Jn

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 152/01

1665

BETWEEN RONALD WILLIAM GEORGE BUTLER

Plaintiff

AND KAREN ANNETTE SHERRY

Defendant

Date of hearing: 28 November 2001

Counsel: R Ablet-Hampson for Plaintiff
L C Langridge for Defendant

Judgment date: 19 December 2001

JUDGMENT OF MASTER J C A THOMSON

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[1] The defendant applies to strike out the plaintiff's second cause of action in the Amended Statement of Claim.

[2] The plaintiff's Amended Statement of Claim contains two causes of action:

(a) The first cause of action – defamation (paragraph 9 to 26 of the claim)

(b) The second cause of action – negligence (paragraph 27 to 30 of the claim)

[3] The first cause of action (defamation) contains the plaintiff's allegation that the defendant defamed him by virtue of the contents of a report the defendant wrote on or about 2 October 2000.

[4] The defendant was a reviewer appointed by the Institute of Chartered Accountants of New Zealand (ICANZ).

[5] The position of reviewer was part of the complaint's procedure established by ICANZ to fulfil the requirements of ss 6 & 7 of the Institute of Chartered Accountants of New Zealand Act 1996.

[6] The second cause of action (negligence) simply relies upon the same factual matter – the report written by the defendant on or about the 2 of October 2000 – and alleges a duty of care was owed by the defendant to the plaintiff. The loss claimed by the plaintiff is distress, humiliation and unnecessary cost to legal fees for this proceeding.

[7] Counsel for the defendant submits the plaintiff is simply attempting to bolster his defamation claim with the claim for negligence. This type of attempt to combine a claim for negligence with a defamation claim has been the subject of four Court of Appeal decisions.

[8] First in *Bell-Booth Group Limited v Attorney General* (1989) 3 NZLR 148, the Court of Appeal held:

> "...the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element". (Per Cooke P, page 156,lines 37 to 41)".

[9] Secondly, in *Balfour v Attorney-General* (1991) 1 NZLR 519, the Court of Appeal held:

> "Any attempt to merge defamation and negligence is to be resisted. Both these branches of the law represent the result of much

> endeavour to reconcile competing interests in ways appropriate to the quite distinct areas with which they are concerned, but not necessarily appropriate to each other...An inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation o a duty of care not to defame". (Hardie Boys J, page 529, lines 1 to 8)".

[10] Thirdly, in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd/Mortensen v Laing* (1992) 2 NZLR 282 the Court of Appeal held:

> "...there are weighty considerations in favour of a duty in the kind of situation with which we are now dealing. But in the other scale there have to be put a series of formidable objections arising because the duty asserted would cut across established principles of law in fields other than negligence. The first is the one that weighed most with this court in *Bell-Booth*, namely the defences available in a defamation action.
>
> ...Qualified privilege can be defeated by proof of malice, but not by proof of mere negligence. The suggested cause of action in negligence would therefore impose a greater restriction on freedom of speech than exists under the law worked out over many years to cover freedom of speech and its limitations...Qualified privilege is conferred because of reciprocal duty and interest between a writer or speaker and those with whom he communicates. To cut down the practical scope of the protection would run counter to public policy in this field" (Per Cooke P, page 301, line 50 to page 302, line 23).

[11] And recently in *Midland Metals Overseas PTE Limited v The Christchurch Press Company Limited and Ors* (CA 67/01 Gault J, Keith J, Blanchard J, Tipping J and McGrath J, 5 September 2001) the full Court of Appeal were asked to reconsider their previous decisions (paragraph 16 – 35, 53 – 56, 63 – 66). The declined to amend or vary the ambit of those decisions.

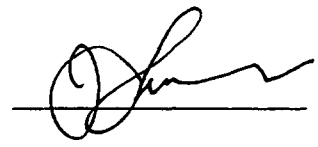
[12] Counsel for the defendant submits the current position is there is no concurrent liability in defamation and negligence in New Zealand in cases such as this one. To allow the plaintiff the right to bring a claim for negligence in these

circumstances where it is clear his right, if any, is to make a claim for defamation, allows the plaintiff to block defences otherwise available to the defendant – defences such as honest opinion and qualified privilege.

[13] Having regard to the recent judgment of the Court of Appeal in *Midland Metals*, I am quite satisfied that no matter how the second cause of action is pleaded it will not be able to avoid strike out and that cause of action is struck out accordingly.

[14] Costs reserved.

Dated at Wellington this 19th day of December 2001 at 3 ~~am~~/pm.



Master J C A Thomson

Solicitors

S M Cooper, Wellington for Plaintiff

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