



827

BETWEEN

HOARE

Plaintiff

3

AND

DEMPSEY and Anor

Counsel: Mr Timmins and Miss Sim for Plaintiff
Mr Pidgeon Q.C. and Miss Davis for Defendants

Date: 12 June 1986 (2.15 pm)

ORAL RULING OF SMELLIE J ON ADMISSIBILITY

Yesterday the Plaintiff called Mr Potter in order that he might give evidence on his relationship with the Defendants over a period of some three or four years in the early 1970s when they were neighbours. He commenced to give evidence of specific instances which had led to a deterioration in the relationship and ended, he said, in hostility.

At that stage, (Mr Pidgeon having earlier entered a tentative objection), I stopped the evidence. The basis upon which I stopped it will be found recorded in the notes at page 55, lines 27 to 40, and page 56 lines 1 to 5. In accordance with what is recorded there I heard submissions this morning from Counsel and I now give my ruling on the admissibility of the proposed evidence.

As requested Mr Timmins indicated that in addition to the evidence already adduced from Mr Potter it was his

intention, if permitted to do so, to adduce further evidence relating to the general conduct of Mr and Mrs Dempsey as neighbours in Campbells Bay and also evidence as to Mrs Dempsey's stated concern as to her health and Mr Potter's understanding of the reality of that concern.

In addition Mr Timmins indicated that a Mrs Morton could be called and her evidence would fall into two parts. First the reputation of Mr and Mrs Dempsey as neighbours and secondly details of Mrs Morton's dealings with the Dempseys as vendors of a property. He indicated that Mrs Morton as purchaser would give evidence of the way the Dempseys had conducted themselves in a dispute over a sale of property. Mr Timmins indicated that the evidence would relate particularly to building dispute type matters and that the location and timing of Mrs Morton's evidence would be in the suburb of Kohimarama in the early 1980s.

As I understood him Mr Timmins accepted that normally only evidence of general reputation can be adduced and further that the extent to which evidence of the honesty of a litigant can be adduced is similarly limited.

Mr Timmins contended, however, that because of allegations of harrassment, assault, verbal abuse, intimidation and nuisance in these proceedings this case is in a similar category to defamation suits. By analogy he argued that the approach of the Court of Appeal in Waters v Sunday Pictorial Newspapers Ltd (1961) 2 All E.R. 758 should be followed. In that case the Court of Appeal allowed evidence of a particular section of the Plaintiff's life to be examined in detail and Mr Timmins' contention was that that section of the Dempsey's life which relates to their conduct as neighbours, vendors and builders could be similarly examined.

Alternatively Mr Timmins argued that this earlier

evidence of alleged disputes and disagreements with neighbours could be admitted under the similar facts rule. He contended that the rule is different in criminal cases and he relied upon the 6th Edition of the English Publication of Cross on Evidence at page 346 and the decision of Lord Denning M.R. in Mood Music Publications v De Wolfe (1976) 1 All E.R. 763. In the latter case breach of copyright was alleged and the Court allowed proof of similar breaches in a case where an alleged infringer contended that any copying was purely coincidental.

Mr Pidgeon submitted that character is not admissible as a general rule and he relied upon the views expressed in Garrow and McGechan "Principles of the Law of Evidence" 7th Ed at page 68. He contended that contrary to Mr Timmins' submission the test in fact is the same in both criminal and civil litigation and he referred to a statement to that effect at page 80 of McGechan's work.

Mr Pidgeon also referred to Phipson and Elliot Manual of the Law of Evidence at page 18 dealing with the question of the admissibility of character evidence and he adopted the following passages of the learned editor:-

"But we are here concerned with where evidence of character is proffered as circumstantial evidence of a fact in issue, where in effect it is sought to prove that a person did a certain act by evidence that his character or disposition is such that he would be likely to do the act and therefore probably did it.

And dropping down a line or two -

"Evidence of bad character is additionally objectionable on the ground that its admission would harass and prejudice the party against whom it is offered by raking up the whole of his

career, which he would not be prepared to defend without notice; so even if the evidence has some distinct relevance, it may be rejected on that score."

Turning to the question of similar facts Mr Pidgeon relied upon the law as stated in McGechan at pages 78, 79 and 80 and he also drew my attention to the decision of the Court of Appeal in R v Davis [1980] 1 NZLR 257 at 263 where in the judgment of the Court delivered by Cooke J it is pointed out that:-

"... admissibility of similar fact evidence is necessarily a matter of degree, discretion and judgment: hard and fast rules cannot be evolved; common sense is not to be codified."

Like Mr Timmins Mr Pidgeon also relied upon the Mood Music case and in particular on that portion of the leading judgment to be found at page 766, lines c to d reading as follows:-

"In civil cases the Courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side, and also that the other side has fair notice of it and is able to deal with it."

I am quite satisfied in this case that it would be entirely inappropriate for a prolonged investigation of the characters of the litigants on either side to be embarked upon. I do not accept that the law applicable in defamation cases can appropriately be applied to this case. I accept Mr Pidgeon's submission that it would be oppressive and unfair if the Defendants were obliged at this stage in their case to embark upon a detailed defence of their conduct back in the 1970s in Campbells Bay or

even elsewhere at a more recent date in Kohimarama. Similarly, although the matter was not traversed in the submissions it would seem to me that Mr Potter's layman's assessment of Mrs Dempsey's medical condition and her description of it would not only be inadmissible but of little or no help to me.

So far as the similar fact argument is concerned I accept the submission that it is rarely admitted. In the exercise of my discretion it seems to me that commonsense dictates that what happened on other occasions with neighbours or when sales were being carried out is not going to help me to decide who to believe in respect of the events that are relevant in these proceedings.

The result of this ruling is that whilst Mrs Morton may be called to give evidence of the reputation of the Dempseys in the neighbourhood she will not be permitted to go beyond that and it seems to me that there is no evidence that Mr Potter could give that would be admissible.

Counsel no doubt appreciate, but I mention it for the sake of completeness, that although I am ruling against evidence being called in chief on questions of character, nonetheless within bounds the litigants on either side can be cross-examined on questions of character. Counsel will further appreciate that in such circumstances they will be bound by the answers they get if those questions are asked.

Robert Smellie J.
