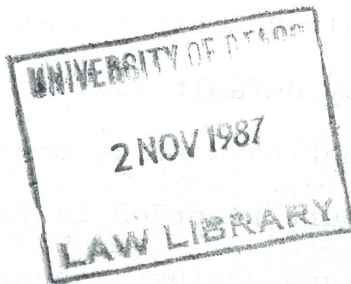


IN THE COURT OF APPEAL OF NEW ZEALANDC.A. 165/86BETWEENKENNETH WILLIAM CRISPIN  
of Napier, Electrician  
ContractorAppellantANDTHE REGISTRAR OF THE  
DISTRICT COURT AT NAPIERRespondentCoram:Cooke P.  
Somers J.  
Casey J.Hearing:

2 September 1987

Counsel:J.R. Wild for Appellant  
G.L. Lang for RespondentJudgment:

4 September 1987

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JUDGMENT OF THE COURT DELIVERED BY COOKE P.

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In the High Court action out of which this appeal arises, the plaintiff, Mr Kenneth William Crispin of Napier, a self-employed automotive electrician and appliance serviceman, trading in and around Napier as K.W. Crispin Services, sues a defendant described in the statement of claim as simply 'The Registrar of the District Court at Napier'. According to the statement of claim, supplemented by an explanation given to us from the Bar without objection, Mr Crispin had the misfortune to have once had the telephone number of a man of another name who owed money to the company which publishes in Hawkes Bay The Daily Telegraph. The company issued a default summons for the debt, some \$93, naming the defendant as Kenneth William

Crispin, trading as Ideal Builders. The company found out the mistake and the other man was duly substituted as defendant and judgment was entered by default against that other man for a total of \$143.96. But by mistake one of the Deputy Registrars in the District Court recorded in the civil record book that the judgment was against Kenneth William Crispin, trading as Ideal Builders, 75 Clarence Cox Crescent, Napier.

The entry was corrected later, but not before the Mercantile Gazette had published Mr Crispin's full name as that of the judgment debtor. He alleges that his business was detrimentally affected. Presumably the Mercantile Gazette would be protected by qualified privilege (see for instance the authorities cited in 28 Halsbury's Laws of England, 4th ed. para.115, n.4 and in New Zealand the Defamation Act 1954, ss.2 and 17 and First Schedule). Be that as it may, Mr Crispin has sued the Registrar, described simply in the way already mentioned. He claims general damages of \$100,000 for defamation, and for a second cause of action he alleges that the defendant owed the plaintiff a duty of care and claims \$25,000 general damages and \$4834 special damages for negligence.

Both these causes of action incorporate in the statement of claim the allegation that 'the defendant, acting by one of his Deputy Registrars' (whose name is then given) recorded the judgment in the civil record book as

being against Mr Crispin. The pleaded allegations of defamation include reference to the publication in the Mercantile Gazette but we were told by counsel for the plaintiff, Mr Wild, that this was intended to go to foreseeability and damages, and that it was publication by the record book entry which was primarily relied on. The pleaded allegations of negligence include 'The wrong entry in the Civil Record Book which the defendant made or caused to be made was a breach by the defendant of his duty of care to the plaintiff'.

The defendant moved to strike out the whole of the statement of claim as disclosing no reasonable cause of action. After considering argument McGechan J. acceded to this motion, holding in a reserved judgment for reasons fully explained that the principle of judicial immunity applies and affords a complete defence. The plaintiff appeals from this striking out.

At the outset of the hearing of the appeal we were constrained to draw counsel's attention to a series of difficulties concerning the constitution of the action and the allegations in the statement of claim, some of which difficulties were touched on in passing in the High Court judgment, but none of which formed the basis of the Judge's decision. After discussion in this Court between bench and bar Mr Wild candidly accepted that the difficulties cannot be overcome with the statement of claim in its present form

or with any reasonable amendment of it. The preferable course, as counsel acknowledged, is to dismiss the appeal, leaving the plaintiff free, if he is so minded and so advised, to begin a fresh action. We are not to be understood as encouraging that course, for, however his claim may be framed, there are formidable difficulties in his way. On the other hand one must feel some sympathy for his grievance.

Claims in tort based on actions or omissions of Crown servants can be put forward in three ways. First, there can be an action against the Crown, commonly represented by the Attorney-General, under the Crown Proceedings Act 1950, alleging vicarious liability on the part of the Crown. Secondly, there can be an action against the individual employee or employees alleged to have committed the tort: this would be against them personally, named as individuals, although it would often be the case that the Crown as a good employer would stand behind them financially. Thirdly, where a statute or subordinate legislation so permits, there may be an action against the holder of an office named simply as such holder: a class of case in which the legislation authorises the holder of the office for the time being to be sued eo nomine. What cannot be done, however, is to sue a senior Crown servant on the footing that at common law he is vicariously liable for the torts of his subordinates. For this well-settled principle, see for instance Bainbridge v. Postmaster-General [1906] 1 K.B. 178.

The present is not an action against the Crown under the Crown Proceedings Act. If it were, the question would arise whether the Crown would be entitled to the protection of s.6(5) of that Act, which reads:

(5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

It is not suggested, as we understand it, that there is any legislative provision making a District Court Registrar vicariously liable and suable in tort for the acts or omissions of subordinate officers. Yet neither is there any clear allegation in the statement of claim that the Registrar of the Napier Court personally committed or was a party to any tort. If such a claim were intended, it would be necessary to sue the particular Registrar in his personal name. The claim seems to be rather that the named Deputy Registrar committed the tort or torts, but the proceedings have not been brought against her.

Clearly therefore the action is not properly constituted or pleaded. This is much more than a mere technical objection. It is vital in such a case to determine precisely how the causes of action are alleged to arise and whether they are personal or vicarious. For example, if what is alleged is that the Deputy Registrar was under a personal duty of care, not merely owed to the Crown

as her employer but extending to an outside party in the plaintiff's position, that will raise a clear-cut but not necessarily easy question of negligence law as to the incidence or scope of duties of care. It will also raise the question whether, the injury complained of being essentially to reputation, the plaintiff must sue for defamation or nothing: see Takaro Properties Ltd v. Rowling [1986] 1 N.Z.L.R. 22, 71. And, if in defamation, the question of complete or qualified defences under defamation law will need investigation at some stage.

The scope of judicial immunity, on which McGechan J. relied, will arise however the action is framed, but the other difficulties are there also. As it stands, the action is not properly constituted and has not been framed in such a way as to enable these various questions, some of them both important and difficult, to be effectively considered and determined.

In the circumstances the only feasible course is to dismiss the appeal, leaving the plaintiff and his advisers to consider whether to start afresh. Mr Lang for the respondent indicated that in that event costs in this Court would not be sought. The appeal is dismissed accordingly, although we hope that what we have said may be of some help to the parties.

Solicitors:

Dowling & Co., Napier, for Appellant  
Crown Solicitor, Napier, for Respondent

*R. B. Cooke P.*