Set I

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.174/81

BETWEEN	P.M. O'BOYLE Plaintiff
A N D	P.R. LIGGETT First Defendant
A N D	D. COLLINS Second Defendant
A N D	R.K. ROOT Third Defendant
A N D	R.J. ROGATSKI Fourth Defendant
A N D	M.A. RAYNER Fifth Defendant
A N D	K.M. PENN Sixth Defendant
A N D	R.F. CARSON Seventh Defendant
A N D	B.R. BENNISON Eighth Defendant
A N D	R.W.M. TAYLOR Ninth Defendant
A N D	W.D. LYNN Tenth Defendant
A N D	G.E. BLOOMFIELD Eleventh Defendant

Hearing: 12 March 1984

Counsel: A.A.P. Willy and I. Brooks for Plaintiff
B. McClelland Q.C. and P.H.B. Hall for Defendants

Judgment: 18/5/84

JUDGMENT OF ROPER J.

This is a motion by the Defendants for judgment of non-suit, or alternatively an order directing a new trial, or entry of judgment for the Defendants non obstante veredicto.

At all material times the Plaintiff was a tanker driver employed by Mobil Oil New Zealand Limited at the company's oil depot at Chapmans Road in Christchurch. The Defendant Mr Liggett is the Secretary of the Drivers Union, Mr Collins worked for B.P. Europa and was at one time President of the Union, and the remaining Defendants were tanker drivers employed by either Mobil or Shell operating from the Chapman Road depot. Some held positions in the Union such as union delegate. Although tanker drivers had their own award they had no separate union and were simply members of the general Drivers Union. I understand that the position has now changed and tanker drivers work on their own account on contract, but that is by the way.

By his second amended Statement of Claim the Plaintiff allged that the Defendants had conspired together to -

"(a) cause the plaintiff to pay to the Canterbury & Westland Drivers and their Assistants Industrial Union of Workers (hereinafter called 'the Union') (of which the plaintiff is a member) an unlawful levy of 25 cents, and later 95 cents per week.

(b) cause the plaintiff mental and physical suffering.

(c) cause the plaintiff to lose his right to attend meetings of the members of the above Union and there exercise the privileges of membership.

(d) put the plaintiff's continued performance of his contract of service with his abovenamed employer in jeopardy."

And that their conduct was actuated by -

"(a) a spirit of vengeance because the plaintiff has publicly questioned the right of the Union to charge and collect the levy.

(b) a desire to terminate the plaintiff's employment with the company.

(c) a desire to teach the plaintiff and other like-minded persons that he and they should not question decisions of the Union however they are arrived at, and whether lawful or unlawful.

(d) a desire to cause the plaintiff unnecessary mental and physical suffering."

The Plaintiff sought an injunction to restrain further conspiring, compensatory damages of $5,000 against each Defendant "For the Plaintiff's physical and mental pain and suffering", and punitive damages in the sum of $1,000 against each.

By his second cause of action the Plaintiff claimed punitive damages as before against each Defendant, the allegation being intimidation. Paragraph 6 of the Statement of Claim reads:-

"6. THAT between the 1st day of September 1980 and the present time, the abovenamed defendants have alone and together intimidated the plaintiff with actual violence, threats of violence, interference with the plaintiff's employment,

damages against each.

The hearing before the jury occupied seven days and after an 11 hour retirement it returned with these answers to the issues:-

"1. Was there a conspiracy involving two or more of the Defendants having as its predominant purpose to cause injury to the Plaintiff?

Answer: Yes

2. If the answer to question 1 is 'yes', which of the following Defendants was a party to that conspiracy?

(a)	P.R. Liggett	Answer:	Yes
(b)	D. Collins	Answer:	Yes
(c)	R.K. Root	Answer:	Yes
(d)	R.J. Rogatski	Answer:	Yes
(e)	M.A. Rayner	Answer:	Yes
(f)	K.M. Penn	Answer:	Yes
(g)	R.F. Carson	Answer:	Yes
(h)	B.R. Bennison	Answer:	Yes
(i)	R.W.M. Taylor	Answer:	Yes
(j)	W.D. Lynn	Answer	Yes
(k)	G.E. Bloomfield	Answer:	Yes

3. If the answer to question 1 is 'yes', did such conspiracy cause damage to the Plaintiff in any one or more of the following ways:-

(a) By causing the Plaintiff to pay to the Canterbury & Westland Drivers and their Assistants Industrial Union of Workers (hereinafter called 'the Union') (of which the Plaintiff was a member) an unlawful levy of 25 cents and later 95 cents per week?

Answer: Yes

(b) By causing the Plaintiff mental and physical suffering?

