Neutral Citation Number:[2010] EWCA Civ 350

Case No: A2/2009/1196

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE EADY
[2009] EWHC 1101 (QB)`

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE MASTER OF THE ROLLS
and
LORD JUSTICE SEDLEY

- -

Between :

British Chiropractic Association	**Claimant/ Respondent**
- and -	
Dr Singh	**Defendant/ Appellant**

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- -

Ms Adrienne Page QC and Mr William McCormick (instructed by Bryan Cave Solicitors) for the **Appellant**
Ms Heather Rogers QC (instructed by Messrs Collyer Bristow) for the **Respondent**

Hearing date: Tuesday 23 February 2010

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Judgment

Lord Judge, Lord Chief Justice of England and Wales :

We have all contributed to this judgment of the court.

1. The claimant the British Chiropractic Association (the BCA) is a company limited by guarantee. Its objects include promoting and maintaining high standards of conduct and practice among the United Kingdom's chiropractors, about half of whom it represents. It contends that it has been defamed by the defendant, a scientist and science writer, who in the edition of the Guardian of 19 April 2008 published on the paper's "Comment and Debate" page an article which included this passage:

> "The British Chiropractic Association claims that their members can help treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, even though there is not a jot of evidence. This organisation is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments."

2. By agreement between the parties, Eady J was asked to determine two preliminary issues. The first was what defamatory meaning the words bore. The second was whether they constituted assertions of fact or comment. Upon the answers much of the eventual trial of the action, which is to be by judge alone, depends.

3. Eady J, in a judgment delivered on 7 May 2009, held that the words would mean to a reasonable reader

   i) that the BCA claimed that chiropractic was effective in helping to treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, although it knew that there was absolutely no evidence to support its claims, and

   ii) that by making those claims the BCA knowingly promoted bogus treatments.

4. He went on to hold that these were assertions of fact, not expressions of opinion. If so, the defendant at trial must prove that the meanings are factually true or lose.

5. By this appeal, brought by permission of Laws LJ, the defendant contends that the judge was wrong in both respects. The claimant contends not only that Eady J was right but that his finding on meaning is a finding of fact which can only be overset by this court if we are quite sure that it is wrong.

6. Before turning to the arguments of counsel, it is appropriate to set out the relevant part of the article, which, together with the page caption, "Comment and Debate", constitutes the context in which the material words have to be read and judged.

> "This is Chiropractic Awareness Week. So let's be aware. How about some awareness that may prevent harm and help you make truly informed choices? First, you might be surprised to know that the founder of chiropractic therapy, Daniel David Palmer, wrote that, '99% of all diseases are caused by displaced vertebrae'. In the 1860s, Palmer began to develop his theory that the spine was involved in almost every illness because the spinal cord connects the brain to the rest of the body. Therefore any misalignment could cause a problem in distant parts of the body.
>
> In fact, Palmer's first chiropractic intervention supposedly cured a man who had been profoundly deaf for 17 years. His second treatment was equally strange, because he claimed that he treated a patient with heart trouble by correcting a displaced vertebra.
>
> You might think that modern chiropractors restrict themselves to treating back problems, but in fact they still possess some quite wacky ideas. The fundamentalists argue that they can cure anything. And even the more moderate chiropractors have ideas above their station. The British Chiropractic Association claims that their members can help treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, even though there is not a jot of evidence. This organisation is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments.
>
> I can confidently label these treatments as bogus because I have co-authored a book about alternative medicine with the world's first professor of complementary medicine, Edzard Ernst. He learned chiropractic techniques himself and used them as a doctor. This is when he began to see the need for some critical evaluation. Among other projects, he examined the evidence from 70 trials exploring the benefits of chiropractic therapy in conditions unrelated to the back. He found no evidence to suggest that chiropractors could treat any such conditions."

