

Notes for Media Slot Nine To Noon Wednesday 6 June 2012
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1. I want to talk today about a recent decision of the UK High Court called *King v Grundon*. This was a defamation decision given extempore, which means an oral judgment given by the judge at the time - live, so to speak, or 'off the cuff'. Such judgments are in the nature of doing immediate justice, but are persuasive only because of their 'less thought out' character.
2. This makes the case a bit obscure, but it has an interesting New Zealand connection and is useful as an example of where the law is going and where it might go here.
3. The decision states that the claimant, Mr King, was a former English barrister who was convicted in New Zealand in 2003 of conspiracy to unlawfully detain a person without his consent with intent to imprison and unlawful possession of a firearm.
4. By now, this is probably ringing a bell for listeners. In 2003, a plywood box big enough to hold a man was at the center of a trial of two men who were accused of plotting to kidnap a businessman at gunpoint. The box found hidden in the Rimutaka forest park by Wellington Regional Council workers the year before prompted a police surveillance operation and the eventual arrest of Upper Hutt lawyer, John Burrett and his nephew and another man. At the eventual trial of the first two men, Mr Burrett defended himself in flamboyant style and one of the things he told the court was that he was a crazy eccentric who liked to feed ducks. I remember writing a satirical skit about the case for the Canterbury Law Student Revue of that year, though there was hardly a need to use satire with those facts.
5. In terms of media law, the New Zealand criminal case was significant because part of the proceedings established that the intended victim of the planned kidnap, described as Mr X, who was a man from a prominent business family, was not entitled in law to have his name suppressed for reasons of personal privacy.
6. At his trial, Mr Burrett asserted that he had been simply playing 'a game' and that he lacked any criminal intent. However, he was found guilty by a jury and was eventually sentenced to seven years imprisonment. A subsequent appeal against conviction and sentence was rejected by the New Zealand Court of Appeal. Mr Burrett served about four years of his sentence and eventually returned to the UK. In 2005, he was disbarred there by the Honourable

Society of Middle Temple.

7. In 2008, Mr Burrett published a book about his experiences and protesting his innocence, called 'One Game Too Many'. The book is available on Amazon, where it has been given a five star review by J. King. The book was published by an online literary agent and publisher, 'formed in mid 2007 to help overcome some of the genuine frustration and feeling of helplessness felt by so many first time writers trying to get their book published.' The contact on the website for the publisher is Mr John King, who was the claimant in *King v Grundon*. Mr King is referred to in the *King* decision as the writer of the book and as the lawyer convicted in New Zealand in 2003 of conspiracy to unlawfully detain a person without consent. Mr Burrett then, is Mr King.
8. In *King v Grundon*, Mr King sued for libel alleged to arise from two publications:
 1. An email written by Mr Grundon (a former engineer who had known the claimant) to his former partner's solicitor which referred to the claimant as having been "convicted of armed kidnap in New Zealand in 2003".
 2. A comment posted on the amazon.co.uk listing for the claimant's book, which referred to the claimant as an "armed kidnapper".
9. Mr Grundon applied to strike out the claim and/or for summary judgment, and was successful on all grounds. What we have seen in the UK courts since the 2005 decision of *Jameel v Dow Jones*, is a desire to quickly weed out claims which have no possible chance of succeeding and hence will just clog up the courts and cost defendants, often media. So where the continuation of the litigation would not achieve any significant vindication of a claimant's reputation it will be seen as an abuse of process to continue the action. Courts will also look closely at whether there would be any possibility of the action being successfully defended if it went to full trial. Mr King's claim pretty much failed on all grounds.
10. The judge, Mr Justice Sharp, thought the claim was a classic example of abuse of process. A person's convictions are admissible as evidence of bad character, even though foreign convictions are not conclusive proof of guilt in the UK. Justice Sharp noted Mr King's convictions were still current and had also been widely reported in England & Wales, along with details of his strike off

from the Bar. As in New Zealand, evidence can be admitted that the claimant's reputation is generally bad in the aspect to which the proceedings relate. Here, the convictions not only related to the relevant sector of the claimant's reputation but also related directly to the words complained of. Therefore, the Court concluded it was not possible to suggest that the claimant had any reputation capable of being vindicated.

11. In the UK, the question of abuse of process also involves questioning who read the published words and whether anyone thought any less of the claimant as a result. This goes to the question whether there has been a 'real and substantial tort'. In *King*, there was no evidence before the court that either publication had been read by a large number of people. There was certainly no evidence from which to infer that the second publication had been read by a substantial number of people within the UK, so overall there was no "real and substantial tort". The judge thought that to allow the claim to continue would effectively be a rerun of the claimant's trial in New Zealand. This requirement for a real and substantial tort is recent in the UK common law (ie: judge-made law) and there is a draft Defamation Bill currently being considered over there which will continue the approach by introducing a requirement that a defamatory publication has caused or is likely to cause 'serious harm' to a claimant's reputation.
12. Furthermore, the judge thought the defence of justification (what we call truth) was bound to succeed because the sting of the defamatory allegation was substantially true. The view here was that being called an '*armed kidnapper*' or an '*armed kidnap plotter*' was, for the purposes of a libel claim, no different. This is interesting because, although it is difficult for us to accept at times, it is possible for those convicted of crimes to still have some sort of reputation left over which the law will protect. For example, calling a convicted shop lifter a paedophile when they are not could sound in damages. Generally, then, if you accuse someone of a crime different from, or more serious than the one they have committed, you may be in trouble. You may remember that some years ago when Helen Clark was Prime Minister, she was sued successfully by a man who she had referred to as a convicted murderer, but who had in fact been convicted of manslaughter. That claim was settled. In contrast, in the *King* case, the judge clearly thought that in the circumstances, calling someone an armed kidnapper was

close enough to calling them an armed kidnap plotter .

13. The final ground for finding abuse of process in *King* was that the first publication - the defendant's email sent to a solicitor enquiring whether the solicitor was still acting for his former partner in litigation between them - would have had a defence of absolute privilege had the case gone to trial. This was because it was part of ongoing litigation correspondence and parties to litigation need to communicate without fear of defamation claims.
14. So, as mentioned, the case illustrates attempts by the UK courts to weed out insubstantial claims, and the UK Defamation Bill will attempt to embody this in legislation. There are problems, - for example, until there are decided cases, it will be difficult to determine how serious harm from publication has to be and whether it has occurred or is likely. And the idea of looking for how many people have actually seen a publication is fraught, especially in relation to the internet. But perhaps the threshold requirement will reduce the number of filed abusive claims, and even the number of threatening letters beforehand.
15. We don't have such a threshold requirement in New Zealand but media would find it useful. There is a tension for the law with these cases. They are often filed by litigants in person without legal advice, who may have real claims and are entitled to have access to justice. However, undeserving cases need to be stayed as quickly as possible as otherwise costs build up. The DomPost, for example, has sought orders for strike-out in an number of cases in recent years, where the litigants did not appear to have income or assets and would not be able to meet any costs orders if they lost. It is useful to be able to seek strike-out, but even these cost media due to the need to instruct legal counsel. So a threshold requirement would be good if it operated as another method of disposing of these claims. Whether it would deter litigants in person like the claimant in *King* remains uncertain, however.