011 but was well enough then to continue and assist the new manager. The defendant, Mr Bray, asked her to provide a statement of the evidence which she would give if called as a witness. She prepared a statement and sent it to Mr Bray in June 2012. She died in August 2012. The defendant now seeks to

adduce her statement as a hearsay statement under s 18 of the Evidence Act 2006. The plaintiff opposes that course.

[3] The statement is admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable. The circumstances include the nature and content of the statement, and circumstances relating to the making of the statement, the veracity of the person, and the accuracy of observation of the person.

[4] The statement takes the form of a narrative statement of events, similar to a brief of evidence to be given in court. Mr Bray, who gave evidence at the hearing before me and was cross examined, said that he approached Ms Campbell-Board after proceedings were issued in May 2012. He was aware that she was ill and that there were concerns for her long-term health. On the instructions of his solicitor he approached her in June 2012 about providing some evidence. She responded that when the time came she would be willing to give evidence in court. Mr Bray was able to persuade her to make a statement at that stage on the basis that it would provide the starting point for her proposed brief of evidence. She emailed a statement to him on 29 June 2012.

[5] Mr Bray identified the statement which he had requested from Ms Campbell-Board and he identified her signature on the statement. Counsel for the plaintiff challenged Mr Bray's evidence as to the circumstances that relate to the making of the statement. Counsel submits that an email produced by Mr Bray is inadequate to support his evidence as to the way the statement was forwarded to him. I do not find it necessary to discuss that evidence in detail. I accept Mr Bray's evidence as to the circumstances in which the statement came to be made.

[6] In the ordinary course of events, a witness giving evidence can be cross examined. That will not be possible in this case. The lack of an ability to cross examine does not directly go to the circumstances relating to the statement and whether they provide reasonable assurance as to its liability, but is, at least indirectly, relevant to that issue. It is also relevant to the question of whether, under s 8 of the

Evidence Act, the probative value of the statement is outweighed by the risk of an unfairly prejudicial effect.

[7] The lack of an ability to cross examine is likely to be significant. The nature and contents of the statement are such that cross-examination to explain the evidence and to elicit further detail would be important. Further, a reading of the statement indicates a degree of partiality on the part of Ms Campbell-Board. She clearly has a favourable view of the defendant, and a less than favourable view of the plaintiff. That is obvious from a number of points which she makes in her statement. Cross-examination, to provide some balance, would be important. The degree of partiality demonstrated by the statement, coupled with the lack of ability to cross examine, goes to the reliability of the statement. Those factors also suggest that the prejudicial effect of the evidence may well outweigh its probative value.

[8] Another matter relevant to the reliability of the statement is that, in one respect, Ms Campbell-Board's statement is at variance with Mr Bray's evidence. She says that, at a meeting at the marina, a Wellington City Council representative showed the defendant the photographs which the plaintiff took. Mr Bray says that is not so. That would be an important consideration, if the statement were admitted, for the fact finder in determining whether Ms Campbell-Board's evidence on that point was reliable. The focus at this stage, so far as reliability is concerned, is not on the evidence itself, but on the circumstances in which the statement was made. The inaccuracy of the hearsay statement on this point indicates that the circumstances may not have been conducive to a completely accurate recall by Ms Campbell-Board of events which had happened some four months previously.

[9] A relevant consideration in determining whether the statement should be admitted, particularly in considering its probative value under s 8, is that much of the background evidence which Ms Campbell-Board gives could be provided by other witnesses. For example, the extent of the plaintiff's engagement with the marina management is a matter which, on the face of Ms Campbell-Board's statement, is capable of being addressed in this way. She says in her statement that the plaintiff "has generally directed his issues via documentation directed at the Chairman and Board".

[10] To the extent that Ms Campbell-Board's statement relates to her own observations, it is not entirely clear from her statement whether she is purporting to describe events which she witnessed, or events of which she was otherwise aware. Her evidence as to the way in which the defendant's notice was posted at the marina is an example of this. That circumstance also weighs against the admissibility of the statement.

[11] I have reached the view, taking all of these circumstances into account, that the circumstances relating to the statement do not provide reasonable assurance that the statement is reliable.

Admissibility of evidence of reputation

[12] The defendant proposes to adduce general evidence that the plaintiff has a reputation amongst the Chaffers Marina community as a complaining and disputatious person. Also, in his second amended statement of defence, the defendant has given notice of his intention to adduce, under s 42 of the Defamation Act 1992 (the Act), evidence of specific instances of misconduct by the plaintiff which the statement of defence describes as "instances of unjustified, petty and disputatious complaints and demands at Chaffers Marina".

[13] That evidence falls into two of the three categories of evidence as to reputation which are recognised on the authorities.¹ The defendant's proposed evidence is:

- (a) evidence of general bad reputation; and
- (b) evidence of particular acts of misconduct on the part of the plaintiff tending to show his character and disposition.