7. The judgment of Eady J, which can be found at [2009] EWHC 1101 QB, concluded with this passage:

> 12. What the article conveys is that the BCA itself makes claims to the public as to the efficacy of chiropractic treatment for certain ailments even though there is not a jot of evidence to support those claims. That in itself would be an irresponsible way to behave and it is an allegation that is plainly defamatory of anyone identifiable as the culprit. In this case these claims are expressly attributed to the claimant. It goes further. It is said that despite its outward appearance of respectability, it is

> happy to promote bogus treatments. Everyone knows what bogus treatments are. They are not merely treatments which have proved less effective than they were at first thought to be, or which have been shown by the subsequent acquisition of more detailed scientific knowledge to be ineffective. Bogus treatments equate to quack remedies; that is to say they are dishonestly presented to a trusting and, in some respects perhaps, vulnerable public as having proven efficacy in the treatment of certain conditions or illnesses, when it is known that there is nothing to support such claims.
>
> 13. It is alleged that the claimant promotes the bogus treatments "happily". What that means is not that they do it naively or innocently believing in their efficacy, but rather that they are quite content and, so to speak, with their eyes open to present what are known to be bogus treatments as useful and effective. That is in my judgment the plainest allegation of dishonesty and indeed it accuses them of thoroughly disreputable conduct.
>
> 14. I therefore would uphold the claimant's pleaded meanings. It will have become apparent by now that I also classify the defendant's remarks as factual assertions rather than the mere expression of opinion. Miss Rogers reminded me, by reference to Hamilton v Clifford [2004] EWHC 1542 (QB), that one is not permitted to seek shelter behind a defence of fair comment when the defamatory sting is one of verifiable fact. Here the allegations are plainly verifiable and that is the subject of the defence of justification. What matters is whether those responsible for the claims put out by the BCA were well aware at the time that there was simply no evidence to support them. That is an issue capable of resolution in the light of the evidence called. In other words, it is a matter of verifiable fact. That is despite the fact that the words complained of appear under a general heading "comment and debate". It is a question of substance rather than labelling.

8. The grounds of appeal contend, in brief, that the judge elided the issues of meaning and comment when, though related, they are distinct; he used an unwarranted “verifiable fact” test to eliminate comment as a defence; contrary to the article 10 jurisprudence, his decision placed an onus on the defendant to prove what was in truth a value judgment; in deciding the meaning of the words the judge overlooked their context; he paraphrased them damagingly; his approach marginalised or underrated the value now placed by the law on public debate on issues of public concern.

9. The claimant’s response is that the judge committed no such error of law and came to a perfectly tenable conclusion about meaning, a conclusion which excluded any triable defence of comment.

The litigation

10. If, like many trade and professional associations, the BCA was not incorporated but consisted simply of the totality of its members, neither individually nor collectively would they have had standing to sue. Some corporations – municipal ones, for example - also lack standing to sue in defamation. The BCA is not subject to either of these disadvantages. If the present claim is well founded in law, the BCA is entitled to pursue it. Moreover, as the law presently stands, it was entitled, for its own reasons, to reject the opportunity fairly offered to it by the Guardian to take issue with and refute the criticisms expressed by Dr Singh and to demonstrate the fallacy of his opinions. Instead the BCA sued Dr Singh, but not the Guardian, for libel.

11. It is now nearly two years since the publication of the offending article. It seems unlikely that anyone would dare repeat the opinions expressed by Dr Singh for fear of a writ. Accordingly this litigation has almost certainly had a chilling effect on public debate which might otherwise have assisted potential patients to make informed choices about the possible use of chiropractic. If so, quite apart from any public interest in issues of legal principle which arise in the present proceedings, the questions raised by Dr Singh, which have a direct resonance for patients, are unresolved. This would be a surprising consequence of laws designed to protect reputation.

12. By proceeding against Dr Singh, and not the Guardian, and by rejecting the offer made by the Guardian to publish an appropriate article refuting Dr Singh's contentions, or putting them in a proper prospective, the unhappy impression has been created that this is an endeavour by the BCA to silence one of its critics. Again, if that is where the current law of defamation takes us, we must apply it.

