IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-003038

BETWEEN	J F KARAM Plaintiff
AND	K PARKER First Defendant
	V PURKISS Second Defendant

Hearing:	25 September 2013
Appearances:	P A McKnight and A J Romanos for Plaintiff First Defendant in person No appearance for Second Defendant
Judgment:	26 September 2013

MINUTE OF COURTNEY J

Introduction

[1] The plaintiff, Mr Karam, has sued the defendants, Messrs Parker and Purkiss, in defamation. The statements in question are those posted on various websites and relate to Mr Karam's involvement in the David Bain case. Mr Karam asserts, amongst other things, that the statements convey that he acted improperly, counter to the interests of justice and effectively maintained a propaganda effort in order to achieve an acquittal for David Bain at the retrial.

[2] The trial of the matter is scheduled to start in two weeks. The parties have recently exchanged briefs of evidence, copies of which have been filed in Court. Both sides have objected to aspects of the briefs. In this minute I rule on those objections.

Kent Parker

[3] Almost all of Mr Parker's brief is inadmissible. Paragraphs 1-19 may be retained but so much of the rest is to be excluded that it is not feasible to deal with it on a paragraph by paragraph basis. I therefore direct that Mr Parker file a new brief by 4 October 20103 that does not include material of the type I describe below. In preparing a new brief Mr Parker should bear in mind that much of what is contained in his current brief is in the nature of submission, not evidence. He will be able to explain these points to me in his submissions but they cannot form part of the evidence.

[4] First, much of the material to which objection is made consists of restating either the allegedly defamatory statements, statements made around the allegedly defamatory statements (for context), extracts from Mr Karam's own publications and the retrial transcript. All such material is to be included either in agreed bundles of documents or (in the case of Mr Karam's publications) provided to me in the form of a complete copy of the books concerned. On that basis the brief should not contain any of this material. In this regard I direct that, if not already included in the dundle of documents, the transcript of the radio interview between Mr Laws and Mr Karam be included.

[5] Secondly, Mr Parker makes numerous comments about the exhibits or extracts from posts, either to show context or to explain the meaning. To the extent that they show context, provided that the additional material is contained in the bundle of documents, it is a matter for submission. To the extent that they purport to explain the meaning of the words, they are not admissible. The meaning of the words is a matter for me to decide, though that may be the subject of submission. The nature of statements made in posts as honest opinion or true statements of fact are, again, for me to decide.

[6] Thirdly, a significant portion of Mr Parker's evidence is opinion evidence on issues of psychology. He claims that he is qualified to make these comments because he holds a degree in psychology. Some of this evidence I allow to remain because it is not offered as expert evidence but rather as part of his honest opinion defence, with his opinion formed partly with the benefit of his academic knowledge. He will undoubtedly be challenged on this but I do not exclude the evidence.

[7] Other opinions are, however, inadmissible. In particular, Mr Parker offers his opinion on evidence given about Robin Bain's psychological state. He challenges the conclusions of witnesses given at trial as to whether Mr Bain may have been suffering from depression and expresses his opinion on whether Mr Bain was in fact suffering from depression and also on other aspects of Mr Bain's psychological state. I exclude all of this evidence. It is not relevant and, even if it was, Mr Parker's brief does not lay a sufficient basis on which to conclude that he has the expertise to assist the Court through expressing such views; holding a degree in psychology, without more, is insufficient, even leaving aside the problem of Mr Parker's lack of independence.

[8] The entire section entitled "Bad reputation" and comprising paragraphs 292-296 is excluded. This is all in the nature of submission and is not evidence.

[9] There are a number of specific paragraphs that do not fall within the general category of objectionable material I have outlined above. They are, by reference to paragraph numbers:

- 30 – submission

- 31 - speculation
- 32 – submission
- 36.4 – 36.7 – submission
- 255 – 258 – irrelevant as it relates to events well after the alleged defamation occurred
- 286 – 287 – irrelevant. These are essentially submissions relating to the issue of costs following the withdrawal of the prelimary questions application
- 290 – speculation and irrelevant

[10] In addition, there are further specific paragraphs which contain evidence which, in my view, Mr Parker is not qualified to give. These are:

- 43 – being essentially expert medical evidence
- 56 – irrelevant
- 154 – both irrelevant and outside Mr Parker's area of expertise
- 162 – outside Mr Parker's area of expertise
- 203 – irrelevant
- 204 – irrelevant
- 211 – outside the area of Mr Parker's expertise and within the ambit of a pathologist
- 242 – this is psychological evidence of the kind I have indicated is to be excluded
- 263 – 265 – this is outside Mr Parker's area of expertise though could probably form the basis for submissions by him
- 278 – 279 – this is outside Mr Parker's area of expertise.

Victor Purkiss

[11] Paragraph 5 of this brief explains some of Mr Purkiss' concerns which have led him to hold the views that he has expressed on the various websites. Although Mr McKnight objects to that evidence and I agree that it is of marginal relevance, I do not exclude it.

