28/2 NZLReport X

A.No. 91/81

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BETWEEN ARTHUR GOODMAN
Plaintiff

112

AND CONSUMER COUNCIL
First Defendant
TERENCE HARRY JOURNET
Second Defendant
ALLIED PRESS LIMITED
Third Defendant

Hearing: 15, 16 February 1984

Counsel: G.P. Barton and Margaret Lee in support
C.H. Arndt and H.M. Bowie to oppose

Judgment: 17 February 1984

ORAL JUDGMENT OF EICHELBAUM J

Following a six day trial, the plaintiff recovered a verdict of $25,000 damages for defamation in an article in the "Consumer" magazine published by the first defendant. Pursuant to leave reserved the first defendant moved that the judgment entered in favour of the plaintiff be set aside and judgment entered for the defendant. Alternatively the motion sought a new trial. The applications do not affect the second and third defendants. For convenience therefore I can refer to the first defendant as "the defendant. I have come to the conclusion that both applications fail.

Background

The defendant's article dealt with a transaction between a Mrs Wood, a customer at the fur shop of the plaintiff Mr Goodman. It came to the latter's knowledge

that Mrs Wood had a jacket on layby which she wished to change. By arrangement he met Mrs Wood at the shop on the evening of Friday, 18 July 1980. Mrs Wood had intended to purchase the jacket for her daughter. She wished to change it, first because it was too big and also because she had had second thoughts about the colour. Mrs Wood picked a jacket of a different colour and style out of stock which Mr Goodman said would cost approximately $50 more. Mrs Wood claimed that it was identical in style and make with her original choice but the jury was entitled to accept Mr Goodman's evidence that it was more expensive. At any rate, as Mrs Wood agreed, at this stage she became somewhat annoyed and the interview terminated on the basis Mrs Wood would think about it. According to Mr Goodman Mrs Wood did not ask for her money to be refunded. Mrs Wood at first maintained that on this occasion she asked for a refund, but the jury would have been entitled to find that after cross-examination this was left in doubt. Mr Goodman agreed however that on or about this date Mrs Wood cancelled the layby sale, so on Mr Goodman's version it has to be assumed that it was clear that Mrs Wood was not going to proceed with the purchase of the original jacket, but that the possibility was left open that the amounts she had put on layby, namely three separate payments totalling $135.50, might be used towards an alternative purchase.

About a fortnight later, Mr Goodman said, he received a request for a statement of account. In response on 7 August he sent Mrs Wood a brief note recording the original purchase price of $345.50, the three payments made and their respective dates, and showing a balance owing by Mrs Wood of $210. Mrs Wood had made the request on the advice of the defendant whom she had consulted in the meantime. It may be assumed that the defendant's object was

that Mrs Wood should obtain a statement of the amount owing in accordance with the provisions of the Layby Sales Act. As her letter was not put in evidence it is uncertain whether she failed to make her intention clear or on the other hand Mr Goodman misunderstood it. Mrs Wood maintained that she also telephoned requesting a refund but Mr Goodman denied that any such conversation took place. Next, Mr Russell of the Consumers' Institute telephoned the plaintiff on Mrs Wood's behalf. This was an important conversation and its terms were very much in issue. Mr Russell's version of it was largely as set out in the article, although in the end there were some discrepancies between what he wrote and his evidence as to what took place which the jury could have regarded as significant. It was common ground that Mr Russell requested that a refund should be made. Mr Russell maintained that Mr Goodman replied it was not his policy to give refunds after six months : "I don't care what you say, that is our policy" - so the article quoted him. Mr Goodman's version on the other hand was that Mr Russell maintained that the vendor was bound to refund the full amount paid. If so this was not in accordance with the Act. Mr Goodman said he pointed out that having kept the jacket in stock for near enough to six months he was entitled to certain deductions. I interpolate that in terms of the Act, if the article had depreciated the vendor was entitled to an allowance for this; the length of time for which the goods had been held would be a relevant factor in the case of fashion goods which could lose value once the particular season was over. Further a vendor was entitled to an allowance for expenses he had incurred relevant to the layby sale. If it had been a question for me I would have assumed that Mr Russell was as well aware of these matters as Mr Goodman. The thought went through my mind during the trial, and may equally have occurred to the jury,