Meaning

13. What the words in issue in a libel action mean is subject to two controls: a decision, reserved to the judge, as to whether the defamatory meaning alleged by the claimant falls with the range of possible meanings conveyed by the words in their context; and a decision, traditionally reserved to the jury, as to what they actually mean. The former is regarded as a question of law, the latter as one of fact, with the result that the meaning eventually decided upon by the jury is shielded from attack on appeal save where it has crossed the boundary of reasonableness.

14. Heather Rogers QC for the BCA accordingly submits that we cannot interfere with Eady J's decision on meaning simply because we may disagree with it: we can only do so if we are quite sure that he was wrong. Adrienne Page QC for Dr Singh submits, first, that we are free to retake that decision if, as she submits is the case, it is vitiated by an error of law; but she submits in any event that the deference accorded on appeal to what is ordinarily a jury's verdict has no equivalent where the finding in question is the speaking decision of a judge.

15. Ms Page draws our attention in this connection to *Slim v Daily Telegraph* [1968] 2 QB 157, an appeal from a decision of Paull J who, as is to happen in the present case,

had tried a libel action without a jury. Diplock LJ (at 174) explained the two functions in this way:

> "The decision as to defamatory meanings which words are capable of bearing is reserved to the judge, and for this reason, and no other, is called a question of law. The decision as to *the* particular defamatory meaning within that category which the words do bear is reserved to the jury, and for this reason, and no other, is called a question of fact."

The purpose of this careful explanation becomes apparent when, having held that the trial judge had failed to direct himself adequately as to the true meaning of the words complained of, Diplock LJ (at 177) asks "What then is this court to do?" and answers:

> "I do not think we need send it back for a retrial …. This court is in as good a position as the judge to determine what is the natural and ordinary meaning of the words…."

Fact and comment

16. What a passage of prose means when read in context is, however, not the critical question in a case such as this. The critical question, at least for present purposes, is whether its meaning includes one or more allegations of fact which are defamatory of the claimant, or whether the entirety of what it says about the claimant is comment (or, to adopt the term used by the European Court of Human Rights in its Article 10 jurisprudence, value-judgment).

17. One error which in Ms Page's submission affects Eady J's decision on meaning is that in §14, quoted above, he treats "verifiable fact" as antithetical to comment, so that any assertion which ranks as the former cannot qualify as the latter. This, it is submitted, is a false dichotomy. It led the judge to postulate the resultant issue as "whether those responsible for the claims put out by the BCA were well aware at the time that there was simply no evidence to support them". This, he held, was "a matter of verifiable fact".

18. It seems to us that there is force in Ms Page's critique – not necessarily because fact and comment are not readily divisible (that is a philosophical question which we do not have to decide), but because the subject-matter of Dr Singh's article was an area of epidemiology in which the relationship of primary fact to secondary fact, and of both to permissible inference, is heavily and legitimately contested. The issue posed by the judge is in reality two distinct issues: first, was there any evidence to support the material claims? and secondly, if there was not, did the BCA's personnel know this? If, as Dr Singh has contended throughout, the first issue is one of opinion and not of fact, the second issue ceases to matter.

19. In our judgment Eady J, notwithstanding his very great experience, has erred both in conflating these two elements of the claim and, more particularly, in treating the first of them as an issue of verifiable fact.

20. To see where this approach leads, one can look at the pleadings. By his defence Dr Singh sets out the undisputed fact that the BCA promotes chiropractic as a treatment for infants and young children suffering from colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, and then says:

> "The comment which the Defendant contends that the article bears is that the Claimant's behaviour in so doing is reckless and irresponsible in the light of the lack of any reliable scientific evidence supporting the effectiveness of such treatments and in the light of the risks of the treatment proposed."

