Case No: A2/2015/2839

IN THE COURT OF APPEAL
CIVIL DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 22nd March 2016

Before:

LORD JUSTICE SIMON

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(1) STEVE PARIS
(2) ANGEL GARDEN

Applicants (Claimants)

- and -

(1) ANDREW LEWIS
(2) MELANIE BYNG

Respondents (Defendants)

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THE APPLICANTS (CLAIMANTS) appeared in person

MR. PRICE appeared on behalf of the **Respondents/Defendants**

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P R O C E E D I N G S

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LORD JUSTICE SIMON: You are Mr. Paris?

FIRST APPLICANT: Yes, I am, sir.

LORD JUSTICE SIMON: It is your application?

FIRST APPLICANT: Yes, it is. Do I start?

LORD JUSTICE SIMON: You start and it is probably more convenient if you stand but if you find you have notes in front of you that you cannot use if you stand, you can remain seated.

FIRST APPLICANT: I will remain seated as it is easier if it is in front of me.

LORD JUSTICE SIMON: Okay.

FIRST APPLICANT: First of all, sir, we would like to submit to the court that this, actually, I am puzzled as to why the respondents are here because ----

LORD JUSTICE SIMON: Do not worry about that, they are entitled to be here. It is not a secret court.

FIRST APPLICANT: No, I know it is not a secret court.

LORD JUSTICE SIMON: Just get on with it.

FIRST APPLICANT: Okay. We would like to submit to the court that this case is in the interests of justice and in the greater public interest and because of this we would like the court to consider the request for costs protection as mentioned in our skeleton argument.

We would like to question the fact that, is it the purpose of the British courts to take the home from a family who have achieved agency against bullying? Our situation

began with the bullying of our children and since 2011 we have been subject to a hate campaign for standing up for ourselves and for other parents, on behalf of other parents.

It is not exaggerating to say that our family now lives in fear. We are both on antidepressants, we suffer numerous effects of stress, including lack of sleep, anxiety, loss of confidence, loss of income, depression, erm, and does the court really believe that what has happened to us for standing up for our and our children's rights is reasonable and proportionate?

These effects which are known to be the result of such course of conduct, were all happening since 2011, well before the punitive costs order that we have now been subjected to, and a costs order that the sale of our children's home would not even cover so which means that we will have to give these people our forwarding address, whichever address it is, and find some money from somewhere else to carry on paying them, for them having covertly harassed us.

The cost order, please, should be put aside as a matter of urgency and we appeal to your Lordship for costs protection going forward because we feel that the human rights settlement we have concerning agency for bullying is worth protecting.

Regarding the case, there are too many misdirections for the judgment to be safe. Of course, as you can see, we are representing ourselves, we have ----

LORD JUSTICE SIMON: You represented yourselves in front of the judge as I understand it?

FIRST APPLICANT: That is correct, yes. Just yesterday we had an opportunity to get legal representation but he could not come today and we asked for an adjournment but ----

LORD JUSTICE SIMON: I am afraid I refused the adjournment. Your application was put on urgently and the court has made this date available so we must stick with that I am afraid.

FIRST APPLICANT: Yes. So, there are various points we would like to bring up but I guess is also depends, I mean, I assume you have read the documents that we have provided?

LORD JUSTICE SIMON: Yes.

FIRST APPLICANT: Is there anything within that that you feel that we need to expand on?

LORD JUSTICE SIMON: The starting point is the judgment.

FIRST APPLICANT: Yes.

LORD JUSTICE SIMON: And your speaking note or submissions for the oral hearing, the judge heard evidence over five days, he formed views about the witnesses, in particular the claimants and the defendants. He set out the background which all started with what might be regarded as a relatively trivial incident in France some time ago. He then, perhaps anonymously, deals with the extent of publication which normally would come at the end of a libel judgment but perhaps that does not matter, he deals with that. That is the first

point, the extent of publication.

Then he deals with meaning, the meaning of the five separate publications that he identifies which were the original claim. Then the defence justification, whether they were substantially true, then qualified privilege and then malice which is the answer to the defence for qualified privilege. He never got around to the question of damages.

So those are really the points you need to focus on, whether there are arguable grounds for saying that he was wrong in relation to those various points.

SECOND APPLICANT: Excuse me, your Honour, I am the other appellant.

LORD JUSTICE SIMON: That is fine. I think as long as you take turns and do not speak at the same time.

SECOND APPLICANT: Part of our appeal is that we wish to appeal his judgment of the pre-trial review which we did not appeal at the time because of what he said in it, which was that he would examine the course of conduct that he identified and allow us to use that to dismantle qualified privilege. But, as we have submitted in the transcript, clearly we were stopped from doing that at the point where we were going to prove that this accusation that was said that we had written to journalists making this scurrilous accusation, which we had never made at all, and that email does not exist. At the point where we were about to prove that we were interrupted

and told that we couldn't do that because we were not, we did not have claims in harassment.

LORD JUSTICE SIMON: As I understand, there were originally claims for harassment, they came out and then you sought to reintroduce them at a pre-trial hearing and the judge refused that.

SECOND APPLICANT: During our research we discovered that, you know, I mean, last week that the CPS made an announcement of new guidelines regarding covert harassment, it is very, very difficult to ----

LORD JUSTICE SIMON: Let us leave aside the CPS for the moment because, as you probably know, harassment consists both in a civil form and a criminal form and they are obviously dealing with the criminal side of it. The point that may be taken against you is that if you wanted to reintroduce harassment as part of your claim you should have appealed the judge's decision at that point and you are now out of time.

SECOND APPLICANT: But the reason we did not do that was because the judge said we would be able to examine that course of conduct in relation to their defence of qualified privilege and the defamation, but then when it came to that he said, no, you can't do that because you have not got harassment ----

LORD JUSTICE SIMON: There is certainly a considerable amount of cross-examination on the question of malice, one can see that from the papers and, indeed, from the judgment.

SECOND APPLICANT: Interestingly though, the points that we actually did prove are not there.

