IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV-2011-454-000198

BETWEEN	ROGER JAMES WOODGATE Appellant
AND	MARGARET ANNE HARRIS Respondent

Hearing: 4 July 2011

Counsel: H C McDouall for Appellant
D M Woodbridge for Respondent

Judgment: 12 July 2011

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 11.45am on the 12th day of July 2011.

RESERVED JUDGMENT OF GENDALL J

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[1] This is an appeal against a decision of Judge G M Ross, delivered in the District Court at Palmerston North on 25 February 2010 declining to strike out defences pleaded by the respondent (Ms Harris) in the defamation proceedings brought against her by the appellant (Mr Woodgate).

[2] The five defences pleaded by Ms Harris were:

- under the Limitation Act;
- there had been consent to publications by Mr Woodgate;
- honest opinion;
- absolute privilege; and

- qualified privilege.

[3] The defence of absolute privilege is not maintained. Mr Woodgate applied to strike out the Limitation Act, honest opinion and qualified privilege defences. Judge Ross struck out the defence of qualified privilege and no challenge is made to that. He declined to strike out the defences pleaded under the Limitation Act and of honest opinion. It is against those findings that the appeal is brought.

Background

[4] When Richard John Bingham, 7th Earl of Lucan (Lord Lucan) disappeared on 8 November 1974 on the night his children's nanny was murdered, he could never have contemplated that, 33 years later, two neighbours in a quiet suburb of Bonnie Glenn in rural Rangitikei would become embroiled in a defamation case which touched upon the belief of one neighbour that the other was in fact the British peer. Lord Lucan had become infamous as a result of his disappearance and because an inquest or coroner's jury had named him as the murderer of his children's nanny. Following his disappearance he was legally declared dead in 1999. So that his apparent presence in rural Rangitikei would have been bound to attract considerable interest.

[5] Ms Harris and Mr Woodgate have not had an amicable or tranquil relationship. The reasons do not matter. But in early 2007 Ms Harris saw a photograph of Lord Lucan in a magazine and she said that she formed the belief that Mr Woodgate was in fact the notorious English peer alive and well in New Zealand. She contacted a New Zealand weekly newspaper, the New Zealand Truth (NZ Truth) and spoke to a reporter about her neighbour being Lord Lucan. On 26 April 2007 NZ Truth published comments which were attributed to Ms Harris, and which are not denied:

> I saw a photo of him in a magazine. It was obvious. He hadn't changed a skerrick in 33 years. He's definitely Lord Lucan. Somebody needs to be told.

[6] Other media groups latched onto the "story". The Dominion Post Newspaper (Dominion Post) published an article on 9 August 2007 attributing certain comments to Ms Harris, as did Television New Zealand (TVNZ), the British Broadcasting Corporation (the BBC) and the Daily Telegraph, an English newspaper. It is pleaded by Mr Woodgate that a number of national and international media entities published or broadcast reports of Ms Harris' claim or belief as to the identity of Mr Woodgate.

[7] Mr Woodgate's original statement of claim is dated 22 April 2009 and was filed on 24 April 2009. In it he sued Ms Harris but not the NZ Truth. It alleges that she published or caused to be published the defamatory matter by falsely and maliciously stating that he was in fact Lord Lucan. That pleading contained one cause of action. He claimed general damages of $100,000 against her.

[8] Later Mr Woodgate amended his statement of claim, still suing Ms Harris as the only defendant but alleging that she published or caused to be published the defamatory matter in NZ Truth on 26 April 2007; in the Dominion Post on 9 August 2007; and in various multiple publications of other international news and media agencies. There are further causes of action in defamation based upon comments published and attributed to Ms Harris in the Manawatu Standard, the Dominion Post and TVNZ on other subsequent occasions.

[9] Ms Harris admits in her pleadings that she told NZ Truth reporter that her neighbour was Lord Lucan but denied doing so falsely or maliciously, or that it had a defamatory meaning. She denied she caused it to be published later on 26 April 2007. She admits that the appellant is not in fact Lord Lucan. She denies that comments published by other newspapers and media bodies, and attributed to her, were made falsely and maliciously and carried a defamatory meaning. She asserts that she did not publish or cause their publication.

