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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY **CP 109/00**

BETWEEN **VONRICK CHRISFORD KERR** of Wellington, Unemployed

Plaintiff

AND **HER MAJESTY'S ATTORNEY-GENERAL** (sued on behalf of the **NEW ZEALAND POLICE**)

First Defendant

AND **WELLINGTON NEWSPAPERS LIMITED** a duly registered company having its registered office at Wellington

Second Defendant

Date of hearing: 31 January 2001

Counsel: A Hewton for Plaintiff
D Boldt for First Defendant
J B Stevenson for Second Defendant

Judgment Date: 1 March 2001

JUDGMENT OF MASTER J C A THOMSON

Solicitors
Crown Law Office, Wellington for First Defendant
Izard Weston, Wellington for Second Defendant

[1] This is an interlocutory application by the second defendant for further and better discovery by the plaintiff – Rules 297, 298 and 300 are relied on. It is supported by the first defendant. The plaintiff opposes.

[2] The proceedings arise out of an article published in The Dominion of 5 November 1998. The article refers to the plaintiff and that he had:

(a) Been freed from prison after serving a five month sentence.

(b) He had been arrested in March; and

(c) A protection order had been taken out by his wife and had been breached.

[3] The defendants submit, associated with the sentence, arrest and protection order, there must be documents.

[4] The Statement of Claim pleads:

"7. The statements contained within that passage that the plaintiff had assaulted his wife, that he had threatened to drive his car, containing his then three year old daughter, over the edge of a cliff, are defamatory of the plaintiff and untrue."

[5] The amended statement of defence of the second defendant:

(a) Denies the meaning.

(b) Pleads truth to the whole of the article

(c) Pleads qualified privilege – statutory and common law

(d) Pleads honest opinion in relation to the statement relating to the plaintiff not being approached.

(e) Pleads prior reputation in relation to the protection order and four breaches and the sentence imposed for actions on 4/5 November 1998.

(f) Alleges no injury to the plaintiff's reputation.

(g) Gives notice of intention to raise specific misconduct relating to bad reputation.

[6] The defendants say the Statement of Claim and the Amended Statement of Defence have put in issue the whole character and reputation of the plaintiff and that all documents relating to the character and reputation of the plaintiff are discoverable. In particular, all court documents relating to protection orders, breaches of protection orders and criminal proceedings are relevant and discoverable.

[7] The plaintiff filed an unverified list dated 18 September 2000 and on 25 September 2000 the Court ordered the plaintiff to file a verified list. Ms Hewton says a verified list has not been filed because the plaintiff is awaiting the outcome of this application.

[8] However by letter dated 16 October 2000 the plaintiff's solicitor stated:

> "I have now been able to peruse the District and Family Court files and speak with counsel about discovery of documentation relating to Mr Kerr's previous criminal and Family Court proceedings.
>
> I am of the firm view that the matters involved in both jurisdictions are irrelevant to this claim and I will not therefore discover those documents without an order from the Court."

[9] The application seeks discovery of:

(a) Court and other documents relating to orders, charges and convictions in the District Court.

(b) Similar documents in relation to the Family Court.

(c) Generally any Court or other documents relating to the plaintiff regarding assault, breach of non-molestation order and/or any other offence or crime.

[10] I set out the grounds listed in the Notice of Opposition and the defendants' response thereto:

(a) Court records are not in the possession or under the control of the plaintiff. Ms Hewton did not make submissions in support of this ground of opposition and in any event as submitted by the second defendant, this ground of opposition fails to address the requirement of Rule 298(8), which requires listing in the verified list "any other relevant document known to the party making the list". The Court records must come within Rule 298(8). The full wording of Rule 298(8) is:

"(8) The list shall further enumerate any other relevant documents known to the party making the list to exist and shall state the name of the person (whether a party or not) in whose possession he believes such documents respectively to be."