that the conversation proceeded on a misunderstanding on both sides : Mr Goodman may have thought Mr Russell was maintaining that he was obliged to make a full refund, Mr Russell may have taken Mr Goodman to be saying that after six months he was not obliged to make any refund, and both may have been mistaken. The jury may have thought too it was curious, if Mr Russell's version was correct, that the article (which Mr Russell drafted) should state "We pointed out . . . . that Mr Goodman was bound to refund the money that had been paid" (my emphasis). This was immediately followed by the alleged libel : "But Mr Goodman had no respect for the law". Then the article set out the disputed statement regarding Mr Goodman's policy not to make refunds after six months.

The upshot of the telephone conversation was that Mr Russell wrote to the plaintiff setting out Mrs Wood's rights as he understood them. Mr Goodman replied enclosing a statement calculating the refund to which as he saw it Mrs Wood was entitled in terms of the Act. The letter concluded that if Mrs Wood agreed with the figure the plaintiff would be pleased to pay it. In fact the proposal was not acceptable to Mrs Wood and that aspect became the subject of litigation in the District Court on which a reserved judgment was awaited at the time of the trial.

The Consumers' Institute responded with a letter that took issue with Mr Goodman's calculations. The letter also informed the plaintiff that the defendant intended to publish an article in "Consumer" in which Mrs Wood's case would feature. A draft was enclosed for Mr Goodman's comment. Although ostensibly an article on layby sales about half of it was devoted to Mrs Wood's transaction, no detail of which appeared too minute to be worthy of mention. It was the only transaction discussed. Practices followed by two other businesses were referred to in unfavourable

terms, one in five lines and the other in four. In addition there were general comments about the Act and its administration. AFter the description of Mrs Wood's dealing with Mr Goodman reference was made to shops which "openly flout" the Act and to the "unhappy customer" who may have been "cheated both of rights and money". The amount of the award suggests that the jury regarded the article as delivering a stinging attack on the plaintiff.

Before turning to discuss the defendant's motion under the separate headings which were argued I should record that the issues for the jury were settled by me without objection after receiving drafts from both sides. It was agreed that all questions of fact not falling within the ambit of the issues should be determined by the trial Judge. In the event no such questions arose.

Judgment non obstante

This was based on the grounds (a) that the publication was protected by qualified privilege, and (b) that there was no evidence, or no sufficient evidence, to support the finding of malice. I propose to deal first with (b). As to the definition of malice, I refer to Horrocks v Lowe 1975 AC 135 and the exposition by Lord Diplock which had the concurrence of Lords Wilberforce, Hodson and Kilbrandon. There must be some dominant improper motive, generally a desire to injure the plaintiff. If it is proved that the defendant did not believe what he published was true, this is generally conclusive evidence of malice. Even a positive belief in the truth of what is published may not be sufficient to negative express malice if it can be shown that the defendant misused the

occasion, for example to give vent to personal spite or ill will towards the plaintiff, or where the dominant motive is to gain some private advantage.

As to the principles on which the Court should approach an application to set aside a verdict, Mr Barton relied on Mechanical & General Inventions Co Ltd v Austin 1935 AC 346 and other authorities well known in this field. For present purposes I do not think I need do more than refer to the speech of Lord Wright in the case just cited at pp 374-5.

The subheadings below refer to the particulars of malice. I accept that the plaintiff must be confined to the matters pleaded.