[12] Paragraph 6 comprises threads from Trade Me posts on one side of the page with an explanation of the full comment on the other side of the page. All of this material is to be before the Court in the agreed bundles of documents and is not properly adduced as evidence.

[13] The same comment applies to paragraph 10 which reproduces comments made on Trade Me.

[14] Mr McKnight objects to paragraph 11 which is an explanation of a comment made on a video as being satire. This is more in the nature of submission but I do not exclude it.

Juror from Bain retrial

[15] The defendants wish to call as a witness a member of the retrial jury. Her brief describes aspects of conduct by individual jurors, incidents that occurred during the course of the retrial and remarks made by jurors or those close to them. Mr McKnight objects to this evidence being given on the ground that it will constitute a contempt.

[16] Section 76 of the Evidence Act 2006 provides that:

> (1) A person must not give evidence about the deliberations of a jury.
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> (2) Subsection (1) does not prevent the giving of evidence about matters that do not form part of the deliberations of a jury, including (without limitation) –
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> (a) the competency or capacity of a juror; or
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> (b) any conduct of or knowledge gained by a juror that is believed to disqualify that juror from holding that position.

> (3) Subsection (1) does not prevent a person from giving evidence about the deliberations of a jury if the Judge is satisfied that the particular circumstances are so exceptional that there is a sufficiently compelling reason to allow that evidence to be given.
>
> (4) In determining, under subsection (3) whether to allow evidence to be given in any proceedings, the Judge weigh –
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> (a) the public interest and protecting the confidentiality of jury deliberations generally;
>
> (b) the public interest in ensuring that justice is done in those proceedings.

[17] The Court of Appeal has made it clear that the scope of subsection (3) which permits a juror to give evidence about the deliberations of a jury is very limited. In *Neale v R* it said:[1]

> [11] It will be observed that this section prohibits the giving of evidence about the deliberations of a jury. This is to promote the policy objectives of the finality of verdicts and uninhibited discussion during jury deliberations. Hence evidence cannot be given as to what was said or done during the time that the jury is undertaking its fact finding function. This would, of course, include its function of deciding what the intention of the accused was in relation to an alleged crime.
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> [12] Subsection (3) does allow a very narrow escape hatch to avoid a possible miscarriage of justice but only "if the Judge is satisfied that there are exceptional circumstances amounting to a sufficiently compelling reason to allow the evidence". This will be a very difficult standard to reach. One example of the Law Reports of that kind is *R v Young*[2] (use of Ouija board by the jury).

[18] Paragraphs 14 and 15 of the brief of evidence appear to relate to the jury deliberations and are not admissible. The rest of the brief relates to the jury's conduct over the course of the trial prior to the jury's deliberations and after the verdict was delivered. This evidence is not excluded by s 76(1). It does, however, raise a different the issue of contempt.

[19] There is a high public interest in the finality of jury verdicts, the integrity of jury deliberations and the protection of jurors' privacy. Although the acquittal following the retrial is unassailable the nature of the proposed witness' evidence is

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1 *Neale v R* [2010] NZCA 167 at [7].
2 *R v Young* [1995] QB 324.

clearly intended to cast doubt on the independence of the jury and the integrity of the verdict. This is a serious matter.

[20] The issue of contempt in connection with post-trial comment by jurors was considered at some length by the Court of Appeal in the *Solicitor-General v Radio New Zealand Ltd*.[3] The Court said:

> Subject to rare exceptions the function of a jury ends with the delivery of its verdict. Proceedings may continue before the trial court or in the Court of Appeal but so far as the particular jury is concerned its life is at an end. Nothing jurors say thereafter about the deliberations themselves can affect the verdict. Questioning jurors about their deliberations or their attitude to the discovery of further evidence is to endeavour to prolong the life of the jury, contrary to the principle of finality ...
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> Turning to ... the preservation of frankness in jury deliberations ... it is necessary to remember that the jury is brought together by compulsion to perform a public duty, a responsible and often difficult task requiring the courage to speak up in the jury room and sometimes to contribute to a decision unpopular with at least some members of the community. The desired qualities will not be promoted or safeguarded if afterwards enquiries are permitted revealing the process by which diverging views and opinions were melded into the final unanimous verdict.
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> The privacy of jurors is an equally important consideration. The responses and reactions of eight of the nine jurors approached in the present case confirm our own belief that generally jurors serve in the impression that their privacy will be respected and their identity remain undisclosed; that they will not be interviewed about their deliberations nor called upon to explain or justify their verdict.

[21] There are a number of aspects of the proposed evidence which satisfy me that adducing this evidence would amount to contempt for the same kinds of reasons as described in the *Radio New Zealand* case. The first is that, rather than commenting on the juror's own conduct, the proposed witness criticises the conduct of other jurors and makes quite serious allegations. These are allegations which have the capacity to undermine public confidence in the jury system. Further, it is proposed that these allegations be made without the right of other jurors being able to respond and with very limited ability to test the evidence. The evidence is not so crucial that it would justify this.

