IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2005-412-000519

ALAN BRIAN COURT
Appellant

v

TREVOR WILLIAM AITKEN
Respondent

Hearing: 13 February 2006

Appearances: C S Withnall QC for Appellant
L A Andersen for Respondent

Judgment: 31 March 2006

JUDGMENT OF HON JUSTICE JOHN HANSEN

[1] The Appellant and Respondent are both taxi drivers. On 7 March 2004 they were both outside the entrance to the Dunedin airport and a heated exchange took place. As a consequence the Appellant commenced defamation proceedings against the Respondent.

[2] The Judge found that in front of other taxi drivers, and possibly passengers exiting the airport, the Respondent called the Appellant a paedophile and a person who looked at paedophilic websites. He found the defamation proved and awarded damages of $20,000 to the Appellant.

[3] The Appellant appeals against that award on the following grounds:

a) The learned District Court Judge failed to address and apply the principles applicable to awards of damages for defamation, but instead attempted to assess damages by reference to awards in other cases.

b) The learned District Court Judge failed to give any or sufficient weight to the aggravating features of the Respondent's defences and conduct of the trial, including the rejection of the Respondent's claim that he acted in response to abuse by the Appellant, the rejection of the Respondent's evidence on important factual issues, the Respondent's persistence with a defence of truth, the fact that the Respondent had put pressure on witnesses to give evidence which was not in accordance with the facts and which was exaggerated, and the repetition of the defamatory allegations during the trial.

c) The learned District Court Judge erred in treating the defamatory words proved as being limited to an allegation that the Appellant looked at paedophile sites on the Internet, when that was contrary to the meanings pleaded and the words found to have been used by the Respondent.

d) The learned District Court Judge erred in not assessing damages on the basis that there were two different episodes of defamatory language.

e) The learned District Court Judge erred in holding that the Respondent's refusal to retract and apologise was not an aggravating factor.

f) The learned District Court Judge erred in finding that the Appellant's initial attempt to resolve the matter by having the Respondent retract and apologise was a matter which reduced the damages to which the Appellant might otherwise have been entitled.

g) The learned District Court Judge erred in his assessment of the relevance of the case of *Heptinstall v Francken* (HC Dunedin, CP 62/00, 15/2/02, Doogue J) to the quantum of damages in the present case.

h) The learned District Court Judge erred in failing to attach any or any sufficient weight to the Respondent's conduct between the date of the defamatory utterances and the date of trial, as proved, which showed the Respondent was motivated by malice and ill will and demonstrated a total lack of contrition and a determination to repeat defamatory allegations against the Appellant.

The District Court Judgment

[4] The Judge preferred the evidence adduced by the Appellant and his witnesses to that of the Respondent and his witnesses. Having believed those witnesses it is clear the words used by the Respondent were "I'm not taking instructions from a bloody paedophile" and repeating that "You're a paedophile. You're just a bloody paedophile". Mr Van Haaften and Mr Hastie, other taxi drivers, heard this and confirmed the Appellant's evidence.

[5] The Appellant said he requested the apology and further words were used saying that the Appellant was a paedophile, it could be proved and that he looked at paedophile sites on the internet. Another taxi driver, Mr Taylor, heard the same thing, although there was a gap between the two outbursts.

[6] In relation to the Appellant's computer, the Judge found there was adult material on it but that was all. He did not accept there was paedophilic material on the computer, and interestingly found the worst material on it was in the form of email attachments from the Respondent.

[7] Turning to damages, the Judge referred to a number of decisions and then came a passage described as "Comparable Cases". Following that the Judge

determined that an appropriate award would fall between two of the "comparable cases" and awarded $20,000.

Submissions

[8] Mr Withnall, on behalf of the Appellant, firstly submitted that the Judge failed to address and properly apply the principles applicable to the award of damages for defamation. He said that effectively the Judge had treated other decisions as a comparative exercise, as if he was dealing with a sentencing. He looked at those cases, found similarities or dissimilarities, and used that to award damages in this case. Mr Withnall submitted that was not in accord with proper practice.

[9] Secondly, Mr Withnall submitted the Judge failed to give sufficient weight to the aggravating features, including the rejection of the defence that the Respondent acted in response to abuse; the rejection of the evidence on factual issues; the Respondent's persistence with the defence of truth; the fact he had put pressure on witnesses to give evidence which was not in accordance with the facts and which was exaggerated; and the repetition of the defamatory allegations during trial.