LORD JUSTICE SIMON: That is a question of whether it is relevant are not. Anyway, let us not lose sight of some sort of structure to your submissions. I think we were going to start with the publications, the five heads of publication if I can put it that way, variously publications by the first defendant, the second defendant. What do you want to say about that?

FIRST APPLICANT: Actually, your Honour, if I may, is it possible to talk about qualified privilege?

LORD JUSTICE SIMON: Yes, you can make your submissions in any form you like.

FIRST APPLICANT: Okay, thank you, sir. One thing that I want to bring out, it is kind of relevant to all this but it is the fact that at the pre-trial review the judge correctly identified our claim which was, and I quote from the detailed judgment, that we were making allegations that the respondent: "'Covertly inciting organisations and individuals to shun the Claimants [applicants] by portraying them as dangerous and mentally unstable.' I could, by going through the 24 pages of appendices, pick out a number of obvious candidates for this ...".

LORD JUSTICE SIMON: The allegation is against whom?

SECOND APPLICANT: The respondents.

FIRST APPLICANT: The respondents.

LORD JUSTICE SIMON: Both of them?

FIRST APPLICANT: Yes. He could see through the examples to disclosure that we had showed him, that he could pick a number of examples of the respondents enticing organisations and individuals to shun us by portraying us as dangerous and mentally unstable. In his final judgment he repeated multiple times that our claim was in fact that the respondents were engaging in a campaign encouraging others to publish remarks, critical or defamatory of the claimants. He said that multiple times.

LORD JUSTICE SIMON: That was your claim.

FIRST APPLICANT: It is not the same thing.

LORD JUSTICE SIMON: The claim is, let us not lose sight of it, the claim is in relation to five publications.

FIRST APPLICANT: Yes, that the respondents made.

LORD JUSTICE SIMON: Yes.

FIRST APPLICANT: This was that they were encouraging others to shun us and not to encourage others to attack us. He said all the way through, I cannot find that there are any invitations to encourage others to publish anything in respect of the second claimant. This was what the judge had identified at the PTR when we tried to put the harassment back in. There is a world of difference between encouraging others to shun you because you are dangerous to encouraging others to attack you.

That was never our claim. What was even more baffling is that in his judgment at paragraph 245 ----

LORD JUSTICE SIMON: Let us have a look at that. Yes.

FIRST APPLICANT: He uses multiple examples, including like the last ones, whatever he says now "Roger will be a bit shaken".

LORD JUSTICE SIMON: Hold on, I am not sure I have this, paragraph 245?

FIRST APPLICANT: Yes, paragraph 245 of the judgment.

LORD JUSTICE SIMON: Yes, it is divided into two or possibly three.

FIRST APPLICANT: It is the first section, the last bit of the first section.

LORD JUSTICE SIMON: I am going to read this again. **(Pause)** Yes.

FIRST APPLICANT: These where examples of warning others, on warning them not to have, and inciting them not to have anything to do us which was what he identified at the PTR and not what he then said was our claim. We never said the enticement was to attack us. It said, well, our main claim was that they were telling others that we were dangerous. Like, for example, when the second respondent told somebody that Angel has a clinical diagnosis, a clinical judgment borderline personality disorder.

LORD JUSTICE SIMON: Yes, that is at paragraph 248.

FIRST APPLICANT: Actually paragraph 248 is not everything there. Actually what the judge has not quoted is probably the most

damning one which we have in our bundle with our skeleton which is on page 296 of our skeleton if you have it.

LORD JUSTICE SIMON: I will just make sure. **(Pause)** I am not sure I have that. Is it in the appeal bundle?

FIRST APPLICANT: Yes.

LORD JUSTICE SIMON: It is an exhibit, is it, tab 11?

FIRST APPLICANT: Yes, in the exhibit, yes. I have a copy right here.

LORD JUSTICE SIMON: I think I have it.

FIRST APPLICANT: This is just an example but it says that Angel has a personality disorder, this is a clinical judgment, not a personal opinion, it is not simply depression, it makes her very dangerous. Angel has no such thing.

LORD JUSTICE SIMON: Let us check. This is from whom to whom?

FIRST APPLICANT: This is from the second respondent to ----

LORD JUSTICE SIMON: The second defendant, yes, to whom?

FIRST APPLICANT: To a friend of hers.

SECOND APPLICANT: Who did not want to shun us, your Honour.

LORD JUSTICE SIMON: Who is it addressed to?

FIRST APPLICANT: Sam.

LORD JUSTICE SIMON: To Sam who?

FIRST APPLICANT: The name was withheld.

LORD JUSTICE SIMON: Right, okay.

SECOND APPLICANT: It was somebody that we had had a small communication with and she said that she had tried to persuade

the second respondent out of her course of conduct and that she had been unwilling to be persuaded out of it.

LORD JUSTICE SIMON: Right.

FIRST APPLICANT: Essentially when people essentially do not tow the line the second respondent was telling her outright lies. This is not like a personal belief, she was telling them there was a clinical judgment which made Ms. Garden a danger to people around her.

LORD JUSTICE SIMON: That is the matter that is dealt with in 248, is it not? The judge at 247 says that these were matters of cross-examination.

FIRST APPLICANT: Yes, but ----

SECOND APPLICANT: Excuse me, your Honour ----

LORD JUSTICE SIMON: I think we will have one at a time. You can come in later if you want. So do you have 247?

FIRST APPLICANT: Yes, I have 247 right here, your Honour.

LORD JUSTICE SIMON: The defendant agreed that she had been in contact with a number of individuals and offered them warnings or caution in respect of the claimants. Then at 248 a repeated complaint of the claimants has been that the second defendant promoted smears about their mental health. That is exactly what you have shown me and described the second claimant as mad or nuts and so on. Then there is an illustrative interest, a reference to the particular email of 10th May, it is not the one you have shown me, 2012, but it is

quite clear that the judge did have this in mind and dealt with it.

FIRST APPLICANT: Except that he said it was her belief, that because it was her belief it was okay for her to say that to others.

LORD JUSTICE SIMON: No, it is not a question of whether it is okay. Its relevance is whether it shows malice.

