Neutral Citation Number: [2011] EWHC 1058 (QB)

Case No: HQ09D04958

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 April 2011

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

SYLVIA HENRY **Claimant**

- and -

NEWS GROUP NEWSPAPERS LIMITED **Defendant**

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- -

Harvey Starte (instructed by **Taylor Hampton Solicitors LLP**) for the **Claimant**
Mark Warby QC and **Adam Wolanski** (instructed by **Farrer & Co**) for the **Defendant**

Hearing date: 13 April 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. There were two contested applications before me on the morning of 13 April 2011. The Defendant sought to strike out one subparagraph of the particulars of claim dealing with aggravated damages (paragraph 83.4.1), whereas the Claimant was relying on that passage to launch an application for specific disclosure. The trial is due to take place in June and it was important for me to let the parties know the outcome promptly. I indicated at the end of the argument, in broad terms, that I would refuse an order for specific disclosure but I was not going to strike out the challenged subparagraph in its entirety. I would, however, for a number of reasons confine the Claimant's plea on aggravated damages to her perception of the Defendant's conduct and to the impact it had on her feelings. What I would not permit was an investigation into the state of mind of any of the Defendant's journalists at or prior to publication of the relevant articles. This would not be relevant to a resolution of the real issues between the parties and would, in any event, be likely to prolong the trial and divert the jury from its proper task. I now give my reasons for those decisions.

2. The Claimant was given saturation coverage in *The Sun* newspaper, published by the Defendant, during November and December 2008 in connection with the notorious "Baby P" case. A small boy, whose name was Peter Connelly, died in August 2007 following abuse and cruelty from his mother and two men in the same household. It was following their convictions at the Central Criminal Court that the Defendant unleashed a sustained attack on the Claimant in a series of no less than 35 articles. She was one of the social workers within the London Borough of Haringey who had been responsible for Peter's care between 11 December 2006 and 24 January 2007, at which point the decision was taken that he could return to his mother's care. That decision, which Mr Warby QC for the Defendant has described as "fatal", was taken at a meeting in which various people, including the Claimant, participated.

3. There is virtually no dispute between the parties as to the seriously defamatory nature of the charges levelled at the Claimant in *The Sun*. It is said that by reason of gross negligence on her part she must take at least some of the blame for the child's death. (The Claimant's case is that the Defendant goes beyond that and attributes sole responsibility to her.) Furthermore, it is also alleged in connection with another notorious child death in Haringey, that of Victoria Climbié in 1999, that the Claimant had in effect forged a note with a view to absolving herself from any responsibility. The document in question had been found during the inquiry into Victoria's death in the file of the NSPCC's Child and Family Centre in Tottenham, to which the Claimant had been temporarily seconded as a practice manager while still employed in the London Borough of Haringey. It purported to record that she had received a telephone call from a Mr Barry Almeida of Haringey Social Services stating that Victoria had moved out of the borough, that Haringey had accordingly "closed" her case and that no further action need be taken by the Child and Family Centre (to which she had been referred by Haringey). Mr Almeida has denied making any such call and the Defendant, having referred to the matter in some of its articles, now alleges that the Claimant quite simply created a false record.

4. It is right to record that the only substantive defence, whether in relation to the Claimant's involvement with Peter in 2006 and 2007, or to her note at the Centre, is that of justification. There is no plea of privilege or (any longer) fair comment.

Specifically, there is no plea of *Reynolds* privilege such as legitimately to open up an enquiry into the quality of the Defendant's journalism.

5. It is against this background that the Claimant raises the claim in aggravation of damages. In a case of this gravity, if the Claimant succeeds in relation to both sets of defamatory allegations, it can reasonably be supposed that she will recover very substantial damages that would embrace both vindication and compensation for distress and hurt feelings. It may be questioned in those circumstances how useful a plea of aggravated damages is likely to prove. It is, in any event, important that such a plea should be strictly focused on the relevant material and not cause the trial to be diverted from the grave issues that are central to the claim.

6. The two subparagraphs that are significant for present purposes are as follows:

> "The gross insult to the Claimant's feelings has been further exacerbated by …
>
> 83.4.1 the knowledge that the Defendant newspaper had and must have known that it had no sound evidence that she was culpable or responsible to the alleged or any degree for Peter Connelly's appalling abuse and death;
>
> 83.4.2 the Defendant newspaper persisting and revelling in its reckless campaign of vilification against her as an occasion and opportunity for self-congratulation and self-promotion … "

Although the Defendant's attack is confined to the first of these passages, I have included the second for context.

7. The purpose of aggravated damages is to compensate the claimant for any salt that the relevant defendant has rubbed in the wound over and above the injury caused by the defamatory publication(s) complained of. It follows that the aggravating conduct must have been known to the claimant. It cannot be relevant to enquire into what was going on behind the scenes ("What the eye does not see … ").

