Neutral Citation Number: [2004] EWHC 408 (QB)

Case No: HQ02XO1992

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2004

Before :

THE HONOURABLE THE HONORABLE MR JUSTICE TUGENDHAT

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Between :

GLENROY TERENCE MEADE	**Claimant/ Respondent**
- and -	
KATY PUGH and MARIE HAMILTON	**Defendants/ Appellants**

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- -

Sara Mansoori (instructed by **Berrymans Lace Mawer**) for the **Appellants**
The Respondent appeared in person

Hearing dates: 25th February 2004

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Judgment

Mr Justice Tugendhat :

1. The Claimant is an experienced social worker. In 2002 he was studying to complete a diploma in social work at Ruskin College in Oxford. As part of the course he had to complete two placements, of fifty and eighty days respectively. His fifty day placement was with the Carers' Centre, Oxford. This is a company and a registered charity. It describes itself as supported by Oxfordshire County Council. The Defendants to this libel action are the Manager and Assistant Manager of the Centre. The action was commenced in May 2002. The words complained of are alleged to have been written by the Defendants in an undated feedback report ('the report') prepared in April 2002. It is signed only by the First Defendant. It was required for the purpose of the Final Placement Report on the Claimant. Ruskin College's Handbook specifically requires such a report to be prepared. Feedback reports were requested on 15th April by Dr Angela Green, the Claimant's Practice Teacher. It was Dr Green who compiled the Final Report on the Claimant. Accompanying that Report were four feedback reports.

2. The report is comparable in style and format to a school report, and takes up about half a page of A4 typed single spaced. It is unnecessary to set it out in full. The document is headed 'Final Placement Report – Terry Meade'. The first words complained of are representative. They are that the claimant 'did not participate sufficiently in the main office environment and consequently did not observe and develop the manner normally used by staff'. Other parts of the report comment favourably upon the Claimant, but the conclusion is that the writer would hesitate to write a positive reference for a potential employer and would not employ the Claimant 'without strong evidence of development in his next placement'.

3. Fortunately the Claimant was awarded a Pass.

4. The Defendants argue that the Claimants' claim is still not pleaded in accordance with the rules, for example in failing to set out the meaning complained of, or the extent of the publication. There is substance in these arguments, to which I will return. At the hearing before me the Claimant told me what he says is the meaning of the words complained of, namely that 'he was mediocre as a Carer's Centre worker, and unemployable as a Carer's Centre Development worker'. He also told me that publication was to the individuals responsible for him at Ruskin College, namely the course co-ordinator and tutor, as well as those at the Carer's Centre. He went on to submit that the words complained of are a public document. I have seen no evidence that the words complained of are a public document. The document that the Claimant produced at the hearing before me to support this states 'Your essay or project is a public document', but that does not suggest to me that the words complained of are public. Nevertheless for the purposes of this appeal, I assume the report is available to the public.

5. A Defence and Reply (entitled 'Claimant's Defence') have been served. The Defence includes a plea of qualified privilege. On 28 July 2003 the Defendants applied to strike out the claim under CPR Part 3.4(2) alternatively for summary judgment under CPR Part 24.

6. On 27 August 2003 the Claimant sent the Defendants an additional document headed 'Statement of Case (additional information)'. By this the Claimant complained of words in a second document date 15th April, similar in form to the report, and signed

by the Second Defendant. He had not complained originally about this document. The document is headed 'Final Placement Report – Terry Mead' and includes the request of Dr Green as follows: 'As part of Terry's final report, we need some feedback from colleagues. I should be grateful if you could find the time to comment briefly on your experience of working with Terry'. There then follows half an A4 page of comments. It is not necessary to set them all out. They conclude 'I hope that as he progresses through his course he feels more able to relax and to enjoy his second placement, rather than being at pains to endure it as sometimes seemed the case'. The report is very mild in its terms, and says nothing about future employment, one way or the other.