[14] Evidence in the first category was admissible at common law. Its admissibility is preserved by s 42 of the Act. Evidence in the second category was

¹ *Scott v Sampson* (1882) 8 QBD 491 at 498.

not admissible at common law, but has been rendered admissible by s 30 of the Act.

That provides:

In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

[15] The admissibility at common law of evidence in the first category was subject to the restriction that evidence of general bad reputation must be confined to the sector of the claimant's character relevant to the defamation. A similar restriction on the admission of evidence in the second category has been introduced in s 30. It must relate to reputation "in the aspect to which the proceedings relate".

[16] As Mr Fowler submits, the bounds of that restriction have been variously expressed in the cases. The essence of the common law rule is that the evidence must be confined to the relevant sector of the plaintiff's life or character.

[17] The test for the admissibility of evidence of general bad reputation at common law as preserved by s 42, and the test for the admission of specific instances of misconduct going to reputation under s 30, is essentially the same. Nothing turns on the slightly different terms in which the tests are expressed at common law, and in the statute. The test requires the exercise of judicial judgment. As Cooke J said in *Television New Zealand v Prebble*:²

In allowing evidence of specific instances of misconduct, this is intended to be a change in the law; but the phrase "the aspect to which the proceedings relate", also used in s 40 in a requirement of pleading, reflects the existing law.

Identifying the relevant area of conduct may be difficult, as Viscount Simonds recognised in *Speidel v Plato Films Ltd* at pp 1124-1125. In the same case Lord Denning put it at p 1140, in a way probably deliberately allowing for a degree of judicial judgment on the particular facts:

"When evidence of good or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the judge to rule what is the relevant sector."

² *Television New Zealand v Prebble* [1993] 3 NZLR 513 (CA) at 524.

[18] In applying the test, the pleadings, both as to the words complained of and their alleged defamatory meanings, are relevant. The statement of claim alleges that the plaintiff was defamed in a poster which was put up by the defendant in the Chaffers Marina. The plaintiff's pleading as to the natural and ordinary meaning of the words complained of is:

In their natural and ordinary meaning, the statements contained in the poster and referred to in paragraph 10 above were, as a whole, false and defamatory of the plaintiff in that they meant or were intended to mean that:

- (i) the plaintiff has been secretly taking photographs of residents and users of the Marina's facilities (Poster, paragraphs 1, 2, 3, 4 and 5);
- (ii) the plaintiff secretly took a photograph of the defendant bare legged, wearing shorts and an unbuttoned casual shirt in the vicinity of the male toilets, showers and changing rooms (Poster, paragraphs 1, 2, 3 and 5);
- (iii) the plaintiff refused to answer the defendant's questions because he had acted inappropriately and unlawfully (Poster, paragraphs 2, 3 and 5);
- (iv) the plaintiff ran away rather than answer the defendant's questions because he had acted inappropriately and unlawfully (Poster, paragraphs 2, 3 and 5);
- (v) the plaintiff is a coward (Poster, paragraph 2);
- (vi) the plaintiff admitted secretly taking photographs of the defendant (Poster, paragraph 3);
- (vii) the plaintiff refused to confirm that he had been secretly taking photographs of the defendant until threatened with the Privacy Act (Poster, paragraph 3);
- (viii) the plaintiff has secretly taken other photographs of other berth licensees and/or residents in or around the changing facility area and/or in the male changing room facilities (Poster, paragraphs 1, 3 and 4);
- (ix) the plaintiff has acted unlawfully and/or illicitly (Poster, paragraphs 1, 2, 3, 4 and 5);
- (x) the plaintiff's conduct is such that warrants a complaint to the Police (Poster, paragraph 5);
- (xi) the plaintiff refused to return the photographs because he knew his actions were unlawful (Poster, paragraphs 3 and 5);
- (xii) the plaintiff is a pervert and/or sexual pervert (Poster, paragraphs 1, 2, 3, 4 and 5);

- (xiii) the plaintiff is a paedophile (Poster, paragraphs 1, 2, 3, 4 and 5);
- (xiv) the plaintiff is a dirty old man who secretly takes photographs of people in the toilets or amenity blocks (Poster, paragraphs 1, 2, 3, 4 and 5);
- (xv) in taking the photographs secretly and/or covertly the plaintiff has a sexual motive (Poster, paragraphs 1, 2, 3, 4 and 5).

[19] Mr McClelland, for the plaintiff, submits:

In this case there is nothing in the poster (or the meanings pleaded) that makes relevant the plaintiff's alleged propensity to complain about (minor) issues to Chaffers Marina. The particulars of misconduct pleaded do not relate in any way to the aspect to which the proceedings relate. Equally the evidence as to general bad reputation is not directed to the relevant sector or aspect of the plaintiff's life, i.e. that the plaintiff is a pervert, stalker or dirty old man.