FIRST APPLICANT: Surely if she tells somebody that somebody has a clinical judgment that makes her a dangerous person and therefore must be avoided, when it is completely untrue, that has to be malicious?

LORD JUSTICE SIMON: That is your submission.

FIRST APPLICANT: That is one of my submissions.

SECOND APPLICANT: Your Honour, can we further submit that in the transcript of that part of the trial, where the second respondent's husband was admitting that the diagnosis of borderline personality disorder is a risk diagnosis, the judge interrupted him and said, well, it is not a question of whether there is a clinical judgment or not, well, clearly in a defamation trial it is, that is why ----

LORD JUSTICE SIMON: No, no, I think we are getting confused here or at the risk of getting confused. The second defendant's husband was formally a party to the proceedings, was he not?

FIRST APPLICANT: Yes, he was.

LORD JUSTICE SIMON: Then he came out. He was a doctor, he was an

academic doctor, was he not?

FIRST APPLICANT: He still is, yes.

LORD JUSTICE SIMON: So he was not there to give opinion evidence about diagnosis and it seems to me that that may be a difficulty in trying to elicit evidence from him.

SECOND APPLICANT: I think he was just making a statement which everybody knows that borderline personality disorder is a risk diagnosis. That was not clinical evidence.

LORD JUSTICE SIMON: Ok.

FIRST APPLICANT: He also agreed that, to use his credentials next to that would strengthen the belief, or whoever it has been told that that is true, he also agreed to that.

LORD JUSTICE SIMON: Okay.

SECOND APPLICANT: What I do not understand is, if it not a question, I mean if it goes to defamation to the extent of crossing the world to do a defamation trial and somebody has told somebody something about you that is not true, that is a risk diagnosis that means people will shun you, it is not in the judgment the fact that she did actually say that to one person at least and she said in court that a lot of her warning was not even on email, it was by ----

LORD JUSTICE SIMON: Ms. Garden, it is dealt with in the judgment, in the passages I have just shown you.

SECOND APPLICANT: He did not quote it, my Lord.

LORD JUSTICE SIMON: Well, he quoted a considerable amount of

material.

SECOND APPLICANT: He quoted everything that did not say that.

LORD JUSTICE SIMON: What he says ----

SECOND APPLICANT: But he ----

LORD JUSTICE SIMON: Just one moment.

SECOND APPLICANT: Sorry.

LORD JUSTICE SIMON: We have looked at it. It starts at 245, we have looked at the passage at 248. We have looked at the reference to cross-examination 247, and at 249 he says that these private communications are undoubtedly strongly disparaging of the second claimant. At 250 he goes on to say that he has read with care both the material which the claimants submit is particularly important and other material to which reference has been made. He can't be expected to deal with each and every point because the relevance of all this was to defeat the defence of qualified privilege in relation to a quite limited amount of material.

SECOND APPLICANT: We do understand that. We understood that a matter of defamation had to be looked at against the objective facts that there were at the time which are that I did not have any such diagnosis. Therefore, if she is going around telling lots of people that I have and that is a diagnosis which goes to my personal integrity and will cause people to shun me, as in the case recently of ***Tim Yeo v Times Newspapers,*** this was why it was deemed that it was not

defamatory because it was not going to personal integrity. This has had a marked effect on our life. People have come up to us, the reason we knew this was happening in the background is because of the amount of people who came up and said, "you are nutters, you are completely mad. You are delusional". Where did they get that idea from? I did not know them.

By ignoring the one time in the actual emails where she did tell somebody there was a clinical judgment and saying in court it is not a question of whether there was a clinical judgment or not, we submit that the judge misdirected himself in saying that it was not a question of whether there was a clinical judgment.

If the court needs me to submit myself to an examination of a doctor to prove that, I am quite willing to do it. I do not think you would like it or anybody, if somebody went around telling somebody that you were a danger to yourself and other people. That is defamation, it has to be otherwise nothing is. If anyone can say that about anybody then ----

LORD JUSTICE SIMON: Ms. Garden, we are getting away from the matters of specific complaint here.

SECOND APPLICANT: That is, with respect, that is a matter ----

LORD JUSTICE SIMON: No, no, the matters of complaint in the defamatory publications.

SECOND APPLICANT: With respect, your Honour, that is a defamatory publication but it was not one that we would bring up as a

head of claim because we did not know about it at that time.

LORD JUSTICE SIMON: Right, okay.

SECOND APPLICANT: Which is why we tried to re-put the harassment claims in, because covert harassment is very difficult to deal with. When it comes out in a huge disclosure as it did in this case, it should have been allowed to be re-included. Had we known that the judge did not mean his promise to thoroughly take that into consideration, we would have appealed the PTR but he promised us that he would not. Then when it went to trial he changed the case. It is a case that was not our case.

LORD JUSTICE SIMON: Okay.

FIRST APPLICANT: Another matter that we want to bring up is the fact that the judge overlooked a lot of the things that they did covertly which were attacks upon us because according to Gatley, if A publishes words which B considers defame him and B publishes a response in self-defence and A then publishes further defamatory material, perfectly by way of a rejoinder to B's response, it has been held in Australia that A's second publication is not protected by qualified privilege because it would inhibit B's right of self-defence since by exercising it would be laying himself open to further privileged attack. Second, assuming the original attack to be unjustified ----

SECOND APPLICANT: To be justified.

FIRST APPLICANT: No, the original attack was unjustified and

republication was unjustified.

SECOND APPLICANT: Sorry.

FIRST APPLICANT: A would be gaining benefit from his own wrong. We submit that the respondents are gaining benefit from their own wrong by ignoring all the covert attacks they have done upon us because the judge has essentially ... Whereas he said at the PTR that the essence of the tort is of direct effect upon a claimant regarding harassment he never really asked the question of the effect that this had on us.

LORD JUSTICE SIMON: I think he said that the harassment had come from your side initially.

