54/91

SUPREME COURT OF VICTORIA

GRAHAM v ROBINSON

Smith J

29, 30 January, 4, 8 February 1991 — [1992] VicRp 18; [1992] 1 VR 279

CIVIL PROCEEDINGS – DEFAMATION – CLAIM FOR DAMAGES – NATURE OF INJURY – WHETHER TO REPUTATION OR PHYSICAL/MENTAL HEALTH – WHETHER CLAIM FOR "DAMAGES IN RESPECT OF PERSONAL INJURY" – CLAIM FOR $20000 – WHETHER IN EXCESS OF JURISDICTION – TEST OF WHAT CONSTITUTES DEFAMATORY MATERIAL: *MAGISTRATES' COURTS ACT* 1971, S3.

Section 3 of the *Magistrates' Courts Act* 1971 read:

"Jurisdictional limit" means—
(a) in the case of an action where the damages claimed consist of or include damages in respect of personal injury — $5000; and

(b) in any other case — $20000."

Ms Nancy Graham, a relatively small, brunette shire ranger claimed $20000 damages for defamation from a country newspaper owner when an advertisement in the newspaper read: "Found. One small dark mongrel bitch. Answers to the name of Nancy." At the hearing, it was submitted that the claim was for damages in respect of personal injury, thereby limited to $5000 and accordingly, the claim for $20000 was in excess of the court's jurisdiction. The magistrate rejected the submission and after hearing evidence in the matter, awarded $5000 damages to Ms Graham. Upon order nisi to review—

HELD: Order nisi discharged.
1. The expression "personal injury" does not extend beyond physical injury and mental illness to include emotional hurt. Damages are awarded in the typical personal injury and nervous shock cases where the pain and suffering flow from and are connected with physical or mental injury. In a defamation action the injury is to reputation not to the person or to physical or mental health. Accordingly, the magistrate was not in error in hearing the claim for $20000.

2. Having regard to the natural and ordinary meaning of the words complained of and the way in which they reflected on the origins and character of the complainant, it was open to the magistrate to be satisfied that the words would be likely to be understood by reasonable persons as defamatory and accordingly, to find that the complainant was entitled to damages.

SMITH J: [1] This is the return of an order nisi granted by Master Evans on 8th March, 1990, and varied by Marks J on the 20th April, 1990. The applicant was the defendant in a defamation action brought by the respondent by summons in the Magistrates' Court. The alleged defamatory statement was contained in the *Daylesford Advocate* on the 1st February, 1989. The grounds on which the order nisi was granted, are as follows:

> (1) That the learned magistrate erred in law in ruling that he had jurisdiction to hear and determine the respondent's claim which included a claim for damages for personal injury when the total damages claimed exceeded $5000.
>
> (2) That the learned magistrate was wrong:
> (i) in holding that the words published by the complainant bore a meaning or were capable of bearing a meaning defamatory of the defendant;
> (ii) in failing to give any or any proper consideration to the evidence concerning the reputation of the defendant in assessing damages;
> (iii) in that in assessing damages the learned magistrate failed to take into account or give proper consideration to the evidence of the reputation of the defendant;
> (iv) in that reaching his decision or alternatively in assessing damages the learned magistrate took into account an irrelevant consideration, namely malice of the complainant;
> **[2]** (v) in holding that the complainant was guilty of malice when there was no evidence or no sufficient evidence as to malice.
> (vi) in that in reaching his decision or alternatively in assessing damages he took into account

an irrelevant consideration namely negligence of the complainant in publishing the alleged defamatory words;
(vii) in that in holding that the damages were aggravated by the failure of the complainant to publish an apology he failed to give any or any proper consideration to the evidence of the offer by the complainant to publish an apology and the response of the defendant to it;
(viii) in holding that the defendant was entitled to damages due to negligence of the complainant.

I will rule on each Ground in turn:

GROUND 1: The jurisdictional issue arises from the nature of the damages sought in paragraph 5 of the particulars of demand. That paragraph read as follows:

> "By reason of the publication of the said words, the complainant has been injured in her reputation and character, has suffered hurt and distress, has been brought into public scandal, hatred, odium, ridicule and contempt and has suffered damage."

The applicant argues that in claiming damages for the 'hurt and distress' alleged to have been suffered and for having been "brought into public scandal, hatred, odium, ridicule and contempt", the complainant was claiming damages **[3]** for personal injury. The respondent argues that such a claim is outside the jurisdictional limit applicable to the proceedings. That limit is set out in s3, *Magistrates' Courts Act* 1971 (as amended in 1986). It reads:

> "Jurisdictional limit" means—
>
> (a) in the case of an action where the damages claimed consist of or include damages in respect of personal injury - $5000; and
>
> (b) in any other case - $20000."