7. On 15th October 2003 Master Rose made an order in which he permitted the Claimant to add to his Particulars of Claim the contents of the 27 August 2003 document. The Master also dismissed a claim by the Claimant pleaded under the Human Rights Act 1998, alleging breach of Art 3 of the European Convention on Human Rights (inhuman and degrading treatment), and transferred to the Central London County Court a claim by him alleging breaches of the Sex Discrimination Act 1975 and the Race Relations Act 1976.

8. The provisions of the CPR referred to read as follows:

> '3.4 (2) The court may strike outa statement of case if it appears to the court – (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> 24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or ...; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.'

9. This is the Defendants' appeal from the Master's decision not strike out the claim, or to give summary judgment, and against his permission to the Claimant to rely on the document dated 27 August 2003. There is no appeal from the other parts of the Master's order. There is also before me an application to be made, if the appeal fails, for a ruling on meaning under CPR Part 53PD para 4.1. In addition, the Claimant has put before the court a Respondent's notice in which he seeks to rely on new material.

10. The provisions of the CPR relating to appeals, so far as material are as follows:

> '52.11 (1) Every appeal will be limited to a review of the decision of the lower court unless – .... (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) Unless it orders otherwise, the appeal court will not receive –

> ... (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was –
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.'

11. It is clear beyond argument that the report, and the similar report complained of in the document of 27 August 2003, were both published on an occasion of qualified privilege. This is the form of qualified privilege that has long existed in circumstances where there is an existing relationship. See *Adam v Ward* [1917] AC 309 and *Kearns v General Council of The Bar* [2003] EWCA Civ 331. The defendants do not need to rely on the extension of this privilege in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 2002. This conclusion on qualified privilege is the same, whether the words complained of are a public document or not. If they are in a public document (which I think very unlikely), then it is because Ruskin College make that requirement, and the Claimant has agreed to the requirements of Ruskin College. That cannot affect the question whether the defendants were acting under a duty in making the feedback reports requested by Dr Green who was also acting under a duty in requesting the reports for the purpose I have stated. It is indisputable that they were all three acting under a duty. The only basis on which the claim could succeed is if that privilege can be defeated by a plea of malice.

12. The Claim Form includes an allegation of malice as follows:

> 'The above comments discredited my reputation as highlighted earlier; they were malicious due to the assumption of Ms Pugh assuming that I 'did not participate sufficiently in the main office environment and consequently did not observe and develop the manner normally used by staff'. Because of this, Ms Pugh's ulterior motive was to slow down my progression on the Diploma in Social Work course, as well as to delay or stop my progression in Social Work. Comments mentioned by a Carer highlighting that the Carers' Centre should employ someone like me; was not only written down on paper but it was brought to the attention of Ms Pugh when she telephoned a client whilst I was on a home visit, inquiring if I was there, this I thought peculiar. On hearing positive feedback Ms Pugh in my opinion decided to act maliciously to sabotage my future placement and career'.

13. The Reply pleads malice in the following terms.

> 'The claimant believes that the comments made by defendants one and two were not based on facts and that the defendants acted maliciously by giving the claimant an offensive doorknocker. The talking doorknocker did not have the desired

> effect so defendants one and two engineered an ulterior motive to discredit the claimant's reputation by writing maliciously about him in the practice teacher's report. The claimant believes that defendants one and two did so maliciously because the claimant did not over familiarise or socialise with them and their colleagues in the manner to which they would have liked'.

14. Earlier in the document, as particulars of humiliating and degrading treatment in breach of Art 3 and of his other claims, the Claimant had pleaded:

> 'Evidence of the breach was in the form of an embarrassing and humiliating talking doorknocker … which was given to the claimant by defendant number two … on his last day at the Carers' Centre. Members of the staff team were present at the time, in particular a new colleague who started on the claimant's last day. On knocking the doorknocker, the claimant was greeted with a message saying: "Hello! You look 'fantastic', maybe when you've finished here, we could go out together, what do you think?" … On knocking a second time the claimant was greeted with a very malicious, humiliating and degrading message, which said: "I don't know who the hell you think you are but you're not welcome her, now get lost!"

