IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-7325

BETWEEN	THE ATTORNEY GENERAL OF NEW ZEALAND Appellant
AND	CHARLOTTE KUIA WRIGHT Respondent

Hearing: 18 May 2007

Appearances: A M Powell for Appellant
T Beach for Respondent

Judgment: 31 August 2007

JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 31 August 2007 at 11am pursuant to Rule540(4) of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

Crown Law Office, Wellington
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[1] On 30 October 2006, in a judgment given in the District Court, Auckland, Charlotte Wright was awarded $35,000 damages. The police had defamed her, the Judge held, when they had her photograph published in a newspaper over a statement implying, quite incorrectly, that she was guilty of cheque fraud.

[2] On this appeal the Attorney General contends that the Judge was wrong to hold, under s 19 of the Defamation Act 1992, that the police 'took improper advantage of the occasion of publication', and to deny them the benefit of qualified privilege. To have lost the privilege, the Attorney General contends, the police would have had to be more than careless, even grossly careless. They would have had to be consciously reckless.

[3] The Attorney General also challenges the award contending that the Judge failed to take sufficient account of two mitigating factors that s 29 makes mandatory, the prompt retraction published and Mrs Wright's delay in bringing her action.

Context

[4] On Tuesday 28 August 2001 a photograph of Mrs Wright, a Maori woman in her mid 60s, who had lived all her life in Kaitaia, was published in the twice weekly newspaper, the Northland Age. It was a photograph taken by a security camera in the Westpac Trust Bank, Kaitaia, on 6 August 2001. The headline read 'Needing a name'. The article beneath the photograph said this:

> Police are keen to hear from anyone who can name the woman pictured above, captured on security camera at the Kaitaia Branch of Westpac Trust and wanted in connection with the presentation of a stolen cheque on July 31. Anyone who can help is asked to contact Constable [M] at the Kaitaia Police Station, phone 4080400, or leave information anonymously if preferred, on the 24 hour Crime Line answerphone 408-8768.

[5] In this the police were completely mistaken. Mrs Wright had not presented any stolen cheque. Immediately the article was shown to her by her daughter she saw the constable named, who has since left the police force. She demanded that he correct the mistake in the next issue. She wanted her photograph published a second

time, this time with a retraction. The constable arranged that with the editor leaving to him how that was to be achieved.

[6] On Thursday 30 August the photograph was again published by the Northern Age, this time under the headline 'Totally in the clear'. The text said this time:

> The Westpac Trust security camera photograph published on Tuesday (and again above) shows Kaitaia woman Charlotte Wright, who the police say had no involvement whatsoever in the offence which prompted publication. The photograph was supplied to the Northland Age in an effort to identify a person who allegedly presented a stolen cheque, police saying they were totally satisfied that the person portrayed was in no way connected with that or any other offence.

[7] The two publications, the Judge accepted, were of equal prominence, and though there was some suggestion that the first had also been published on the internet, he found no evidence of that.

[8] In between the two publications, the Judge accepted, there was a family hui at Mrs Wright's marae to celebrate her daughter's graduation and Mrs Wright was discomforted even though the manager of the Westpac Trust Bank, Kaitaia, brought flowers, chocolates, wine and an apology. The Judge accepted also Mrs Wright's evidence that, between the two publications, a local supermarket refused to accept from her a pre-signed cheque from her employer. She was kept waiting in the presence of other shoppers. She abandoned her trolley at the checkout and left the store. People continued to mention the offence attributed to her, the Judge accepted. Her grandson asked if she was a thief.

[9] Mrs Wright received no apology from the police or the newspaper. She consulted a local lawyer, who did nothing. She did not press him. She became caught up in a bereavement and a troubling family issue. She suffered depression, the Judge accepted. She moved from Kaitaia to Auckland. It was not until early 2004, when she returned to Kaitaia to a family gathering, that she realised the extent to which she remained embarrassed and humiliated.

[10] Mrs Wright brought her action in September 2005, out of time but unopposed. The Attorney General accepted that the publication was defamatory and

pleaded the defence of qualified privilege, the defence that the Judge held the Attorney General was entitled to invoke but not be shielded by.

[11] The publication, the Judge held, was made on an occasion of qualifying privilege. But, he held also, the privilege had been abused. The police had been so grossly negligent, he held, that they were recklessly indifferent as to the truth. That deprived them of the privilege and though there had been a retraction, they had not apologised promptly. The hurt to Mrs Wright's reputation could only be assuaged by an award of $35,000 damages.