Particular 1

This related to the intrinsic evidence of the words of the libel. The short answer is that the jury could not have relied on this allegation. Particular 1 was the only allegation of malice applicable to the second defendant, the editor of "Consumer". The jury absolved him of malice. There was no arguable basis on which there could be a finding against the Consumer Council, but in favour of its editor.

Particular 4

This relied on refusal to apologise. Speaking generally it is recognised that at best this is a weak ground : Horrocks v Lowe p 152. There may be instances where after conclusive or at least strong evidence has been placed before the defendant, refusal to withdraw may enable the necessary inference of motive to be drawn. Matheson v Schneideman 1930 NZLR 151, cited

by Mr Arndt, is an example. I do not think this is such a case. While, as will be seen later, I take the view that the jury was entitled to reject the evidence of Mrs Wood, and Mr Russell, the information available to the director of the Consumers' Institute when the question of an apology arose would not have indicated a strong probability that such a result would follow.

Particulars 5 and 6

It was Consumers' Institute's standard practice to examine its records for any previous information about a trader who was under investigation. Such research unearthed brief information of a previous complaint against the plaintiff. Although not used in the article the information was quoted in a letter to plaintiff's solicitor at a later date. I am unable to see any credible basis on which a reasonable jury could have failed to accept the explanation given by the defendant. I do not regard this aspect as capable of supporting the finding of malice.

Particular 11

The section of the article describing the transaction between Mrs Wood and Mr Goodman concluded with the following passage :

> " . . . . (W)e are pleased to report that Mr Goodman has now changed his view and is prepared to refund Mrs Wood's

deposit. However it has
taken a long time to arrive
at this conclusion. "

Mr Arndt contended that this grossly misrepresented the true facts. He submitted, I consider correctly, that it was open to the jury to find that the first unequivocal demand for a refund was in Mr Russell's telephone conversation of 29 August. Mr Goodman's letter of 12 September made it clear that he was prepared to make a refund subject to the deductions to which he was entitled. From that point onwards the dispute was as to the quantum of those deductions. The passage quoted however, appearing as it did in an article in November, made it sound as if after months of effort by the Institute, it had at last succeeded in bringing Mr Goodman to heel. The inference is open that in pursuit of its desire to enhance observance of the Layby Sales Act, the defendant puffed up its own efforts, or perhaps sought to give a warning to other traders who might be tempted to follow Mr Goodman's example, this at the price of misrepresenting Mr Goodman's attitude. These submissions were linked with a more general proposition that in the end Mr Goodman really became a pawn used in furtherance of the Institute's desire (in itself of course a proper one) to promote knowledge of the legislation. In effect, what was being suggested was that to give the article more punch Mr Goodman's case became a semi-fictionalised one. In rehearsing this argument I am not of course expressing a personal acceptance of it. The question is whether a reasonable jury could find malice on this material : in my view it was open to it to do so.

Particular 13

On 17 September 1980 the Consumer Council, acting on the recommendation of a background paper prepared by the Director, decided that certain steps should be taken to encourage better compliance with the Layby Sales Act, a subject in which the Council had long had an interest. Among the steps proposed was a further article in "Consumer". The background paper made no reference to the case of Mrs Wood, which had just reached the stage where Mr Goodman had made what the Institute considered an unsatisfactory proposal for a refund.

Two days before the Council's decision Mr Russell had already written to Mrs Wood as follows :

> " We have had no positive response from Universal Fur Co Ltd and so we have prepared the attached draft article which we intend to publish in our magazine 'Consumer'. "

As already indicated Mrs Wood's case was the most prominent matter in the article.