[20] That latter submission as to the relevant sector or aspect of the plaintiff's life essentially relates to particulars (xii) to (xv). In a defamation action tried before a judge and jury, the question whether the words complained of are capable of bearing the defamatory meaning pleaded by the plaintiff is a question for the judge. In determining that question the judge will construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence.³

[21] The question whether the words complained of are capable of bearing those meanings is not before me at this stage. I consider it is open to serious question whether reasonable persons of ordinary intelligence would interpret the words relied upon so as to give them the meanings pleaded in particulars (xii) to (xv). For present purposes, and because the matter has not been argued before me, I proceed on the basis that the words may be so capable. However, I should make it clear that, in proceeding on that basis, I make no finding that the words are capable of bearing any of the meanings which the plaintiff attributes to them.

[22] Assuming that the words are capable of bearing meanings which would imply that the plaintiff is a pervert, stalker or dirty old man, as counsel submits, that does not confine the relevant aspect of the plaintiff's character to those matters. The

³ *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell London, 2008) at [36.4].

meanings pleaded go beyond implications of that type. The matters pleaded at (i) to (xi) are broader. They relate directly to the plaintiff's pursuit of his concern at the use of anti-fouling products within the marina, as pleaded in paragraphs 4 to 6 of the statement of claim, and related issues. The plaintiff's position within the marina community is a central aspect of his case, on the pleadings.

[23] The statement of claim includes an allegation that the defamation has caused him and his wife to move from the marina. He claims as special damages a loss on the consequential sale of his marina berth. His general reputation in the marina community is directly relevant to that claim. Mr McClelland submitted that, if the evidence of that general reputation was admissible only because of that claim for special damages, it would be dropped. I therefore do not place weight on the claim for special damages in considering the relevance of the plaintiff's reputation in the marina community.

[24] It is relevant that the allegedly defamatory poster was published only within the confines of the marina. The scale of the publication of a defamatory statement is relevant to the assessment of damages. The general reputation of the plaintiff among a limited class to which the defamatory material is published will also ordinarily be relevant to that assessment. The plaintiff's actions, of which the defendant complained in his poster, were directly concerned with the marina. It would be totally unrealistic to treat as a separate matter, unrelated to the alleged defamation, the plaintiff's general reputation within the marina community.

[25] For these reasons, I consider that the plaintiff's general reputation in the marina community is a directly relevant aspect of the proceedings.

[26] One consequence of the admission of evidence of the plaintiff's reputation, and of conduct relevant to that reputation, may well be that the scope of the trial is extended. The defendant's proposed reputation evidence includes a catalogue of issues on which it is alleged that the plaintiff has acquired a reputation as a disputatious and complaining person. The statement of defence pleads a lengthy list of alleged specific instances of misconduct which will be the subject of evidence. A likely response is that the plaintiff will contest that evidence. The introduction of

reputation evidence and evidence of specific alleged misconduct, with the possibility of evidence in response, may add considerably to the length of trial.

[27] The dispute between the parties had its origin in a petty disputation within the Chaffers Marina community. Put bluntly, that is where it should have stayed. The issuing of these proceedings has escalated the dispute outside that arena. There is a risk that this trial will involve a trawling over of minor issues of an essentially domestic nature.

[28] Defamation litigation is not for the faint-hearted. It requires a deep pocket. There may be proceedings which are simply not worth the court time and costs which they entail, that is, which are “not worth the candle”.⁴

[29] Such considerations, however, are not directly relevant to the issue before me. The possible consequences are not a reason for restricting the scope of admissible evidence. I am concerned only with whether the evidence of general bad reputation and of specific misconduct which the defendant seeks to adduce is admissible. For the reasons I have given, I conclude that it is.

[30] I rule that evidence of the plaintiff’s general reputation and alleged misconduct in the respect pleaded by the defendant is admissible.

Other issues

[31] Counsel had in their respective memoranda raised a number of other issues as to admissibility of particular parts of some witness statements. They indicated at the hearing that most of these had been or could be resolved. Any remaining evidential issues can be addressed later if necessary.

[32] The defendant has filed a second amended statement of defence. The plaintiff has sought leave to file an amended statement of claim, altering the damages sought. To the extent that leave is required for these amended pleadings, it is granted.

⁴ *Gatley*, above n 3, at [32.44].

Result

[33] The hearsay statement of Ms Campbell-Board is not admissible.

[34] The evidence as to the plaintiff's allegedly bad reputation as particularised in schedule 4 of the second amended statement of defence is admissible.

[35] Leave to file amended pleadings as sought is granted.

[36] As each of the parties has had a measure of success, there will be no order as to costs.

Solicitors: M F McClelland, Barrister, Wellington, for Plaintiff
Buddle Findlay, Wellington, for Defendant
(Counsel Acting: R J Fowler, Barrister, Wellington)

“A D MacKenzie J”