

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

4/3

LOW  
PRIORITY

CP85/92

BETWEEN JOHN FRANCIS DAVID  
PATTERSON

Plaintiff

A N D EDWIN CHARLES  
SMITH

Defendant

Hearing: 16 February 1994

Counsel: G.A. Keene for the Plaintiff  
D.R. Broadmore for the Defendant

Judgment: 16 February 1994

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JUDGMENT OF ELLIS J.

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In this case Mr Patterson sues Mr Smith for defamation. The facts of the matter arise out of a sad history involving Mr and Mrs Patterson's son Carlton who was over a period of several years in and out of Porirua Hospital where Mr Smith was a psychiatric nurse and who was involved with Carlton Patterson's care from time to time. The allegations arise from notes that Mr Smith made in July 1983 following a meeting when Mr Smith, Mr Patterson and his son were all present.

While I have not thought it appropriate to reserve my decision, I hope that what I am about to say will cover all the salient points that are in issue on the facts.

Carlton was suffering from schizophrenia and he voluntarily placed himself in Porirua Hospital on the 27th of June 1983. Dr Perera admitted him and made the following account of his admission:

"A twenty one year old man brought in by parents 8.30pm. His condition had been satisfactory until 3-4 days ago. Appeared reasonably composed (quiet) on arrival but became a lot more agitated as evening wore on Especially during doctor's interview.

Has a previous admission to W.9 transferred to V.2.

Carlton stated he has been eating and sleeping well and taking his medication regularly. Stated he was tricked into coming here by his parents and doctor. He doesnt seem to trust them at all at the moment. He also stated 'that he would stay here if that's what they (his parents) wanted'. His S.T. memory seemed a little patchy.

His L.T. memory was a little better.

Concentration was poor. Prone to wandering half way through a sentence.

Orientated in place but not time. Appears to be having visual and auditory hallucinations.

Hasnt got much insight into his mental condition."

The nursing notes over the ensuing days were produced and it appears that Carlton expressed a desire to go home and his parents responded to his request and went out on Sunday 10th of July. I immediately record Mr Patterson's reservation as to whether or not it was 10th of July that he and his wife went out to see their son, but he accepts that there was such an occasion round about that date. His reservation is also part of a criticism by him of the accuracy of Mr Smith when he made the note. I now set out the note itself which is the basis of Mr Patterson's claim. I now set it out as typed out on pages 1 and 2 with the word "discouraged" changed to "discharged" and the full stop after worthwhile in the last line removed:

- "10.7.83 UPDATE (1) On Sunday I talked c' a rather unkempt and grubby Mr Patterson Senior. A rather nebulous fellow, who after stating he had come to visit his son, proceeded [sic] to set off on a tangeant [sic] about Dr Skinner's surgery being just around the corner. Skipping a beat he then said 'Momma' was not now working, and that he would take Carlton home c' him today. Discharge?
- (2) I asked him into the office to talk about Carlton. I explained that we had planned for Carlton to go to Hart House. He gave a sensible reply that he and his wife wanted Carlton at home. Carlton stated he wished this same thing and could his father contact Dr Skinner at home on Sunday this day of rest in the year of our Lord. Father's reply was just an abstract a statement that in effect; Carlton's inner man his very own doctor within would tell him when he was ready to go. The reply from within said 'I'll go now'. Father said 'Well, pack your things. You look O.K. to me'. I asked if I could get Carlton to see the Doctor first thing Monday. He replied that Carlton wouldn't be here. He did not see any difficulty in getting Carlton to work if Carlton was sick and tired of catching a bus and train. He would simply drive him from home to work. Each day. Carlton complained that if he was at home, he would have to get up too early. His father said he would also have to get up at the same time now. The conversation was obviously occurring on two different levels with neither dad or Carlton really listening to each other. I became a little giddy and had the feeling that Dad was in indeed of some treatment, or help.
- (3) At this point it would seem hardly worthwhile considering Hart House."

Mr Patterson does not take particular issue with the description of him in the first part of the note. His real complaint is that from his point of

view there is a sting in the tail of the note which he read as critical of him and suggesting that he too was suffering from a mental illness.

I observe that Mr Patterson only came to read the note following Carlton's death and when he as Carlton's administrator obtained access to the hospital file and read it all carefully, as one might expect under the circumstances.

