DL

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 172/86

IN CAMERA HEARING

BETWEEN NEWS MEDIA OWNERSHIP LIMITED

Appellant

AND DESMOND MAXWELL TUCKER

Respondent

UNIVERSITY
14 JUL 1988
LAW LIB

Coram: Cooke P.
McMullin J.
Hillyer J.

Hearing: 23 October 1986

Counsel: Miss Sandra Moran for Appellant
P.J. Bartlett and P.A. Morten for Respondent

Judgment: 23 October 1986

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal from a decision of Jeffries J. granting an interim injunction until the further order of the High Court. At the same time the Judge adjourned the case to 3 November 1986 for a considered hearing, clearly a reference to the plaintiff's application for an interim injunction which had been made orally. The Judge heard the application at 7.45 p.m. on the day during which the High Court action was issued. Both parties were represented by counsel before him. In turn we have accorded urgency to the hearing this afternoon of the defendant's appeal. It should be recorded that this Court has sat in camera for the present hearing, an order to that effect having been made

without objection by the appellant. It is one of those very exceptional cases in which a public hearing would have rendered futile the relief being sought in the action: see Skope Enterprises Ltd v. Consumer Council [1973] 2 N.Z.L.R. 399 and the authorities there collected.

Miss Moran for the appellant made it clear to us that the newspaper has not made a definite decision to publish (unless restrained by the Court) an article on the lines feared by the plaintiff; it merely wishes to reserve the right to publish and has brought this appeal as a matter of principle in an attempt to reserve that right. It has not been part of the appellant's argument that the public interest is so strong as to demand publication before 3 November.

Mr Bartlett for the respondent intimated to us that it is proposed to amend the statement of claim, understandably in hardly more than outline form at present. As the Judge accepted, the plaintiff's allegations will require consideration as to whether there are in New Zealand law torts of unlawful invasion of privacy and intentional or reckless infliction of physical harm (as by emotional shock): Jeffries J. saw these matters as to some extent at least coalescing in the present case.

We agree with the Judge that the allegations raise seriously arguable and indeed important and difficult issues. It is enough to read two passages from Salmond and Heuston on Torts, 18th ed. At p.33 there is the following:

> ... there are cases in which complaint is made about the public disclosure of embarrassing private facts about the plaintiff - for example, that he does not pay his debts. In the leading American case the defendant published to the world an account of the plaintiff's earlier career as a prostitute and the accused in a sensational murder trial. The plaintiff, who had quite left aside her earlier life of shame and now moved in reputable society, recovered damages. Until the Rehabilitation of Offenders Act 1974 the defendants would have had the defence of justification if sued for libel in such a case in England.

And at pp.198-9 under the general heading of Emotional Distress:

> ... one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it. In Wilkinson v. Downton the defendant, a licensed victualler, after going to the races, by way of a perverted practical joke had told the plaintiff that her husband was lying injured at a public-house in Leytonstone as the result of an accident, and that she was to go at once in a cab with two pillows to fetch him home. The resultant shock to the plaintiff's nervous system produced severe and permanent physical consequences for which the defendant was held liable in damages by R.S. Wright J. The defendant is also probably liable if his conduct, though directed at some third party, causes emotional distress to another, who is known to be present and might reasonably have been foreseen as likely to be affected by it.

The authority for this last proposition is the New Zealand case of Stevenson v. Basham [1922] N.Z.L.R. 225.

The relevant law of New Zealand is far from clearly settled in either area. We add only that we agree with Miss Moran that the extent of any defence of justification would require consideration. We have in mind in particular the argument that a plaintiff who makes an appeal to the public for funds may in some circumstances have to accept a certain amount of investigation of his history. No view would now be appropriate on that or any other aspect of the ultimate legal issues in the case.

Being satisfied that there are seriously arguable questions we are not prepared to disturb the Judge's discretionary decision to grant an interim injunction. The statement of claim and the affidavit of Dr Thompson provide a sufficient basis for concluding that the plaintiff has reasonable apprehension that the defendant will publish an article having what Dr Thompson describes as a potentially lethal effect. As already indicated, the defendant does not repudiate the possibility of publishing the kind of article which the plaintiff apprehends. The Judge was entitled to find that the balance of convenience pointed to the grant of interim relief: once published such an article would have done its damage, whatever that might be; whereas we repeat that an urgent necessity to publish for any reason has not been contended for.

The course to be followed on 3 November will be for the Judge, subject to the representations and ordinary rights of the parties. The present appeal is dismissed. Costs are reserved.

R B Cooke P.

Solicitors:

Goddard Oakley Carter & Moran, Wellington, for Appellant

Macalister Mazengarb, Wellington, for Respondent