15. There is a revised version of the document dated 27 August 2003, which the Claimant signed on 18 October 2003. There has been no permission to amend it, but I have read it. In this version of the document the Claimant states that the doorknocker was given to him by Marie Hamilton on 10 April 2002, the last day of his placement, in the main office in the presence of members of staff, and that when he opened it then it played the first of the two messages cited above, and that the message was repeated. He says that Marie Hamilton then told him that there was a second, nasty message, which he could play by flicking a switch, which he did.

16. There is no specific allegation that the First Defendant participated in the gift of the door knocker, although the Claimant does also say that he considered the door knocker to be a gift from everyone. Until the document of 27 August 2003 there was no complaint of the reference given to the claimant by Marie Hamilton, and there is nothing to support the allegation that Marie Hamilton had had anything to do with the preparation of the report by the First Defendant.

17. In fairness to the defendants I must record that in a witness statement of their solicitor made on their behalf, it is stated that the Claimant was given a voucher as a leaving present, and that the door knocker was a present from Dr Angela Green, who is keen on novelties and toys. Her reports about the Claimant are all favourable, so far as I have seen. The defendant's case is that it was a novelty gift. For the purposes of this appeal, which is not a trial, I can make no findings as to the facts at all.

18. For the purposes of this appeal I shall assume that the Claimant's allegations are all true as a matter of fact. This is an assumption I make simply to test them in law, not as a finding of fact, or an expression of opinion as to what the facts are likely to be. Because this is a libel action, where the claimant has a right to trial by jury, the test I must apply on these applications is closely analogous to the test used in criminal trials

in the light of *R v Gailbraith* [1981] 1 WLR 1039. This is re-emphasised by May LJ in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840, 1852, P 37-39. It is: Could a jury properly directed, and seeking dutifully to comply with the relevant directions, conscientiously reach a conclusion that the applicants were actuated by malice or not? If so, I should leave it to the jury, or at least to a later stage, to determine. But if I am able to conclude that a properly directed and conscientious jury could only decide the issue in favour of the appellant, then it will be my duty to close off that issue so as to save time and money in accordance with the objectives of the Civil Procedure Rules. If that is established, then there is no issue for a jury to decide.

19. The Master said this in his judgment on malice:

> 'In this particular case there is evidence before me of an incident which occurred some short while before the publication of the two memoranda in question. That incident was the handing over of a talking door knocker by a representative or representatives of the Carer Institute …. I have asked myself whether the fact of presenting the claimant with such an object which uttered offensive words should be regarding evidence of malice. I do not think I can say that there is no real prospect of the claimant showing malice ….'.

20. It was on this basis that he declined to strike out the claim or grant summary judgment to the defendants.

21. It is to be noted that he makes no reference in his judgment to the question of whether there is a prospect of the claimant showing that the defendants did not believe what they had written to be true.

22. The law on malice has been stated as follows.

23. In *Horrocks v Lowe* [1975] AC 135 Lord Diplock said at p149:

> 'The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the

occasion for some other reason he loses the protection of the privilege.

So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief." If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate

evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest," that is, a positive belief that the conclusions they have reached are true. The law demands no more.

Even a positive belief in the truth of what is published on a privileged occasion - which is presumed unless the contrary is proved - may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames. If this be proved, then even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true.

Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.

There may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even although he believed it to be true.’

24. In *Telnikoff v Matusevitch* [1991] QB 102 Lloyd LJ said at p120:

> 'If a piece of evidence is equally consistent with malice and the absence of malice, it cannot as a matter of law provide evidence on which the jury could find malice. The judge would be bound so to direct the jury. If there are no pieces of evidence which are more consistent with malice than the absence of malice, there is no evidence of malice to go to the jury.'