The applicant argues that the claims mentioned above are in respect of personal injury and that, therefore, the complainant's action was one where the damages claimed "include damages in respect of personal injury". The Court's jurisdiction was limited, therefore, to claims for $5000.00. The amount claimed however, was $20,000.00. The claim being in excess of the jurisdiction, it is argued that the Court did not have jurisdiction. This argument was raised before the learned magistrate and rejected by him. It is common ground that the issue to be decided is whether "hurt" and "distress" and "public scandal hatred, odium, ridicule and contempt" when suffered by a person come within the expression in the Act of "personal injury".

Prior to the 1986 amendment, the jurisdiction of the Magistrates' Court in civil matters was limited to determining a narrow range of legal issues. The amendment was intended to provide a general civil jurisdiction limited in amount. One exception was made. In *Hansard*, the change was described in these terms: (*Hansard*, Legislative Council, 19th March, 1986, p143):

> **[4]** "The bill will remedy this situation by providing that Magistrates' Courts have civil jurisdiction to deal with any action involving a claim of up to $20,000 or concerning property which is valued up to that amount. The one exception is in personal injury claims in which the existing limit of $5,000 is retained to ensure that a litigant is not deprived of the right to seek a jury trial, which is not available in the Magistrates' Courts. In conferring jurisdiction the same formula is used, with appropriate modifications as that which confers jurisdiction on the County Court."

Reference to the County Court legislation reveals that there was a similar dichotomy employed in the formula. That legislation included, however, a definition of personal injury. In s37(2) *County Court (Jurisdiction) Act* 1972 the following appears:

> "(2) In paragraph (a) of sub-section (i) 'personal injury' includes any disease and any impairment of a person's physical or mental condition".

That definition, it is common ground, does not appear in the *Magistrates' Courts Act* 1971 as amended in 1986. The definition used was identical with that in *Limitation of Actions Act* 1958, s3(1). It would be surprising if Parliament had intended to have the expression "personal injury" interpreted differently in the two sections. Any case which exceeded the Magistrates' Court jurisdictional limit would be dealt with in the County Court which applies a similar dichotomy in determining its jurisdiction. If that is the correct conclusion, then it was argued for the respondent

that the damages claimed for hurt and distress and for being brought into public scandal, hatred, odium, ridicule and contempt did not amount to damages for any impairment of the complainant's mental or physical condition. The definition, however, is inclusive so that even if the **[5]** statutory definition is applied, it remains necessary to determine whether the damages claimed are in respect of personal injury.

Counsel have not been able to refer me to any authority on the expression "personal injury" which shed any light on its meaning. I have been unable to find any authority that assists. The provision is one that seeks to limit the jurisdiction of the Magistrates' Court and, to that end, the interpretation urged upon me by the applicant would bring the limit into operation whenever a complainant sought damages for any form of hurt personal to the complainant – for example, a claim for breach of contract where damages for emotional distress were claimed (e.g. *Jarvis v Swan's Tours* [1972] EWCA Civ 8; [1973] QB 233; [1973] 1 All ER 71; [1972] 3 WLR 954). It seems to me that this is casting the net too wide.

In the absence of express authority, I have come to the conclusion that the expression "personal injury" does not extend beyond physical injury and mental illness to include emotional hurt. I am encouraged to this view by the fact that the law has rejected grief or sorrow as a form of injury which can be relied on to mount a claim in negligence (*Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383 at 394; [1971] ALR 253, *Jaensch v Coffey* [1984] HCA 52; (1984) 155 CLR 549 at 587; (1984) 54 ALR 417; (1984) 58 ALJR 426; [1984] Aust Torts Reports 80-300; (1984) 1 MVR 257). It is true that damages are awarded for pain and suffering in the typical personal injury case. They are awarded, however, where pain and suffering flow from and are connected with physical or mental injury and may therefore be said to be damages "in respect of personal injury". To interpret the legislation in this way would enable it to encompass the typical personal injury case **[6]** and also the "nervous shock" cases. It would address the object of the legislation to give litigants in typical personal injury cases the opportunity of seeking jury trial where the claims exceeds $5000.00.

I do not have to decide whether the provision would apply to a claim for damages which included a claim for physical injury or mental illness resulting from a defamatory publication. The complainant did not seek such damages. In the light of my ruling it is not necessary to consider the meaning of the expression "in respect of". I note, however, that the answer to the present question may be that the limit applies to cases where physical or mental injury is alleged as an element in the cause of action and damages are claimed for it and its consequences – pain and suffering, loss of enjoyment of life and loss of earning capacity. Such a claim for damages would be connected to and flow from the original injury and be "in respect" of it. In a defamation action, the injury is to reputation, not physical or mental health, and the emotional hurt that flows from that. A claim for damages in such a case may be said to be "in respect" of injury to reputation, not injury to the person. The matter has not been argued, however, and I express no final view on it. The distinction made in the section between "damages consisting of damages in respect of personal injury" and "damages including damages for personal injury" may be intended to cover the distinction made in *Brunsden v Humphrey* (1884) 14 QBD 141; [1881-5] All ER 357; 53 LJQB 476. For the foregoing reasons I rule against the applicant on the first of the grounds relied upon.