Qualified privilege

[12] There is no issue on this appeal that the Judge was right to conclude that the police were entitled to invoke qualified privilege. To apprehend offenders they must be able to enlist the media to reach out to the public for help and on this occasion, the Judge held, the mistake complained of apart, they acted properly. For my part, I agree.

[13] The Attorney General also carried the Judge as to a central consideration. The Judge accepted that the constable never turned his mind to whether the photograph was of the wrong person. The constable disavowed even considering that and the Judge accepted his evidence. The constable, the Judge held, had no reason to publish 'a photograph of questionable provenance'. The Judge did not accept, however, that this meant that Mrs Wright ought to be denied, in the greater public interest, an award of damages.

[14] In this, the Attorney General contends, the Judge departed from the logic of his own finding of fact. Having found, if only negatively, that the constable believed that the person in the photograph published, Mrs Wright, was the correct person, in the sense that he did not advert to the possibility that she was the wrong person, the Judge ought to have concluded, the Attorney General argued, that however grossly careless the constable was, he was not so irresponsible as to deprive the police of qualified privilege.

[15] On this appeal, the Attorney General contends, s 19 of the Defamation Act 1992 was intended to codify the existing law, then classically expressed by Lord Diplock in *Horrocks v Lowe* [1975] AC 135, 150. Qualified privilege could only be lost when it was misused; principally when the one relying on it lacked any honest belief in the truth of what was said. Such a belief equated to malice at common law and could extend to recklessness. But, as Lord Diplock said, at 150, a careless person, even one who was grossly careless, is not to be deemed reckless:

> If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true.

[16] The Attorney General's central proposition then was, and remains, that for the police to lose the benefit of qualified privilege under s 19 they must either have acted with express malice, as to which there was no question, or recklessly, 'without considering or caring', whether what they published was true. The dichotomy Lord Diplock identified, the Attorney General contends, means that for the Judge to have concluded that the constable was reckless he would have had to be satisfied that the constable adverted to the risk that Mrs Wright was not the correct person and been indifferent. But, as the Judge accepted, and this is to be assessed subjectively, the constable never turned his mind to the issue. However negligent, even grossly negligent, he was, he acted inadvertently. He never turned his mind to the risk.

[17] The Judge's error in law, the Attorney General contends, lay in assuming that in *Lange v Atkinson* [2000] 3 NZLR 385 the Court of Appeal had held no longer to be definitive, when determining whether qualified privilege is to prevail, what the Judge described as the 'bright line of distinction between what is traditionally reckless as opposed to merely careless behaviour'. I cannot agree with that submission. The Judge, I consider, stated the effect of the Court's decision correctly and for the reasons he gave.

[18] I see no reason on this appeal to trace what the Court of Appeal then held to be the law to its sources. As Professor Burrows says in *Lange v Atkinson 2000:*

Analysis 2000 Law Review 389, 390, in its decision in 2000 the Court of Appeal modified significantly its earlier decision in 1998 and, as he says also, at 396-7:

> While the Court of Appeal affirms that recklessness as to truth amounts to an improper purpose not carelessness alone, carelessness goes to recklessness or indifference to the truth, and it is no longer the case, as Lord Diplock said, that carelessness, impulsiveness or irrationality may not amount to malice. In a serious case they may at least be evidence of impropriety.

[19] The purpose of qualified privilege, the Court of Appeal said, at para 42, is to safeguard public disclosure and discussion that is responsible, not the converse, and whether the privilege has been used improperly in any case can never be answered abstractly. Malice at common law is a flexible concept as is the way it is now embodied in s 19, and that is precisely because each case tellingly differs.

[20] The Court elected, at para [44], not to take literally the dichotomy Lord Diplock makes between indifference, in the sense of recklessness, on the one hand, and carelessness, impulsiveness or irrationality on the other. The Court did find helpful, at para [46], Lord Diplock's description of recklessness – publishing defamatory material without considering or caring whether it was true – and again distinguished between reckless indifference to truth and carelessness as to truth. But the Court saw both as going to the underlying issue whether the one who publishes defamatory material has acted with 'the degree of responsibility which the occasion required'. In this aspect of its analysis the Court said this:

> Indifference to truth is, of course, not the same thing conceptually as failing to take reasonable care with the truth but in practical terms they tend to shade into each other.

[21] The Court said next, at para [47], that the nature of the occasion and the publication will be decisive as to what constitutes recklessness; and equated with that 'a cavalier approach to the truth'. Critically in this aspect of its analysis, the Court said this:

> If it is reckless not to "consider or care" whether a statement be true or false, as Lord Diplock indicated, it must be open to the view that a perfunctory level of consideration (against the substance, gravity and width of the publication) can also be reckless. It is within the concept of misusing the occasion to say that the defendant may be regarded as reckless if there has been a failure to give such responsible consideration to the truth or falsity of

> the statement if the jury considers should have been given in all the circumstances.

