A Lesson in Why Not to Sue for Defamation (or, at least, to settle early):

KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden [2020] NSWCA 28 (3 March 2020)

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No one wins in defamation cases. Sure, successful plaintiffs can be awarded huge sums of money and be "vindicated" by the courts – but there is always the risk of this being overturned on appeal. More often than not, both plaintiffs and defendants are dragged through the mud throughout the course of the proceedings, with every aspect of their lives being simultaneously under the microscope and broadcast to a much broader audience than the original publication.

This was illustrated all too clearly in the recent decision of the NSW Court of Appeal in *KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden* [2020] NSWCA 28 (3 March 2020). At first instance the plaintiff, a young male childcare worker, was awarded $237,970.22 in damages plus costs in a case concerning an email sent by his employer to 35 recipients. Within a year, he went from this remarkable high to losing his case on appeal and being ordered to pay the costs of the defendants for both the first instance proceedings and the appeal. A devastating result for someone just starting out in their career.

In his appeal judgment, Basten JA was scathing. He took a dim view of the trial judge, the case management of the proceedings, the lack of proportionality between the resources expended in the proceedings as compared to the nature of the claim, and the fact the proceedings were pursued at all. His Honour observed:

> *"…on a broader view, the proceedings have been counter-productive, having regard to their proper purposes. The respondent was a young man starting upon a career. A newsletter sent to 35 parents of children who were cared for by the appellants contained a brief reference to the termination of his employment and the reasons for taking that step. If money was his motive in bringing the proceedings, he has failed entirely and is now subject to a heavy obligation to meet the costs of the defendants. However, a careful assessment of the likely award of damages if successful, together with an appreciation of the risk of failure, might cast doubt on his judgment in bringing the proceedings for that purpose.*
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> *If his primary purpose was to defend his reputation, one immediate effect of the proceedings was to ensure that the comments in the newsletter became available for public consumption. Furthermore, he had to resist the defence that the adverse imputations were true and also, to prove that they were made maliciously. The fact that he succeeded at trial on both relevant defences must tend to sully the reputations of the defendants. Their success on appeal will only partly remedy that stain. Sullying one person's reputation to protect another's is a high cost. The situation is more troubling where the adverse effect on the defendants appears to have been unwarranted."*

The facts

In April 2016, an email was sent on behalf of the childcare centre to 35 parents of children who attended the centre. Under the heading "Staff Updates", the email stated that the plaintiff "is unfortunately no longer with us due to disciplinary reasons", "was not truthful with us regarding his studies and some other issues" and "I felt it was better for him to move on and possibly gain a bit more life experience". When the plaintiff became aware of the email, he commenced proceedings claiming the email gave rise to false and defamatory imputations that he was dishonest; was not truthful with Hubba Bubba Childcare regarding his studies and some other issues; was fired for disciplinary reasons; conducted himself in such a manner that a childcare centre terminated his employment; and is not a fit person to work in childcare.

Levy DCJ found in favour of the plaintiff, dismissing the defendants' defences of truth, qualified privilege and triviality.

The appeal

However, the Court of Appeal overturned the decision at first instance, finding that:

- Levy DCJ erred in finding that the email was not published on an occasion of qualified privilege at common law, in that he conflated the assessment of whether there was a privileged occasion with an assessment of whether material was included in the email which was irrelevant to the occasion of privilege. It was found that the assessment of whether there was an occasion of privilege is an objective question, and should not take into account the subjective purpose of the publisher. The reference by Levy DCJ to a "defence" or "actual or apparent interest" was described as "regrettable", given no such defence exists to a defamation action.

- Parents at a childcare centre have a legitimate interest in knowing about staffing changes and the reasons for those changes, which supported there being an occasion of privilege. It was found that the court should not take a narrow view of whether what was said on an occasion of privilege was strictly in pursuit of the duty or interest. What must be considered is whether the defamatory statements were "sufficiently connected" to the privileged occasion to attract the defence, and it was held that this was the case.
- Levy DCJ erred in finding that the defendants were actuated by malice. The appeal court observed that to establish a predominantly improper motive in publishing the matter complained of is a "heavy onus" - honesty is presumed, and the plaintiff has the onus of negativing it. Proof of ill-will, prejudice, bias, recklessness, lack of belief in truth or some motive other than duty or interest for making the publication is insufficient of itself to establish that malice actuated the publication. The appeal court found that the evidence did not support a finding of malice.
- Even if the qualified privilege defence had failed, the damages award at first instance was "manifestly excessive". The appeal court noted that "There remains an issue in this State about the fundamental approach to damages in defamation cases" in light of the Victorian Court of Appeal's decision in *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674 and that section 34 of the *Defamation Act 2005* (NSW) provides that the Court must ensure "that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded". It was held that an award of $40,000 would have been appropriate in this case, and there was no occasion for an award of aggravated damages.

Criticisms

The Court of Appeal was critical of the fact that:

- the trial in the District Court ran for 11 days, an unjustifiable period given the nature of the claim and the amount at stake, particularly given that the case was heard by a judge sitting without a jury;
- the costs of each party must have exceeded the reasonable expectation of damages in the event of success;
- the judge did not order that the parties exchange witness statements prior to the trial. The appeal court observed that it is common practice in defamation proceedings not to exchange statements, but said this is likely to lead to inefficiencies and that the general practice should be reconsidered; and
- there was a delay of almost 11 months between the conclusion of the evidence and the delivery of the judgment, which was unsatisfactory in a case which turned upon the credibility of witnesses giving oral evidence.

Lessons

Practitioners should be alive to the practical consequences of running defamation proceedings to trial and the potential negative impacts on their clients. Putting to one side the inherent risks and uncertain prospects involved in any litigation, defamation cases also carry the risk of further publicity being given to the alleged defamation, additional adverse material being adduced in the course of a truth defence or bad reputation plea, and adverse and critical findings being made by the court in terms of a party's credit.

Defamation proceedings are also extremely expensive and time consuming. It is often said that only the lawyers come out the winners in defamation cases, but in this case where the huge burden of costs now lies on a person barely in his twenties, it will be difficult for even the lawyers to get their pay day.