The decision of the District Court

[10] Judge Ross struck out the pleaded defence of qualified privilege. He was right to do so. It was not a tenable defence that publication to a reporter at NZ Truth (or later republications if she was responsible for them) were made pursuant to

interest or duty to report that belief to a national newspaper. There was no duty to communicate that information or belief to someone who did not have a correlative duty to receive it. The respondent does not cross-appeal against that finding.

[11] In respect of the Limitation Act defence pleaded, the Judge correctly observed that it was the cause of action which related to publication to NZ Truth (and its republication) to which a limitation defence might apply. The Judge referred to the situation being "novel" given that the print publisher NZ Truth was being bypassed as a party to be sued and rather that it was Ms Harris the original publisher of the information to them who was the defendant. His reasoning appears to be that the cause of action possibly arose and was completed at the time of the oral communications by Ms Harris to the reporter, which on the face of it were more than two years before the statement of claim was filed.[1] He saw the republications by NZ Truth as being relevant only to quantum of damages, or part of the damages from the original slander, and not from, as is more often the case, actual publication in a newspaper.

[12] The Judge went on to conclude that a possible cure for a plaintiff might be seeking relief under s 4(6B) of the Limitation Act 1950 where a Court may grant leave to bring a defamation action at any time within six years from the date upon which the cause of action accrued, the Court having a discretion to grant leave where it considers delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law, so that such an application might be brought in respect of the first cause of action arising from the communication to NZ Truth.[2]

[13] So he declined to strike out the Limitation Act defence.

[14] In respect of the defence of honest opinion the Judge concluded that he took from the pleadings and submissions that Ms Harris' opinion:[3]

> was strongly held, but it has to be an honest opinion based on true facts. She certainly understood certain facts to be true. In likening the plaintiff to Lord Lucan and believing him to be the same, she has clearly touched upon

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1 *Woodgate v Harris* DC Palmerston North CIV 2009-034-24, 25 February 2010 at [13].
2 At [15].
3 At [20].

> an issue of public interest, curiosity, and even after all these years, notoriety. Only at a substantive hearing can it be determined if the defendant went beyond the bounds of the defence of honest opinion. For the present, the plaintiff cannot establish that this defence is so clearly untenable that she could not possibly succeed in pleading it.

Discussion

Limitation issues

When did the cause(s) of action accrue?

[15] The cause of action in defamation (whether liable or slander) accrues when a plaintiff can establish that a defamatory statement has been made, it was about a plaintiff, and it has been published by a defendant. Assuming that remarks made by Ms Harris to the NZ Truth reporter are defamatory then such defamation is actionable without proof of special damage.[4] Clearly there was publication to NZ Truth by Ms Harris passing information to it. Repeated publications by the newspapers created causes of action against those publishers. Do they create separate/new causes of action against Ms Harris?

What is the liability of the initial publisher of a defamatory statement for republication of it by others?

[16] Generally speaking, where a person to whom publication of defamatory matter is made, and republishes that on a different occasion, the original publisher would not be liable to a plaintiff for repetition of that to another person.[5] But the original publisher will be liable if he/she authorised the repetition by another person or intended that that would occur.[6] An original publisher is also responsible for republication if the repetition was foreseeable as a natural and probable consequence of the original publication.[7] Individual cases will, however, depend on their own facts and repetition of a defamatory statement by someone else can sometimes be

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4 Defamation Act 1992, s 4.

5 *Weld-Blundell v Stephens* [1920] AC 956 (HL).

6 *Speight v Gosnay* (1891) 60 LJQB 231 (CA) at 232; *Whitney v Moignard* (1890) 24 QBD 630 at 631.

7 *Slipper v British Broadcasting Corporation* [1991] QB 283 (CA); *McManus v Beckham* [2002] 1 WLR 2982 (CA).

treated as an intervening act for which the original maker of the statement is not responsible.

[17] It is clear, however, that if a person orally communicates defamatory words to a reporter for the purpose of having those words published in a newspaper that person will be liable for such publication.[8] The tests for liability for such republication are:

(1) first, the maker of the statement authorises the repetition; or

(2) second, it can be inferred from the surrounding that the maker of the statement anticipated and wished the words to be repeated in that form; or

(3) third, the repetition was foreseeable or a natural and probable consequence of the publication.