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[3] *Solicitor-General v Radio New Zealand Ltd* HC Wellington CP 531/92, 30 August 1993.

[22] Secondly, there is a significant risk that if this evidence were permitted the names of the other jurors would find their way into the public arena which would represent a serious infringement of their privacy. I do not know how Mr Parker and Mr Purkiss identified the juror whom they propose to call as a witness; under s 12(2) of the Juries Act 1981 the jury list is required to be kept confidential to the Registrar and the Court staff. Following the Bain retrial at least one juror chose to speak out, though to my knowledge her identity was not disclosed in the mainstream media. However, the fact that one juror has been identified (possibly by choice) does not justify risking other jurors also being identified.

[23] I have reached the view that to allow a juror from the retrial to give evidence at other jurors' conduct would undermine the jury system and constitute contempt. The juror's evidence is therefore excluded.

Michael John Stockdale

[24] Mr Stockdale was a member of the Justice for Robin Bain group and his brief covers his understanding of the establishment of the group and how it was administered. Some of this material is hearsay and some irrelevant. Mr McKnight has objected to particular passages of paragraphs 3, 6 and 7. I agree that the highlighted passages are inadmissible.

[25] As to the remaining paragraphs:

- Paragraph 17 is irrelevant
- Paragraph 18 has no probative value
- Paragraph 19 comprises simply an extract from Mr Karam's publication Innocent. It is not evidence. Similarly, paragraph 20 simply refers to a statement taken from Mr Karam's book David and Goliath.
- Paragraph 21 has no relevance to the issues in this case, nor do paragraphs 22 or 23.

- The first sentence of paragraph 24 is a statement taken from Mr Karam's book Trial by Ambush and is inadmissible. The second sentence of paragraph 24 is hearsay.
- Paragraph 25 is irrelevant as to the first sentence, hearsay as to the second and irrelevant as to the third.
- Paragraph 26 contains a statement taken from Mr Karam's book Trial by Ambush. The second sentence of paragraph 26 is partly submission and partly a reference to testimony from David Bain's original trial, neither of which is admissible as evidence from this witness. The same comment attaches to paragraph 27.
- Paragraph 28 is hearsay and inadmissible.
- Paragraph 29 comprises mainly an extract from David and Goliath with the last sentence in the nature of submission.
- The first sentence of paragraph 30 is admissible but the rest is submission.

Ralph Taylor

[26] Mr Taylor is a member of the Trade Me message board which is the subject of some of the allegedly defamatory posts:

- The first sentence of paragraph 30 is admissible but the rest is submission.
- Paragraph 4 is a hearsay statement regarding the creation of the original Facebook page. It is inadmissible.
- The last two sentences of paragraph 5 are inadmissible; they are unrelated to the present case in any way.
- In paragraph 7 Mr Taylor records a post that he made referring to Joseph Goebbels. He then states that he posted those comments. Both of those statements are admissible. However, from that point on paragraph 7 becomes a general

discourse about Goebbels and propaganda generally. None of this is admissible.

- The first sentence of paragraph 8 is a re-statement of a post that Mr Taylor made together with his acknowledgement of having done so. After that the rest of paragraph 8 comprises statements taken from Mr Karam's publications and Mr Taylor's comment on them. None of this is relevant and will not be admitted.

Joseph Karam

[27] Mr Parker has raised objections to a limited number of paragraphs in Mr Karam's brief of evidence. They are:

- Paragraph 52, which I accept is irrelevant and, in relation to the second sentence, hearsay. It is excluded.
- Paragraph 61 is a hearsay statement by David Bain that "even if it took him the rest of his life he would prove his innocence". This is hearsay. But I perceive that it is not being offered for its truth. If, as I suspect, it is being offered to demonstrate a basis for Mr Karam's motivation, then it is admissible. It can remain, subject to any further objection at trial.
- Paragraph 123 is a statement as to when the defendants became interested in the Bain case. Notwithstanding the qualifier "apparently" it is a statement of fact. However, it does not have any apparent relevance to the case and I exclude it.
- Paragraph 126 is objected to on the basis that it is supposition. It is a statement that the defendants had never met Mr Karam nor, prior to July 2009, read any of his publications. The first part of the sentence is plainly relevant and admissible. The second is not evidence that Mr Karam can give, though it may

be the subject of cross-examination. The second part of paragraph 26 is excluded.

- Paragraph 135 is a statement as to the authorship of "other defamatory material on Trade Me". Mr Parker objects to it as being irrelevant. However, it is likely to assume some relevance on the issue of publication and I allow it to remain save that it assumes that the material is defamatory when that has yet to be decided. Paragraph 135 is therefore to be amended either by deleting the word defamatory or by adding the word allegedly before it.

P Courtney J