Answer: Yes

interference with the plaintiff's property and property for which the plaintiff is responsible and over which the plaintiff has control, by strikes and threats of strikes, by threats against the plaintiff's family, personal abuse and foul language, and by pressure brought to bear on the plaintiff's employer, all of which conduct is intended to force the plaintiff to:

(a) pay an illegal levy to the Union

(b) cease to raise at Union meetings matters of concern to the plaintiff relating to the collection and use of certain Union funds

(c) give up his job with the Company

(d) resign from the Union."

It is claimed that the intimidation had these effects:-

"(a) loss in that he has paid an unlawful levy to the Union in the sum of $54.85

(b) physical assault and mental suffering and fear for his safety and that of his family and fear that he may lose his job

(c) caused the plaintiff to lose his right to attend meetings of the members of the above Union and there exercise the privileges of membership."

The third cause of action alleged a conspiracy to intimidate which to my mind would only have served to confuse the jury in an already difficult case. I did not allow it to go to the jury.

The fourth cause of action alleged physical assaults by certain of the Defendants with again a claim for punitive

(c) By causing the Plaintiff to lose his right to attend meetings of the members of the above Union and there exercise the privileges of membership?

Answer: Yes

(d) By putting the Plaintiff's continued performance of his contract of service with his abovenamed employer in jeopardy?

Answer: Yes

4. If the answer to question 1 is 'yes' and the answer to any part of question 3 is 'yes', assess the compensatory damages (if any) to be paid by such of the Defendants as were parties to the conspiracy (as found in Issue 2):-

(a)	P.R. Liggett	$5,000.00
(b)	D. Collins	$3,000.00
(c)	R.K. Root	$5,000.00
(d)	R.J. Rogatski	$3,000.00
(e)	M.A. Rayner	$5,000.00
(f)	K.M. Penn	$5,000.00
(g)	R.F. Carson	$2,500.00
(h)	B.R. Bennison	$3,500.00
(i)	R.W.M. Taylor	$5,000.00
(j)	W.D. Lynn	$5,000.00
(k)	G.E. Bloomfield	$4,000.00

Special Damages (Agreed as to quantum) $ 54.85

5. If the answer to question 1 is 'yes' and the answer to any part of question 3 is 'yes', assess the punitive damages, if any, to be paid by such of the Defendants as were parties to the conspiracy (as found in Issue 2):-

(a)	P.R. Liggett	$1,000.00
(b)	D. Collins	$ 500.00
(c)	R.K. Root	$ 750.00
(d)	R.J. Rogatski	$ 200.00
(e)	M.A. Rayner	$ 750.00
(f)	K.M. Penn	$ 700.00
(g)	R.F. Carson	$ 200.00
(h)	B.R. Bennison	$ 300.00
(i)	R.W.M. Taylor	$ 750.00
(j)	W.D. Lynn	$ 750.00
(k)	G.E. Bloomfield	$ 500.00

6. Did any of the Defendants intimidate the Plaintiff by coercing him to take any one or more of the following actions:-

(a) To pay an illegal levy to the Union?

Answer: Yes

(b) To prevent him from raising at Union meetings matters of concern to the Plaintiff relating to the collection and use of certain Union funds?

Answer: Yes

(c) Into giving up his job with the Company?

Answer: Yes

(d) Into resigning from the Union?

Answer: Yes

7. If the answer to any part of Issue 6 is 'yes', which of the Defendants so intimidated:-

(a)	P.R. Liggett	Answer:	No
(b)	D. Collins	Answer:	No
(c)	R.K. Root	Answer:	Yes
(d)	R.J. Rogatski	Answer:	No
(e)	M.A. Rayner	Answer:	Yes
(f)	K.M. Penn	Answer:	Yes
(g)	R.F. Carson	Answer:	No
(h)	B.R. Bennison	Answer:	Yes
(i)	R.W.M. Taylor	Answer:	Yes
(j)	W.D. Lynn	Answer:	Yes
(k)	G.E. Bloomfield	Answer:	Yes

8. If the answer to any part of Issue 6 is 'yes' assess the punitive damages, if any, to be paid by the Defendants who so intimidated as found in Issue 7:-

(a)	P.R. Liggett	$-
(b)	D. Collins	$-
(c)	R.K. Root	$
(d)	R.J. Rogatski	$-
(e)	M.A. Rayner	$
(f)	K.M. Penn	$
(g)	R.F. Carson	$-
(h)	B.R. Bennison	$

(i)	R.W.M. Taylor	$
(j)	W.D. Lynn	$
(k)	G.E. Bloomfield	$

(NOTE: Only one award of punitive damages may be made against any particular Defendant.)