FIRST APPLICANT: Yes, exactly, because you ignore all the attacks that happened beforehand. As an example, in the original public attack that we suffered the judge states that the second respondent wrote two emails before the attack and two emails near the end of the attack. Whereas in fact, during the entire attack the second respondent sent 28 emails, fanning the flames of the attacks that were happening publicly. She was doing it all covertly and feeding them misinformation and ----

LORD JUSTICE SIMON: I think we are going back to the point we have just left.

FIRST APPLICANT: Well, the point is the fact that by ignoring, I was quoting Gatley, by ignoring the first, which is A publishes words which B considers defaming, by ignoring this

because it was covert, our publications to defend ourselves are now viewed as attacks upon the respondents and, therefore, their response to that are replies to attack whereas in fact they should be retorts. Retorts are not given the right of qualified privilege.

LORD JUSTICE SIMON: I understand.

FIRST APPLICANT: So, there is one other point regarding the first respondent which led to his publication on Posterous.

LORD JUSTICE SIMON: That was the first matter of complaint, the earliest, 9th November.

FIRST APPLICANT: Exactly. That said it was a reply to an attack which was us writing to him saying, "you have to stop this", whereas in fact the reason we wrote to the first respondent was because we had been given communication that he had given to a third party where he was attacking us telling that person that we had malice of heart, we were spreading horrible lies, essentially ----

LORD JUSTICE SIMON: The judge found he did not want to publish your material.

FIRST APPLICANT: Yes; no, this was months later. We, erm, what happened is before the publication on Posterous we received a few days before a communication that showed us, a communication that the first respondent had to a third party wherein he attacked us. Our writing to the first respondent was us responding to that attack and saying, "you can't say

these things privately to other people and defaming us" and, therefore, his publication on Posterous was a retort. It was not a reply to attack. It was a retort.

LORD JUSTICE SIMON: Yes.

FIRST APPLICANT: So the same thing applies here. There was ... again this is in Gatley, I mean, if ----

SECOND APPLICANT: He had made the attack.

FIRST APPLICANT: He had made the attack. We were responding to it. He ----

LORD JUSTICE SIMON: What is it that you are complaining about? There are ----

FIRST APPLICANT: That is ----

LORD JUSTICE SIMON: Just one moment, there are two aspects of this. The first is the words that they claim their children were expelled because they were being bullied, I understand the school to say that it was because the parents' behaviour. That is the first.

Then the second one is, "since February I have ignored and filtered out their constant harassment of my blog tweet and video both of myself and of others." So we are talking about the second complaint.

FIRST APPLICANT: That was part of the whole publication. I mean, I am ----

LORD JUSTICE SIMON: We cannot go into the whole publication. Those are the two matters of complaint.

FIRST APPLICANT: What I am saying is that that publication was a retort, not a reply to attack.

LORD JUSTICE SIMON: I see.

FIRST APPLICANT: Because he had attacked us privately, we got hold of that. So we are responding to him and told him, because if he was attacking us, writing to a stranger to him, somebody he did not know, we said, "well, if he so casually attacks us to a complete stranger he must easily be doing it to people he knows". So, then we wrote him and said, "you have got to stop doing this and let us deal with this". Then he published that publication which was first complained of.

So, that is publication is not a reply to attack, it is a retort. So by it being a retort it should not be granted qualified privilege.

SECOND APPLICANT: It is plain that that is a misdirection, your Honour.

LORD JUSTICE SIMON: Okay.

SECOND APPLICANT: We are at a great disadvantage if we cannot bring the course of conduct of the defendants up because of the fact that we were led to trial on the basis that it was going to be looked at and then it was changed into something that it just was not.

LORD JUSTICE SIMON: That is a point I understand and you have made that already.

SECOND APPLICANT: What that means is that if the judgment is

allowed to stand it means that people can be covertly attacked and they cannot do anything about it. Quite simply, if they defend themselves it will be seen that they are attacking only by cloak of darkness because the original course of conduct is secret. Therefore, anything you do can be pointed to as being really problematic and then retorts can come and they can pose as replies to attack all over the place. That is what has happened here. If this is allowed to stand it can happen to anybody, your Honour.

LORD JUSTICE SIMON: Yes.

SECOND APPLICANT: All we were asking these people to do was to openly debate issues which they claim and seek influence on and which we had a legitimate interest in as is shown by the fact that this landmark settlement is something that seeks to address a problem which ----

LORD JUSTICE SIMON: I am not sure what you are talking about Ms. Garden.

SECOND APPLICANT: Well, the Titirangi settlement, soon after which the first defendant republished his blog post which the judge has allowed that says that we are in dispute with the Steiner School. We are not. It says that we claim there was bullying. In fact the school acknowledged that our child's accounts of bullying were honest. So, it is completely prejudicial to her. It rubbishes something that has been the subject of respectable enquiry.

So the fact that Judge Seys Llewellyn excused this publication on the basis that it was not made consciously. He said in his judgment that there was no question, it was not questioned in court that the first respondent had moved it in common with all his other material from Posterous. Well, it was not questioned because that was not his case. In his witness statement he said, erm, that he had, er, the claimants objected to certain sections of the blog post which was originally posted on Posterous and subsequently moved to Quackometer in April 2013 "when I migrated some of the posts in Posterous". This was represented in the judgment as him having moved all of them and he did not.

FIRST APPLICANT: He selectively chose to move that one and let others die.

SECOND APPLICANT: And that was the reason, because there was no publication it could not be defamatory. My Lord, how can it not be defamatory to publish something saying you are in dispute with the Steiner School when you have just got a landmark human rights settlement? It is crazy.

FIRST APPLICANT: It also goes against what was found in ***Flood v Times*** where it says that publishers have a responsibility to update their articles because people who visit them after the date they were written may assume that ----

LORD JUSTICE SIMON: I think we are getting slightly away from the point, which is your attack on the judgment. That seems to me

to be an after thought.

FIRST APPLICANT: It is not an after thought, we mentioned this in our closing a few times because it is, the second respondent considers himself a publisher. He has said so on a number of occasions and because we are in this internet age, everybody is a publisher, not just journalists and newspapers.

