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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.377/SD99

00/1397

BETWEEN DESMOND FRANCIS GORMAN

Plaintiff

AND TV3 NETWORK SERVICES LIMITED

Defendant

Hearing: 22 June 2000

Counsel: A.H. Waalkens for Plaintiff to oppose
J.G. Miles QC for Defendant in support

Judgment: 11 August 2000

JUDGMENT OF WILLIAMS J

Solicitors: *Keegan Alexander Tedcastle & Friedlander, DX CP21504 for Plaintiff*
Grove Darlow & Partners, DX CP24049 for Defendant

Gorman v TV3 Network Services

[1] This case arises out of a television broadcast by the defendant, TV3, in its "20/20" programme on 23 May 1999 which the plaintiff, Dr Gorman, claims was defamatory of him.

[2] TV3 applied for an order under r 418 as to whether the broadcast of which Dr Gorman complains is capable of bearing the meanings alleged in a number of passages in an amended statement of claim filed on 21 February 2000. On 22 May 2000, Salmon J made a consent order that the application be allocated a fixture but when this matter came on for hearing on 22 June, counsel had agreed that rather than argue whether the defendant's application for a r 418 determination should be granted, they should argue the r 418 application itself. The matter accordingly proceeded on that basis.

[3] As a result of discussion during the hearing, Dr Gorman was given leave to serve a further amended statement of claim with TV3 having the opportunity to comment in subsequent submissions. A very different statement of claim was filed, TV3 commented and this judgment arises from perusal of that material.

[4] There was little difference of view between counsel as to the principles to be applied. They include:

[a] The Court has jurisdiction in a defamation action to determine as a matter of law under r 418 whether the words complained of by the plaintiff are capable of bearing the defamatory meaning for which the plaintiff contends and should exercise that jurisdiction in appropriate cases where it is apparent that a saving of cost may result. (*Keays v Murdoch Magazines (UK) Limited* [1991] 4 All ER 491.)

[b] In *Darby v Bay of Plenty Times Limited* (1994) 8 PRNZ 211, 212, Robertson J adopted the list of the relevant principles in cases such as these which were produced by counsel and adopted by Fisher J in *Willis v Katevich* (Hich Court, Auckland, 21 August 1989, CP.547/85) as follows –

(i) The test is objective: Under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?

(ii) The reasonable person reading or listening to the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.

(iii) One is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.

(iv) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.

(v) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other,

(vi) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared.

[c] Whether or not the words are capable of bearing the defamatory meanings alleged is a matter of law in determining which the Court is to decide whether under the circumstances of publication a reasonable person to whom the publication was made would be likely to understand the natural and ordinary meaning of the words in the defamatory sense pleaded: (*Rubber Improvement Limited v Daily Telegraph Limited* [1964] AC 234, 258; *Laws NZ: Defamation*, para 41 p.26).

[d] The whole of the context in which the words were used must be considered. (*Grubb v Bristol United Press Limited* [1962] 2 All ER 380.) *Charleston v News Group Newspapers Limited* [1995] 2 All ER 313, 316 where Lord Bridge held:

> "The locus classicus is a passage from the judgment of Alderson B in *Chalmers v Payne* (1935) 2 Cr M & R 156 at 159, 150 ER 67 at 68, where he said:
>
> 'But the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together.'"

[5] The form of the statement of claim current at the hearing included some four pages of excerpts from the programme. It was followed by the first meanings pleaded with 15 particular excerpts from the programme. That was followed by a second meaning subdivided into four and followed by nine excerpts and a tenth particular re-pleading all the particulars from the first meaning. The fourth-eighth meaning all re-pleaded the particulars from the second including the re-pleading in the particulars from the third-sixth inclusive. The seventh meaning contained two particulars relying on different excerpts. The eighth meaning again re-pleaded the second with the further re-pleading of the first.

[6] During argument, Mr Waalkens, counsel for Dr Gorman, accepted that it would be extremely difficult if the case went to trial on that pleading for counsel, the Judge and the jury to consider every particular relating to every meaning, especially when a number of the meanings were followed by the conjunction "and/or", (see the comments of the use of that conjunction in *Bonitto v Fuerst Bros & Co Limited* [1944] AC 75, 82: *Re Lewis, Goronwi v Richards* [1942] 1 Ch. 424, 425).

[7] It was for that reason that leave was given for the filing of the amended statement of claim and judgment was reserved until that had been done and counsel for TV3 had an opportunity to comment.

[8] The further amended claim relies on the same excerpts from the programme but asserts only three meanings with 11, 15 and 12 paragraphs of particulars respectively.

[9] Put very broadly at this stage, the programme fell into two sections, one of which suggested that Telecom's working environment was unsafe for some of its employees who claimed to have suffered similar work injuries but who were unable to obtain accident compensation. The second section focused on medical reports provided by doctors, particularly Dr Gorman, which were said to have been relied on by Telecom and Accident Compensation to deny the former workers compensation or terminate the compensation they were receiving.

[10] The first meaning pleaded is that in the context of the whole programme the natural and ordinary meaning of the words was that Dr Gorman

> Acted unprofessionally by expressing his opinion in respect of ACC claims without having consulted or examined the claimant/patient concerned.

