Neutral Citation Number: [2008] EWCA Civ 1258

Case No: A2/2007/2473

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR RECORDER MOLONEY QC
6BQ02399

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:13 November 2008

Before :

THE RT HON. LORD JUSTICE WARD
THE RT HON LORD JUTICE SEDLEY
and
THE RT HON LORD JUSTICE LONGMORE

- -

Between

H	**Appellant**
- and -	
Tomlinson	**Respondent**

- -
- -

William Bennett (instructed by Messrs Attwood & Co) for the appellant
Mrs H appeared in person

Hearing date: 24th June 2008

- -

Judgment

Lord Justice Ward:

1. This is the judgment of the court.

The issue

2. This is a rather sad and unfortunate case to reach the courts. In the way the case was presented to us, the issue is essentially this: where a claim for damages for libel and slander is dismissed because the sting of the defamation is defeated by the defence of justification, can the same remarks nonetheless found a claim for breach of the claimant's Article 8 right to respect for his privacy and reputation? On 31st July 2007 Mr Recorder Moloney Q.C., sitting as a judge of the High Court, decided that the human rights claim was arguable and he gave leave to amend the particulars of claim to include it. The defendant now appeals with permission granted by Keene L.J.

The facts

3. The claimant who sues by his litigation friend, his mother, is a boy born on 22nd August 1992. There is an order which we have continued that his identity and the identity of the school he attended should not be revealed. I shall therefore refer to him simply as B and to his mother as Mrs H. Unfortunately B suffers from Asperger's Syndrome, has an obsessional compulsive disorder and has behavioural difficulties which led to a statement of his special educational needs being made by his local authority. He was placed in mainstream education at a Campus school, which was a pilot school to promote curriculum choices for students to meet the needs of the national curriculum. On 22nd March 2005 he behaved in a violent manner and he was permanently suspended from the school by his headmaster, the appellant in this appeal. That exclusion was later upheld by the school governors and the matter was then reviewed by the statutory appeal panel which conducted an oral hearing on 7th June 2005.

4. On 9th June 2005 the statutory appeal panel decided that the pupil had committed the acts complained of by the headmaster on the date in question but nonetheless overturned the decision permanently to exclude him. Despite that, the panel refused to reinstate him in the exceptional circumstances that reinstatement would not be in his best interests nor in those of the whole community. Alternative arrangements were put in place for his future education.

5. The headmaster had prepared a written report for the purpose of these enquiries into the pupil's suspension. It included the following record of the events of Tuesday 22nd March 2005:

> "10 am B was slapping U who is a disabled Year 8 boy with a walking frame (referred to as "happy slapping"). He then hit Mr B a learning support tutor hard on the back of the head.
>
> 10.45 am B punched and kicked U several times and damaged his laptop.
>
> 11.10 am B jumped in the lift with U. B kicked and punched U several times in the lift. U had physically been hurt, was

> marked and seemed very distressed. I then phoned Mrs H and asked her to come in to calm B down. We often used this strategy and at this stage B was not following commands or instructions. Mrs H could not get to school immediately because she was working but came as soon as possible.
>
> 11.30 am B stole a pencil case and damaged what was in it and the case itself. In Mrs M's (learning support tutor's) statement B had told her to "piss off" and she saw B trying to trip up Mr F (Year 8 teacher).
>
> 12.14 pm B tripped up Mr F who is a maths teacher.
>
> 12.35 pm B was swearing in front of Mr B.
>
> 12.55 pm B threw a punch at Mr B which he avoided and it was reported that he had shouted at Mrs W at lunchtime using an aggressive tone. All morning B had not followed any instructions from any teacher. If Mrs H had not arrived I was going to call the police."

6. The report then gave an account of his mother's arriving at the school, being asked to take B home but leaving without him. B was very distressed and the school contacted the social services department. B continued to walk around the school swearing to himself and not wanting to talk to anyone. He went outside the school and was swearing at members of the public in a violent and aggressive manner. The school continued to attempt to contact the social services department. B walked off and the headmaster contacted the police.

7. On the following day the decision was taken to exclude B. The report recorded that:

> "The staff at the Campus came to the conclusion that B was mentally unstable and with his violent behaviour he was a real danger to everybody at school. We also know on several occasions he has shown very violent behaviour towards his mother."

Then followed the words which found the libel claim:

> "On one occasion we know for sure that the police had to arrest B at his father's house for violent and dangerous behaviour."

8. At the appeal hearing the headmaster read his report and was asked for details of that incident and the name of the person who had given the information to which he replied: "Two very reliable parents had seen him being led away in handcuffs". This is the second statement of which complaint is made.