LORD JUSTICE SIMON: There is no issue that these are publications for the purposes of the ----

SECOND APPLICANT: I am sorry, my Lord, I do not understand why, it seems to me this is probably the most relevant point for appeal because if the judge said that it was not defamatory because it was not published and in fact it was published, he said it was not published because it was ----

LORD JUSTICE SIMON: Which one are we talking about? Are we talking about the first one?

SECOND APPLICANT: The second publication.

FIRST APPLICANT: The second publication, the one that ----

LORD JUSTICE SIMON: You do not mean the second publication, you mean the first publication republished, do you not?

SECOND APPLICANT: The republication, sorry. You know that that was why, because earlier on in his judgment he said that the first time that this was published it was not defamatory because there had not been an issue from the human rights process.

LORD JUSTICE SIMON: That is right.

SECOND APPLICANT: The second time it was published he said it was not ----

LORD JUSTICE SIMON: When was it published subsequently?

FIRST APPLICANT: In April 2013 I think.

LORD JUSTICE SIMON: That is the subsequent reposting on the Quackometer blog, is it?

FIRST APPLICANT: Correct.

SECOND APPLICANT: Correct.

LORD JUSTICE SIMON: When is that?

SECOND APPLICANT: April 2013.

LORD JUSTICE SIMON: Okay.

SECOND APPLICANT: We had achieved a settlement at the end of the year before, we published about it and it had been on the television and in the newspaper in New Zealand and the first respondent has admitted that he did know about it when he republished his article and chose to republish it not in a bulk publication, so therefore he did publish something that he knew to be false.

LORD JUSTICE SIMON: Yes.

SECOND APPLICANT: We do not understand how the judge made that mistake because we did actually talk about it in court and he was questioned about it and it is written in his witness statement that he did not, that he did, I mean really, even if he did move them all over he still did that so that is still, so that is still republishing them but the fact that he did

not move all the material from one site to another shows that he must have chosen to do it.

LORD JUSTICE SIMON: Yes.

SECOND APPLICANT: The judge said he did not.

FIRST APPLICANT: ***Flood v Times*** says that the publisher has a responsibility to update his article if something new comes along.

LORD JUSTICE SIMON: Yes.

SECOND APPLICANT: I am afraid we are very hamstrung by not being able to refer to their course of conduct due to the fact harassment claims were taken out.

LORD JUSTICE SIMON: I understand.

SECOND APPLICANT: And that the course of conduct identified was then ignored.

LORD JUSTICE SIMON: Well, it is not ignored because, for the reasons I have indicated, it was considered under the heading of malice. Anyway, that is your next point.

FIRST APPLICANT: Another point that we have, which goes back again, the whole thing is all connected, that is the problem. It goes back to the covert attacks that we were being subjected to. On paragraph 226.8 ----

LORD JUSTICE SIMON: Sorry, 226 point?

FIRST APPLICANT: 8, of the judgment.

LORD JUSTICE SIMON: Yes, hold on. **(Pause)** Yes.

FIRST APPLICANT: It is the last sentence of that point where he

says that in his judgment the consistent thread of communication by the second defendant is to encourage people not to engage publicly with the claimants in relation to allegations of what did or did not transpire in relation to the holiday in France.

LORD JUSTICE SIMON: Yes.

FIRST APPLICANT: It was not a holiday but what is so confusing is we showed the judge page after page of evidence of the claimant telling people that, of the defendants telling people that it was our methods that had to be sort of, that we were untrustworthy and, for example, if you go back to paragraph 250 above, no below, sorry.

LORD JUSTICE SIMON: Yes, 250.

FIRST APPLICANT: At 250 the judge quotes a letter from the second respondent to Richy Thompson, a member of the BHA, the British Humanist Association, and he quotes just a small part of it. What he does not say is that another part of that very same email was her saying that it is best not to give them any attention or RT their work, "I am occasionally forced into warning others if they are being prolific as they are today".

What we were doing on that day was promoting our work on Steiner. It had nothing to do with the respondents in any way. So, what she was doing was telling them, do not RT their work. She told another person, Dan Duggan, an American who is a Steiner critic, that their working methods are unethical and

they are untrustworthy and anything else is a distraction. There is email after email after email of that, of her saying that it is our work, like on paragraph 79 of the judgment where he quotes a long email that the second respondent sent to the first respondent, it is a long email, I have it on page 19 of that judgment.

LORD JUSTICE SIMON: Sorry, where are we talking about?

FIRST APPLICANT: It is paragraph 79 where it goes over multiple pages, so it is page 19 of the judgment.

LORD JUSTICE SIMON: I will find it. Yes, it is very long, I remember it, the 31st January.

FIRST APPLICANT: Yes, that one.

LORD JUSTICE SIMON: The "he" there is the first defendant as I understand it.

FIRST APPLICANT: The second defendant wrote to the first defendant.

LORD JUSTICE SIMON: Yes.

FIRST APPLICANT: That email.

LORD JUSTICE SIMON: Yes, I have that.

FIRST APPLICANT: In that email he quotes, he uses that as an example and he says ----

LORD JUSTICE SIMON: Sorry, who says?

FIRST APPLICANT: Well, the second defendant says but the judge quotes that, "we are making it very clear that we expect ex Steiner parents to use their own identities to whistle blow

the bad experiences at Steiner schools" and "if not we feel" I am changing it to us "we feel pressure should be brought to bear on these families to come clean."

That is a horrendous accusation which we showed at the hearing that this was not true. They could not find us making it very clear or even insinuating or anything that we tried to blackmail people to people or put pressure on them to come clean.

SECOND APPLICANT: In fact we made anonymising videos to hide their identity.

FIRST APPLICANT: So this is all about our work, trying to kick us off the platform that they wanted to keep for themselves. The judge himself said ----

LORD JUSTICE SIMON: But the judge's point is that this is their platform, they can do what they like with it. They do not have to publish your material if they do not want ----

FIRST APPLICANT: Absolutely but you see, we were publishing on our own.

LORD JUSTICE SIMON: Right.