25. It is well known that it is difficult for a claimant to prove malice based on a dominant motive of spite, if he cannot prove that the defendant had no honest belief in the words complained of. In *Branson v Bower* [2002] QB 737 Eady J said at para 8:

> 'As is well known from Lord Diplock's speech in *Horrocks v Lowe* [1975] AC 135, it is, at least theoretically, possible that a finding of malice could be made notwithstanding a conclusion that the defendant was speaking honestly on an occasion of qualified privilege. Lord Diplock emphasised that judges and juries should be slow to find a defendant malicious on the sole ground that the publication of the defamatory words (even though he believed them to be true) was prompted by the dominant motive of injuring the claimant. I have never heard of such a finding, but it is there in the jurisprudence as a possible outcome.'

26. It follows from the foregoing that it is not enough for the claimant to prove that the defendants' motive in publishing what they allegedly did was personal spite, or a desire to injure. He must also prove either that personal spite, or a desire to injure, was their dominant motive, or that they did not believe what they wrote to be true. The Master did not address these questions in his judgment.

27. I therefore turn to consider whether there is any evidence that they did not believe it to be true, or that spite, or a desire to injure, was their dominant motive.

28. So far as the door knocker is concerned, the Master considered possible, and I too assume for this purpose, that it was given by the defendants, and they were acting spitefully, or with a desire to injure. However, that does not of itself show that the defendants did not believe what they wrote to be true. Giving a spiteful gift (if that is what they did) and writing a false reference are two different things. Even if I assume that the gift was malicious that is not evidence which makes it more likely than not that the reference was written dishonestly.

29. So far as the pleading is concerned, there are no other matters pleaded which are more consistent with the defendant not believing, rather than believing, the words complained of.

30. The Respondent's Notice addresses this point. In it the Claimant writes that that defendants did not believe that what they had written was true and asks permission under CPR52.5(1) to uphold the order of the Master for reasons additional to those given by the Master.

31. The documents attached to the Respondent's Notice are very voluminous. I have read them, with a view to considering whether permission should be given. They include

various reports of the Claimant's performance during his placement, almost all of them favourable. Included are a number signed by Dr Green, none of them the subject of any complaint by the claimant. There is a report dated 13th March 2003 signed by both the Claimant and the First defendant, which is less favourable, and similar in tone to the words complained of. A letter from the First Defendant to a person for whom the Claimant had cared, asking for comments on the Claimant, produced a warm recommendation that they should employ more carers like the Claimant.

32. I can find nothing in these papers which in any way supports an argument that either defendant wrote reports in April which they did not believe to be true. The First Defendant's views appear, so far as these papers are concerned, to have been consistent. There is nothing to indicate that the position of the Second Defendant was any different. The fact that the reports of some members of the staff are more favourable than others does nothing to show that those who wrote the less favourable reports did so dishonestly. The fact that a report dated 20 March 2002 says that the Claimant was making excellent progress is not inconsistent with what the First Defendant wrote some three weeks later. The fact that the First Defendant did not adopt the recommendation that they should employ more carers like the Claimant does nothing to show that the First Defendant was dishonest in writing a different recommendation.

33. I refuse permission to rely on the Respondent's Notice or the additional documents. It would serve no purpose.

34. Unless the contrary is proved, which I find it is not, then, as a matter of law, a positive belief by the defendants in the truth of what is published on a privileged occasion is presumed. Accordingly, I can see no prospect of the Claimant defeating the plea of qualified privilege, and so of succeeding in the action. The Master erred in law in his interpretation of the significance of the evidence of malice that he found. On the material before me, making the assumptions that I have said I make, the trial judge would be bound to withdraw the issue of malice from the jury.

35. For the same reason the Master erred in law in permitting the introduction of the document dated 27 August 2003. The Second Defendant has other objections to the Master's order in this respect, based on the lateness of the amendment. But in the event, it is not necessary for me to make a decision on these objections.

36. The Claimant has no real prospect of succeeding on the claim. The appeal will be allowed and summary judgment will be entered for the Defendants.

37. Given my conclusions on malice, I do not need to consider the other points made for the defendants. Nor do I need to move on to the defendants' application for a determination of the issue relating to meaning.