

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

CP 143/99

0016

BETWEEN      RICHARD CHARLES TAINUI MANNING

Plaintiff

AND            TV3 NETWORK SERVICES LTD

Defendant

Date of Hearing:    2 February 2000

Judgment:         4/2/00

Counsel:            C A McVeigh QC for Plaintiff  
                          TJG Allan for Defendant

---

**DECISION OF MASTER VENNING**  
**On Defendant's Application For Further And Better Particulars**

---

---

*Solicitors:*  
Corcoran French, Christchurch for Plaintiff  
(Counsel – C A McVeigh QC, Christchurch)  
Grove Darlow Partners, Auckland for Defendant  
*Cc:*  
Chisholm J

## **APPLICATION**

[1] The Defendant seeks an order requiring the Plaintiff to provide further particulars of the Plaintiff's statement of claim in this defamation action.

## **BACKGROUND**

[2] On or about 18 July 1999 the Defendant television company broadcast a "20/20" programme that ran an item concerning the felling of native timber in the South Island. The first part dealt with the felling of native beech forest in Fiordland. The item then went on to raise the issue which the Plaintiff complains about.

[3] The item complained of referred to the "unlawful logging of SILNA lands" [a reference to land held in Maori ownership pursuant to the South Island Landless Natives Act 1906]. The programme referred to such unlawful logging of SILNA lands owned by the PNR Trust in the Catlins area of South Otago. It identified the Plaintiff as the owner of a neighbouring block of land and a person who was a trustee of various SILNA blocks. The item noted that the Plaintiff had developed an informal track in 1998. The programme suggested that the track had been used for the unlawful felling of trees belonging to the PNR Trust. The Plaintiff says that the Defendant has defamed him.

[4] In an amended statement of claim filed to answer the Defendant's original request for further particulars the Plaintiff pleads that a portion of the programme, in its natural and ordinary meaning, in its context and with the accompanying video and soundtrack, had and was understood to have the following extended meanings:

- [a] That he had stolen timber belonging to the PNR Trust; or
- [b] That he was personally responsible for the theft of timber belonging;  
or
- [c] That he had orchestrated the theft of timber that belonged to the PNR Trust; or

[d] That he was somehow involved in the theft of timber belonging to the PNR Trust.

[5] As well as attaching a transcript of the full programme in the amended statement of claim the Plaintiff has also identified the full portion of the item complained of.

[6] The Defendant seeks an order requiring the Plaintiff to give further and better particulars of the statements which give rise to the particular meanings above.

### **ISSUE**

[7] The issue for the Court is whether it is sufficient for the Plaintiff to refer to the entire portion of the item in the statement of claim or whether the Plaintiff is obliged to identify the statements within that portion of the item that are alleged to be defamatory.

[8] Mr McVeigh suggested that the issue was affected by the fact this was a visual documentary programme rather than a defamation arising purely out of written material such as a newspaper article. Counsel suggested the Court view the video. I have viewed the video and considered counsels' submissions in the context of the video and the pleadings.

### **THE STATUTORY BASIS FOR THE DEFENDANT'S APPLICATION**

[9] The application is made in reliance upon R185 of the High Court Rules and s37 of the Defamation Act 1992.

[10] Rule 185 provides for a notice requiring further particulars or more explicit pleading to be issued and if not complied with for the party seeking the particulars to make application to the Court for an order as the Defendant has in this case.

[11] In the present case the focus is also upon the requirements of s37. Section 37 reads:

37. PARTICULARS OF DEFAMATORY 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.
- (3) Where the plaintiff alleges that the matter that is the subject of the proceedings was used in a defamatory sense other than its natural and ordinary meaning, the plaintiff shall give particulars specifying--
  - (a) The persons or class of persons to whom the defamatory meaning is alleged to be known; and
  - (b) The other facts and circumstances on which the plaintiff relies in support of the plaintiff's allegations."

[12] The particularly relevant subsection in this case is s37(1). On a plain reading s37(1) requires particulars in the statement of claim specifying, and thereby identifying expressly, every statement that is alleged to be defamatory and untrue. Prima facie then it would appear that the requirement to specify every statement would not be met by generally referring to an article or portion of an article as a whole.

[13] Section 37(1) was considered by the Court in *Knigh t v Independent News Auckland Ltd* (unreported, HC Auckland, CP 144/96, 16/12/96, Elias J). In that case the plaintiff claimed he was defamed by an article in a local paper which described his actions in cutting down some trees on his property. The article appeared under a headline "Tree Removal Vandalism". The statement of claim merely reproduced the article in full. The defendant sought particulars of what statements were alleged to be defamatory and untrue in reliance upon s37(1).

