IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 109/98

BETWEEN **ROGER ERIC WYNDHAM BUCHANAN**

Plaintiff

1027

AND **OWEN ROBERT JENNINGS**

Defendant

Hearing: 31 July 2000

Counsel: M R Camp QC for Plaintiff
M A F Gilkinson for Defendant

Judgment: 25 August 2000

RESERVED JUDGMENT OF HERON J

Solicitors:

Kensington Swan, Wellington for Appellant
Bell Gully Buddle Weir, Wellington for Respondent

[1] This is an application to have these proceedings heard before a Judge alone on the grounds that the plaintiff has not given to the defendant any notice pursuant to Rule 427 of the High Court Rules, but in particular that the trial of the proceeding will involve mainly the consideration of difficult questions of law.

[2] The plaintiff disputes that he has not given notice pursuant to Rule 427 and says that the matter can be conveniently tried by a jury and in the interests of the parties and in the general interests of the administration of justice, trial by jury would be appropriate.

[3] S.19A(5) of the Judicature Act 1908 provides:

> (5) Notwithstanding anything to the contrary in the foregoing provisions of this section, in any case where notice is given as aforesaid requiring any [civil proceedings] to be tried before a jury, if it appears to a Judge before the trial--
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> > (a) That the trial of the [civil proceedings] or any issue therein will involve mainly the consideration of difficult questions of law; or
> >
> > (b) That the trial of the [civil proceedings] or any issue therein will require any prolonged examination of documents or accounts, or any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise, being an examination or investigation which cannot conveniently be made with a jury,--
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> the Judge may, on the application of either party, order that the [civil proceedings] or issue be tried before a Judge without a jury.

Background

[4] The statement of claim alleges a defamation between 11 November 1997 and 18 February 1998. Proceedings were issued in May 1998 and application for strike out was heard and a decision given on 3 December 1998. On 17 December 1999 a Full Court reviewed the decision given on 3 December 1998 which declined to strike out the first and third causes of action. That application to review was dismissed and

an application for leave to appeal that decision was refused by Neazor J on 11 April 2000. As the Full Court judgment said:

> "[4] It is not in dispute that the alleged defamatory remarks made by the defendant in the House are protected by absolute privilege. Nor is it in dispute that if the same remarks had been repeated in the same or similar form outside the House, they would not be so protected. However, the plaintiff alleges that in the course of an interview by a reporter and in a letter to a newspaper, the defendant repeated or adopted the remarks made in the House by saying he did not resile from them but without actually repeating the words earlier used."

[5] Dealing with the first point first, the jury notice was given in the praecipe and that is all that is required pursuant to Rule 427. There is nothing in the first point. As to the second point, the issues in this case are as agreed by counsel on both sides, succinctly summarised by Neazor J as follows:

> There can be, and the judgments have said there arguably is in this case, a factual issue whether what was said outside the House was a repetition of what was said inside so as to make the words examinable in Court as a non-privileged statement. The defendant's contention that the words used did not amount to a repetition may prove to be right, but that is not a reason for allowing a further appeal in respect of a strike-out application.

[6] The defendant relies on ***Guardian Insurance v Lidguard*** [1961] NZLR 860, 863 where Cleary J said:

> The cases which come within para (a) are, we think, cases where the questions of law are of such a nature that it becomes difficult to keep the respective functions of Judge and jury separate from one another. There are cases where matters of law and matters of fact so merge into one another that the task of the jury becomes complicated in the application to the facts of questions of law which it is difficult for the Judge to explain in language they could be expected to appreciate and apply.
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> There are other cases where, during the course of the trial the Judge will be called upon to give consideration to difficult questions of law and where it is not possible to isolate satisfactorily questions of fact for submission to the jury. These are broadly the cases to which, we think para (a) applies. It should be added, however, that it is not possible to describe exhaustively any category of cases in which the power conferred by the paragraph might properly be exercised, but we have said enough to show that, in our opinion, the principal matter for consideration under the paragraph must be the extent to which the exposition and application of matters of law may cause difficulty to the Judge and the jury in the discharge of their respective functions.

[7] The defendant says that this case comes directly within the examples of cases considered by the Court of Appeal in ***Guardian Assurance*** and it will be difficult to keep the respective functions of Judge and jury separate. It is a case where matters of law and matters of fact merge into one and another, and the task of the jury becomes complicated in the application to the facts of questions of law, which it is difficult for the Judge to explain in a language the jury could be expected to appreciate and apply. The defendant says that the plaintiff's case is that the words and question constitute effective repetition and the Full Court had held that there was an arguable case that the parliamentary remarks have been effectively repeated outside the house.