[10] In relation to the third point, Mr Withnall submitted the learned District Court Judge in limiting the defamatory words proved as being limited to an allegation that the Appellant looked at paedophile sites on the internet, was acting contrary to the meanings pleaded and the words found to have been used by the Respondent.

[11] Next Mr Withnall submitted that the learned District Court Judge erred in not assessing damages on the basis there were two separate incidents of defamatory language about 30 minutes apart.

[12] The fifth ground, was that the Judge was wrong in holding the Respondent's refusal to retract and apologise was not an aggravating feature.

[13] The sixth ground was the Judge erred in finding the Appellant's initial attempt to resolve the matter by having the Respondent retract and apologise was a matter which reduced damages which might otherwise have been appropriate.

[14] Mr Withnall submitted that the Judge erred in his assessment of the relevance of *Hepinstall v Francken* to the quantum in the present case.

[15] It was also submitted the Judge erred in failing to attach any, or sufficient, weight to the Respondent's conduct between the defamatory utterances and the date of trial, which demonstrated the Respondent was motivated by malice and ill will and demonstrated a lack of contrition and determination to repeat defamatory allegations.

[16] For the Respondent Mr Andersen submitted no criminal conduct was alleged on the part of the Appellant and the Judge's finding meant all that was being considered was an allegation of looking at paedophile sites on the internet.

[17] Next he submitted that the maintenance of truth was not relevant to the assessment of damages, it was simply the failure on the part of the Respondent to prove it that tended to increase damages.

[18] Mr Andersen next submitted that there was no finding that the Respondent acted maliciously or deliberately when the Judge found at [52] "… I am not persuaded that he did". Mr Andersen submitted that malice was ruled out by the acceptance by the Court that the Respondent's comment reflected his belief as to the situation, even though that belief was not established.

[19] Next Mr Andersen submitted that the Judge did not accept that the Respondent had put pressure on witnesses to give untrue evidence.

[20] He rejected the first ground of appeal on the basis that the Judge had given a careful consideration to all relevant issues of damages, and that it was not improper to refer to the level of damages in other cases.

[21] In response to the second ground it was submitted that the Judge properly gave consideration to the aggravating features, the subsequent incident, and the plea of truth not being established. Mr Andersen submitted there were no other aggravating features.

[22] In relation to the third ground it is submitted that it was not available to the Appellant as the appeal was limited to the quantum of damages only, and the third ground of appeal relates to the substantive finding as to the nature of the defamation.

[23] In relation to the fourth ground, Mr Andersen relied on s 7 of the Defamation Act 1992 to submit that each publication of a defamatory statement gives rise to a separate cause of action, but in this case they were pleaded as one.

[24] In relation to the fifth ground, the Judge was correct not to treat the Respondent's refusal to retract and apologise as an aggravating factor because such action is necessarily an admission of defamation and is contrary to the assertion of truth.

[25] In relation to the sixth ground Mr Andersen submitted that the Judge in fact did not find that the Appellant's initial attempt to resolve the matter by having the Respondent retract and apologise was a matter which reduced damages. All the Judge did was take into account the willingness to receive an apology and retraction as having a bearing on the damages caused by the publication.

[26] As to the seventh ground, Mr Andersen submitted that the Judge did not directly compare the case to *Heptinstall v Francken*, but in any event he submitted that case was a more serious defamation.

[27] As to the eighth ground, he submitted there was no finding of malice by the Court, or any factual finding that would justify an inference of malice. Further, Mr Andersen pointed out that there was no appeal against the refusal of the learned District Court Judge to award exemplary damages.

Discussion

[28] It is appropriate to deal with the third ground first before turning to a general consideration of the principles applicable to awards of damages in defamation cases.

[29] In relation to that ground I accept the submission of the Appellant. The Judge clearly found, on credibility issues, in favour of the Appellant and his witnesses. While the second exchange overheard by Mr Taylor carried with it the limitation of viewing sites on the internet, it is quite clear the earlier exchange was not so limited. Having accepted that evidence it means the Judge accepted the following statements that were made at the beginning of the incident:

> "I'm not taking instructions from a bloody paedophile" and
>
> "You're a paedophile. You're just a bloody paedophile".

[30] What was said after the Appellant demanded a retraction and apology was:

> "I'm not apologising. I can prove you're a paedophile" and
>
> "You look at paedophile sites on the internet"

[31] In those circumstances it was not open to the Judge to find, as he did at [59] that the defamation was limited to a person who simply viewed sexual activity with children on the internet.

[32] Finally, in relation to this it is appropriate to say that Mr Andersen's submission there was no allegation of criminal behaviour is incorrect. Branding someone a paedophile is to allege that. Even if it was limited to an allegation of viewing paedophilic material on the internet that still amounts to a criminal offence, as counsel must be aware.