[18] The original publisher who authorised republication may be sued jointly with the republisher or alternatively, he/she may be sued in respect of the original publication and may be liable for the damage flowing from the republication.[9]

[19] In this case counsel for Ms Harris contended that because the initiating alleged defamation took place more than two years before the proceedings were filed, republication by others relates only to issues of damages and their remoteness, and not to liability. So, he argued that all elements of the cause of action had already existed and that the cause of action is statute barred. He contends that it is only the amended statements of claim that pleads several causes of action, being alleged "republications", but it does not plead a separate cause of action arising out of the alleged slander when Ms Harris spoke to NZ Truth. It is pleaded that that NZ Truth publication occurred on 26 April 2007.

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8 *Adams v Kelly* (1824) 171 ER 977; *R v Cooper* (1946) 8 QB 533.
9 *Cutler v McPhail* [1962] 2 QB 292.

[20] Counsel also argued that the action was not brought until the filing of the amended statement of claim on 29 June 2009, and accordingly that the "new" cause of action is barred by the Limitation Act, in any event.

[21] That would rest on a finding that the relevant cause of action asserted by Mr Woodgate was "fresh". A "fresh" cause of action may not be included in an amended statement of claim if it is statute-barred.[10] That provision is necessary because of the technical rule that, for limitation purposes, the new cause of action is deemed to have been commenced at the time that the proceeding was issued, not when the new cause of action was added to the claim.[11] The test for whether or not a cause of action is "fresh" is set out in *Chilcott v Goss*.[12] Essentially the test is whether the amended claim pleads "matters of fact or questions of law, or both, different from what have already been raised"; that test being a question of degree.[13]

[22] What is required to comprise the cause(s) of action by Mr Woodgate against Ms Harris involves consideration of a significant number of cases which deal with the responsibility of a slanderer for damages which might later arise through authorised (or for that matter unauthorised) republication of the defamatory matter.

[23] For example, in *Slipper v British Broadcasting Corporation* Stocker LJ said:[14]

> In a defamation case where there has been republication the question whether or not there has been a breach in the chain of causation inevitably arises but such cases are not in a special category related to defamation actions but are examples of the problem and will fall to be decided on general principles and in light of their own facts as established ... In this case, therefore, the questions raised ... are ...
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> (i) Did the [republication] reproduce the sting of the libel?
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> This is a question of fact for the jury.
>
> (ii) Did the defendants invite such [republication?]

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10 High Court Rules, r 7.7(2)(a).

11 McGechan on Procedure at [HR7.77.06], citing *Warner v Simpson* [1959] 1 QB 297 (CA) at 321-322.

12 *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 273.

13 Ibid.

14 At 296.

> The answer to this question depends upon the facts concerning all the circumstances in which the preview was given to the press and, again, is a matter of fact for the jury.
>
> (iii) Did the defendants anticipate that such [republications] would repeat the sting of the libel?
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> It is at this point that the issue of natural and probable consequence or foreseeability arises. In my opinion this is a question of remoteness of damage and not liability and raises an issue of fact for the jury. ... I would go further and say that the matter cannot be resolved without the findings of fact by the jury ... This includes the question of whether or not it was foreseeable or a natural and probable consequence of the invitation to [republish] and that such [republication] would include the sting of the libel.

[24] Counsel for Ms Harris referred to a passage contained in *Gatley on Libel and Slander*[15] referred to in *McManus v Beckham*:[16]

> Where a defendant's defamatory statement is voluntarily republished by the person to whom he published it or by some other person the question arises whether the defendant is liable for the damage caused by that further publication. In such a case the plaintiff may have a choice: he may (a) sue the defendant both for the original publication and for the republication as two *separate* causes of action, or (b) sue the defendant in respect of the original publication only, but seek to recover as a consequence of that original publication the damage which he has suffered by reason of its repetition so long as such damage is not too remote. The cases do not always distinguish clearly between the two situations and in many cases it will make no practical difference whether the defendant's liability is based upon one rather than the other. ... There may also be differences between the two courses of action for other purposes, for example release or limitation. (Emphasis added)