9. B's parents knew these allegations were untrue and they were and have remained deeply upset and offended. They repeatedly requested Mr Tomlinson and his solicitors, who, it should be noted, were acting on the instruction of the school's insurers, to produce the evidence to support his allegations or to withdraw them. They were rebuffed. That response was a serious misjudgement by those advising

him or the insurers standing behind him. The word "Sorry" seems to be missing from insurers' vocabulary which is a shame since an apology may frequently be enough to assuage wounded feelings. As G. K. Chesterton pointed out: "The injured party does not want to be compensated because he has been wronged; he wants to be healed because he has been hurt." Having received no satisfaction, B issued his claim on 5th May 2006 B, suing by his mother, his litigation friend, "for writing a libellous statement about him, then repeating it in public and adding further slanderous remarks".

10. In his judgment the recorder expressed his wholly understandable concern at the prospect of this litigation continuing. He imposed a two month stay "for mediation or conciliation, in the hope that some conversations may take place between the parties in the light of my judgment that will lead to a fruitful resolution without the need of further litigation". That was endorsed by Keene L.J. when giving permission to appeal. Sadly such attempts as were made bore no fruit but we persisted in the exploration of compromise. Under considerable pressure from us, Mr Bennett, counsel for Mr Tomlinson, was finally able to obtain instructions on the telephone to apologise on his client's behalf for reporting to the appeal panel that he had good information that B had been arrested for violence at his father's house. He told us that the headmaster had reported this information in good faith but accepted that it was incorrect. We are glad to say that apology was accepted. It is a great pity it was not proffered much earlier.

The claim

11. The particulars of claim are home-made and plead in paragraph 2 that:

> "Mr Tomlinson in his capacity as headmaster of [the school] excluded B."

The allegations upon which the claim depended were these:

> "6. At the Independent Appeal Hearing Mr Tomlinson read a statement that he said he had presented to the board of governors. Included in this statement was a paragraph, which did not appear in his previous statements: "On one occasion we know for sure that the police had to arrest B at his father's house for violent and dangerous behaviour." …
>
> 8. At the Appeal Hearing Mr Tomlinson when asked for details of the alleged incident, time, date, the name of the person who told him, replied that "Two very reliable parents had seen him being led away in handcuffs". …"

12. By his amended defence the defendant set out the circumstances leading to B's exclusion on that day as we have already summarised them. He pleaded that there was a history of some 59 other incidents between 13th October 2003 and 22nd March 2005 and gave particulars of 12 assaults on members of the staff and fellow students. He admitted that he prepared the report including the allegation of the police arresting B at his father's house but relied upon the whole of the report for its true meaning. The defence did not deal with the allegation of B's being led away in handcuffs

because it was not appreciated that it formed a separate claim. It did set out the defence of qualified privilege pleading that in his capacity as the claimant's headmaster the defendant had a duty to supply all information to the appeal panel which had an interest in receiving it. He also pleaded justification as follows:

> "9. The report and/or the words complained of are true in substance and in fact in so far as they bore or are understood to bear the meaning that:
>
> > the claimant has behaved in a violent and dangerous manner."

He relied on all the allegations which I have summarised above.

13. The defendant issued an application to strike out the claim under CPR 3.4(2)(a) as disclosing no reasonable grounds for bringing the claim, alternatively for summary judgment under CPR 24.2(a)(i) on the ground that the claimant had no real prospect of success.

14. That came before Mr Recorder Moloney Q.C. on 31st July 2007. Also before him was the claimant's application to amend the particulars of claim to add the direct claims under the Human Rights Act 1998.

15. That claim was formulated in this way. It was alleged that:

> "The defendant had no right to use information that had nothing to do with the claimant's school life, and which was irrelevant to his exclusion and which was untrue and unrelated to his private home life."

Particulars of the breaches of the Human Rights Act were given. It was alleged that the appeal tribunal, the school and the board of governors of the school were public authorities but of the defendant it was simply said that he carried out functions of a public nature and was being indemnified by the board of governors. The gist of the claim was pleaded in these terms:

> "The alleged incident was outside the school grounds. The defendant is claiming that this alleged incident took place at the home of one of the parents of the claimant but the claimant was already subject to permanent exclusion. This was all in the private family life of the claimant. The claimant is entitled to his privacy and at the time of the alleged incident he would have been classified as a minor and therefore his name would have had to be excluded from any reports. This did not belong in the public domain and was information totally irrelevant to the claimant's permanent exclusion, and furthermore, there were never any arrests made."