It is trite to say that when one is considering statements that are alleged to have a defamatory meaning, first impression is important. It is also necessary to take the statement as a whole rather than try and dissect it on paper afterwards. However in this case it was a written record that would be presented for reading and to that extent perhaps some closer scrutiny of it is important. When I read the statement first I too thought it was defamatory of Mr Patterson and that the overall thrust of it was that he was perhaps mental unbalanced to an extent. I also thought that the tone of the note overall was to a certain extent objectionable and would give offence to the person about whom it was written by that I mean Mr Patterson senior and not his son.

The question as to whether or not it would be read as defamatory of Mr Patterson by the hospital staff and doctors who would read it is not such an easy question to answer. Dr Perera gave evidence to the effect that he would consider that Mr Smith was attempting to highlight an unusual situation, namely Mr Patterson's unkempt appearance and emotional state as an indication to other clinicians that the family might well be in need of emotional support and reassurance. Dr Perera said that he was not at all surprised to read such a note and that he would have read the note as a whole as an indication that the whole family was in need of some assistance and it was his experience that parents and close family members could

receive benefit from some sort of medication as well as counselling. This highlights the fact in this case that the note itself is capable of two interpretations, that understood by Mr Patterson and that more refined reading that is suggested by Dr Perera.

For present purposes it is unnecessary to resolve the matter by reference only to those people who would read the note, so I proceed on the basis that it is established on the evidence that it is defamatory of the plaintiff.

The plaintiff has established and Mr Smith has admitted in his evidence that the note was read out to other nursing staff on the Monday following the occasion referred to and no doubt it was read by other nursing staff and clinicians from time to time. The plaintiff has accordingly established that the defamatory matter has received publication, albeit limited.

The next consideration is the defendant's contention that what is stated is essentially true. I have listened carefully today to the evidence of Mr Patterson and Mr Smith and I am satisfied that each has done his best to recall what happened some 11 years ago and I bear in mind particularly that it was not called into issue as far as Mr Smith was concerned until 1991, so that his recollection of what took place would not have been in his mind until then. Similarly Mr Patterson was only aware of the notes when he read them in 1988, some five years after the event. It goes without saying that the burden is on the plaintiff to establish the facts on which he relies. He particularly challenges a series of statements in the notes. He told me that he was certain that he would not have said that he and his wife wanted Carlton at home, nor would he have said something to the effect that "Carlton's inner man his very own Dr within would tell him when he was

read to go", nor would he have said to Carlton "well, pack your bags, you look OK to me", nor would he have told Mr Smith that Carlton "wouldn't be there". He further said that he always listened attentively to everything that Carlton said to him and he took issue with the observation by Mr Smith that "the conversation was obviously occurring on two different levels with neither dad or Carlton really listening to each other." He said that he read Mr Smith's note as implying that he, Mr Patterson, was in some way trying to induce his son to act contrary both to his own wishes and Mr Smith's advice.

Here is a situation viewed many years after the event where there are two accounts of what took place. I have no reason whatever to doubt the sincerity of what Mr Patterson said or says now, but it would be unrealistic not to have some reservation as to his ability to recall precisely what was said and I draw a distinction between that and precisely what was meant. Mr Smith's account given now is of course to explain the words that he admittedly used back in 1983 and his understanding of what was said is best gleaned from those notes themselves. It seems to me that Mr Smith did not fully understand what was passing between Mr Patterson and his son. That is not surprising when you are considering two men, one of them the other's son, whose ability and technique of conversing with each other would be honed by close association and of course affected by the difficulties arising from Carlton's illness.

In particular I think that Mr Smith's suggestion that there was a skipping a beat when Mr Patterson referred to Dr Skinner's surgery and the fact that his wife was not working is a misunderstanding of what took place because it seems plain to me that if Carlton was to go home, the fact that Dr Skinner's surgery was just round the corner and the fact that his mother was at home would be significant matters to take into account when you are

considering his day to day care. As far as other criticisms are concerned, there are some matters of style that might give offence such as the use of the word "nebulous" and the comment "just an abstract statement" and also the expression "I became a little giddy" followed by the conclusion that Mr Patterson was in need of some treatment or help.

I have analysed the note in some detail and in essence I conclude that it does not reveal a complete understanding of what passed between father and son, but I now turn to what is in fact the essence of this case.