[14] Elias J (as she was) noted:

"Section 37(1) is a provision designed to carry out the policy that litigation is to be conducted fairly by informing each party of the case to be met. Modern pleadings are expected to eliminate surprises, to enable litigation to be conducted in a manner which is effective and which

keeps costs to a minimum. It is wasteful of the time and resources of litigants if they have to prepare to meet issues which turn out not to be in dispute.”

[15] Her Honour considered it was insufficient for the plaintiff to merely reproduce the article in full. She ordered the particulars sought by the defendant, stating:

“... what is required is for the plaintiff to comply with s37(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.”

[16] Section 37(1) and the Court’s approach in *Knight v Independent News Auckland Ltd* is consistent with the approach taken in other jurisdictions to the particulars required in defamation cases. It is sufficient to refer to the authority of *DDSA Pharmaceuticals Ltd v Times Newspapers Ltd* [1973] 1 QB 21 to illustrate the point.

[17] In the *DDSA Pharmaceuticals Ltd* case “The Sunday Times” supplement included a front page picture and an article extending over ten pages entitled “The Great Drug Fraud”. The plaintiff sued in defamation. The statement of claim pleaded that the front page picture and four numbered pages of the article were defamatory. No particular passages or illustrations were specifically pleaded as defamatory. The statement of claim was struck out by the Master. It was reinstated by a Judge on review.

[18] On appeal to the Court of Appeal the Court of Appeal held that the statement of claim should be struck out as embarrassing and defective for two reasons – the second of which was that

“... where the subject matter for an action for defamation was a long article the plaintiffs must specify the particular passages said to be defamatory of them. To throw the whole article at the defendants and at the court was embarrassing.”

Lord Denning MR cited with approval the Master’s finding that:

“It is tremendously embarrassing to claim the whole of the article as a libel. There is a tremendous amount of the article which is not defamatory of your clients. You must pick out the particular bits and

rely on the rest as extrinsic or surrounding facts giving a defamatory meaning to the words.”

Lord Denning MR said of that ruling:

“That ruling is in accord with the practice as it has been known for many years. The plaintiffs must specify the particular parts defamatory of them.” p26

[19] In the present case the portion of the transcript of the programme attached to the statement of claim runs for four pages of the statement of claim. There are no particular passages specified as being defamatory and untrue. There are passages in the portion of the transcript which are clearly not defamatory and untrue. For instance, some passages refer to meetings between a forester and a local eco-tourism operator and other passages outline the presenter’s meeting with the PNR Trust chairperson and the background to that meeting. They are clearly not defamatory of the Plaintiff.

[20] Despite that, Mr McVeigh submitted that generally the pleading was sufficient in that the Plaintiff had set out the portion of the programme followed by the meanings the Plaintiff alleged followed from that portion of the programme.

[21] While the Plaintiff must identify the meanings complained of, as has occurred in this case, that is expressly required by s37(2). The fact that the Plaintiff has expressly identified the meanings and thereby satisfied the requirement of s37(2) does not generally release the Plaintiff from the obligation to provide particulars under s37(1).

[22] It follows that I accept Mr Allan’s submission that it is not the Defendant’s task in a defamation action to attempt to guess which of the words in the whole of the passage pleaded might be those which the Plaintiff says are defamatory and untrue in the whole of the context of the article or programme.

[23] That is not to say that the Plaintiff is precluded from asserting that in the context of the programme as a whole the statements are defamatory and untrue. The programme and transcript as a whole will properly be made available to the Court: *Knight v Independent News Auckland Ltd* (supra).

[24] Prima facie then, if the present case concerned a newspaper report or other written statement the Plaintiff's claim as presently pleaded would clearly fail to comply with s37(1) of the Defamation Act.

### **DEFAMATION BY AUDIO-VISUAL MEANS**

[25] The next question is whether the fact that the programme is a television programme affects or alters that finding. Mr McVeigh submitted that the visual nature of the programme affected the strict obligation under s37(1) to provide particulars.

[26] Mr McVeigh submitted that where the matter complained of was part of a television, film, or other audio-visual presentation where the combinations and permutations available are endless and material is not easily susceptible to a detailed description of its defamatory aspects, the rules as to pleadings generally applicable to printed defamations are somewhat more relaxed, referring to '*Gatley*' 9<sup>th</sup> edn paras 26.11 and *Lougheed v CBC* [1978] 4 WWR 358.

[27] As a starting point I record that s37(1) requires the Plaintiff to specify "every statement". The '*Shorter Oxford Dictionary*' defines "statement" as:

"The action or an act of stating, alleging, or enunciating something; the manner in which something is stated. ... A formal written or oral account, setting down facts, an argument, a demand, ..."