[25] In *McManus v Beckham* the cause of action was against Victoria Beckham solely for her alleged slander as the original publisher only. The plaintiffs sought to recover damages for loss caused by that original publication and republication. Counsel for Ms Harris submitted that because Mr Woodgate had chosen to initially sue in respect of the original publication only, seeking to rely upon consequent republications as aggravating the damage, the latter only went to damages and did not give rise to separate causes of action. Therefore, he submitted, the cause of action was statute barred. He acknowledged that the limitation defences, at the moment, only apply in respect of the original statement to NZ Truth but advised that

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15 *Gatley on Libel and Slander* (9th ed, Sweet and Maxwell, London, 1998) at [6.30].

16 At 2989.

it was proposed to amend the statement of defence to raise limitation defences also as against "NZ Truth's" and other actual publications.

[26] To the contrary, counsel for Mr Woodgate contends that the multiple separate causes of actions have been pleaded in the amended statement of claim. In any event, and more importantly, he said that a cause of action does not arise until all its essential elements existed, with an essential element of the cause of action being Ms Harris either authorised the republication or it could be inferred that she anticipated and wished that it be repeated, so that repetition was foreseeable and a probable consequence of her initial publication. So, he argued that until there had been such republication the cause of action against her had not fully accrued.

[27] Whether or not republication consequences are relevant only to the question of damage and its remoteness, or as to the liability of a defendant for that republication, I think may depend upon whether there was authorisation of republication or anticipation or wish that the words be repeated. This is because, originating from *Adams v Kelly* where what was published by a newspaper followed upon what a defendant slanderously said to the reporter for the purpose of such publication, was to be considered as being published by the defendant. It would seem to follow that an essential part of the cause of action against the plaintiff, not being sued separately in slander, is that she authorised or it could be inferred that she authorised, the later publication itself. So the cause of action may not be complete until such publication occurs as a consequence of her authorisation (express or implied).

[28] It seems as though Judge Ross was of the view that the republication only went to issues of damages and not to a cause of action, but I am not so sure that this is the case. It is true that libel and slander are actionable without proof of special damage, but the liability for a republication may well only arise or when it occurs. That simply illustrates that there is room for debate and argument about this. It is an intricate matter no doubt arising because the appellant has chosen only to sue Ms Harris as an individual respondent.

[29] Likewise, the question of a "first" cause of action being included, or not, in the amended pleading (see [20]) remains debatable.

[30] The well known criteria for striking out need not be repeated here. They are summarised in *Attorney General v Prince*[17] endorsed by the Supreme Court in *Couch v Attorney-General*.[18] I do not think that the limitation defence ought to be struck out summarily at this stage because although it is possible, or even probable that such defence may not succeed, where the law is confused or developing the Court should not strike out a defence. The case is not so clear that the defence must surely fail.

[31] As I have said, a trial Judge might well find that the causes of action did not finally accrue until the later republication relied upon. But that is a finding that is better to be made after the Judge hears all the evidence and decides particular factual issues. So even though I may not be fully in agreement with the reasons given by Judge Ross I would not differ his from his conclusion that this defence as pleaded in the statement of defence to the amended statement of claim should be struck out.

The defence of honest opinion

[32] Prior to the Defamation Act 1992 this defence was known as "fair comment". The defence is established where an honestly held opinion was expressed by the defendant based upon true facts.[19] The essence of the defence contained in ss 9 – 12 of the Defamation Act remains the same, although there are some changes of detail relating to concepts of malice, corrupt motive and news media defendants.