8. A request was made for further information on 16 September 2010:

> "So that the Claimant's case is clear, please state whether or not the Claimant is advancing a case of express malice against the Defendant, and if so providing full particulars of such case, stating:
>
> 1.1 which individuals at the Defendant organisation it is alleged acted with express malice at the time of publication; and
>
> 1.2 in respect of each such individual, all facts and matters relied upon in support of the Claimant's case that that individual acted with express malice.

> 2. If it is not alleged that the Defendant acted with express malice, please state whether it is the Claimant's case that the insult to her feelings was further exacerbated by her belief (as opposed to her knowledge) that no one at the Defendant newspaper had sound evidence that she was culpable or responsible to the alleged or any degree for Peter Connelly's appalling abuse and death."

9. A response was provided on 29 September of last year setting out the Claimant's case as follows:

   a) She was not (as yet) alleging express malice in relation to the case of fair comment pleaded at that stage (while reserving her position in case further information emerged);

   b) She has not been able to contend that, if any of the publications were fair comment on true facts, they did not represent the honest opinion of the commentator, but "the position may change".

   c) It was "apparent" from the contents of the article that "all the Defendant knew concerning the Claimant and her involvement as a social worker in the case of Peter Connelly when publishing was (a) that she had been involved in some way (but not how) in a decision to return Peter Connelly to his mother's care seven months before his death; and (b) (from no later than 17 November 2008) that prior to him returning to his mother's care (and contrary to the Claimant being implicated as culpably responsible for Peter's abuse and death) the Claimant had attempted to have Peter placed in foster care.

   d) The Defendant "either knew that" it was not the case that the Claimant had been one of the social workers responsible for Peter's case after he had returned to his mother's care and in the period in which social workers had failed to detect or prevent the appalling abuse that culminated in his death; or the Defendant "knew that it had no reliable information that it had been".

   e) It was apparent … that the Defendant newspaper had and must have known that it had no sound evidence that the Claimant was responsible to the alleged or any degree for Peter Connelly's appalling abuse and death.

   Since the plea of fair comment has been withdrawn, the observation contained in subparagraph (b) above about "honest opinion" is no longer relevant.

10. Mr Warby submitted that the disclosure application was a fishing expedition, in effect, to enable the Claimant to advance her (irrelevant) case as to the state of the Defendant's actual knowledge (through one or more unidentified employees). Various reasons were advanced, but clearly the primary point is that the only "facts" as to the Defendant's state of mind that could conceivably be relevant to the issue of aggravated damages are those perceived or known about by the Claimant. Accordingly, disclosure of documents cannot assist.

11. In any event, if the Claimant were permitted to advance a case of "malice" against the Defendant, it would plainly be necessary to comply with the requirements normally attaching to such a plea. That is to say, in the case of a corporate defendant, it would be necessary to identify the relevant person or persons said to have had the malicious state of mind. Moreover, facts should be pleaded which are more consistent with the presence of malice than with its absence: see e.g. the decisions of the Court of Appeal in *Telnikoff v Matusevitch* [1991] 1 QB 102 and *Alexander v Arts Council of Wales* [2001] 1 WLR 1840. It would not suffice simply to make a bare assertion of malice, dishonesty or recklessness. The facts pleaded must go beyond what is merely equivocal or neutral. They must amount to something from which a jury at trial could rationally infer malice (assuming those facts ultimately to be proved). The facts would need to disclose who the relevant individuals were and that they were dishonest, in the sense of knowing the words published to be false, or reckless, or that they each had a dominant motive to injure the Claimant's reputation.

12. Finally, Mr Warby submits that such an enquiry should be prevented on case management grounds, since it would take up time at trial and, as I have said, divert the jury from the important task confronting it.

13. All these points are valid, but clearly it is Mr Warby's first point that really matters. It is not legitimate for the assessment of damages to enquire into the Defendant's state of mind. What matters is the impact of the conduct on her feelings. Mr Warby cited the wording of s.35 of the New South Wales Defamation Act of 2005 which, although obviously not directly relevant, reflects and encapsulates the same point of principle. It is necessary for the court to "disregard the malice or other state of mind of the defendant at the time of publication of the defamatory matter … or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff".

14. It follows that it is irrelevant to damages what evidence the Defendant actually had at the time of publication to support the charges it made. The Claimant is, however, entitled to plead and in due course give evidence as to how she perceived matters in the light of what she knew about its conduct. As Mr Warby accepts, she can tell the jury, if it be so, that part of her frustration and distress was caused by her perception that the Defendant *must have* known that there was no basis for its charges against her – a perception based, at least in part, on what they had or had not published. That is why I formed the view that it could not be said that the whole of subparagraph 83.4.1 was impermissible. I will discuss with counsel how far the strike out should go following the handing down of my reasons. (It may be that the only words that need be deleted are "had and …" in the first line.)

