Neutral Citation Number: [2006] EWHC 1496 (QB)

Case No: HQ05X03295

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2006

Before :

THE HON. MR JUSTICE EADY

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Between :

Marc Tufano	**Claimant**
- and -	
Gareth Vincenti	**Defendant**

- -
- -

Mr Tufano appeared in person
Adam Speker (instructed by **Hempsons**) for the Defendant

Hearing date: 14th June 2006

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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 HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

1. This is an unhappy case and I can understand Mr Tufano's wish to take every opportunity to seek greater access to his children. The question which arises on the present application is whether these libel proceedings represent an appropriate step for him to take in that context.

2. At the hearing on 14 June 2006 Mr Tufano represented himself in order to resist the Defendant's application to strike the claim out. Up to that point, Mr Speker, appearing on the Defendant's behalf, had been under the impression that Mr Tufano wished to discontinue the proceedings. There are a number of manuscript messages from him which suggested that he wished to take that course (albeit with any adverse costs consequences). On the day of the hearing itself, however, Mr Tufano made it clear that he wished to continue.

3. There was an application for a hearing to take place in private, but ultimately I decided that this was unnecessary. Instead I imposed a restriction in accordance with the court's discretion under CPR 31.22. The sensitivity arose in connection with the document which contains the words complained of; namely, a report prepared by the Defendant for the use of the court (the County Court in York) in connection with family proceedings. It was, or purported to be, a psychiatric report. It touched upon matters of a private nature relating not only to Mr Tufano himself but also to his children. Mr Tufano did not apply to have the proceedings heard in private, and I thought that the sensitive material would be adequately protected by imposing a restriction under the provision to which I have referred.

4. There is no need for me to refer in the body of this judgment to the words complained of. It is questionable in some instances whether particular passages are defamatory of Mr Tufano at all, but it is not suggested that the claim should be struck out on the basis that the words are incapable of bearing *any* defamatory meaning. From my brief description of the background circumstances, it will already have become apparent that the primary challenge to the proceedings is founded upon public policy considerations. Mr Speker argues that, from its very nature, the Defendant's report must be protected by immunity from suit or, in so far as there is any distinction to be drawn, by the defence of absolute privilege.

5. As a matter of fact, there are other pleaded defences of consent and qualified privilege (the latter being a "long stop" alternative to absolute privilege). Mr Speker also argued, on the basis of evidence, that the proceedings should be construed by the court as constituting an abuse of process.

6. There is an allegation by Mr Tufano that the Defendant published the contents of his report outside the scope of any privilege and, in particular, to the BBC. That is denied by the Defendant in his witness statement and there is no solid basis pleaded, or in evidence, from which a court could reasonably be invited to infer that he was lying in this respect. I therefore propose to concentrate on the primary publication which forms the subject-matter of this claim.

7. The background can be stated shortly. On 9 December 2004 His Honour Judge Walsh in the York County Court appointed a guardian for the children and directed the guardian to commission, file and serve a report from a suitably qualified psychiatrist

in respect of certain persons, including Mr Tufano, as to their psychiatric condition and any other matter within the expert's competence relevant to the pending application before the court. All the relevant persons (again including Mr Tufano) gave their consent.

8. On 31 January 2005 the solicitor instructed on behalf of the children's guardian wrote to the Defendant setting out his instructions to act in the capacity of sole expert in the York family proceedings. On 21 February 2005 District Judge Handley approved the letter of instruction to the Defendant, then in draft, and gave permission to release case papers to the Defendant for the purpose of preparing his report. Some months later, on 8 June 2005, the necessary consent form was signed by the Claimant. (This is naturally the basis for the pleaded defence of consent or leave and licence.)

9. Matters seem to have moved at fairly leisurely pace, and Mr Tufano attended for interview with the Defendant on 17 August 2005. The finished report was sent to the solicitor on 20 October and she passed it *inter alios* to Mr Tufano.

10. There is no doubt that Mr Tufano considers the report to contain a catalogue of inaccuracies and distortions. Whether he is right about that is clearly not a matter for me to determine at this stage. For present purposes, it is probably appropriate that I should make every assumption in this respect in Mr Tufano's favour. I naturally emphasise that in doing so I am not intending to express any conclusion on the quality or factual content of the report. That would be clearly outside the scope of a preliminary application of this kind.

11. The Claimant sent a complaint by e-mail to the General Medical Council about the Defendant and the preparation of his report. The next day he sent a similar complaint to the NHS Complaints Commission. In each case the complaint was copied to the Defendant (and apparently other people). Two days later, on 7 November 2005, a complaint was also made to the Harrogate Clinic. It was on 9 November 2005 that the claim form was issued initiating these proceedings. The defence was served on 7 December and the present application on 31 January 2006.