9. If the answers to Issue 1 and all parts of Issue 6 are 'no', did any of the following Defendants assault the Plaintiff:-

(a)	W.D. Lynn	Answer:
(b)	B.R. Bennison	Answer:
(c)	K.M. Penn	Answer:
(d)	R.W.M. Taylor	Answer:
(e)	R.K. Root	Answer:

10. If the answer to any part of Issue 9 is 'yes', assess the punitive damages, if any, payable by each Defendant who assaulted the Plaintiff:-

(a)	W.D. Lynn	$
(b)	B.R. Bennison	$
(c)	K.M. Penn	$
(d)	R.W.M. Taylor	$
(e)	M.A. Rayner	$
(f)	R.K. Root	$

Because of the way the issues were framed no answers were required to Issues 8, 9 and 10 and none were given.

The result was an overall award of $46,000 general damages and $6,400 punitive damages.

Judgment was thereupon entered for the Plaintiff in accordance with the Jury's verdict with all questions of costs and interest reserved, and with leave reserved to the Defendants to move for judgment, new trial or such other orders as may be thought necessary, with the time extended for the filing of such application to the 15th February 1984. A copy of my summing up was made available to Counsel a matter of a few days after the conslusion of the trial.

The Defendants' motion seeking the relief already referred to was filed on the 10th February.

The grounds for relief, as set out in the motion, are as follows:-

A. There was no or no sufficient evidence from the Plaintiff that any damage he sustained was caused by the Defendants or any of them.

B. There was no or no sufficient evidence to support the answers of the jury to the issues 1, 2(a) to (k) (inclusive) and issues 3(a) to 3(d) (inclusive) and issue 5(a) to 6(d) (inclusive) and issues 7(c), 7(e), 7(h), 7(i), 7(j) and 7(k).

(This amounts to a plea that there was no evidence to support any of the jury's affirmative answers or awards of damages.)

C. The answers of the jury to issues 2(a), 2(b), 2(d) and 2(g) and 3(a) to 3(d)(inclusive) were inconsistent with the answers to issues 6(a) to 6(d) (inclusive) and 7(a), 7(b), 7(d) and 7(e).

(This in essence is an allegation that there was an inconsistency in the jury's findings that the Defendants Liggett, Collins, Rogatski and Carson were parties to a conspiracy causing the damage referred to in Issue 3, but did not intimidate with the consequences set forth in Issue 6.)

D. The answers of the jury to issues 2(a) to 2(k) (inclusive) and 3(a) to 3(d) (inclusive) and 6(a) to 6(d) (inclusive) and 7(c), 7(e), 7(f), 7(h), 7(i), 7(j) and 7(k) were against the weight of evidence.

E. The general damages awarded were excessive.

F. The punitive damages awarded were excessive.

G. That taking into account the weight of evidence the answers of the jury to the issues and the awarded damages were not those of a reasonable jury.

However, on the hearing of the present motion Counsel for the Defendants sought to advance grounds not referred to in the motion, and the first was that the pleadings and the whole approach to compensatory and punitive damages on the conspiracy allegation were wrong in law and the jury's verdict thereon cannot stand. In short the whole trial miscarried. Mr McClelland's point was that if the Defendants committed the tort of conspiracy they were joint tort feasors, and while it was permissible to join them in the one action there could only be one sum claimed and awarded for compensatory damages and one sum for punitive damages. I must agree with Mr McClelland that conspiracy is a joint tort and that the general principle is that only one sum may be awarded in a single proceeding for a joint tort. However, that is not the way this case was pleaded and proceeded to trial. This point has never been raised before. The Plaintiff's pleadings were not challenged, nor was it ever suggested that the Issues or my directions to the jury presented the case on a wrong footing.

The Defendants elected to defend and conduct their case on the basis of the Plaintiff's pleadings without objection and it is now too late to argue that it should have been conducted on some other basis. The principles as to the conduct of a party at trial have been laid down and acted upon in a number of cases. In Browne v. Dunn (1894) 6 R 67 Lord Halsbury said at page 75:-

> " My Lords, it is one of the most familiar principles in the conduct of causes at Nisi Prius, that if you take one thing as the question to be determined by the jury, and apply yourself to that one thing, no Court would afterwards permit you to raise any other question. It would be intolerable, and it would lead to incessant litigation, if the rule were otherwise. I think Dr Blake Odgers has, with great candour, produced the authority of Martin v. Great Northern Railway, which lays down what appears to me to be a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it."