Privilege

(b) In so far as the application relates to solicitors files, the plaintiff says the documents are covered by legal professional privilege. Again Ms Hewton made no submissions in support of this ground. The second defendant accepts for present purposes that non-litigious legal professional privilege will cover advice given by solicitors for the plaintiff. Also that litigation privilege will apply to documents on the file of the solicitor for the plaintiff which are for the dominant purpose of assisting with this litigation. The litigation privilege applies to "this proceeding" – see Form 27. The unverified list correctly claims litigation privilege for "this proceeding" only. The second defendant I think rightly says that files of the solicitors are likely to have on them documents (including Court documents) which

are relevant and which do not come within the scope of privilege. In any event, a relevant document which is subject to privilege must be listed in the verified list. It should normally be shown in Para A Part II of the list. Privilege is then claimed.

Relevancy

(c) The plaintiff says the documents sought to be discovered are not relevant. It is submitted by the second defendant that clearly the documents sought are relevant to the character and reputation of the plaintiff which is in issue pursuant to the statement of claim, the justification defence, and the pleading in the statement of defence relating to past character and mitigation. I think that submission is correct and certainly such documents would fall within the 'may be' test. In that regard I also think the submissions made by Mr Boldt for the first defendant are correct on the issue of relevancy when he submitted, that by asserting that the statement was defamatory, the plaintiff places his reputation in domestic matters squarely in issue. The plaintiff asserts that, although he has committed a number of criminal offences towards his wife, he has never assaulted her. The nub of his case is that, whatever else he has done, the assertion that he was prepared to use violence in a domestic context has unfairly damaged his reputation.

Further I think Mr Boldt is correct when he says that while the allegation that the plaintiff had been imprisoned for assaulting his wife, as opposed to criminally harassing her, may have been inaccurate, any suggestion that the plaintiff's reputation has been damaged cannot be determined without first establishing the plaintiff's reputation in domestic matters prior to the publication. If it were established, for example, that the plaintiff had seriously assaulted his wife on other occasions, it would be difficult for him to sustain any submission that his standing in the community had been unfairly lowered by the assertion that he had been convicted of a domestic assault. In light of this, any document that provides information relevant to the plaintiff's prior conduct towards his wife, and in particular any suggestion that he was violent towards her, will be highly relevant to this proceeding. Such documents will go a substantial distance toward establishing that the article did not have the effect alleged by the plaintiff.

Disclosure prevented by statutes

[d] The documents may not be disclosed pursuant to Section 169 of the Family Proceedings Act 1980 or section 125 of the Domestic Violence Act 1995. I think this is the most substantial ground of opposition.

[11] The wording of s125 is as follows:

> "RESTRICTION ON PUBLICATION OF REPORTS OF PROCEEDINGS
>
> (1) "No person shall publish any report of proceedings under this Act (other than criminal proceedings) except with the leave of the Court that heard the proceedings."

[12] There is an exemption for reports of a bona fide or technical nature. s169 of the Family Proceedings Act 1980 is in similar terms.

[13] The two sections do not have any prohibition on publication in relation to criminal proceedings, ie criminal proceedings may be reported. Therefore, the sections cannot be an impediment to discovery of any documents relating to criminal proceedings.

[14] The sections are restricted to a "report of proceedings". The documents which should be discovered the defendants say do not constitute a report of proceedings.

[15] The interpretation of these sections has not been judicially considered.

[16] The same wording however appears in section 438 of the Children, Young Persons, and Their Families Act 1989:

> "...no person shall publish any report of proceedings under the Act except with the leave of the Court that heard the proceedings". s438(1).