[33] The opinion needs to give some indication of the facts upon which the commentator is making comment or expressing an opinion.[20] The subject matter must be indicated with sufficient clarity to justify comment being made. A lack of

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17 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).
18 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
19 *Silkin v Beaverbrooke Newspapers Ltd* [1958] 1 WLR 743 (QB); *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 (CA) at 595.
20 *Kemsley v Foot* [1952] AC 345 (HL) at 357.

linkage between the opinion and the facts on which it is based is a factor which may support a conclusion that the offending material is in fact not comment.[21]

[34] Further, the defence of honest opinion will not protect a defendant if he/she is commenting on things that never happened or which they have got wrong. So "the commentator must get his basic facts right".[22] But s 11 of the Defamation Act provides where publication consists partly of statements of fact and partly of statements of opinion, a defence of honest opinion will not fail merely because the defendant does not prove the truth of every statement of fact. If the opinion is found to be genuine opinion having regard to:[23]

> (a) Those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or
>
> (b) Any other facts that were generally known at the time of the publication and are proved to be true.

[35] The defence of honest opinion is only available in relation to statements which are expressions of *opinion* and not defamatory statements of fact. It must appear to a reasonable person reading or hearing the passage complained of that the author is merely presenting his or her comment or opinion on the facts in question and is not purporting to put forward another fact.[24] In this case counsel for Mr Woodgate contends that Ms Harris' comment that Mr Woodgate was Lord Lucan is a statement of fact and not opinion and cannot be subject to the defence of honest opinion. In the end, however, it is the presentation and context which is crucial as to whether a statement is or is not an expression of opinion.[25]

[36] An unsupported statement may sometimes be classified as an assertion of fact rather than a statement of opinion and a passage which intermingles fact with comment runs the risk that a Court will read it as a series of assertions of fact.[26] Further, a statement which is plainly one of fact cannot be transformed into one of

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21 *Channel 7 Adelaide Pty Ltd v Manock* [2007] HCA 60, (2007) 241 ALR 468 (HCA).
22 *Jeyaretnam v Goh Chok Tong* [1989] WLR 1109 (PC) at 1113, *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at 773.
23 Defamation Act 1992, s 11.
24 *Templeton v Jones* [1984] 1 NZLR 448 (CA) at 455.
25 *Mitchell v Sprott* at 772.
26 *Mitchell v Victoria Daily News* (1944) 60 BCR 39 (BCSC).

opinion merely by prefacing it with the words "in our judgement". However, a statement of opinion may be constituted by a conclusion or inference of fact drawn from the primary facts upon which the commentator is relying.[27] Whether or not the statement is one of opinion constituted by an inference of fact or whether it is a further assertion of fact is not an easy distinction.

Is the defence of honest opinion reasonably tenable or capable of argument in this case?

[37] As I have said, counsel for Mr Woodgate submits that a statement that he was Lord Lucan is a statement of fact not opinion and the defence of honest opinion could not succeed. But the issue is not quite that straightforward. Ms Harris is entitled to have the allegedly defamatory statements read in context so as to determine whether or not they are fact or opinion. For example, the republication by NZ Truth, according to the amended statement of claim was that:

> I saw a photo of him in a magazine. It was that obvious. He hasn't changed a skerrick in 33 years. He's definitely Lord Lucan.

[38] There is a tenable argument for the defendant to advance that "he's definitely Lord Lucan" is a statement of Ms Harris' opinion drawn from a comparison of Mr Woodgate and the photograph of Lord Lucan. The allegation in relation to the Dominion Post republication might provide a stronger argument because the amended statement of claim pleads that the republication stated:

> I've got a photo of him and the resemblance to Lord Lucan is incredible ...

That article also refers to a number of other "reasons" why Ms Harris drew that conclusion, consistent with the particulars set out in her defence of honest opinion.

[39] The defence may not succeed. But I do not think that Judge Ross was wrong to refuse to strike it out at this stage. It will need to be a question of fact for the trial Judge whether what was said was factually a matter of opinion and whether as a matter of fact it was honestly held. Ms Harris ought not be deprived of presenting what is a tenable defence although in the end it might fail.

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[27] *Silkin v Beaverbrook Newspapers Ltd* at 748, 749.

Conclusions

[40] For those reasons I have concluded that Judge Ross did not err in declining to strike out the Limitation Act and honest opinion defences at this stage. They may well fail but they are capable of tenable argument. It follows that the appeal is dismissed.

[41] I understand from the file that the parties are legally aided and questions of costs therefore do not arise. If that understanding is incorrect counsel are invited to submit memoranda.

J W Gendall J

Solicitors:
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