FIRST APPLICANT: Our work, we were promoting our own work and they were telling people do not look at it, don't promote it, don't RT it, they were untrustworthy. That is what she said to Richy Thompson which was partially quoted in paragraph 250, "it is best not to give them any attention or RT their work".

What she said here to the first defendant is that we

were trying to essentially blackmail survivors of Steiner, not for us to publish on their platform, they do not own Steiner criticism. It is just she was telling him this, a complete lie, to say that we are dangerous people and not to be trusted.

What shocks me is that even though we showed in court that this was a lie and many parts of this email were complete fabrications, the judge nevertheless published it in his judgment and it is taken to be the truth because it does not say that this was shown to be deconstructed and not true at court. So, anybody who ----

LORD JUSTICE SIMON: I think what he says about it is that ----

FIRST APPLICANT: He did not say anything about it ----

LORD JUSTICE SIMON: Just let me point out paragraph 80, this is vehemently expressed, that on the other hand what it was suggesting was, "the claimants have published accusations and attacks against her personally, including accusations of grooming", which they had.

SECOND APPLICANT: That is not true either.

LORD JUSTICE SIMON: Well, there we are.

FIRST APPLICANT: We will get to that in a second, your Honour.

LORD JUSTICE SIMON: Well, it is going to have to be rather sooner than that because ----

FIRST APPLICANT: I will be very fast. What I am saying is here ---

LORD JUSTICE SIMON: I can't sit much longer than half past four.
FIRST APPLICANT: Okay. The judge published an email and within it were things that were shown to be lies and if anybody reads a judgment when you read a judgment and the judge quotes something from the judgment you expect it to be the truth. Unless the judge says ----
LORD JUSTICE SIMON: No, I mean, I do not think you are right about that. He is simply setting out in his judgment something that was said by one party which was thought to be relevant.
FIRST APPLICANT: In this email she also says at one point that a journalist contacted her because apparently we had sent that journalist an email saying that she had sexually molested our child. That is not true. That never happened. There is no such email. They could not find it. It is all a fabrication.
SECOND APPLICANT: It was at the point where we were going to reveal that it did not exist that we were interrupted so we could not prove it.
LORD JUSTICE SIMON: Okay.
SECOND APPLICANT: Your Honour, the lack of attention to the course of conduct of the respondents has resulted in an injustice, this is something that could happen to anybody. At the beginning of it in the first part where we were mobbed, which the judge said it was robust debate, where people were saying things like, "oh look, you want to out parents and make

them come out by making anonymising videos". I mean it does not even make sense. During that -- we can find the bits where she was there -- he said that the idea that her silence was aggressive was remarkable. We can show you the research on shunning and how ----

LORD JUSTICE SIMON: I have seen what you say about that.

SECOND APPLICANT: It is all about aggressive silence.

LORD JUSTICE SIMON: Okay.

SECOND APPLICANT: Half way through that she said everyone, at the beginning she said, "everyone should be told they are not entirely trustworthy". Half way through she said, "If only Steve could defend himself", "If only matters in France were mentioned he could defend himself" she was perfectly well aware that she, by not communicating her part in any situation was creating a horrible situation for us.

At the end of it she wrote a mock comment that was not published which said "from now on" she is mimicking us "from now on we will only be able to defend our reputations" and here we are at ten past four on 22nd March, years later, still saying that this was entirely to prevent us from being able to have any ordinary debate by anything and we have not been able to.

If we are not allowed an appeal that will not change the injustice, your Honour. It is not helpful to bullied children either. Yes, "she is about to blow I expect, like a whale", I

mean honestly she might as well have had popcorn ----

FIRST APPLICANT: This was all happening in the background while we were being attacked openly ----

SECOND APPLICANT: Just before my mother died which is why she offered to help us.

LORD JUSTICE SIMON: I understand that.

SECOND APPLICANT: Then after that it became, "oh, she is selfish" because my mother needed me to look after her in a particular way which is why they had offered their help in the first place.

Should people who are doing a whistle blowing thing, you know, we did not know that we were going to be doing that, but addressing something and creating agency for bullying, be subject of this kind of behaviour by influential British bloggers, so that debate is stage-managed and underneath they are keeping us in the basement and then when we try to go to court, because it is covert there is all this confusion about whether the claim should be allowed, but it is real, it is all there.

We have been subject to this now for five years. It has had the exact effect on us that you would expect it to do, which the judge has then taken as being an attack.

FIRST APPLICANT: Because the original attack was overlooked.

SECOND APPLICANT: Hidden, it was hidden. So, because they behaved in a deceitful manner they are now going to be

rewarded with our home and, this is not what British courts are for, is it, to give people, to take away the homes of people that have tried to achieve agency for bullying because some influential bloggers did not like us and did not want us to join in the debate, not on their blog, I understand that. Andy Lewis has got every right not to let us comment, at the time he was operating a public comment policy that he accepted comments from anybody and that our point, which the judge did not understand, was we were not saying he had to let us comment, but we were saying that if he was operating the policy where he was telling the public that he was accepting comments but that he was not really, then that is a matter that perhaps people should know.

After that we did not publish, we never tried to publish on his blog again but we were told in the judgment, "We have had lip service to publishing elsewhere" even though the defence is only full of our publication s. How is this possible?

FIRST APPLICANT: That is wrong. There is, we need to talk about I guess the elephant in the room which is the grooming quote because we said that the second defendant had groomed our child because we conditioned it, we know it is a very strong word but there are multiple meanings. After her son left, when she stopped communicating with us, my wife wrote to her six times over a number of days getting more and more puzzled

and frantic as to why they were not responding to us.

At one point she says, "I feel I have been crushed by rocks by this silence. I am starting to feel a little concerned, what is wrong? What have we done?" Because we could not understand it. As far as we were concerned we had resolved the situation. The son left when he wanted. We discussed this ----

LORD JUSTICE SIMON: Sorry, the son, what?

FIRST APPLICANT: The first defendant's, the second defendant's son who had stayed with us in France.

LORD JUSTICE SIMON: Yes, I understand.