And in Seaton v. Burnand [1900] A.C. 135 Lord Morris said at page 145:-

> " In this case the learned counsel on both sides acquiesced in the questions as proposed by the learned judge; and now it is said that there are two other questions which ought to be put. My Lords, of course I do not say the rule is so extreme that if there were some extraordinary miscarriage of justice the persons concerned should be bound by it; but in an ordinary case, in my opinion, the parties must be bound by what is called the course of the trial - that is to say, the way in which the trial was carried on - and when the learned counsel on both sides agree upon what are to be the questions to be put to the jury, in my opinion it would be only in an exceptional case (so exceptional that at the moment I cannot anticipate what would be the circumstances that would, in my judgment, justify

> it) it could be held that any other questions should be submitted to the jury beyond those which the parties had agreed upon."

The same principle is illustrated by Barker v. Pigden [1937] 1 K.B. 664 (C.A.) where the Plaintiff sued the Defendant for a number of separate slanders. The Judge did not direct the jury to return a separate verdict with separate damages in respect of each publication, with the result that the jury found a single verdict, and judgment was entered accordingly. It was held that as no objection had been taken at the trial to the jury being asked to consider the different publications as a whole instead of separately the defendant could not be heard to say that the verdict was a nullity.

Again in Broome v. Cassell & Co. [1972] A.C. 1027 one of the issues was whether a punitive award of damages should have been split between two defendants. At page 1064 Lord Hailsham said:-

> " I also consider that, having agreed to the form of the questions left to the jury, it was not really open to the appellants to contend, on appeal, that the awards should be split."

It follows that I am not prepared to consider the first fresh ground raised. The next new ground alleges a misdirection of the jury on the question of exemplary damages, it being said that I should have directed in accordance with this passage from the judgment of Lord Reid in Broome v. Cassell at page 1089:-

> "The difference between compensatory and punitive damages is that in asessing the former the jury or other tribunal must consider how much the

plaintiff ought to receive, whereas in assessing the latter they must consider how much the defendant ought to pay. It can only cause confusion if they consider both questions at the same time. The only practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss but also for any injury to his feelings and for having had to suffer insults, indignities and the like. And where the defendant has behaved outrageously very full compensation may be proper for that. So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory and as punitive damages. But if they think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment."

What I said to the jury on the question of compensatory damages was this:-

" I propose to deal now solely with the claim for general damages, that is the compensatory damages of $5,000 against each. $5,000 is the claim against each conspirator, if there were conspirators. That is only the Plaintiff's estimate of his damage because when he issues his claim the law requires that he put some figure in it. It may be a realistic figure or it may be wildly exaggerated or it may be somewhere in between, but whatever it is it is not binding upon you in any way except that you could not award more against any one Defendant. What you must arrive at, if you find that these compensatory damages are payable on the allegation of conspiracy, is a sum that will fairly and reasonably compensate Mr O'Boyle for the damage, if any, that he has suffered. That I confess is a difficult task but the mere fact

that damages are difficult of assessment does not mean that the Plaintiff must fail. It simply means that you have got to do your very best to come up with the reasonable answer. There is really no help I can give you on this particular aspect of the matter except to say you must approach your task in a fair and reasonable way, take a commonsense approach, try to be fair to both sides and bear in mind, of course, it is somebody else's money you are dealing with.

Compensatory damages are not awarded as a punishment, and I will deal later with the role of punitive damages which have quite a different purpose, not as a reward. They are awarded as compensation for actual loss suffered and proven, and what you award today, if you make an award, is the end of the matter. Be fair to both sides. Be reasonable and don't be influenced by feelings of sympathy or illwill."

And on punitive damages:-

" Punitive damages - here we have $1,000 claimed against each Defendant who is involved in the conspiracy, intimidation and the assault, and as I said only one award of punitive damages would be made against a particular Defendant whatever the sum. You would not be entitled to award $500 punitive damages on one cause of action and another of $500 on another to bring it up to $1,000. You will not adopt that approach. In cases where damages are claimed, as I have said, they can be either compensatory, that is for actual damage suffered; or punitive. Punitive damages are not directed to any loss or damage sustained by a Plaintiff but are awarded against a Defendant because of the outrageous manner in which he has conducted himself in his actions against a Plaintiff. The Plaintiff must, of course, establish first his cause of action whether it be conspiracy, intimidation or assault in this case, and punitive damages may be awarded where there has been no actual loss but where there has been irresponsible, malicious and oppressive behaviour. Where a Defendant has acted in a quite outrageous manner. It is in short an award which reflects the jury's view of a

> Defendant's conduct. It is a matter for you, having regard for all the circumstances, as to whether punitive damages should be awarded and, if so, how much."

