IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. NO. 1477-SD99

UNDER the Defamation Act 1992

BETWEEN TM HEALEY

Plaintiff

A N D CE STURT

First Defendant

A N D REED PUBLISHING (NZ) LTD

Second Defendant

Hearing: 29th May, 2000

Counsel: GJ Judd QC for Plaintiff
RE Harrison QC for First Defendant
GJ Kohler for Second Defendant

Judgment:

JUDGMENT OF MASTER ANNE GAMBRILL

Solicitors for Plaintiff

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[1] I have before me an application for particulars and an application for security for costs. It is accepted that some security should be given and it prima facie appears to be recognised that the new scale should apply herein and that I should take into account the seniority of Counsel.

[2] I turn the application for particulars. There is a clear divergence of views between the defendants and the plaintiff in the obligation as to particulars in the defamation proceeding and the intent and effect of s 37. The first defendant has not filed a statement of defence because it has been seeking further particulars.

[3] The original statement of claim pleaded in para 4 that

> The first defendant falsely and maliciously published the passage from the book "Dirty Collars" set out herein.....

[4] There was then a notice for further particulars. The application has been amended and what is sought is for the plaintiff in respect of para 4 of the statement of claim to identify precisely which part of the extracts from "Dirty Collars" set out in that paragraph are alleged to be defamatory and untrue in relation to the plaintiff. Secondly, in respect of para 6 of the amended statement claim identifying which part or parts of the extracts are identified as defamatory and untrue in terms of the above allegedly give rise to each of the meanings pleaded in para 6 of the amended statement of claim. The plaintiff responded by filing an amended statement of claim but this has not satisfied the first defendant's requests.

[5] Counsel for the first defendant said that it is axiomatic the tort of defamation consists in the publication of untrue statements about another, damaging or tending to damage his or her reputation. It is also clear that as a matter of proof, all the plaintiff need show in defamation is the publication of material which bears a defamatory meaning. It is for the defendant then to prove that the factual matters contained in the alleged defamatory material are true. This, however, does not by any means follow that the ultimate onus of proof dictates the way in which a claim must be pleaded. The claim must be pleaded so as to fairly and fully inform the other parties as to the nature of the claim and to limit and define issues as required

by Rules 108 and 185 of the High Court Rules. I set out s 37 of the Defamation Act 1992:

> 37. **Particulars of defamation meaning -** (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.
>
> (2) Where the plaintiff alleges that the matter that is the subject of the proceedings is defamatory in its natural and ordinary meaning, the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself.

[6] The first defendant relies on s 37 and says it is not an answer to the plaintiff's explicit obligations under s 37(1) simply to delete a former pleading that any portion at all of the statements alleged to be defamation is untrue. The requirement he says is to give particulars. He says the approach is consistent with previous law and in the more recent decision of *Knight v Independent News Limited* CP.14/96 (Auckland Registry) 16th December 1996 where Elias, CJ (as she now is) held that full particulars must be delivered.

[7] In this case there are two pages of a book as set out in the statement of claim. A number of facts pleaded on their face are neither defamatory nor presumably contested. Counsel identified some of these, such as –

> He was a senior Sydney Barrister.....
>
> After four an a half years.....

[8] Neutral statements he also identified such as –

> .....Healey's insistence that Sydney Judges and Barristers were superior to those in New Zealand

[9] Other statements were expressions of opinion rather than fact such as –

> .....from whom I expected a certain level of legal knowledge and all-round professional ability.

[10] Further examples do not name or necessarily refer to the plaintiff. Counsel's argument is there are a number of possibilities as regards those passages. Parts may

be accepted as correct and therefore not defamatory or contended to be incorrect but bear no defamatory meaning, or contended to be both untrue and defamatory. Of course in respect of the last of these allegations the defendants will need to amount a defence to, in particular a defence by way of justification. Therefore the defendant says the plaintiff must specify the particular portions of the passages quoted which he contends are both defamatory of him and untrue. This is the precise obligation. Counsel suggests this can be done by way of underlining so the context can stay identifiable. He says also while some of the false innuendoes pleaded in para 6 can be easily be linked to other passages, in the case of others, it is impossible or at least difficult to make the necessary linking (which he stressed was essential for the conduct of the case).