It is admitted that this is a situation where statements made by Mr Smith are protected by qualified privilege and he was under a duty, certainly moral and probably legal as well, to make notes of what he heard and observed for the information of other clinical staff with a view of course to the proper treatment of Carlton. A holistic approach is what was expected. Conversely, the other clinical staff read the notes or would read the notes in a situation where they would assess them as best they could and take them into account in the treatment of Carlton. In this case the defence is that the note was made by Mr Smith who acted honestly and to his best abilities in recording what he observed and saw, and that on that basis the plaintiff's claim must fail. The position is well stated in the 8th edition of *Gatley on Libel and Slander* in para 769, and because it is critical to the disposition of this case I will now read it:

**"769. Honest belief.** Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth or what he publishes is not to be

equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must taken them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more."

The authority for that is in the speech of Lord Diplock in *Horrocks v. Lowe* [1975] Appeal Cases at page 150.

In my view Mr Smith was acting honestly and any errors that he made were not made from any ulterior motive or collateral purpose. For the sake of completeness I mention the two aspects in which it is suggested that he may have been acting maliciously, that is without honest belief. It was suggested that a practice might have grown up in the staff of Porirua Hospital of using their imagination to relieve boredom by creating humorous accounts for their mutual amusement. It may well be that in some cases this does occurs, but I am certainly not satisfied that this has happened here. I think that Mr Patterson is justified in saying that there are one or two unhappy expressions in the note that looking back on it Mr Smith should not have used but I certainly do not accept that he was acting frivolously or idly or just for the amusement for himself and other members

of the staff. The second suggestion is that Mr Smith had found Carlton a congenial companion in the work situation and that he admired Carlton's ready wit and keen intellect and Mr Smith readily admitted that Carlton had these attractive sides to his personality. The suggestion was that Mr Smith's ulterior motive was to frame a minute that would ensure that Carlton stayed at Porirua rather than be discharged.

I must reject this too. I think it is far fetched. It is true that Mr Smith's opinion was that Carlton should not be discharged and that was apparently running contrary to Carlton's desires from time to time and may have appeared to have been in conflict with Mr Patterson and his wife's willingness to take Carlton home if Carlton wished to go. I reject this suggestion as well.

It will of course be observed by those who listened to me delivering judgment that I have not resolved one or two difficult aspects of the evidence on the way to reaching my conclusion. I hope that they will appreciate that the passage of time would make it artificial to resolve all those matters, especially when the situation is one where qualified privilege protects the note made by Mr Smith, even if he is in error, in some of the things he recorded.

One thing that is amply apparent however from the evidence is that Mr Patterson was not then and is not now suffering from any form of mental illness that I can detect, nobody has suggested otherwise. To that extent, he is fully vindicated in what he has said.

There are two matters that in my view remain for consideration, one by way of comment because I do not consider I have any power to achieve what I am about to suggest, and the other is the question of costs.

It seems to me that bearing mind the position that has now been reached in this matter, it would do no harm whatsoever if the particular note was expunged from the record of Carlton's case at Porirua Hospital and I would ask the authorities to give compassionate consideration to deleting it from all records that may be kept and may be referred to in the future.

I have now heard further submissions on the question of costs. Normally of course costs follow the event. However there are two special aspects in this matter, the first is that I have held that the statement was defamatory and so the defence of qualified privilege deprives the plaintiff of success on wider public interest grounds. The second aspect of the matter is that the defendant has relied also on the provision of the Mental Health Act to the effect that he cannot be personally liable if he acts in good faith and of course I have held that he did act in good faith. Defamation cases are difficult social exercises in adjusting private citizens rights and this Court is always aware in situations like this that a person in Mr Patterson's position is dealing with a large public institution and there is merit in what Mr Keene says that there is also a public interest to be served in ensuring that private citizens can have their day in Court against such institutions. On the other hand I am also aware that the plaintiff has chosen to sue Mr Smith directly and perhaps the matter should be more properly be looked at as a piece of litigation between private individuals. Taking all these matters into account, I consider this is an exceptional case where each party should bear his own costs. There will be no award of costs one way or the other.

*A.M.J. Egan J.*  
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Solicitors:

Earl Kent Alexander Bennett, Auckland for Plaintiff  
 D.R. Broadmore, Solicitor, Wellington for Defendant

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