The judgment

16. The Recorder dealt first with the defendant's applications. He refused to enter summary judgment on the ground that the defence of qualified privilege would

succeed, because although the hearing of this statutory appeal panel was prima facie a privileged occasion, breaches of the procedural rules arguably undermined the privilege or set up a case of malice. As for justification, he found that the meaning of the report as a whole and the context in which its meaning had to be considered was that the boy's behaviour was so violent and dangerous that he ought to be permanently excluded from the school. There was no dispute about the incidents relied upon in support of the justification, and the incident complained of was but one of the chapter of examples of violent and dangerous behaviour. He concluded that the words complained of shared a common sting with the remaining allegations. In the result the recorder found and ordered that the claimant's claim in defamation be struck out and summary judgment be entered in the defendant's favour in regard to it on the ground that the claimant has no real prospect of defeating the defendant's defence of justification.

17. During the course of the hearing we were persuaded to grant the appellant permission to appeal against the order striking out the defamation claim because there might be some prospect of the claimant defeating the justification defence. On reflection, however, we consider that the experienced recorder gave good reasons for concluding that the sting in the words complained of was just the same sting as was contained in the other allegations in respect of which no complaint can conceivably be made. Consequently, we dismiss the claimant's appeal.

18. The recorder then turned to the application to amend. He pointed out that the Human Rights Act claims were "an elaboration on the defamation claims but they arise out of essentially the same alleged publication of words". He declined to grant permission for the Article 6 claim to be pursued primarily because responsibility for the conduct of the appeal hearing rested with the appeal panel and not the defendant who was "merely a witness or perhaps better described as a prominent party at those proceedings." There is no challenge to that part of his decision.

19. He found the Article 8 claim to be considerably more difficult to deal with in "a fast developing area". He acknowledged that the "powerful arguments" that an arrest by a policeman could not be regarded as a private incident but was a public matter. He also saw the strength of the arguments that the claim had to be balanced against the defendant's right to freedom of expression. He acknowledged there was no "appreciable" damage to the boy but he concluded that:

> "precisely because it is novel and difficult and raises complicated considerations, it would be equitable in all the circumstances for me to permit that claim to be continued."

He gave leave to amend accordingly.

Discussion

20. There are two aspects to the claim for breach of Article 8: the invasion of B's privacy and the damage to his reputation.

As to misuse of private information

21. The first question is whether B has a reasonable expectation of privacy in the particular circumstances of this case. The circumstances are that B, still only 12 years old at the time, suffers the serious misfortune that he is afflicted by Asperger's Syndrome and in that condition and with his other special needs, has a long history of violent behaviour going back over 17 months to October 2003 as set out above. The appeal panel found:

> "Mrs H did not deny that these acts had taken place and on this basis the Panel found, on the balance of probabilities, that the acts had taken place."

One notes that among the matters referred to the panel was the fact that "on several occasions he has shown very violent behaviour towards his mother." Could he, therefore, fairly and reasonably expect that his being arrested at his father's home (the parents being separated) for violent and dangerous behaviour and being led away in handcuffs was information which should not be made public to a statutory panel set up to consider whether his behaviour justified suspension? The answer must be no.

22. Although acknowledging that evidence of his misbehaviour at school was properly laid before the appeal panel, Mrs H cannot accept that evidence of his behaviour within the four walls of his home, nor of his being led away under police constraint could be material to the enquiry. She complains of procedural irregularities in that new reasons were being advanced for the exclusion contrary to the rules prescribed for the conduct of the appeal. We agree with Mr Bennett, however, that the headmaster's ignorance of the rules of the appeal panel and his breach of those rules do not make private that which is not private. She confuses the evidential question of relevance to the Panel's deliberations with the different question of whether B could reasonably expect that his headmaster would not be at liberty to reveal that in addition to his history of violence at school he been violent at home.

23. Mrs H submitted passionately that this information was used by the headmaster to make it seem worse for B because he knew the events of 22nd March did not merit permanent exclusion. "Somebody has to say you are not allowed to do this – to refer to a private matter not in the school domain." We can understand her anxiety and sympathise with (though we do not accept) her fear that this report may have undermined the relationship between father and son. The truth is that her real complaint is that the statements should never have been made because they are untrue and she feels strongly that the law must afford a remedy for the lie to be exposed and for recompense to be made for it. Her difficulty is that if B has a remedy for the telling of a lie about him, then it has to be one which falls within the scope of the law of libel and slander and that case has been struck out.

