IN THE COURT OF APPEAL OF NEW ZEALAND

CA206/2017
[2017] NZCA 447

BETWEEN	EARL RAYMOND HAGAMAN Appellant
AND	ANDREW JAMES LITTLE Respondent

Hearing:	28 September 2017
Court:	Kós P, Miller and Winkelmann JJ
Counsel:	R J B Fowler QC and S J Price for Appellant J W Tizard for Respondent
Judgment:	2 November 2017 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant's estate must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

[1] Does the late Mr Hagaman's appeal against a High Court Judge's ruling in a defamation trial survive his death? That is the question this judgment is concerned with.

Background

[2] Mr and Mrs Hagaman owned a large New Zealand hotel chain. In 2014 Mr Hagaman made a substantial donation to the governing National Party of New

Zealand. The Hagamans' hotel chain later received Niue Government funding to upgrade a hotel in that country. The ultimate source of that funding was New Zealand Government aid assistance. The Leader of the Opposition Labour Party of New Zealand, Mr Little, drew a connection between these events in a series of six public statements.

[3] The Hagamans issued proceedings in defamation against Mr Little in June 2016. Trial commenced in April 2017. During the trial Clark J ruled that the six statements were protected by qualified privilege.[1] The jury were agreed that Mrs Hagaman's claims failed. They also agreed that two of Mr Hagaman's six claims failed. But they could not agree on the other four. Judgment was entered in the High Court for Mr Little against Mrs Hagaman. No judgment was entered in relation to Mr Hagaman's claim.

[4] The present appeal against the Judge's ruling concerns one only of those four disagreed claims — the second cause of action. The appeal was filed in April 2017. Mr Hagaman died in May 2017. Although his personal representatives have not yet been substituted as appellants, they are responsible for the present conduct of the appeal and accept responsibility for any costs ordered on it.

[5] The question trail on the second cause of action given to the jury by the Judge, and the answers they gave, were as follows:

> **First named plaintiff (Earl Hagaman): Second cause of action**
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> 5. Do the words set out in paragraph 10 of the second amended Statement of Claim carry any of the meanings set out in paragraph 11? **[YES]**
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> 6. If the answer to any of issue 5 is "Yes", is that meaning defamatory of the first named plaintiff (Earl Hagaman)? **[YES]**
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> 7. If the answer to issue 6 is "Yes" was the defendant (Andrew Little) motivated by ill-will towards the first named plaintiff (Earl Hagaman) or, did the defendant take improper advantage of the occasion of publication? **[NO ANSWER]**
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> 8. If the answer to issue 7 is "Yes", then assess: **[NO ANSWER]**
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> (iii) General damages $
> (iv) Exemplary damages $

[1] *Hagaman v Little* HC Wellington CIV-2016-485-414, 12 April 2017. Reasons were subsequently given in *Hagaman v Little* [2017] NZHC 813, [2017] 3 NZLR 413.

[6] The practical question we must decide is whether the jury answers on the second cause of action amount to a verdict for Mr Hagaman. We will now explain why this point matters.

When does an appeal in a defamation claim survive death?

[7] The old common law rule was that personal actions in tort (including defamation) abate upon the death of the plaintiff (or the defendant): *actio personalis moritur cum persona*. The rationale for the rule is that such an action is personal to the victim and his or her tortfeasor, and should not devolve to their estates. Professor Pollock called it a "barbarous rule".[2] The effect of the rule, as we will see, rather depended on the stage the claim had reached.

[8] The rule was abolished in part by statute in 1936, permitting the continuation of an action despite the death of a party. Section 3(1) of the Law Reform Act 1936 provides:

> **3 Effect of death on certain causes of action**
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> (1) Subject to the provisions of this Part, on the death of any person after the passing of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his estate:
>
> provided that this subsection shall not apply to causes of action for defamation …

[9] Defamation is excluded from the reforming effect of s 3(1). That simply means that the reform (creating a new statutory survival rule for other torts) does not apply to it. For defamation the old common law rule continues.[3] The rationale said to underlie the exception is that only the plaintiff can give reliable evidence as to his or her feelings or distress, and no one but the defendant can give reliable evidence to rebut an allegation of ill will.[4] Those reasons might not seem altogether compelling today, particularly when injurious falsehood is not similarly excepted. But

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2 Quoted in Henry Goudy "Two Ancient Brocards" in Sir Paul Vinogradoff (ed) *Essays in Legal History* (Oxford University Press, Oxford, 1913) 215 at 216.