It is relevant that in assessing compensatory damages the jury had before it in Issue 3 the actual heads of damage alleged, and it was made clear by Counsel and myself that the claim for compensatory damages was linked to that alleged damage. I said:-

> "He suggested to you when considering the alleged harm that had been suffered, that really Mr O'Boyle had suffered no damage whatsoever. No real medical evidence of any condition he may have suffered from in the way of nervousness apart from Dr Reece, and he suggested his evidence was unhelpful. There was no specialist evidence. He attended union meetings, he was not prohibited from that although apparently prohibited from job meetings. He wasn't sacked and there was no suggestion that he would be, and even if you were to find that in Issue 3 it did cause damage in one or more of the ways there specified, a total claim of $55,000 for compensatory damages is quite unrealistic and quite out of proportion.
>
> In short Mr McClelland said, well on the evidence you heard there was no conspiracy. These were independent acts by men who didn't like scabs. In any event if there was a measure of conspiracy, no damage was suffered. If there was damage then it was minimal calling for merely a nominal award of compensatory damages and no punitive damages."

Broome and Cassell was a defamation case where the heads of damage justifying an award are quite different and to have directed the jury in the instant case as indicated by Lord Reid would have been quite inappropriate. I see no basis for complaint in the way the jury was directed. It follows that I allow the motion to be amended to include the second fresh ground but in the result reject it.

I turn now to consider the grounds actually referred to in the Defendants' motion. In the course of argument there were submissions that there had been misdirections or non-directions in relation to some of the issues raised, although not referred to in the motion, and I shall deal with these when considering the specific ground.

A. Insufficiency of Evidence as to damage

Mr McClelland accepted that loss through payment of an unlawful levy was proved but submitted that beyond that there was no proof of damage apart from very minor physical injuries arising from assaults for which nominal damages would have been appropriate. Apart from the payment of the unlawful levy what the jury had to consider in terms of Issue 3 was whether the conspiracy caused the Plaintiff mental and physical suffering, loss of his right to attend meetings of members of the Union, and jeopardised his continued employment.

Mr O'Boyle's problems began when, at a Union meeting in August 1980, he challenged the validity of a union levy and the uses to which the proceeds from the levy were being applied. It was established at the hearing that the levy was indeed unlawful but that is really by the way. Matters really came to a head when Mr O'Boyle accused Mr Liggett of misapplying the proceeds from the levy, in the sense that instead of the money being used as a welfare fund it was being used to defray the cost of union delegates' attendances at union meetings in Wellington. Mr Liggett and Mr O'Boyle's fellow tanker drivers, for no valid reason that I could see, chose to regard Mr O'Boyle's accusation in a much more serious light, namely one of misappropriation by Mr Liggett. Mr O'Boyle made it perfectly clear in a letter to Mr Liggett of the 7th October 1980 that misappropriation was certainly not alleged, and expressed regret that such an inference might have

been drawn. Despite that Mr Liggett, in a conversation with a Mr Sadler on the 23rd March 1981, was still asserting that Mr O'Boyle had called him "a fucking thief". It might be inferred that Mr Liggett chose the continued adoption of that stand as justification for the treatment Mr O'Boyle suffered.

From August 1980 until he left the Chapmans Road depot in January 1982 Mr O'Boyle was under siege. No one would work with him, and any verbal communications were more often than not in the form of the most foul and menacing abuse, as was clearly demonstrated in the tape recordings produced at the hearing. He was physically assaulted on occasions and his tanker was interfered with. He was barred from some union meetings. The other drivers went on strike in an attempt to have him dismissed. In January 1982 the oil company initiated a tanker owner-driver scheme but Mr O'Boyle was not offered a contract because of his length of service. He was transferred to Lyttelton as a stock control clerk, and although there were no tanker drivers employed there his ostracism continued to the extent that management suggested that he take meal breaks at different hours from the other staff to avoid the situation where everyone in the canteen walked out when Mr O'Boyle entered. He left the job in June 1982 because he could not continue to face the isolation. Up to the time of the hearing he had not succeeded in obtaining employment. There had been considerable coverage in the media regarding Mr O'Boyle and his union problems and it seems that employers were wary of employing him.

As for mental and physical suffering Mr O'Boyle accepted that the various assaults caused no great physical harm, so that mental suffering was the main issue, and the jury was entitled to infer on the evidence before it that the quality of Mr O'Boyle's life had been seriously affected over a prolonged period. Dr Reece, Mr O'Boyle's family doctor,

described a deterioration from "a very healthy man with very few ailments at all", to one who became tense and depressed, insomniac, with no interest in life, unhappy, agitated, and who became thinner and thinner. Mr O'Boyle himself gave evidence to the same effect, and Mrs O'Boyle referred to his nightmares and generally to his deteriorating physical and mental health.