On 22 September Mr Russell wrote to Mr Goodman challenging the deduction that Mr Goodman had proposed to make from the refund. He concluded :

" We intend publishing an article on Layby in our magazine 'Consumer' and we have used Mrs Wood's case in the report. I would be grateful if you would give us any comments you may wish to make on the text before the 29 September. Of course any settlement that is finally reached between Universal Furs and Mrs Wood will also be reported in the article. "

Mr Goodman took this, as he put it, as a not very subtle attempt to apply pressure to him. If he did not agree to the demands that the defendant made on behalf of Mrs Wood an article would be published in an influential magazine, referring to him in thoroughly unflattering terms. Although in due course Mr Goodman's action was based on the single sentence already quoted, the article contained a good deal more that reflected on him. The jury might have thought that the introduction to the layby transaction, which contained about a column of space, was quite irrelevant to the stated purpose of the article and served only to show Mr Goodman and his staff in a bad light. Further, the references previously mentioned to flouting the Act and cheating unhappy customers, might well have been taken as referring to Mr Goodman, among others not specified.

On behalf of the defendant it was maintained that the draft was sent to Mr Goodman simply in accordance with the defendant's usual practice in the preparation of articles, and in compliance with detailed standing instructions. While there is no reason to doubt that that was indeed the defendant's practice I do not think that the jury had to regard this as a conclusive answer. The question arose whether there was an ulterior motive in the timing of the decision to prepare the article : which then - fortuitously as the defendant would have it - was available to be sent to the plaintiff in draft form for comment with the same letter in which the defendant took issue with the amount that the plaintiff was prepared to refund. The thrust of the plaintiff's case under this heading was that the dominant motive in forwarding the draft at that very moment was to apply pressure to Mr Goodman so as to bring Mrs Wood's case to a conclusion that would have been regarded as more satisfactory by the Institute. The summing-up, as to which no complaint has been made, directed the jury that this was a serious allegation and that it would have to be satisfied as to its truth before acting on it.

For purposes of the present application of course it is not for me to express any opinion on whether the allegation was well founded. The question is whether there was material on which a reasonable jury could uphold it. In my opinion the affirmative answer was well open.

Particulars 7 - 10

The exchanges between Mr Russell and Mr Goodman as to the amount of the refund to which Mrs Wood was entitled broke down when they were about $20 apart. Subject to Mrs Wood's consent the defendant decided to

bring a case in her name for the balance. These particulars all related to that matter. In correspondence with the plaintiff's solicitors, the defendant said it had advised Mrs Wood to bring such a case. The jury was entitled to take the view that the defendant concealed its true part. If that was the conclusion, the jury could not have reached any confident view as to why the defendant would wish to do that but as a matter of law it is not critical that the nature of the improper motive should be identified : Coughlan v Jones and Jones 1916 NZLR 41, 44-45. But the jury might have taken the view that if the defendant had made an improper use of the article in the first instance, as discussed under Particular 13, the Institute would not be anxious for the plaintiff to know - that ploy having been unsuccessful - that it was at the defendant's instigation that Mrs Wood was still pursuing the rather trifling amount of money involved. For this reason Particulars 7 to 10 have some relationship with Particular 13. While I think I would be hesitant to uphold the finding of malice if it depended solely on the matters raised under this group of Particulars, when they are taken in conjunction with Particular 13 I think they support one another and strengthen the case for upholding a finding of an inference of an improper motive. In putting my conclusion in that way I am conscious of the remarks of Lord Porter in Turner v Metro Goldwyn Mayer Pictures Ltd 1950 1 All E R 449 at p 455.

I can now revert briefly to point (a), the issue whether the occasion was privileged. In support Mr Barton relied for general principles on Perera v Peiris 1949 AC 1 and Adam v Ward 1917 AC 309 as well as discussing a number of other authorities. The proposition that some media communication is protected by qualified privilege on grounds that its dissemination was in the public interest is often pleaded but rarely upheld. Naturally its prospects

are better where the publication was to a limited group and of a specialised nature, as the case here. In the event Mr Arndt did not present argument against the proposition that the occasion attracted qualified privilege. In the absence of full argument it would not be right that I should express any conclusion on an issue of some general importance when in light of my finding on malice it is unnecessary that I do so.

Motion for new trial

This was argued under two heads.