[11] The particulars relied on consist in some cases of entire responses of persons participating in the programme and in others of snippets, even a few words, from those responses but there is no need for the Court to consider TV3's application in regard to the first meaning pleaded further since it accepts that the words relied on are capable of bearing the meaning pleaded.

[12] The second meaning pleaded is that Dr Gorman "had written medical reports in which he expressed opinions as to the eligibility of persons for ACC which he did not believe to be truthful". The particulars largely repeat, though with some variations and additions, those pleaded under the first meaning.

[13] TV3's application in relation to the second meaning accepts that the broadcast was critical of Dr Gorman for providing medical reports on persons whom he had not seen which in some cases resulted in their being denied compensation or having it discontinued because of his diagnosis that their pain did not stem from a work injury. However, the general thrust of its application that the words relied on are incapable of conveying the imputation pleaded is that the broadcast itself provided both the bane and the antidote.

[14] In particular, TV3 pointed to passages in the earlier part of the programme which said –

> Dr Gorman's medical opinions are frequently used by ACC and other medical insurers. He holds a popular medical view that the type of pain conditions the women are suffering can't be blamed on work injury.
>
> ...
>
> While Dr Gorman's opinions didn't impress the women, in certain circles he's highly thought of. He's a former navy doctor and specialist in underwater medicine. He's also an associate professor at Auckland University where he ocassionally runs courses for ACC case managers and private insurers.

[15] TV3 also relied on passages which noted that "Dr Gorman isn't the only specialist writing such reports but his views seem to carry most weight with ACC", and the views contrary to those held by Dr Gorman expressed by other doctors, in particular a Dr Hancock.

[16] Having re-read the transcript and carefully considered all of counsel's submissions, this Court takes the view that it could perhaps ultimately turn out to be the case that the jury accepts that Dr Gorman's views as expressed in his reports are views genuinely held by a doctor whose professional qualifications entitle him to take that view and that his reports were accordingly truthful. However, the programme reflects a number of clashes of opinion. Telecom clearly has one opinion, ACC another, the former employees a third, Dr Hancock and probably other doctors a fourth, and Dr Gorman and a number of other doctors a fifth. In that context, the sincerity, genuineness and justifiability of Dr Gorman's professional views will plainly be an issue at trial. Depending on the jury's view of those matters, it may perhaps ultimately turn out to be the case that the jury concludes that his reports expressing his opinions were untruthful. Put another way, one of the issues at trial is likely to be whether, when the broadcast is considered as a whole, the bane is wholly quelled by the antidote or merely assuaged. Since it could be open to a jury to conclude that the passages complained of supported an imputation of untruthfulness, TV3's application in relation to the second meaning must fail.

[17] The third meaning pleaded was that Dr Gorman "has provided professional opinions that are influenced by commercial or other extraneous influences". The particulars again consist of a repetition of a number of those earlier pleaded, some with variations, plus some additions.

[18] The commercial and other influences which are pleaded as having influenced to Dr Gorman's opinions (which are presumably to be regarded as the equivalent of his reports as pleaded in the second meaning) are not identified. The programme is open to the inference that the suggested drive to reduce the number of people receiving compensation for work related injuries could be that of Telecom or of ACC or could perhaps be more broadly based. The speakers on the programme seem similarly confused as to whether they were referred to Dr Gorman by Telecom or by ACC. That said, in the Court's view it would be open to the jury to conclude that passages in the programme implied that Dr Gorman's reports to whomsoever they were addressed contained views that were affected by motives other than those of expressing a disinterested medical opinion. Those passages are therefore capable of conveying the defamatory meaning pleaded.

[19] However, some of the particulars are not capable of supporting that meaning. They include the passages from paras 4(l) (o) and (q) pleaded in paras 5.3.8, 9 and 11 as, while those paras may express medical views which are contrary to those held by Dr Gorman, they do not bear on whether the plaintiff's opinions are affected by the pleaded influences. The same might be said for the particular pleaded from para 4(h) in para 5.3.5 but in the context of the article as a whole that paragraph is perhaps capable of the inference that Dr Gorman's views are not impartial when he writes patient's reports.

[20] The balance of the application as regards the third meaning requires to be dismissed although it must be said that had the instructions to Dr Gorman, his reports and the identity of the person who paid his fees been before the Court, it may have

narrowed the range of the possible influences to which his opinions were pleaded to have been subject and that may in its turn have resulted in others of the pleaded particulars being ruled incapable of having the meaning pleaded.

[21] In the light of that, the Court's orders are that –

[a] The defendant's application for an order that the words complained of by the plaintiff are incapable as a matter of law of bearing the meanings pleaded is allowed in respect of paras 5.3.8, 9 and 11 of the first amended statement of claim filed on 30 June 2000 but is otherwise dismissed;

[b] The costs of the hearing are reserved (hearing time 2 hours 50 minutes);

[c] The Registrar is to fix a date for a directions conference at which orders can be made concerning the future conduct of the case.

POST COURT ACTION (Initial / Delete)
Ready List: X
Setting Down Fee: X
Diary / Fix List:
Results:
Database:
Other:

Delivered at 1.10 ~~am~~/pm on 11 August 2000.