[7] GROUND 2(i): This ground, as pointed out by counsel for the respondent, raises several issues. Two are in issue in these proceedings. The first is whether the learned magistrate was in error in finding that the words published were capable of bearing a meaning defamatory of the defendant. The second is whether the learned magistrate was in error in holding that the words in fact did convey a defamatory meaning.

The particular words complained of described the complainant as a "small dark mongrel bitch". The legal test of what constitutes defamatory material is well established. I do not propose to repeat statements of the test. Suffice it to say that I am satisfied that the words, in their natural and ordinary meaning, would be likely to be understood by reasonable men to be defamatory. They reflected on the origins and character of the complainant. No tenable argument was advanced before the learned magistrate or before me to suggest any basis for interpreting the words other than in their natural and ordinary meaning. I am also satisfied that it was open to the learned magistrate to find that they did bear a defamatory meaning. Thus the applicant has failed to establish that the learned magistrate could not reasonably have come to the conclusion that

the words were defamatory (*Taylor v Armour & Co Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232; *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301). Accordingly, Ground 2(i) fails.

GROUND 2(ii): A perusal of the learned magistrate's reasons for decision indicate that he did find that the complainant was unrelenting in carrying out her duties with the Shire Council and that she **[8]** was assertive and "perhaps even aggressive" in carrying out those duties. He also found that there was no evidence to suggest that she was unfair or dishonest. In view of these findings it appears to me that the applicant cannot demonstrate that the learned magistrate failed to consider the evidence given that was adverse to the complainant. Further, I have not been persuaded by the applicant that there is anything to indicate that the learned magistrate failed to give proper consideration to that evidence. Rather, it seems to me that the last paragraph of the reasons for judgment indicates that the learned magistrate's view as to the compensation otherwise payable had been reduced somewhat by the view he had formed on the adverse evidence as to the nature of the reputation of the complainant. Accordingly, Ground 2(ii) fails.

GROUND 2(iii): The comments and conclusions above in relation to Ground 2(ii) are applicable also to this Ground.

GROUND 2(iv): Malice, if established is clearly relevant to the assessment of damages being conduct capable of aggravating damages. (*McGregor on Damages*, 15th Ed, 1664 ff).

GROUND 2(v): While the learned magistrate's reasons can be interpreted in two ways, I propose to adopt the interpretation most favourable to the applicant. Thus, firstly, I assume he regarded, as evidence of malice, the failure to publish a public apology for no adequate reason. Secondly, he also listed the following ways in which malice on the part of the defendant had been shown:

> **[9]** "(a) he has refused to accept advertisements from the complainant unless they were authorised by the Shire Secretary;
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> (b) he has instructed his staff not to publish the name or photograph of the complainant's sister who is the present Shire President;
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> (c) he has instructed his legal advisers to put unsubstantiated allegations to the complainant;
>
> (d) he has instructed his legal advisers to call witnesses whom he knows would be antagonistic towards the complainant;
>
> (e) he has continued with these proceedings in the absence of any real defence."

Clearly there was evidence to support the various factual findings involved in each of the alleged instances of malice. While views might differ as to whether the matters alleged above, particularly in paras. (d) and (e), alone or in combination, should have been regarded as showing malice it was reasonably open to the learned magistrate to so find. He could properly do so in the light of the other findings he had made and in the light of his personal observation of the conduct of the case and the parties. As to (e), I note that in his reasons, the learned magistrate commented that he had been anxious from the first day of the hearing to establish just what the defence to the action was and that he suggested to the defendant that he should carefully consider his position after the first sitting day of the case. (See pages 5 and 6 of the reasons).

GROUND 2(vi): I proceed on the basis that in assessing damages the learned magistrate did take into account his conclusion that the defendant and the defendant's employees had not been as **[10]** diligent and careful as they should have been in accepting the particular advertisement. I also conclude that this finding was used by the learned magistrate in relation to the assessment of damages only. In this case an anonymous advertisement was received in circumstances where some six months previously, a similar advertisement had been received by the *Daylesford Advocate* and the staff at the paper, having contacted the complainant, had been warned by her not to publish it. It was open to the learned magistrate to conclude, as he did, that the defendant and his staff had not been as diligent and careful as they should have been in accepting a similar advertisement. His finding, however, did not amount to a finding of recklessness or gross negligence.