As for the other alleged heads of damage there can be no doubt that Mr O'Boyle's employment was placed in jeopardy, particularly by the strike, and the unlawful interference with his tanker, and generally by the tension his ostracism generated in the workplace. After some initial problems Mr O'Boyle was allowed to attend Union meetings, where he was subjected to a measure of abuse, but was excluded from industry and job meetings.

I therefore conclude that there was ample evidence to support the jury's finding that Mr O'Boyle suffered injury as alleged at the hands of the Defendants. On this ground it was submitted that there had been a non-direction of the jury in a material respect, in that I did not direct it that compensatory damages could only be awarded for <u>past</u> physical and mental pain and suffering and that it was not open to the jury to consider economic loss which had not been pleaded. As I recall, the question of awarding damages for economic loss was never raised at any stage in the proceedings; and it was never suggested that the pressures Mr O'Boyle had been under persisted beyond his leaving the employ of Mobil. Mr McClelland has not satisfied me that anything more was required in directing the jury on damages. The heads of damage were set out in paragraph 3 of the Issues with the clear indication that the assessment of compensatory damages under Issue 4 was related to the jury's findings under Issue 3.

B. Insufficiency of Evidence to Establish Liability for Conspiracy and Damages Awarded.

I have already considered the question of damages and the evidence relating to them, and what this ground really amounted to was a plea that there was insufficient evidence to link four of the Defendants with the conspiracy. Mr McClelland accepted that there was evidence from which the jury could infer that the remaining seven Defendants had been parties to a conspiracy. The four Defendants concerned are Messrs Liggett, Collins, Rogatski and Carson. I had occasion to refer to the last three named in my summing-up when I was dealing with the law relating to a conspiracy. I said:-

> "That involves a careful consideration of the role each played in this particular incident as you heard it from the evidence. It requires very careful thought as regards each Defendant, and I think it appropriate to say - and I think I am now intruding into the facts which are your domain - in my view it requires particularly careful consideration so far as Mr Collins, Mr Rogatski and Mr Carson are concerned. Their roles as you heard, or so it seemed to me, were much less than some of the others involved in this unfortunate matter and as a matter of law the mere fact that a person might stand by observing what he sees as a combination of other people oppressing someone else, but does nothing about it, to stop it, it doesn't necessarily follow that the inference may be drawn that he is in with them, a conspirator, agreeing and supporting what they are doing. It might have that effect but that doesn't necessarily do so. So you have to consider the circumstances concerning each of those men."

I expressed similar reservations about the same three when dealing with intimidation. In the result the jury found that all three were parties to the conspiracy, but (with Liggett) were not involved in the intimidation.

This question from the jury and my answer is also relevant to this ground:-

> "'Does he conspire, that is he who allows others to deal with a situation when he has the power to direct.'
>
> I think I told you earlier that a mere standing by without interference and without encouragement would not necessarily make one a conspirator, even although that person may have the authority and power to prevent the unlawful actions or influence their course. Depending on the circumstances, if a person having that power or control was aware of what was going on and the persons doing the unlawful actions knew that he was aware and he did nothing to stop it, you might be able to infer that he was encouraging and so was a conspirator, and I think it is really a matter of whether a reasonable inference can be drawn on all the facts that he had indeed allied himself with the conspirators and encouraged them in their actions and, of course, that is an inference that can be more readily drawn if no explanation has been proffered by that person as to why he took the stand he did."

The last paragraph in that passage is an oblique reference to the fact that of the four only Mr Rogatski gave evidence. I shall now refer to the main evidence relating to the four.

Mr Liggett

He was at all relevant times the secretary of the Drivers Union.

After Mr O'Boyle had challenged the legality of the levy a message was passed to him by Mr Rogatski to the effect that Mr Liggett had said that if he, O'Boyle, did not pay the levy they would "have his ticket and have him down the road". A short time later Mr O'Boyle's solicitors' letter challenging the levy was read out at a Union meeting. It was this letter