FIRST APPLICANT: Left when he wanted.

SECOND APPLICANT: I wasn't there ----

LORD JUSTICE SIMON: Let us not go in to all that because the judge regarded that as background he dealt with it fairly fully. You said that the second defendant had groomed your child.

FIRST APPLICANT: That is correct.

SECOND APPLICANT: No, we didn't say ----

FIRST APPLICANT: Not in the way the judge has said that we said it because you see ----

LORD JUSTICE SIMON: How else is that to be taken?

FIRST APPLICANT: There are many ways to take it. For example, there is a book out there that says that big companies groom our children for profit. There is no insinuation there that

they are sexually abusing the children. They are grooming them for profit.

SECOND APPLICANT: May I explain this?

FIRST APPLICANT: Yes.

SECOND APPLICANT: The thing is, after these five emails, six emails that I had written her to try and sort this out in private the next thing that happened was on a blog of her friend there was a woman who turned up, apparently in a state of distress about a Steiner School and she was all over her saying, "oh, you know, you could not have known that" it was, it was just unbelievable that she had done that to us and now she just dumped our child. I don't know what you would call it if it is not grooming-type behaviour, your Honour, because she literally made all these offers and in fact what we ----

LORD JUSTICE SIMON: Can you just point to where in the judgment the judge dealt with this?

SECOND APPLICANT: He mentioned it ----

LORD JUSTICE SIMON: Maybe Mr. Price can help.

SECOND APPLICANT: ---- 18 times in his judgment.

MR. PRICE: It is paragraph two hundred ***(unclear)*** ----

FIRST APPLICANT: He mentioned it 18 times in his ----

LORD JUSTICE SIMON: Just one moment. **(Pause)** Thank you.

SECOND APPLICANT: So, I am afraid that Mrs. Byng, having made these offers and then blanked us for no reason, no explanation at all at a time where she knew that my mother was dying and

my child was school averse, which is why she apparently had made these offers, led us to write what we wrote which was that she had made these healing offers of help to reengage her with the school and sending her son out with the message that he came really only to talk to the daughter about his wonderful school in the country. This was an eleven year old child that she was communicating through with her son. When she then cut off communication why wouldn't we consider that that had been grooming behaviour? It was exploitative in the extreme. She has never denied doing it but the thing, the point that what the judge said comes straight from the respondents' solicitors who basically just ----

FIRST APPLICANT: Misquoted.

SECOND APPLICANT: Well, they chopped up the sentence and put a full stop after grooming in order to make it into some kind of sexual, scurrilous thing which they knew perfectly well that it was not. We do not recognise that as what we wrote, your Honour, and we can't because it is not what we wrote. They have removed two thirds of the sentence and they put that in front of the judge and he has been completely misled by it into thinking it was something that it was not. It is unbelievable that they should be allowed to get away with it.

FIRST APPLICANT: May I add that the judge ----

LORD JUSTICE SIMON: Well, that is not a ground of appeal that you have raised.

SECOND APPLICANT: No, I understand that but the point is that they slammed in an article we wrote in here on that basis because they are complaining that we ----

LORD JUSTICE SIMON: Okay, I think we have probably traversed as much material as we can. Do you want to sort of summarise what your grounds are?

FIRST APPLICANT: Regarding that quote, your Honour.

LORD JUSTICE SIMON: Do not get too distracted by the quote. I put it in terms of the limbs of the judgment, the degree of publication, the meaning of the words, whether they are defamatory, whether they are justified, there is a defence qualified privilege malice.

SECOND APPLICANT: The judge said himself that he did not consider that justification was fully made out. The point is that ----

LORD JUSTICE SIMON: I have seen that.

SECOND APPLICANT: ---- he should have not have given them qualified privilege for these reasons: (1) that there was a course of conduct under the surface which was as our expert witness said, that they set out to do a harm.

LORD JUSTICE SIMON: I saw a reference to Mr. Bishop. Did he give evidence?

SECOND APPLICANT: No, he has only put this in ----

LORD JUSTICE SIMON: I saw that he said something which plainly an expert should not say, so perhaps for that reason his evidence was not called.

SECOND APPLICANT: No, we did not know him then. We did not have an expert witness, we did not honestly ----

LORD JUSTICE SIMON: Who is then, who is Mr. Bishop?

SECOND APPLICANT: He is an academic and an expert in cyber harassment.

LORD JUSTICE SIMON: Was he called at trial?

SECOND APPLICANT: We did not know of him then.

LORD JUSTICE SIMON: I see.

SECOND APPLICANT: Right.

LORD JUSTICE SIMON: There is a reference to ----

SECOND APPLICANT: If we have an appeal then he probably will be called.

LORD JUSTICE SIMON: No, he probably will not be called if you have an appeal.

SECOND APPLICANT: He won't? Right, okay. Your Honour, erm, they set out to do us harm and you can see in their disclosure that they loved doing us harm. They want us to scream into the void, they knew nobody is reading our stuff, they are much more powerful than us. If it was under the 2013 Act they would be expected to be much more robust about anything that we wrote. In BCA ----

LORD JUSTICE SIMON: That might be said about you too.

SECOND APPLICANT: We are not public figures, we are a family that tried to do something about bullying.

LORD JUSTICE SIMON: Nor are they public figures for the purposes

of the ----

SECOND APPLICANT: Well, they have been in the press, they have been in the national press several times on the subject of Steiner Schools so they are much more public figures than we are.

We consider that, my Lord, we have to submit that unless this is dealt with as a course of conduct either in background to defamation and including numerous private defamation alongside the heads that were in the claim, then what happens then is that anybody can just target anyone, cut off public debate by not offering right of reply and not taking their own right to reply. Then, spreading around these evil rumours under the surface which because the effects of shunning are to make people respond and react quite, in some cases, violently, but people feel very horrible to be excluded from a debate.

We are not talking about writing on some particular person's blog. We are just talking about being able to be included in it at all. That this is something that is not in the public interest at all to allow people to behave like that and the representative of the respondents have enjoyed huge public influence and approval for being champions of free speech and upholding open publication, whereas here they are defending a covert campaign of harassment which should be criminal, your Honour, because the standard of proof is beyond reasonable doubt.