12. Mr Speker submits that the issues of absolute privilege and immunity from suit are appropriate for summary determination, since there are no facts in issue which would require to be determined by a jury. Reference was made in this context to the cases of *Alexander v Arts Council of Wales* [2001] 1 WLR 1840, at [37] and *Wallis v Valentine* [2003] EMLR 8, at [13]. The relevant facts, which I have briefly summarised already, relating to the circumstances in which the Defendant was instructed as an expert are not in dispute.

13. My attention was drawn to certain passages in *Gatley on Libel & Slander* (10th edn) at paras. 13.11 and 13.12:

> "No action will lie against a witness (whether an expert witness or a witness of fact) for defamatory words spoken in his character of witness with reference to the inquiry upon which he is called or required to give evidence, even though such words were irrelevant and spoken maliciously and without reasonable or probable cause. … Like the judicial immunity the rule is established not for the benefit of malicious witnesses but

> for the public benefit to prevent honest witnesses being deterred from telling the truth by fear of action. It has also been pointed out that the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence.
>
> The privilege which protects a witness from an action for defamation in respect of his evidence in a judicial proceeding applies not only to evidence given *viva voce*, but also to statements contained in an affidavit, a witness statement, or in a document handed in by a witness at the close of his examination. However, privilege extends a good way beyond what is said or done in court. It has long been the case that if the person making the statement was called or proposed to be called as a witness then the protection of absolute privilege would extend to what he said while a proof of his evidence was being taken and the same was so in respect of interviews with the object of possibly calling him at the trial".

On a parity of reasoning, the same protection would be afforded in proceedings for some comparable cause of action, such as malicious falsehood.

14. For a recent illustration of this general principle, Mr Speker referred to the judgment of Collins J in *Meadow v GMC* [2006] EWHC 146 (Admin) at [9]:

> "The point is based on the immunity from suit of a witness in respect of evidence he gives in a court of law. That immunity applies as much to an expert as to any other witness: see *X (minors) v Bedfordshire CC* [1995] 2 AC 633 approving *Evans v London Hospital Medical College* [1981] 1 WLR 184. The immunity extends to any civil proceedings brought against a defendant which are based on the evidence which he gives to a court. It extends to any statement which the witness makes for the purpose of giving evidence".

15. It can thus be readily appreciated that the report, containing the words complained of in these libel proceedings, falls squarely within the ambit of that principle. There is scope for debating the theoretical difference between absolute privilege and immunity from suit: see e.g. *Fayed v Al-Tajir* [1988] 1 QB 712. But there is no reason to explore that for present purposes.

16. This point is enough to dispose of the present application. Mr Tufano was undoubtedly keen to have the opportunity of a jury verdict on the accuracy of the facts contained in the Defendant's report and upon his state of mind, since he would wish to allege bad faith and/or recklessness on the Defendant's part. As I explained in the course of argument, however, the primary issue is a matter of law to be determined by the judge. If this first issue can be determined in the Defendant's favour without the need to investigate evidence, as I have held that it can, then I am afraid that is the end of the claim.

17. Strictly speaking, therefore, there is no need to address the supplemental arguments raised on the Defendant's behalf. Mr Speker did press, with some vigour, the argument based upon abuse of process. Reference was made, for example, to the case of *R v Kellett* [1976] 1 QB 372. Mr Tufano takes offence at the suggestion that he was abusing the court's process in bringing these proceedings, since his purpose was to demonstrate the flaws in the Defendant's report. It is necessary to remember in this context that the law recognises that, in certain circumstances, it *may* be appropriate (that is to say, legally permissible) to approach a witness or seek to persuade him to change his evidence if it is genuinely believed that it is misleading or false: see e.g. the discussion by Stephenson LJ in *R v Kellett* (cited above) at pp 386-8 and *R v Patrascu* [2004] 4 All ER 1066 at [18]. In the circumstances of this case, I do not consider that I am in a position to come to a definitive conclusion on the issue of abuse of process on the evidence as it stands. Nor is it necessary that I should do so in order to dispose of the present application.

18. Nor do I need to address the merits of alternative defences, such as leave and licence or qualified privilege. I prefer not to address questions of good faith or malice, since it would be for me to consider whether a court would be perverse to make an adverse finding against the Defendant: see e.g. *Alexander v The Arts Council of Wales* (cited above). That is a formidable task at the pleadings stage. In view of my clear conclusion on the primary submission, it is inappropriate to embark upon it.

19. Mr Speker has sought permission to amend his defence to clarify certain matters. I will grant that application and, having done so, I will also grant summary judgment in the Defendant's favour on the ground of absolute privilege and/or immunity from suit.