3 *Halsbury's Laws of England* (4th ed, reissue, 2000) Executors and Administrators at [814].

4 *Smith v Dha* [2013] EWHC 838 (QB) at [13].

regardless, defamation was left out of the 1936 reform. Neither counsel suggests this is the right appeal in which to refashion the common law rule.[5]

[10] Whether a defamation claim abates with death or not ultimately depends on the stage the proceeding has reached. This is best demonstrated by reference to the High Court of Australia's decision in *Ryan v Davies Brothers Ltd*.[6] The plaintiff, Mr Ryan, brought libel proceedings against the defendant newspaper publisher. The jury found for the defendant and judgment was entered for it, together with costs. Mr Ryan appealed seeking that the verdict be set aside. He sought either a contrary verdict and judgment on appeal, or retrial. But before the appeal was heard he died. His executor then sought to be substituted as appellant. The defendant demurred on the basis that the common law rule applied, arguing that if the cause of action itself had not survived, the appeal could not either. That argument met with this rebuke:[7]

> The fallacy in the argument resides, in our opinion, in the assumption that an obligation upon a judgment in respect of an *actio personalis* remains impressed with the character of the original cause of action or wrong. The maxim is not, as has been said, a very rational part of the law, but the extension now suggested is opposed to both reason and authority. This can be demonstrated more easily in the case of an action in which judgment has been entered for the plaintiff. The right of action for the original wrong has merged in the judgment, and a new, higher and different obligation has been created by the judgment. The right under the judgment has never been treated as an *actio personalis* or a right of action based upon the original wrong. The right to enforce the judgment survives to the personal representative of the deceased …

[11] The judgment then drew two entirely logical deductions. First, that if the plaintiff's representatives could enforce a (favourable) judgment, the defendant must also have the right to challenge that judgment. Secondly, that if the defendant could enforce an (unfavourable) judgment against the plaintiff's representatives, those

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5 The 1977 McKay Report recommended further miscellaneous reforms where a plaintiff dies before verdict or judgment, especially where special damage is alleged, but these were not adopted in the Defamation Act 1992: New Zealand Committee on Defamation *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (Government Printer, Wellington, 1977) [McKay Report] at [442].

6 *Ryan v Davies Brothers Ltd* (1921) 29 CLR 527.

7 At 533.

representatives must also have the right to challenge that judgment. In *Ryan* the plaintiff's estate was liable to pay costs. The Court continued:[8]

> If this obligation survives the death of either party to the original action, then it cannot be an *actio personalis* within the doctrine expressed by the maxim already mentioned. But, says the defendant, even if the verdict and judgment be erroneous, still the original cause of action cannot be restored by reversal of the judgment nor can a new trial be had. The plaintiff is dead; and, if his original cause of action cannot be treated as merged in a judgment which is reversed, then that original cause of action must necessarily have ended also with the death of the plaintiff, and cannot survive to his representative. All this is true and may be admitted. Yet it does not meet the point that an erroneous judgment of the Court (for this is the hypothesis upon which the argument proceeds) casts an obligation upon the representative of the plaintiff to pay a sum of money for costs out of the assets in his hands.

[12] The distinction arises from the principle that upon entry of judgment the cause of action merges with judgment.[9] Where the decision is that of a jury, it is the entry of a verdict, rather than the subsequent formal entry of judgment by the trial judge, that precludes application of the rule.[10] That is the conventional principle in defamation.[11] In *Smith v Dha* the defendant in a defamation claim sought summary judgment.[12] The plaintiff died after argument but before judgment on the application could be given. Davies J held the ordinary rule applied: the cause of action abated and no judgment would be entered on the defendant's application.