[22] Finally, in para [48], the Court stressed again that the stakes may be so high that the duty resting on the publisher may 'come close to a need for the taking of reasonable care'. When the stakes are not so high 'a genuine belief in truth after relatively hasty and incomplete consideration' may not be fatal.

[23] In this analysis the Court of Appeal allows for the very conclusion the Judge reached. The constable may not ever have considered the possibility that the photograph published could have been of the incorrect person, but why he did not almost defies belief.

[24] The constable knew the date on which the offence suspected was said to have happened, 31 July 2001. He had a description of the person said to be responsible: 'approx 5', young, 20ish, hair pulled back, bleached – starting to grow out, Maori girl.' Yet the photograph he passed to the editor of the newspaper to publish, selected not by him but by someone else, was plainly marked with a quite different date, 6 August 2001. The person depicted, Mrs Wright, a mature woman, did not begin to correspond with the description he had. Others also made errors, but his were decisive.

[25] The Judge went too far when he concluded, tentatively, that the constable may have been reckless in Lord Diplock's narrower sense. That is inconsistent with his finding that the constable did not advert to the risk. The Judge was fully entitled to conclude that the article the constable caused to be published on 28 August 2001 was so potentially harmful that to retain qualified privilege the police had to have acted with a commensurate level of care. He was no less entitled to conclude that the constable was so grossly negligent as to be indifferent to the truth and that the benefit of the privilege ought to be denied to the police.

Damages award

[26] In appealing the award of damages, the Attorney General accepts that any award is discretionary and that a court on appeal will only hesitantly interfere.

Though it may be more willing to do so in a case such as this where the award is made by a Judge as opposed to a jury. The award must still be justifiable, the Attorney contends, when set against the functions that such an award serves: consolation for the distress suffered, repairing the harm to reputation and vindicating reputation. And when measured against those purposes and the s 29 considerations the award was excessive. I am unable to agree.

[27] First, the Attorney General contends, the Judge failed to take into account that the defamation was unintentional and that this had to be less distressing to Mrs Wright than one that was intended. She had every reason to know that the constable acted out of mistake. To my mind, however, in this context, that is quite irrelevant and misstates the position.

[28] This was an occasion on which the police had to act with great care. Engaging the public through the media can be a very potent means of apprehending offenders. It is an equally potent way of damaging the reputation of the innocent. The police must be confident for good reason that those whom they identify as having committed offences, or as possible witnesses, are the one or the other. If they act as carelessly as the constable did here, so carelessly as to be recklessly indifferent to the truth, the one defamed must be entitled to real redress.

[29] Secondly, the Attorney General contends, the Judge did not take sufficient account of the two matters which s 29 makes mandatory, the first of which was that there was a retraction, it was unequivocal, it was prompt and it was given as much prominence as the publication it corrected. The Judge did, however, see that as mitigating. But, he found, the retraction did not say that the publication was entirely mistaken. It left open the possibility that there had been grounds for suspicion. Nor did it contain any word of apology. The earliest apology came in excess of three years later. These reservations were open to him.

[30] Thirdly, the Attorney General contends, in assessing the effect of the delay under s 29, the Judge failed to take into account that as time passed any harm to Mrs Wright's reputation must have reduced as must the effect on her. The Judge did take into account, however, that very considerable delay and did attribute it principally to

Mrs Wright. But he also took into account why she had delayed and was at pains to say that she had not been cynical, opportunistic or mercenary. He might also have added, because it is plain from his decision as a whole, that her distress did not diminish over time. If anything it compounded.

[31] Finally, in fixing his ultimate award, the Attorney General says, the Judge was unduly influenced by the award of $40,000 damages made in *Court v Aitken* (HC Dunedin CIV 2005-412-000519 31 March 2006, Hansen J). However, the Judge distinguished that case from this. What moved him principally was that Mrs Wright's honesty had been impugned throughout the area in which she lived and authoritatively by the police. If anything, he held that called for a greater award. The award he made was reduced by the s 29 factors.

[32] Once again, I consider this aspect of the Judge's decision was entirely open to him and for the reasons he gave.

Conclusion

[33] The appeal is dismissed. Mrs Wright is entitled to costs, as I should have thought at scale 2B. If costs cannot be agreed Mrs Wright is to file her memorandum within 10 working days of the date of issue of this decision and counsel for the Attorney General within the succeeding 10 working days.

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P.J. Keane J