The law to be applied by the learned magistrate is set out principally in the case of *David Syme Co Ltd v Mather* [1977] VicRp 58; [1977] VR 516 at 526, 527 and 529; (see also *Andrews v John Fairfax Pty Ltd* (1976) 28 FLR 173; 12 ALR 355; [1976] 2 NSWLR 225 at 244, 250 and 265). It may, I suggest, be summarised in this way. The conduct of the defendant may cause an aggravation of compensatory damages in circumstances where the conduct increases the subjective hurt to the plaintiff. So far as negligence, as opposed to recklessness or gross negligence is concerned, it will not generally be available in aggravation of damages but nonetheless, in an appropriate case, it can be.

The learned magistrate's reasons do not give any detail of the basis on which he determined that the negligence of the defendant and his staff might be said to aggravate the damages. I accept, however, that he did reach that conclusion. **[11]** It is common ground that the complainant did put the question of negligence to the learned magistrate as a factor which would aggravate damages. The question to be resolved, therefore, is whether it was reasonably open to the learned magistrate to draw the conclusion that the failure to exercise due care increased the hurt suffered by the plaintiff. There does not appear to have been any direct evidence from the plaintiff indicating that the failure to exercise due care was something that caused her more distress. I have come to the conclusion, however, that a magistrate properly directing himself could have inferred from the evidence presented to him that the failure to exercise due care did increase the hurt.

The learned magistrate found that the complainant had been made aware approximately six months earlier by a member of staff at the paper that someone had tried to place an advertisement which was in similar terms. On that occasion she told the staff member that she would sue if the advertisement were published. The learned magistrate held that the newspaper should have been on its guard. Such findings were clearly open to the learned magistrate. The negligent publication of the advertisement, therefore, was made in circumstances where the plaintiff knew that the paper had been alerted to the danger but had nonetheless failed to avert it. In her evidence (see particularly her affidavit, paragraph 25) she spoke of her great distress at the publication of the advertisement and appears to have done so almost immediately after referring to the fact that she had been informed of the earlier attempted publication and her reaction to that.

The learned magistrate, also would have been able to observe the plaintiff when giving **[12]** her evidence on those matters and in that sequence. In these circumstances, it was open to the learned magistrate to conclude that the negligence had increased the hurt. It is true that the learned magistrate did not expressly so find. The applicant is faced with the problem however, that every reasonable presumption must be made in favour of the decision of the learned magistrate and it should be upheld if it can be supported upon any reasonable view of the evidence, (*Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38; [1954] ALR 168).

In seeking to uphold an order of the learned magistrate, the party doing so is entitled to support that order upon any ground which was open to the party at that stage when the order was made, including arguments rejected by the magistrate (*Preston Ice & Cool Stores Pty Ltd v Hawkins* [1955] VicLawRp 17; [1955] VLR 89; [1955] ALR 371). The applicant would have to demonstrate that the nature of the decision suggests some error, which was due to the matter not having been considered appropriately or at all (*Yendall v Smith, Mitchell & Co Ltd* [1953] VicLawRp 53; [1953] VLR 369; [1953] ALR 724). In the present case, the plaintiff would need to demonstrate that the awarded damages of $5,000.00 were excessive and that the explanation was that the learned magistrate had increased the damages because of the negligent publication. It cannot be demonstrated, however, that the damages were excessive. Accordingly, this ground also fails.

GROUND 2(vii): Accepting that the learned magistrate held that the failure to publish an apology did aggravate damages, I am not persuaded that the learned magistrate failed to give any or any proper consideration to the evidence relating to the negotiation of the apology. The evidence before the learned magistrate **[13]** indicated that there were some negotiations. The complainant supplied a form of apology which apparently was unacceptable to the defendant. There the negotiations appeared to end. But there was no evidence to suggest that the defendant attempted to negotiate a form of apology that would have been satisfactory to him.

It must also be borne in mind that it was always open to the defendant to publish his own apology and by doing so, and taking other action, to take advantage of the *Wrongs Act* 1958,

s7. Further, it is clear from the learned magistrate's reasons that he rejected the explanations, such as they were, that were offered by the defendant for the failure to make a public apology. He described the reasons as being totally beyond his comprehension.

It was clearly open to the learned magistrate to reject the reasons advanced. I am not persuaded that there is anything in the material to suggest that the learned magistrate either failed to consider the evidence relating to the negotiation of the apology or that he failed to give any proper consideration to it.

GROUND 2(viii): I am not persuaded that the learned magistrate held that the complainant was entitled to damages against the defendant on the basis of negligence of the defendant. Negligence was considered as something relevant to the assessment of damages for defamation.

In conclusion, the applicant has failed to make out any of the grounds relied upon and the order nisi will therefore be discharged.

APPEARANCES: For the plaintiff Graham: G Moore, counsel. Sutton and O'Loughlin, solicitors. For the defendant Robinson: B O'Doherty, counsel. Dayle Cinque and Co, solicitors.