[33] I propose now to turn and consider the general principles relating to damages in defamation.

[34] Damages in defamation are awarded to compensate for injuries to the plaintiff's reputation, natural injuries to his feelings, and for grief and distress caused by the publication: *TVNZ v Keith* [1994] 2 NZLR 84 (CA). While such damages are at large, they are not limited to any pecuniary loss that can be specifically proved: *Rookes v Barnard* [1964] AC 1129. They are intended to vindicate a plaintiff to the public and provide compensation for the wrong done. In *Keith* it was said they are better viewed as a solatium than as a monetary recompense for harm measurable in money terms.

[35] It follows that as far as money can do the award of compensatory damages is to restore the plaintiff to the position he was in if the tort had not been committed.

[36] Compensatory damages may be increased to take into account the motives of a defendant in uttering the words complained of; the conduct before or after the proceedings; and such aggravated damages are meant to compensate the plaintiff for the additional injury, going beyond that which would have flowed from the words alone, caused by the presence of the aggravating factors: *Rookes*.

[37] The Courts recognise that damages in defamation can fall within a wide bracket: *Cassell & Co Ltd v Broome* [1972] AC 1027 per Reid LJ. There is a subjective element within the award of damages in defamation action which makes it difficult to gauge the right figure in any particular case. Nonetheless the Courts have found it possible to identify factors which can properly be taken into account in assessing damages. The seriousness of the defamation is, of course, always a relevant and important consideration.

[38] One of the most important factors in the assessment of damage is the effect of the defamation on the plaintiff's feelings: *McCarey v Associated Newspapers Ltd (No. 2)* [1965] 2 QB 86 per Person LJ at 104; *Cassel & Co Ltd v Broome* per Reid LJ.

[39] If a defendant has behaved in a way that has increased the injury to the plaintiff's feelings, flowing naturally from the publication of the defamatory words, it is appropriate to include an element of aggravated damages. This is a sum to be

awarded as a single sum, and those aggravated damages are intended as compensation for the plaintiff and not as a form of punishment of the defendant. Failure to apologise or an unsuccessful plea of justification or truth are among factors likely to increase damages.

[40] The manner of publication and the extent of circulation is always a powerful factor in the award of damages in a defamation case. The greater the circulation the higher the damages tend to be, although not necessarily in direct proportion. However, the Courts have recognised that even a limited publication may be extremely damaging, depending who it is made to.

[41] If a defendant has improper motives that may aggravate the damages, and while the honest belief of the defendant in the truth of what is published does not itself provide a defence it may be a relevant factor in the assessment of damages. For example, a defendant may wish to rely on his own bona fides, or other circumstances, to reduce damages which would otherwise be appropriate.

[42] The defendant's words or actions between the date of publication and trial can be relevant as factors aggravating damages, whether they indicate an improper motive at the time of publication or not. Examples of this are the persistence in attack on the plaintiff (*Greville v Wiseman* [1967] NZLR 795); an uncompromising reply when invited to mitigate damages (*News Media Ownership Ltd v Finlay* [1970] NZLR 1089 (CA)); and a failure or delay in publishing a correction (*Smith v Harrison* (1865) 1 F & F 565).

[43] Although a defendant's failure to apologise is not normally evidence of improper motive, it may in some cases be a factor that can be properly considered as tending to aggravate damages: *Matheson v Schneideman* [1930] NZLR 151, *Baker v Australia & NZ Bank Ltd* [1958] NZLR 907.

[44] While an apology does not provide a defence to an action for defamation, unless it is wholly inadequate or insincere or made at a late stage it is a factor to be taken into account in assessing damages.

[45] The fact that a defendant has entered a plea of truth (formerly known, of course, as justification) but has failed to prove it may be taken into account as tending to increase damages: *Greville v Wiseman*. However, if the defendant has acted in a bona fide and justifiable manner in the circumstances as they are known to the defendant that should not be allowed to aggravate damages: *Singleton v Ffrench* (1986) 5 NSWLR 425 (CA).

[46] It is appropriate to take into account the conduct of the defendant in assessing damages. This may be at a time material to the proceeding, but extends to the conduct of the trial itself: *Quinn v TVNZ Ltd* [1995] 3 NZLR 216.