[8] At the heart of the defendant's submission is that the effective repetition issue is one of mixed fact and law and that the jury would have grave difficulties in fulfilling its separate function of deciding matters of fact, namely as to whether there has been effective repetition. Although it is said to be essentially a question of fact and degree questions of law will necessarily arise. Hampel J in ***Beitzel v Crabb*** [1992] 2 VLR 122, 127, referred to extensively in the Full Court decision, said:

> "Whether what is said outside Parliament amounts to a publication of defamatory words is a mixed question of fact and law".

[9] Finally, the narrowness of the factual issue and the danger that the jury called on to decide it will too readily embark on an examination of the remarks made in Parliament, bring this case within S.19A(5)(a).

[10] The plaintiff in reply says that defamation cases are traditionally brought before juries. See ***Smith v Television New Zealand Limited*** 7 PRNZ 456, where the authorities are reviewed. The plaintiff says it is a simple defamation. There are no defences of truth, honest opinion or qualified privilege, and the plaintiff understands that there will be no defence evidence. The only defence is absolute privilege which raises one factual issue, that is the sufficiency of the repetition.

[11] As the Full Court said in paragraph 44 and 45:

> [44] Although the expressions "adoption by reference" and "repetition" are frequently used interchangeably in this context, we

> prefer the terminology of "effective repetition" because it better captures the rationale for denying the defence of privilege. Whether there has been an effective repetition is essentially a question of fact and degree. The whole of the circumstances will call for examination, including the remarks originally made in the House, the nature and context of the questions asked subsequently, and the defendant's response. Where the words of the Parliamentary statement are not repeated outside Parliament, the plaintiff will seek to establish some sufficient temporal or other substantive link to the Parliamentary statement. Regard may also be had where necessary to the extent of any prior reporting of the Parliamentary statement to establish whether the public could reasonably be expected to link the defendant's remarks outside the House to the Parliamentary statement. All of this is background to the central question whether what has been said outside Parliament is properly to be regarded as a repetition of the statement protected by privilege. It is not enough to avoid the privilege that there be a reference outside Parliament to a statement inside the House, there must be sufficient to be a repetition of it. Otherwise, the proceeding is a challenge to a statement made inside the House.
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> [45] In our view, while the remarks attributed to the defendant in response to *The Independent* reporter do not go as far as those in some of the cases discussed, we nevertheless consider there is an arguable case that the Parliamentary remarks have been effectively repeated outside the House. In the first cause of action, based on the defendant's statement reported in the article in *The Independent* of 18 February, it is apparent that the defendant was referred to the remarks he made in Parliament. He went further than simply acknowledging that he had made those remarks. He stated he did not resile from his claim about the officials' relationship which is the nub of the plaintiff's claim. He added to this by acknowledging he may have made an error about the amount of sponsorship money the board had provided towards the Barbarians' tour. While he did not further elaborate upon the remarks made in Parliament, we consider it is arguable that the was in effect repeating what he had said in Parliament.

[12] It is difficult to know what may be revealed by the evidence and what may come to fall on either side of the dividing line of what is effective repetition which on the authorities may be a nice question of law. Plainly the application of the facts to existing but arguably unsettled legal principles is a matter of some novelty as the judgment of the Full Court revealed. The arguments as recorded in the judgment on the striking out application, give me little reassurance that the matter is quite as simple as the plaintiff would suggest. Depending on the factual findings, may well depend the question of whether there has been an effective repetition. As a trial

Judge, I must say I would be much happier dealing with this matter on my own, than attempting to settle the factual issues for the jury. In arriving at a conclusion as to whether there has been effective repetition, a number of factual matters will have to be resolved. I incline to the view that this trial, for those reasons is best left to a Judge alone. There are no wider public interest reasons such as in ***Prebble v TVNZ Limited*** [1992] 6 PRNZ 113.

[13] As I have said in ***Smith v Television New Zealand Limited*** my inclinations would generally be for such a defamation case as this to be heard before a jury, but I think this case is different. In terms of ***Guardian Assurance v Lidguard*** here I think the questions of law are of such a nature that it becomes difficult to keep the respective functions of Judge and jury separate from one another, and that there are matters of law and matters of fact which merge into one another. It follows from what I have said that the application of the defendant is successful, and the case is to be heard before a Judge alone. It is in my list and it is apparently ready for trial. The parties are to confer with the Senior Deputy Registrar for a conference and subsequent fixture.

[14] The defendant is to have costs which I fix at $2,500.

Delivered at 2.40 pm this 25th day of August 2000.