[28] The wording of s37 would, on that definition of "statement", be broad enough to apply to an audio-visual presentation as in the present case, and would still require particulars to be provided. However, the practical position must be recognised as it was in the *Lougheed* case.

[29] In *Lougheed*'s case the plaintiff, the Premier of the province of Alberta, sued the defendant for general and punitive damages for an alleged defamatory portrayal of him in a television programme. The statement of claim alleged in general terms the plaintiff had been defamed in several ways but did not cite the specific words used. The defendant sought inter alia further and better particulars.

[30] In the Alberta Supreme Court Miller J identified the question as follows:

“While it is settled law that the specific words or passages claimed to be defamatory must be specifically set out in the plaintiff’s pleading, almost invariably the cases which have laid down this principle are those which dealt with a written document, verbal statements or a reading from a written script. The vehicle which published the alleged defamation in this case is a play broadcast over a television network. ... How, then, should the established legal principles which have stood the test of time respond to a broadcast of a television play? Are they appropriate or adequate or must we now develop modifications or even entirely new principles to be fair to all sides.” p366

[31] His Honour then considered what little authority there was, and concluded:

“In my view a plaintiff, in a defamation case involving an audio-visual presentation, should not be bound by the same strict rules as to particulars which apply to a written document or a verbal statement. However, this privilege granted to such a plaintiff should not be extended to permit the pleading merely of general conclusions that the plaintiff has been defamed. The plaintiff must, though his pleadings, clearly indicate to the defendant which portions of the television play give rise to the allegations of defamation in order to delineate properly the issues of the case and to inform the defendant of the case he must meet.” p379

[32] With respect to Miller J, that seems a sensible approach to enable the application of the general principles to the situation of an audio-visual presentation.

[33] Mr Allan sought to submit that there was a distinction between a “play” as in the *Lougheed* case and a factual documentary item as in the present case. There may be more variable factors in a play, such as the characters, sets, costumes, background music and the like than would be available to the producer and presenter of a documentary or an investigative report. Nevertheless it cannot be overlooked that even in a documentary or report the setting in which words are stated and the emphasis placed upon the words by the presenter may be particularly material. Those matters cannot necessarily be captured by the transcript.

[34] I am unable to accept that there is a sufficient distinction between a play as in the *Lougheed* case and an investigative documentary item as in the present case to mean that the general approach suggested by Miller J should not be applied to the present case. I also note that Miller J’s conclusion was expressed in a general way after considering a number of earlier cases.



[35] In my view the statement of principle expressed in the *Lougheed* case is applicable to audio-visual presentations such as the documentary in the present case. Whilst the strict rules may be relaxed, that is only to a limited degree. That is recognised both by Miller J and in the passage referred to from 'Gatley'.

[36] It follows that I reject Mr McVeigh's submission that it is sufficient for the Plaintiff to identify the portion of the documentary generally. The Plaintiff must go further and specify the particular parts of the item dealing with him that he alleges to be defamatory rather than merely repeating the whole portion.

[37] At the conclusion of his submissions Mr McVeigh attempted to do that by highlighting certain passages of the portion already attached to the amended statement of claim. I record that that was a fall-back position on his behalf and his prime submission, which I have rejected, was that the Plaintiff had properly pleaded his claim by referring to the item.

[38] I understood that in reply Mr Allan accepted that if the specific parts of the transcript were underlined to identify the defamatory statements then that would meet the Defendant's request for further particulars. I record that that was without prejudice to the Defendant's expressed intention to pursue any other applications that may be necessary.

### **SUMMARY**

[39] For the foregoing reasons I accept the Defendant's submission that the Plaintiff has not at present adequately complied with his obligations under s37(1) by generally referring to a portion of the transcript and that further particulars are required. The application succeeds.

[40] The Plaintiff is to provide those particulars by filing and serving an amended statement of claim so the matter is formally before the Court.

## **TIMETABLE**

- [a] The Plaintiff is to file and serve the amended statement of claim by 11 February.
- [b] The Defendant is to plead fully to that second amended statement of claim by 25 February.
- [c] The parties are both to complete verified lists of documents in this case by 10 March.
- [d] Inspection is to be completed by 31 March.
- [e] Any further interlocutory application by either party to be filed and served by 14 April.
- [f] This proceeding will be reviewed before me at a telephone conference on *19 April 2000 at 9.00am*. Any interlocutory applications filed are to be allocated that date of hearing. Leave is reserved to relist earlier on 48 hours notice if required.

## **COSTS**

[41] The Defendant has succeeded on the application and is entitled to costs. Costs to the Defendant in the sum of \$1,000 plus disbursements (to include counsel's reasonable travel expenses).

## **VIDEO**

[42] The Registrar is to return the video to Mr McVeigh.

  
MASTER VENNING