21. He then sets out, ailment by ailment and study by study, his reasons for considering that none of the available epidemiological evidence reliably supports the BCA's claims. This is met by a reply of comparable length in which the BCA, again ailment by ailment and study by study, contests his view and asserts that there is some dependable evidence for its claims. Ms Rogers has told us that, given the judge's ruling that these are verifiable facts, the trial can be expected to involve expert evidence on both sides and a judicial conclusion as to whether there is any evidence for the BCA's claims.

22. One has only to contemplate this prospect to conclude that something is amiss. It is one thing to defame somebody in terms which can only be defended by proving their truth, even if this ineluctably casts the court in the role of historian or investigative journalist. It is another thing to evaluate published material as giving no evidential support to a claim and, on the basis of this evaluation, to denounce as irresponsible those who make the claim. Recent years have seen a small number of high-profile libel cases in which the courts, however reluctantly, have had to discharge the first of these functions. But these have been precisely cases in which the defendant has made a clear assertion of highly damaging fact, and must prove its truth or lose.

23. The present case is not in this class: the material words, however one represents or paraphrases their meaning, are in our judgment expressions of opinion. The opinion may be mistaken, but to allow the party which has been denounced on the basis of it to compel its author to prove in court what he has asserted by way of argument is to invite the court to become an Orwellian ministry of truth. Milton, recalling in the *Areopagitica* his visit to Italy in 1638-9, wrote:

> "I have sat among their learned men, for that honour I had, and been counted happy to be born in such a place of philosophic freedom, as they supposed England was, while themselves did nothing but bemoan the servile condition into which learning among them was brought; …. that nothing had been there written now these many years but flattery and fustian. There it was that I found and visited the famous Galileo, grown old a prisoner of the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought."

That is a pass to which we ought not to come again.

24. Ms Rogers argues forcefully that this is not the route along which she wishes to take us, or that it is necessary for her to go. She simply relies upon the phrase "there is not a jot of evidence" as a plain assertion of fact upon which the allegation that the BCA happily promotes bogus treatments is founded. And she paraphrases "happily" as meaning "knowingly". Unless, therefore, Dr Singh can make good the assertion, Ms Rogers submits, he cannot begin to defend what follows as fair comment.

25. We respectfully reject both the premise and the conclusion.

26. What "evidence" signifies depends heavily on context. To a literalist, any primary fact – for example, that following chiropractic intervention a patient's condition improved – may be evidence of a secondary fact, here that chiropractic works. To anyone (and not only a scientist) concerned with the establishment of dependable generalisations about cause and effect, such primary information is as worthless as evidence of the secondary fact as its converse would be. The same may equally well be true of data considerably more complex than in the facile example we have given: whether it is or not is what scientific opinion is there to debate. If in the course of the debate the view is expressed that there is not a jot of evidence for one deduction or another, the natural meaning is that there is no worthwhile or reliable evidence for it. That is as much a value judgment as a contrary viewpoint would be.

27. The pleadings in the present case usefully illustrate this. Dr Singh's defence includes, in §8(25), a survey of controlled clinical trials on the efficacy of chiropractic in treating infantile colic, none of which, he contends, affords objective support for the BCA's claim. The BCA, in §9(23) of its reply, relies (among other studies) on a 1989 observational study of 316 children, of which it is said:

> "This …. measured the number of hours each child spent in crying. It showed a reduction in crying time from 5.2 hours each day to 0.65 hours each day at 14 days. This was a very substantial improvement. There was no control group. However, the study constitutes evidence."

One need go no further in order to see how value-laden the word "evidence" is in the present context, let alone to envisage the examination and cross-examination of witnesses called to testify about it, and about the dozens of other reports cited by one side or the other. If Eady J's decision stands, it will not be open to the trial judge to conclude that what they amount to is all a matter of opinion, for it will already have been decided that the existence or non-existence of evidence for the claims made by the BCA is a verifiable fact.