[11] The second defendant supported the application and stressed to me the use of the word "shall" in s 37 and urged that the obligations as to pleading were mandatory.

[12] The plaintiff approached the matter on the basis that adequate particulars were given and the plaintiff was tied to the pleadings as they stood. Counsel said that it was important to consider s 8 which related to the defence of the truth of the statements made. The statements that were defamatory had been pleaded and they bear the meanings pleaded in para 6. He says the whole of the paragraph pleaded in para 4 is defamatory. He says if the defendants prove the imputations pleaded in para 6 are not materially different from the truth the defence of truth will succeed. He said all the statement is defamatory and untrue because taken as a whole, it contains the imputations pleaded in s 6. He relied on a ruling of Nicholson, J *Edwards v Harlick M.229/98* (Auckland Registry) 17th February 1999. He said the statement relied on as being defamatory contained no particular passages which could be said to be untrue. In respect of s 37(2) relating to the obligation of the plaintiff to give particulars, he said that this had been expressed/rejected by the 1997 Committee on Defamation and relied on the report. I believe that it is of no advantage to either party to look at that Parliamentary report because of the strength of s 37 when enacted. I rely on the judgment of Elias J (as she then was) in *Knight* supra particularly para (1) p3:

> I consider that it is necessary that the statements relied upon by the plaintiff as being defamatory and untrue should be identified with greater particularity. That does not preclude the assertion that in the context of the article as a whole, those statements are defamatory and untrue and that the words bear the defamatory meani8jngs identified by the plaintiff in paragraph 6 of the statement of claim. But what is required is for the plaintiff to comply with s 37(1) by specifying every statement in the article that he alleges to be defamatory and untrue. That degree of particularity is required also by Rules 108 and 185 of the High Court Rules.

[13] I am satisfied the first defendant has made out a case for further particulars and the identification of each and every alleged defamatory statement as made in the book together with identification relating to and identifying the innuendoes flow therefrom. These are to be supplied within 21 days hereof and the defendant will then have a further 21 days to file his statement of defence. I suggest Counsel adopt the process of underlining suggested by Dr Harrison.

Security

[14] I am satisfied that as the plaintiff is overseas and the parties are entitled to security. It is merely the quantum which has to be settled. At this point in time the plaintiff's view of a trial is one day, the first defendant's is five days and the second defendant's is 10 days. There is the additional problem that there is $400,000 in damages sought and exemplary damages. Consequently the litigation to be conducted by QC's and senior counsel could be extremely costly in relation to the likelihood of a substantial recovery. There is also debate whether this case would be before a jury and this appears likely.

[15] Counsel alerted me to some of the previous cases such as *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143. Mr Kohler effectively sought a greater sum than Dr Harrison although there seemed to be consensus over the matter of security. In my view it is difficult to estimate the trial time and I would be loath to fix a final sum for security thereon. My own view is that the interlocutories and preparation for trial on this matter would warrant security of $15,000 in respect of each defendant and the same is to be paid within 21 days hereof. My other view is that unless the trial time was to exceed five days, security should be fixed to be paid

on the setting down of this proceeding for hearing by the Master, by a further sum of $15,000 in respect of each defendant. Leave, however, is reserved to review that sum at the conference which will be held when this proceeding is to be set down for trial.

[16] I am satisfied that the defendants have succeeded in their application and are entitled to costs on the appropriate Scale 3. The matter is to be listed in a Chambers list on 21st July 2000 at 10am to ensure the security has been paid and the particulars given allowing this case to move forward to a pretrial conference.

MASTER ANNE GAMBRILL