[13] Although rights of appeal post-verdict remain regardless of death, the rule may yet affect available appellate outcomes. For instance, it may be that a new trial cannot be ordered because the cause of action abates with death.[13]

Does Mr Hagaman's appeal survive his death?

[14] We are concerned only with the second cause of action. Mr Tizard for Mr Little submits there is neither verdict nor judgment on that cause of action.

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8 At 534.

9 *Calderwood v The Nominal Defendant* [1970] NZLR 296 (CA) at 301.

10 *Hodge v Marsh* [1936] 1 All ER 848 (PC); and *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398.

11 David Price, Korieh Duodu and Nicola Cain *Defamation: Law, Procedure and Practice* (4th ed, Sweet & Maxwell, London, 2009) at [17–17]; McKay Report, above n 5, at [429]; and *Halsbury's Laws of England* (5th ed, 2012) vol 32 Defamation at [725].

12 *Smith v Dha*, above n 4, at [15].

13 *Ryan v Davies Brothers Ltd*, above n 6 at 534; and *Calwell v IPEC Australia Ltd* (1975) 7 ALR 553 (HCA) at 555 and 562.

It follows it has abated and the appeal must be dismissed. Mr Fowler QC for Mr Hagaman's representatives submits that although there is no judgment, the cause of action does not abate because there is at least a verdict. He submits that the jury answers constitute a special verdict finding that Mr Hagaman was defamed by Mr Little.[14]

[15] A special verdict is one where the jury is asked to respond with answers to a series of questions rather than simply stating whether they find for the plaintiff and in what amount.[15] The modern practice in New Zealand is for a trial judge to set a series of questions, called a "question trail", the answers to which may constitute a special verdict. There are practical advantages to the receipt of specific answers as part of a special verdict. They may obviate the need for retrial if a judge has misdirected in one particular. And they may provide a better informed basis for an appellate court to redetermine damages.[16]

[16] But an incomplete set of answers will not amount to a verdict for one party or the other. A verdict is a conclusive determination of all factual issues within a cause of action, for one party or the other. The verdict can then be perfected by entry of judgment.[17] In defamation a verdict for the plaintiff must include the jury's award of damages; otherwise it is incomplete and void.[18]

[17] It is evident that in this case the jury was asked by the Judge to respond to a series of questions, the intended result of which would be a special verdict on each cause of action. This produced verdicts for Mr Little on the causes of action alleged by Mrs Hagaman. It also produced verdicts for Mr Little on the fifth and sixth causes of action alleged by Mr Hagaman. Here the jury, asked questions similar to those in [5] above, answered either that the words did not bear the meaning alleged or that the meaning was not defamatory. That meant, as the question trail makes

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14 Section 52 of the Defamation Act 1992 provides for both general and special verdicts. The High Court Rules also contemplate a jury stating facts rather than reaching a verdict for either party: r 10.1(3).

15 That being a general verdict: see Price and others, above n 11, at [32–16].

16 Above, at [32–16].

17 *Tancred v Christy* (1843) 12 M & W 316; 152 ER 1219.

18 Alistair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (Sweet & Maxwell, London, 2013) at [35.8], citing *Clement v Lewis* (1822) 129 ER 1299, Brod & Bing 297.

clear, that the jury had no more work to do. The answers were complete, even though not all questions had been answered.

[18] The same cannot be said of the second cause of action. The jury's work was incomplete. Having answered the first two questions affirmatively, they had to go on and answer the third. But they could not agree on it. That is not a special verdict, because there is no conclusive answer on that cause of action. No judgment upon it could be pronounced.[19]

[19] It follows that no verdict was given on the second cause of action. It therefore abates with the death of Mr Hagaman. No appeal may now be advanced upon it. As the whole of the appeal is confined to that cause of action, it also follows that the appeal itself must be dismissed.

Result

[20] The appeal is dismissed.

[21] The appellant's estate must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Meares Williams, Christchurch for Appellant
Oakley Moran, Wellington for Respondent

[19] Had a retrial been directed the second jury would have to answer the full set of the same questions. The views of the earlier jury on the first two questions would neither be before the second jury nor be of any interest to it.