28. Ms Rogers has understandably not sought to make a major issue of the word "bogus". In its context the word is more emphatic than assertive. But it is also explicitly supported by the next paragraph of the article, which explains that Dr Singh's co-author Professor Ernst had found in 70 trials no evidence that chiropractic could treat conditions unrelated to the back. It is a paragraph which also underlines the evaluative character of the assertion that there was not a jot of evidence for such claims.

29. The other assertion to which the BCA takes objection is that it "happily" promotes treatments which, if Dr Singh is right, are bogus. Eady J accepted the BCA's case that

this meant, in its context, that the BCA was well aware that there was in reality no evidence to support its claims – "the plainest allegation of dishonesty", as the judge put it.

30. Once the allegation that there is "not a jot of evidence" to support the claims is properly characterised as a value judgment, the word "happily", even if synonymous with "knowingly", loses its sting. But we respectfully doubt whether the judge was justified in any event in attributing to the word any significance beyond, say, "blithely". The natural meaning of the passage, in other words, was not that the BCA was promoting what it knew to be bogus treatments but that it was promoting what Dr Singh contended were bogus treatments without regard to the want of reliable evidence of their efficacy – a meaning which takes one back to the assertion that there was not a jot of evidence for the BCA's claims.

Conclusions

31. In these circumstances it is not necessary to embark on other and more troublesome issues: for example, whether the *Reynolds* defence of responsible misreporting of facts (which is not expressly pleaded) can apply to a case like this, or whether there can be a resort here by way of fair comment to an alternative meaning (cf. *Bonnick v Morris* [2002] UKPC 31). Our decision does not seek to collapse or erode the general distinction between fact and comment: it seeks to relate the distinction to the subject-matter and context of the particular article and the dispute to which it relates. Nor is it necessary to decide whether, following the reasoning in *Slim v Daily Telegraph*, we should substitute our preferred meaning for that found by the judge.

32. It may be said that the agreed pair of questions which the judge was asked to answer (see §4 above) was based on a premise, inherent in our libel law, that a comment is as capable as an assertion of fact of being defamatory, and that what differ are the available defences; so that the first question has to be whether the words are defamatory even if they amount to no more than comment. This case suggests that this may not always be the best approach, because the answer to the first question may stifle the answer to the second.

33. However this may be, we consider that the judge erred in his approach to the need for justification by treating the statement that there was not a jot of evidence to support the BCA's claims as an assertion of fact. It was in our judgment a statement of opinion, and one backed by reasons.

34. We would respectfully adopt what Judge Easterbrook, now Chief Judge of the US Seventh Circuit Court of Appeals, said in a libel action over a scientific controversy, *Underwager v Salter* 22 Fed. 3d 730 (1994):

> "[Plaintiffs] cannot, by simply filing suit and crying 'character assassination!', silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation. … More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path towards superior understanding of the world around us."

35. In an area of law concerned with sometimes conflicting issues of great sensitivity involving both the protection of good reputation and the maintenance of the principles of free expression, it is somewhat alarming to read in the standard textbook on the Law of Libel and Slander (Gatley, 11th edition) in relation to the defence of fair comment, which is said to be a "bulwark of free speech", that "…the law here is dogged by misleading terminology… 'Comment' or 'honest comment' or 'honest opinion' would be a better name, but the traditional terminology is so well established in England that it is adhered to here".

36. We question why this should be so. The law of defamation surely requires that language should not be used which obscures the true import of a defence to an action for damages. Recent legislation in a number of common law jurisdictions - New Zealand, Australia, and the Republic of Ireland - now describes the defence of fair comment as "honest opinion". It is not open to us to alter or add to or indeed for that matter reduce the essential elements of this defence, but to describe the defence for what it is would lend greater emphasis to its importance as an essential ingredient of the right to free expression. Fair comment may have come to "decay with … imprecision". 'Honest opinion' better reflects the realities.

37. This appeal must be allowed.