15. Mr Warby further submits that it cannot be right to seek to augment damages in a libel action, which are intended to be primarily compensatory, by trying to prove that one's beliefs about a defendant's conduct are in fact true and extracting documents for that purpose. The result could well be that the award would then reflect injury to feelings caused by the disclosure rather than the publication. Also, there would be a risk of introducing, impermissibly, an element of punishment.

16. Mr Starte, for the Claimant, has referred to some well known passages in older cases such as *Rookes v Barnard* [1964] AC 1129, *Cassell & Co Ltd v Broome* [1972] AC 1027 and *McCarey v Associated Newspapers Ltd* [1965] 2 QB 86. Yet nothing in any

of these cases undermines Mr Warby's fundamental point, which is that aggravated damages are about the impact on the claimant's feelings of the defendant's conduct. Reference was made, for example, to the well known passage in Lord Reid's speech in *Cassell v Broome* at p 1085F-G:

> "It has long been recognised that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation."

17. Nothing there would warrant disclosure of documents for the purpose of exploring a defendant's state of mind. Conduct that would "justify going to the top of the bracket" to achieve fair compensation for a claimant is directed towards a fair reflection of the impact of such conduct on the claimant's feelings. What Lord Reid was saying was in the context of compensatory (not exemplary) damages. As he said shortly before, at p 1085D:

> "Damages for any tort are or ought to be fixed at a sum which will compensate the plaintiff, so far as money can do it, for all the injury which he has suffered. Where the injury is material and has been ascertained it is generally possible to assess damages with some precision. But that is not so where he has been caused mental distress or when his reputation has been attacked – where, to use the traditional phrase, he has been held up to hatred, ridicule or contempt."

18. This is the context of my decision to exclude any investigation in the pleadings, or by way of disclosure, into the Defendant's state of knowledge or the quality of the journalism.

19. Although it is strictly unnecessary to do so, I will briefly consider the application for disclosure of certain categories of documents individually:

    a) the recording or transcript of the BBC Panorama programme broadcast on 17 November 2008 and any information received from the BBC regarding that broadcast

    b) the Haringey Council statement referred to in articles published in *The Sun* of 18 November 2008

    c) records of information received supporting the assertion in the website article of 19 November 2009 that the Claimant was one of the "key people who failed to help Baby P"

d) records of the interview and information received from the then Secretary of State for Children, Ed Balls MP, referred to in articles published on 27 November 2008

e) records of information received concerning the 16-page serious case review report ("the assessment") referred to in articles published in *The Sun* of December 2008

f) records of interview and information received from the "admin assistant" quoted in articles published in *The Sun* and on the website on 3 December 2008

g) records of information received supporting the assertions in the "Sun Says" article of 19 February 2009 that Ms Henry was one of five social workers "most involved" in the "Baby P case"

h) reporters' notes of interviews and conversations concerning the Claimant made in the information gathering process; letters and other written statements concerning the Claimant received in the information gathering process; texts, notes or other records of publications concerning the Claimant received or created in the information gathering process; transcripts or other records of broadcasts referring to the Claimant received or created in the information gathering process.

There is no need to go into the background of these categories of documents in any detail, since Mr Warby's objections can be shortly stated.

(a) The recording or transcript of the BBC Panorama broadcast, etc.

20. There is no reference to the broadcast in the pleadings and no issue arises concerning it. Two of the articles complained of make reference to it, but that does not make the material disclosable.

(b) The Haringey Council statement

21. Again, there is no reference to such a statement in the pleadings and no issue arises in relation to it.

(c) Records of information received suggesting the Claimant was one of the "key people who failed to help Baby P"

22. It appears from the application that this is sought in connection with exploring the Defendant's state of knowledge at the time the website article of 19 November 2009 was published, since it hardly relates to the events at the material time (i.e. between 11 December 2006 and 24 January 2007). It is therefore irrelevant.

(d) Records of the Ed Balls material

23. No issue arises since this material is not mentioned in the pleadings.

(e) Information concerning the serious case review report

24. There is (no longer) any reference to this subject-matter in the pleadings and, accordingly, no issue arises.

(f) Records or notes of interview and information received from the "admin assistant"

25. Yet again, there is no pleaded issue giving rise to any obligation to disclose this material.

(g) Records of information supporting the proposition that the Claimant was one of five social workers "most involved"

26. The same reasoning applies as in relation to category (c) above.

(h) The "sweeping up" provision

27. This appears to be a fishing expedition of a general nature which is impermissible in the absence of either a *Reynolds* privilege defence or a relevant plea of malice.

28. It is already clear that I have rejected the Claimant's application in respect of these documents, the primary reason being that nothing in a legitimate plea of aggravation could possibly give rise to disclosure in any of these categories. Were there any need to do so, however, I should also hold that the exercise would be disproportionate and unnecessary on case management grounds.