1. Improper admission of evidence

(a) Mr Kerr's evidence

Plaintiff called the secretary of a well known Wellington retail store to depose, broadly, that the approach used by Mr Goodman in calculating his deductions for selling costs and depreciation was in line with methods used in Mr Kerr's own business. Mr Barton's objection was that such evidence was irrelevant.

At the trial both parties approached the central issue whether Mr Goodman had any "respect for the law" by concentrating on the question whether in the initial stages he refused to make any refund. That enquiry involved not only the communications between Mrs Wood, Mr Russell and Mr Goodman, but an examination into whether Mr Goodman's attitude as a whole evidenced an intention of avoiding a refund. The question whether he had demanded an excessive deduction was relevant to determining that attitude. A layby purchaser, faced with losing some substantial part of her deposit, might well be persuaded that

it was better to complete the transaction, or use the deposit towards a different purchase from the same trader. The plaintiff was cross-examined on the validity of the deductions which he had proposed. After Mr Kerr had given his evidence the subject was not pursued; but in the absence of such testimony it might well have been. I am therefore unable to agree that Mr Kerr's evidence was irrelevant.

(b) Errors by Consumers' Institute

In cross-examination Mr Russell agreed that during a period while he was acting Director the annual report submitted by the defendant to Parliament was found to contain a number of serious mistakes. Further, in consequence it became public knowledge that during the previous year there had been some 13 errors in "Consumer" articles which required withdrawal or explanation. Mr Russell said that he had not personally been responsible for any of them. So far as the annual report was concerned, he had to take responsibility for that by virtue of his position at the time. Again Mr Barton objected that this evidence was irrelevant.

It is of course beyond question that Mr Russell's credibility was directly in issue in the proceedings and as part of that, his accuracy; I refer particularly to questions relating to his initial telephone conversation with the plaintiff and the note made by Mr Russell immediately afterwards. So cross-examination bearing on his credibility in general and accuracy in particular had to be allowed. The fact that, so far as the mistakes made in "Consumer" articles were concerned, Mr Russell's answer was that he was not involved, cannot affect the permissibility of the questions.

There was I think a separate basis justifying the line of cross-examination. The defendant submitted much material regarding its practice relating to the preparation of articles. This included evidence as to the careful way in which successive drafts were written and comments obtained from all interested parties, and an 11 page exhibit, comprising an extract from the defendant's staff manual, headed "Mandatory checking of information before publication". While I accept that the evidence was relevant to other aspects as well, it seems to me that one purpose was to establish the accuracy of "Consumer" with a view to showing the probability that on disputed issues its version rather than Mr Goodman's was correct. Cross-examination designed to show that in practice these systems nevertheless permitted a liberal sprinkling of errors cannot be described as irrelevant.

Accordingly I reject the defendant's contention under this sub-heading also.

2. Certain findings against weight of evidence

At this point it is convenient to deal with a general submission advanced by Mr Barton. It is relevant to the argument on malice as well but more particularly to the present issue. As a substratum for his arguments Mr Barton referred to the jury's finding in answer to Issue 8. This was the last of the group relating to fair comment, and asked :

> " In so far as the words complained of are an expression of opinion, does such expression of opinion exceed the limits of fair comment? "

The jury answered "No". In accordance with the direction this meant the jury must have found that the facts in the article were sufficiently true to make the comment fair. By way of illustration the summing-up referred to the issue whether the plaintiff had refused to make any refund. However, as the jury was told, not every fact need be proved. The jury may have taken the view that the delay between 29 August 1980, when Mr Russell made it clear that Mrs Wood was seeking a refund, and 11 February 1981, when Mr Goodman's solicitors forwarded a cheque for the amount he considered owing, was a breach in spirit if not in the letter of the Act; further that it might be a tenable though exaggerated view by an honest person that a trader so acting had "no regard" for the Act.