which contained the "misapplied" allegation. This is Mr O'Boyle's evidence:-

> "Mr Liggett reads out the letter to the members and when he came to the word misapplied he fumbled over the word and when he came to the part which stated 'No known body of men known as the tanker drivers' he explained to the men 'what this fellow means is that whatever you fellows decide he is not going to go along with it.' As to what effect that had on the meeting, there was quite an uproar. As to the way in which Mr Liggett read the word misapplied, to me I knew what the word was but to other people I don't know what it sounded like, it was sort of repeated halfway through. The outcome of the uproar was that Mr Liggett started to call me some names. Those names were, IRA bastard, muck stirrer, pommie, communist, names like that, in front of the other men. As to what effect that had, there was more uproar. Antagonistic to me. As to generally what the sort of behaviour was the rest of the meeting showed to me, they were just calling me names, abuse, filthy names, things like that. Mr Liggett made reference to Mr McCaskey, he said something about up at Wellington they are having a good laugh and then he told the meeting or he may have been talking to me at the time that I was in cahoots with Mr McCaskey, I didn't know McCaskey and explained this to Mr Liggett. Mr Liggett then replied 'he knows all about you, he's another one of those IRA bastards.' Mr McCaskey's job, I believe he was something in the personnel department up at Wellington for Mobil Oil, an executive of Mobil. Mr Liggett said to me about the charge in my solicitor's letter that he had misapplied the funds. At that stage I wished to get the meeting back to the argument of the levy and I accused Mr Liggett of misapplying the funds, Mr Liggett then shouted out 'you accused me of misappropriating Union funds.' By misapplied I mean it was not put to a use that it was expressed to me at the time. As to whether I had then or have since accused Mr Liggett of misappropriating, I have never accused him of misappropriating Union funds. When Mr Liggett told me that I had accused him of misappropriating the funds there was more abuse from the meeting directed to me. Mr Liggett demanded that I withdraw my letter of complaint to the registrar and that I apologise to him,

> otherwise I take the consequences. He didn't state at that time what they would be. As to what effect that had on the meeting, there was more uproar, people were accusing me of saying he misappropriated funds. I did not agree to withdraw my letter to the Registrar or my solicitor's letter, I explained to them it was too late, the registrar would have my letter already. As to whether Mr Liggett said about any discussion he had with the registrar about this matter, he said he had been talking to the registrar a few days ago but that is all he said. I asked him what was the registrar's opinion of the levy and he said 'I am not prepared to disclose that.' Mr Liggett then intimated he was going to take legal advice because I had defamed him. He said that out loud to the meeting and there was more uproar and more abuse. Mr Liggett then started to walk out of the meeting, he said he was going to take legal advice and on his way out he said to the men 'I'll leave you lot to deal with him.' He also stated 'don't make too big a martyr of him'. There was more uproar and more abuse."

At a later meeting, after the strike, a Mr Campbell of the Drivers Federation indicated that the Union was close to being deregistered, and that there was no way that Mr O'Boyle could be legally dismissed from the Union. There was then some discussion among those present as to how Mr O'Boyle could be removed, with comments as to what had happened to "scabs" in the 1951 waterfront strike. At one stage Mr Liggett said "I'll give him three months before his wife is on his back begging him to leave. He will have a few sleepless nights I can tell you that." Later, a letter Mr O'Boyle had sent to Mr Liggett advising that he was not going to pay the levy found its way to the notice board at Mobil. There was further evidence, and in particular from a Mr Wisheart and a Mr Sadler, that Mr Liggett was fully aware of the treatment Mr O'Boyle was receiving and supported its continuance. Further, an inference can be drawn that Mr O'Boyle's conciliatory letter of explanation to Mr Liggett concerning the use of the word "misapplied" was deliberately kept from at least some members of the Union, including Mr Rogatski.

Mr Collins

Was a tanker driver and at one stage was President of the Drivers Union. At one stage he told Mr O'Boyle that if he did not pay the levy he would be the only one loading out of Mobil, which I take to be a threat of strike action if Mr O'Boyle did not conform. He was present at the meeting when Mr Liggett made his "you lot deal with him" comment, and shortly after said "I don't know what you lot think but I'm not working with him". That brought the meeting to an uproar, and abuse of Mr O'Boyle. On the 20th October 1980 Mr Collins presided over the meeting which had been called to expel Mr O'Boyle, and which was told by Mr Campbell that there was no legal basis for expulsion. Mr Collins said at that meeting "when Paddy goes into the depot we stop work". I think it can reasonably be inferred that anything the drivers could do to hasten Mr O'Boyle's departure had Mr Collins' support, and the drivers knew it.

Mr Rogatski

Who was a Union delegate, was the only one of the four to give evidence. After Mr O'Boyle had questioned the legality of the levy Mr Rogatski rang him and this was Mr O'Boyle's evidence:-

> "I spoke to him. The purpose of the call, Mr Rogatski asked me was I going to pay this 25c a week levy. I replied 'No'. He told me 'well there's going to be a punch up at Mobil in the morning.' By that I understood, he meant that there was going to be trouble for me. As to whether he said about my membership of the Union, he said 'are you going to pay the increased levy when it comes in', I said 'no'. He then told me 'Campbell and Liggett said if you are not going to pay the levy they are going to have your ticket and they'll have you down the road.'"