[17] This term "report of proceedings" under s438 has been considered in the cases of *Television New Zealand Ltd v Department of Social Welfare* [1990] NZFLR 150 AND *Director-General of Social Welfare v Television New Zealand* (1989) 5

FRNZ 594 and *Director-General of Social Welfare v Christchurch Press Co Ltd*, HC Christchurch, CP 31/98, 29 May 1998. In the last case Pankhurst J reviewed the authorities and said:

> "But to my mind the section is rendered workable, and the limit of the prohibition is appropriately set, when one looks at the operative phrase in the context of the subsection as a whole. It provides:
>
> > "(1) Subject to subsection (2) of this section, no person shall publish any report of proceedings under this Act except with leave of the Court that heard that proceedings."
>
> Subsection (2) then provides that the prohibition does not extend to the publication of any report in a bona fide professional context, to statistical information relating to proceedings, or to the results of bona fide research. In my view, when so read, the sense of subsection (1) becomes apparent.
>
> The focus is upon the publication of reports. I do not consider those words are apt to capture the bare communication of information to genuinely interested people, like social workers, foster parents and teachers, who of necessity must be given some information on account of their involvement with a child involved in the proceeding."

And

> "Whether a newspaper article constitutes a report of proceedings will always be a matter of judgment in the particular circumstances of the case. To my mind this example does not come close to being a report of proceedings. At most it contains reference to an allegation of abuse which is under police investigation, and which may require separate consideration by the Family Court in due course. However, the passage is not a report of proceedings in terms of s438(1)."

[18] Mr Stevenson for the second defendant submits that the above extracts from the judgment affirm the importance of the "report" concept. In the same way as the

newspaper article was not a report of proceedings he says, neither the documents sought to be discovered, nor the verified list constitute a report of proceedings.

[19] He refers to the slightly wider wording in section 140 of the Criminal Justice Act 1985:

> "...a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification." S 140(1).

[20] As to that section he refers to Burrows in 'Media Law in New Zealand' (4th Edition) where it is noted at p 241 that the boundaries of that expression, 'report or account relating to proceedings', are somewhat fluid and have been given a liberal interpretation in keeping with the spirit of section 140.

[21] It is submitted by the second defendant that individually or collectively the documents sought do not constitute a "report of proceedings". The listing of the documents in a verified list is even further removed from what may constitute a "report of proceedings".

[22] Mr Boldt for the first defendant supports the second defendant. He argues as to the statutory prohibitions on publication contained in the Domestic Violence Act and the Family Proceedings Act, that discovery of the Family Court documents will not constitute "publication of reports" of the proceedings. The documents of most relevance for present purposes he says will be affidavits and other evidence. Even if they might constitute "reports" of the proceeding (and the provisions are designed,

not for application in cases of this kind, but in order to limit media reporting of Family Court proceedings), there is no suggestion that the documents will be "published".

[23] Mr Boldt submits that Mr Stevenson in his written submissions, analyses the various High Court authorities regarding the definition of "proceeding", and the discussion of whether reporting of matters outside the courtroom fall within the ambit of the sections. It is submitted that those decisions are of only limited relevance in the present case. Although both Gault J in *Director-General of Social Welfare v TVNZ* (1989) 5 FRNZ 594, and Pankhurst J in *Director-General of Social Welfare v Christchurch Press Co Ltd*, HC Christchurch CP31/98, 29 May 1998, expressed the view that the word "proceeding" incorporates all aspects of a case, from its initiation, through its various phases, and concluding with judgment, neither decision focuses on what constitutes "publication of a report" of that proceeding. I think Mr Boldt is correct in that submission. As to that issue he says that the definition of "publish", in the context of an identical provision, was discussed by Tompkins J in *Ali v Deportation Review Tribunal and another* HC98/96 Auckland Registry, 28 November 1996. In that case, the appellant sought to appeal against a decision of the Deportation Review Tribunal which, in concluding that he should be deported from New Zealand, took account of an adverse judgment issued in guardianship proceedings. Section 27A of the Guardianship Act 1968 is identical to the provisions in the Domestic Violence Act and Family Proceedings Act on which the plaintiff seeks to rely. Tompkins J observed:

> "In support of [the submission that use of the judgment did not constitute publication, counsel] referred to the Oxford English Dictionary meaning of 'publish' as including 'to make publicly' or

> generally known; to declare openly and publicly; to make generally available'. {Counsel} also referred to the decision of Master Kennedy-Grant in *Re Baird* (a bankrupt) [1994] 2 NZLR 463. One of the issues in that case was whether the consent of the Court was a necessary pre-condition to use by the Official Assignee in the public examination of a bankrupt of information obtained in the course of the private examination of other persons. Section 68(7) of the Insolvency Act 1967 provided that it shall not be lawful for any person 'to publish a report of any examination' without the consent of the Court. Master Kennedy-Grant held that the use of the information for that purpose did not amount to publication, holding (at page 468) that:
>
> 'The word 'publish' imports a far wider degree of dissemination than occurs either in the incorporation of the transcript in the Official Assignee's report ... or the use of the transcript for the purpose of examining the bankupt.' Whether or not a report of proceedings under the Guardianship Act has been Published, must be in any case a matter of fact and degree. In the present case the judgment was made available to the Minister and to the Tribunal with the result that portions of the judgment were referred to in the decision of the Tribunal itself which is a decision available for unrestricted publication. The result was that at least part of the Family Court judgment became available to the public. It is my conclusion that the consequences is that the judgment, being a report of proceedings, was published within the meaning of s27A."

[24] Obviously, Mr Boldt submits, in the present case, no party intends to make any aspect of the Family Court proceeding publicly available, and all of the restrictions that accompany the use of discovered material will still apply. It is unlikely he says that the affidavits of the plaintiff's wife will be used for anything other than informing the defendants when interrogatories are formulated, and, possibly, for the purposes of determining whether the plaintiff's wife should be briefed as a defence witness. If the documents do not disclose relevant domestic misconduct, then it is unlikely that they will be referred to in any way. If the plaintiff remains concerned regarding the way the documents might be used at trial, and perceives a risk that they may become publicly disseminated through reference to them in open Court, it will be open to him to raise the matter with the trial Judge. If

that occurs, suppression of any reference to the Family Court proceedings can be considered.

[25] Finally, Mr Boldt submits that there would be an air of unreality about suppression of this material, because it will still be open to the defendants to brief the plaintiff's wife as a defence witness, and this course will undoubtedly be necessary if the documents are withheld.

[26] It is inevitable that the plaintiff will be extensively interrogated prior to trial regarding his relationship with his wife, which has already spilled into the public arena on numerous occasions. Further he says it is now public knowledge that the plaintiff is subject to a protection order, and that he has repeatedly breached it. As to that, I was given a copy of Gendall J's judgment *Kerr v Police* AP 123/98 where Mr Kerr appealed against his sentence.

[27] Having considered the submissions of counsel I conclude that the plaintiff himself, by his behaviour, has placed all of the material sought in the public domain. Further, the plaintiff would appear to have waived any right to privacy in these matters by making his reputation in domestic matters the subject of a defamation action.

[28] In my view the documents sought are relevant and discoverable as they contain information which may, either directly or indirectly, enable the defendants to advance their case or damage the case of the plaintiff as they would appear to contain evidence of a history of bad behaviour, misconduct and/or abuse by the plaintiff to his partner, such as to affect his current reputation. Further any reference to the

Family Court proceedings in the defamation action can be the subject of appropriate orders at trial.

[29] I therefore order that the proceedings be struck out unless a proper verified list, listing the documents specified in the application which are in the possession, custody, power or knowledge of the plaintiff is filed and served within 21 days hereof. I should say that I reject Ms Hewton's submission that presentation of such a list would be 'oppressive' because the plaintiff is receiving legal aid and that the further discovery sought should not be ordered for that reason. Costs reserved.

Dated at Wellington this 1st day of March 2001 at 2.30 ~~am~~/pm.

Master J C A Thomson