24. Nor does the nature of the information – public or private? – change because the headmaster refused to reveal his sources for the information. I am quite satisfied that this was not an invasion of B's privacy.

25. Can it be transformed into a human rights claim because the misconduct is (wrongly) alleged to have taken place within the home? We think not. We agree with what Eady J. said in *A v B* [2005] EWHC 1651, QBD: [2005] E.M.L.R. 36 at [32]:

> "For public policy reasons, there would be powerful arguments against concealing, with the assistance of the court, information about one's criminal activities. … [It] would be hard to justify the concealment of information about (say) domestic violence or tax evasion simply because it has taken place behind closed doors. It could hardly be categorised as information in respect of which there would be a reasonable expectation of confidentiality."

26. Mr Bennett, counsel for the appellant, relies on the old rule that "there is no confidentially in the disclosure of inequity", per Wood B.C. in *Gartside v Outram* (1957) 26 L.J. Ch. (n.s.) 113, 114. It may be, as Gray J. observed in *Maccaba v Lichtenstein* [2004] EHWC 1579, QBD; [2005] E.M.L.R. 6 at [7] that:

> "Iniquity is nowadays regarded as no more than one aspect of a broader defence of public interest or just cause,"

but we do not need to contribute to this interesting debate.

27. Here the case extends beyond disclosing information of misconduct which took place behind the closed doors of the home. It records the arrest for that misconduct and his public removal from the scene by the police. Those are not, in our judgment, private matters in respect of which the arrested person can claim confidentiality. These were matters in the public domain reasonably capable of being deployed in an enquiry to decide what to do with an unruly boy.

28. With respect to the recorder, who has great experience in this field, we conclude that he misdirected himself because B could have no real prospect of establishing a breach to his right for respect to his private life through misuse of this information. The amendment should not be allowed for that reason.

29. That makes it unnecessary to consider Mr Bennett's further submissions but, for what it is worth, we can say that we would regard any damage flowing from the disclosure of an assault which took place in private when there is an abundance of evidence of numerous assaults which took place in public to be minimal and any declaration of that breach to be an utterly hollow remedy.

As for damage to the claimant's reputation

30. A claim under the Human Rights Act 1998 is a free-standing claim independent of any common law claim which may arise from the same facts. In *W v Westminster City Council* [2004] EWHC 2866, QBD; [2005] 1 F.L.R. 816, an allegation was made at a social services child protection case conference that W had groomed an 11 year old girl for prostitution. He sued in libel. Unlike our case (and this is an important distinction), there was no well-founded plea of justification but only the defence of qualified privilege. No malice having been established, the libel claim failed. Tugendhat J. went on, however, to add at [103]:

> "However, it is possible, in an appropriate case, that a court might, in a claim under s.7 of the HRA, be willing to investigate the truth or falsity of words complained of, and to

> grant some declaration, even if the claim is clearly one to which a defence of privilege would be available, if brought in libel."

That, doubtless, was the inspiration for the amendment which was sought here. But is this an appropriate case for amendment?

31. The first issue now is what exactly is this pupil's reputation? The next question is whether that reputation has been diminished by the acts complained of. Here, there can be no argument about the first question. Sad as it is to say it, the catalogue of B's misbehaviour establishes that his reputation is that he is a disturbed child, at times beyond control and violent. We are conscious that this is a harsh judgment to pass on a young boy whose poor behaviour is no more than a symptom of his illness.

32. We must, however, put sympathy for B and his parents aside and ask the crucial question: "Does knowledge that he has assaulted his father, been arrested and led away in handcuffs make his reputation any the worse?" The sad and inescapable fact is that his reputation was already such that the additional allegations make no difference. So he has no real prospect of establishing the breach. The recorder was wrong not so to find.

Conclusion

33. It follows that in our judgment the claim as it was proposed to be amended would not withstand an application for summary judgment. As the action is inevitably doomed, permission should not be granted for the amendment. We would therefore allow that appeal. The result is that the claim fails altogether and must be dismissed.

34. We invite the parties to put in writing any submissions they may wish to make as to the form of the order which is to be drawn in the light of this judgment and on any outstanding issues relating to costs. The recorder ordered the claimant to pay the defendant 50% of his costs of the applications and the hearing that day assessed in the sum of £2,000 plus VAT. That leaves outstanding the remainder of the costs of the action which will now stand dismissed and the costs of this appeal. We will need to reflect upon what consequences, if any, the withdrawal of the allegation about the episode at the claimant's father's home will have on the order for costs that it will be appropriate for us to make in all of the circumstances of this case.