[47] This is appeal by way of rehearing. Where it is an appeal from an award by a Judge alone it is not required to be considered in the same way as an appeal from an award by a jury. In *Truth (NZ) Ltd v Bowles* [1966] NZLR 303 (CA) at 308 the Court said:

> … This is an appeal from an award by a Judge alone, and therefore the case does not require to be considered in precisely the same way as would be necessary if this was an appeal from an award of damages by a jury …

[48] The House of Lords addressed this issue in *Davies v Powell Duffryn Associated Colleries Ltd* [1942] 1 All ER 657 and said at 664-665:

> No doubt an appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages. Such a finding differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases. There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case (*Mechanical & General Inventions Co v Austin*). Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an

> ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ, in *Flint v Lovell*, at p 360. In effect, the court, before it interferes with an award of damages, should be satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

[49] The authorities consider the relevance of awards in other defamation cases in light of instructions to juries. However, as a matter of principle, there is no reason why these would not apply in an action before a Judge alone.

[50] In New Zealand the Court of Appeal in *Quinn* took a more cautious approach than the United Kingdom. One of the reasons is that there are fewer defamation cases which can benchmark awards. The Court did, however, indicate there was nothing in New Zealand to preclude the Judge from providing guidance to the jury by referring to "investment or buying power with a practical comparison", suggesting a range of figures is also open to a Judge in addressing a jury.

[51] While a Judge on appeal should be slow to interfere with an award of damages, in this case I have reached the conclusion that the Judge has carried out a comparable exercise as if it was a sentencing matter. He has also strayed into error in limiting the defamation to someone looking at paedophilic images on the internet. His own findings make it plain that as well as that the defamation consisted of describing the Appellant as a paedophile. That must be given its objective meaning to normal, reasonable persons, i.e. an adult who is sexually attracted to children or indulges in sexual acts with children. Viewed in that light, even allowing for the limited publication, the award is significantly insufficient as the allegation is one of the most reprehensible criminal behaviour.

[52] Mr Andersen's submission that the Appellant was only alleging that the Respondent said he was a person who looked at paedophile internet sites is not borne out by the evidence. At page 115 of the bundle it is clear that the Appellant's reply is non committal and the Judge's acceptance of the Appellant's, and his witnesses', evidence makes it clear what words were used by the Respondent.

[53] The Judge has considered aggravating features, but in my view has not given sufficient weight to some of them, in particular the efforts made to pressure a witness to say inaccurate things. That, in my view, is a serious aggravating feature and would increase damages.

[54] In relation to ground five, in my view, in this case it is somewhat equivocal and properly a matter for discretion. The Judge was not wrong to not take it into account, but equally if he had chosen to do so he could have taken it into account.

[55] In my view, the Respondent's submission that the Appellant in seeking an apology somehow reduces damages is simply incorrect. In this case the Respondent refused to retract and apologise, he repeated the defamation, and persisted with a defence of truth and conducted the trial on that basis. While an apology may have ended the matter, if genuinely and sincerely made, it is not proper to take it into account in assessing the level of damages suffered where someone has been called a paedophile.

[56] The allegation in *Heptinstall v Francken* was of personal misconduct, not criminal misconduct as here. In my view, the level of defamation is much higher in this case and the submission of the Respondent that the defamation in *Heptinstall* was more serious because the potential for the defamatory statements was to adversely affect the plaintiff's employment is not correct. While that is serious, what happened in this case was more serious in my view. It is iniquitous to compare two serious defamations, but the reality in this case is the Respondent made an allegation accusing the Appellant of serious criminal behaviour. It is criminal behaviour that is viewed with total disgust and disdain by the community.

[57] The final matter relating to the conduct between the date of the defamatory utterances and trial, is something the Judge could have taken into account but was a matter for his discretion.

Conclusion

[58] In my view, the grounds of appeal one, three, six and seven are strong. The term "paedophile" is to be read under its normal meaning as referred to in [51].

[59] However, I do not think the level of damages contended for by Mr Withnall is sustainable. While there are significant aggravating features that are proper to take into account, the limited nature of the publication must also be considered. Certainly there were other taxi drivers who knew the Appellant who heard it. Some passing travellers may also have heard the comments, but the evidence in that regard is somewhat ambivalent.

[60] Applying the above principles to this particular case it is seems to me an appropriate award is one of $40,000. Accordingly the appeal is allowed and the Judge's award of damages of $20,000 is replaced by $40,000.

[61] Memoranda as to costs are to be filed within ten working days of the handing down of this decision.

Solicitors:
O'Driscoll & Marks, Dunedin for Appellant
(Counsel – C Withnall QC, Dunedin)
L Andersen, Dunedin – counsel for Respondent
CC:
Judge MacDonald