They did tell people on email that I was a danger to people. If that is not criminal then that is just dangerous. How can that not be criminal when it is proven to that extent? If I did it I would know it was a criminal act.

LORD JUSTICE SIMON: Okay. Is there anything else?

SECOND APPLICANT: Please grant an appeal to this.

LORD JUSTICE SIMON: That I understand, that is the nature of your application.

SECOND APPLICANT: Please put the costs order aside because our family is losing their home because we had to come and try and address this which meant crossing the world.

FIRST APPLICANT: Two more things then, the judge has said that Twitter is ephemeral, it is not. Twitter is not ephemeral, it is easy to find, it is searchable through Google ----

LORD JUSTICE SIMON: I think the point is that if you look for it you may be able to find it, you may not but you may be able to find it but I think his point is that nobody is going to bother to look at that ----

FIRST APPLICANT: Well, we do not know that.

LORD JUSTICE SIMON: ---- because the nature of Twitter is ephemeral and therefore you do not go searching for past grievances ----

SECOND APPLICANT: Can I just say ----

LORD JUSTICE SIMON: No, I think I have heard from you enough. I will hear from your husband now.

FIRST APPLICANT: Okay. The judge said that he could find, for example, no evidence that the defendants had stalked us but in that email to Richy Thompson that I quoted you, she said, "I have to warn people when they are being prolific" how would she know unless she was stalking us. So there was stalking. They knew we were in Venice.

There is another point I want to make which I do not understand regarding jurisdiction. If somebody is not in a case, your Honour, they are not obliged to disclose anything, am I correct? Because he exonerated Richard Byng by saying that he could not find any emails from him in disclosure. He was not in the case. He couldn't have ----

LORD JUSTICE SIMON: It is not a question of exonerating Dr. Byng; he was not a party.

FIRST APPLICANT: Exactly, but he pretty much said that because there was no writing from him it was not called for for us to write to his boss. We never wrote to him to ask him to lose his job, we asked for help. But the problem is that he may not have been a party but he was fully involved. He said in his witness statement that he was involved. Actually, ironically, the police, when we talked to the police about what was happening to us they said, "why don't you contact his boss?" And the judge really punished us for that, but his wife's disclosure shows that he was involved first of all, "Richard is going to write to Dan". At the end of the day it

is his clinical judgment she seems to have forgotten he ----

LORD JUSTICE SIMON: Mr. Paris, this is really a side issue.

FIRST APPLICANT: It is not because it is all about the attacks that we were having in the background you see, your Honour. We were ----

LORD JUSTICE SIMON: They were not attacks from Dr. Byng.

FIRST APPLICANT: At the end of the day it is his clinical judgment which she seems to have forgotten. What clinical judgment? She is not a patient of Dr. Byng. Essentially, it is all those attacks like I keep saying, I mean, Gatley says, you can't ignore the first one because otherwise the people are benefiting from their own wrong and I really would submit by ignoring, by overlooking all of the covert attacks that they have on us, which were not just about France, which was all about making us disappear from the platform of standard criticism because they did not want us there so they would tell people not to have anything to do with us, that we were dangerous, contrary to what the judge says that there is no evidence, this is a repeat of it and I have given you a couple of examples.

By ignoring all this, our defence is that we wrote to defend ourselves because we do not know who they were talking to. We knew, we could see by people, other people were telling us that things were being said, so we thought we need to set the record straight, therefore we publish to say this

is the record and offered right of reply at all times. By ignoring their attack our defence has been turned into an attack on them.

Then they have what comes afterwards which is a retort which we should have qualified privilege for. This is really crucial, that is why I keep hammering the point, your Honour, because all the lies that they have said about us to get us to be kicked off the platform. They do not own it. Anybody can do it. They are way more influential than us because we only just started going online when we met the second defendant.

We are in an uphill struggle and we were pushed down by them covertly. All the covert attacks have been overlooked. They have been rewarded for having done it all covertly. They have been, they have profited from their own wrong and apparently, well, Gatley says you cannot do that.

LORD JUSTICE SIMON: Okay. I am going to ask Mr. Price one question in relation to the republication of the first blog of 9th November in April 2013; did the judge deal with that?

MR. PRICE: My Lord, at 237 what in fact the judge finds is that the, well, it was not defamatory in so far as it is dealt with the ----

LORD JUSTICE SIMON: There were two parts of it, were there not?

MR. PRICE: Yes, so the school issue he found ----

LORD JUSTICE SIMON: He had earlier found that it was not defamatory at the time that it was published. Did he make any

finding about it after there had been a resolution of the dispute between the school and the claimants?

MR. PRICE: I think that that is dealt with at 235 and 236, I found it was not defamatory and he also finds it did not become defamatory simply because there may have been a change in circumstances. Even if it was rendered inaccurate by a change in circumstances that does not bring into play the principle in ***Flood*** and ***Loutchansky***, to which I think reference is made, because it does not matter for the purposes of defamation if something is simply wrong, unless it is also defamatory.

FIRST APPLICANT: Your Honour, at 237 the judge says again the mistake that he moved that article about us along with all the other material ----

LORD JUSTICE SIMON: I am not concerned with the other material.

FIRST APPLICANT: I know but that means that is not true, he selectively chose. The human rights settlement that we did get which showed that our daughter had been bullied, surely it goes against when the first defendant said that we claim our children was bullied. "We claim", the natural and ordinary reading of the word means to say something without providing any proof.

Well, we had proof before, we had all our publication published online, all our email communication online once our children had been expelled. But now we have a human rights

settlement, a settlement from a respectable body that said that our child had been bullied at that school so, therefore, "claim" says, the parents claim the children were bullied, which says they say this without providing any proof ----

LORD JUSTICE SIMON: Okay.

FIRST APPLICANT: ---- is not true.

LORD JUSTICE SIMON: Thank you very much.

(For judgment see separate transcript)