Mrs O'Boyle also spoke to Mr Rogatski on that evening

when it seems that Mr Rogatski held out some hope for her husband if he would apologise for his conduct, although Mrs O'Boyle did not see it in that light. In evidence Mr Rogatski agreed that there were a lot of people who wanted Mr O'Boyle out of the Union, and so far as he, Mr Rogatski, was concerned the obligation was on Mr O'Boyle to toe the Union line regardless of whether the levy was legal or illegal. He agreed that as Union delegate he knew what treatment Mr O'Boyle was receiving at the hands of other union members. He never intervened although he had never known of such persistent abuse of a fellow member.

Mr Carson

He was a Union delegate and worked for Shell. It is apparent from the Jury's verdict on damages that it regarded him as the least blameworthy of the Defendants. Mr Carson moved that Mr O'Boyle be removed from one of the meetings and it seems that some present took that as an indication that he should be forcibly removed but nothing came of it.

At that same meeting Mr Carson expressed the opinon that Mr O'Boyle wouldn't last six months. There was evidence that Mr O'Boyle suffered a physical assault at the hands of the Defendant Mr Rayner. He was charged by the police but acquitted after he and Mr Carson had given evidence. There was compelling evidence that Mr Rayner lied at that hearing and it was open to the Jury to conclude that Mr Carson had done the same to protect Mr Rayner. Mr O'Boyle taped a conversation with Mr Carson, unbeknown to the latter, from which it is clear that he was aware of and supported Mr O'Boyle's harrassment although he did not agree that the harrassment should extend to Mr O'Boyle's wife and family.

I don't know that I would have reached the same

conclusions as the Jury in relation to Messrs Rogatski, Collins and Carson, but for all that I am not satisfied that on a reasonable view of the whole of the evidence its conclusions were unjustified.

I therefore reject that ground of complaint.

C. Inconsistent Answers

The jury found that Messrs Liggett, Rogatski, Collins and Carson were parties to the conspiracy but did not engage in personal intimidation.

I see no inconsistency and indeed it seems rather a curious plea to be made by the defence, that four Defendants who were exonerated should have been found guilty. In respect of the seven Defendants found by the Jury to have intimidated there was clear evidence of acts of coercion by assaults and threats. There was no such evidence against the other four and in my opinion the Jury was fully justified in excluding them. Even if it could be said that there was an element of inconsistency it was not such that the verdict cannot stand.

D. Jury's Answers Against the Weight of Evidence

In the light of Mr McClelland's concession concerning seven of the Defendants, and my answer to grounds A and B of the motion there is nothing more that need be said on this ground which is rejected.

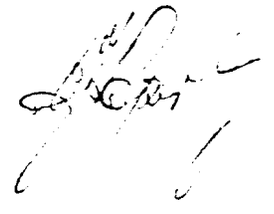
Damages

Grounds E, F and G, which all relate to damages, can

be considered together. Mr O'Boyle was awarded a total of $46,000 general damages and $6,400 punitive damages. Having regard for the quite outrageous mnanner in which the Defendants conducted themselves over a prolonged period I believe it impossible to say that the punitive damages awarded cannot be supported. It has been said that immoderate awards of punitive damages are to be discouraged, but I see nothing immoderate in the present award.

As for the general damages, it is well established that a jury's finding will be set aside only if it is out of all proportion to the circumstances of the case; or if the Court is satisfied that the jury has applied a wrong principle of law. I think all that can be said in this case, and one must bear in mind that it was an unusual one with no ready guidelines available, is that the award was somewhat higher than I would have made. That in itself is no basis for finding the award excessive. It follows that I am not satisfied that the jury failed to take a reasonable view of the evidence and so reached a verdict no reasonable jury could find.

The Defendants' motion is therefore dismissed with costs reserved. The questions of costs and interest are still unresolved. I have Mr Willy's calculations, and now require submissions in writing from Mr McClelland on these issues. Mr Willy may file a Memorandum in reply.



Solicitors:
Duncan Cotterill & Co., Christchurch, for Plaintiff
Wood Hall & Co., Christchurch, for Defendants

A.174/81

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

BETWEEN	P.M. O'BOYLE Plaintiff
A N D	P.R. LIGGETT First Defendant
A N D	D. COLLINS Second Defendant
A N D	R.K. ROOT Third Defendant
A N D	R.J. ROGATSKI Fourth Defendant
A N D	M.A. RAYNER Fifth Defendant
A N D	K.M. PENN Sixth Defendant
A N D	R.F. CARSON Seventh Defendant
A N D	B.R. BENNISON Eighth Defendant
A N D	R.W.M. TAYLOR Ninth Defendant
A N D	W.D. LYNN Tenth Defendant
A N D	G.E. BLOOMFIELD Eleventh Defendant

JUDGMENT OF ROPER J.