Sometimes the common sense or fairness of a jury verdict is more readily discernible than its inexorable logic. The jury might have been quite satisfied that the defendant had failed to prove the truth of the libel, and further that they themselves as reasonable people would not have commented that Mr Goodman had no respect for the law, but nevertheless - perhaps with hesitation - been prepared to say that a fair minded man prone to colourful or exaggerated turns of phrase might have described Mr Goodman in the words in question. I was not surprised by the failure of the plea of justification but confess I found the answer on fair comment unexpected. For the reasons given however I do not think the two are irreconcilable : c f Broadway Approvals Ltd v Odhams Press Ltd 1965 1 WLR 805, 823 I cannot accept that the answer to Issue 8 meant that the jury resolved all the critical conflicts of fact in the defendant's favour. To the contrary, for the reasons just discussed I do not think it means that they necessarily found any of them against the plaintiff.

In view of remarks made in the course of this judgment, particularly in the introductory section, not a great deal remains to be said in relation to the contention that the three specified findings were against the weight of the evidence. I have already indicated the manner in which at the trial, both parties approached the question of "regard for the law". In argument on this motion, Mr Barton sought to refer to an additional basis, namely Mr Goodman's alleged failure to supply a statement of account, but I do not think that was open to him either on the pleadings or in light of the course of the trial.

As already indicated there was a sharp conflict on whether Mr Goodman ever refused a refund. So far as oral testimony went the jury was entitled to prefer Mr Goodman's to that of the defence witnesses. Mr Barton's main point was that in light of the documentary evidence the only course reasonably open to the jury was to accept Mr Russell's version of the conversation he had with Mr Goodman. First Mr Barton pointed to the fact that Mr Russell had the assistance of a note of the conversation. This contained the disputed phrase that it was Mr Goodman's policy not to give refunds after six months. Initially this note was permitted to be used only to refresh memory but, after legal argument, later was admitted as an exhibit on a restricted basis. Mr Barton argued that because of the nature of the cross-examination of Mr Russell on the document it should be regarded as if it had been admitted for all purposes. I do not accept that submission; but even if the document were regarded as an ordinary exhibit without limitation as to use the jury did not have to regard it as conclusively in favour of Mr Russell. Mr Russell's evidence was that he took rough notes during the conversation which he used to prepare the file note afterwards. The jury could have decided that he was

mistaken in his recollection of the details of the conversation and in this regard it may be noted that the memorandum had Mr Russell say that Mrs Wood was entitled to "receive the money she had paid back", a phrase that he denied using. Alternatively the jury could have thought he misunderstood Mr Goodman's reference to the six month period.

Then, Mr Barton relied on the letter written by Mr Russell shortly after the conversation, which stated that Mr Goodman had refused a refund both to Mrs Wood personally, and to Mr Russell in the telephone conversation. Mr Barton pointed out that Mr Goodman's reply did not take up either of these points. However it was open to the jury to take the view that when replying Mr Goodman being then unaware there was any question of publication of an article, may not have seen any point in nitpicking his way through Mr Russell's letter when he was not disputing that some refund was due. When a little later he received the draft article he described it as "a mixture of fantasy, half truths and downright untruths". He did not specifically traverse the alleged requests for a refund, but the jury may well have thought Mr Goodman believed (as he said) that the real purpose of the draft article was as a lever to compel a better settlement. Accordingly, although in its totality the documentary evidence gave little support to the plaintiff's case, none of it was so cogent or conclusive as to compel a finding that Mr Russell's account must necessarily be correct. If the jury preferred Mr Goodman's version there was as I have demonstrated a credible answer to each of the points made on the documents.

In so far as the application for a new trial was based on the malice finding, I need not add anything to what I have stated on the application for judgment non obstante.

Accordingly the motion is dismissed with costs to the plaintiff of $750.

Solicitors :
O'Regan Arndt Peters & Evans (Wellington) for Plaintiff
Tripe Matthews & Feist (Wellington) for Defendants