IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY CP 224/97

1345

BETWEEN TIPENE O'REGAN

Plaintiff

AND THE RADIO NETWORK LIMITED

First Defendant

AND PAUL SCOTT HOLMES

Second Defendant

Hearing: 16 October 2000

Counsel: D R Knight for the Plaintiff
J W Tizard for the First and Second Defendants

Judgment: 25 October 2000

JUDGMENT OF WILD J

Introduction

[1] The issue is whether this defamation proceeding should be tried by a Judge and jury, or by a Judge alone.

[2] It arises because the two defendants filed on 16 July 2000 a notice under r 427 requiring trial by jury.

[3] The plaintiff ("Sir Tipene") wants his claim tried by a Judge alone.

Background

[4] On 12 May 1997 the second defendant ("Mr Holmes"), on his Breakfast Programme on the first defendant's Radio 1ZB (I will refer to the first defendant as "Radio 1ZB"), broadcast some remarks about Sir Tipene. Mr Holmes' comments were about Sir Tipene in his capacity as the Chairman of the Treaty of Waitangi Fisheries Commission. Sir Tipene alleges they defamed him.

[5] On 3 September 1997 Sir Tipene commenced a proceeding against Radio 1ZB and Mr Holmes. Against 1ZB Sir Tipene claims general and punitive damages. In accordance with s 43(1) Defamation Act 1992, those damages are not quantified. He also seeks against 1ZB:

> "(c) A recommendation from the court pursuant to s 26 of the Defamation Act as to publication of an appropriate correction."

[6] Against Mr Holmes Sir Tipene seeks $500,000 general, and $50,000 punitive, damages.

[7] The defendants' statement of defence filed on 22 October 1997:

[a] Admits the broadcast by Radio 1ZB and Mr Holmes, and its content (a transcript of the remarks complained of is appended to Sir Tipene's statement of claim).

[b] Denies the defamatory meanings alleged by Sir Tipene and denies that the remarks were false and malicious.

[c] Denies damage to Sir Tipene's reputation.

[d] Denies the alleged basis for punitive damages.

[e] For a first affirmative defence, pleads that the remarks are not defamatory: are not capable of bearing any of the alleged defamatory meanings, and were not understood by listeners to bear them.

[f] For a second and alternative affirmative defence, pleads honest opinion:

> "... the words ... insofar as they consist of facts are true or not materially different from the truth and insofar as they are opinion is the genuine opinion of (Mr Holmes) and that such opinion, in its context and in the circumstances of the publication of the matter did not purport to be the opinion of (Radio 1ZB) which believed such opinion was the genuine opinion of (Mr Holmes) or such opinion did not purport to be those of (Radio 1ZB) or any employee or agent of (Radio 1ZB) and (Radio 1ZB) had no reasonable cause to believe the opinion was not the genuine opinion of (Mr Holmes)."

Quite detailed particulars are then given of this defence.

[g] For a third and alternative defence, pleads qualified privilege: publication in good faith on a matter of public interest and concern by defendants under a moral or social obligation to publish the same to New Zealanders, who had a corresponding interest in what was published.

[8] A praecipe, signed unilaterally by counsel for Sir Tipene, was filed on 30 March 2000. After inquiring of the defendants as to their position, the Registrar set the proceeding down for trial, advising the parties by letter dated 11 June that he had done so. That letter was received by the defendants' solicitor on 13 June. Consequent upon setting down, the proceeding was placed in the Master's Chambers list for 4 July, so that any necessary further directions toward trial could be given. Mr Tizard told me he thought mode of trial would be dealt with at that hearing, at which he intimated the defendants sought a jury trial. However, following receipt on 7 July of a further letter from the Registrar indicating that a Judge alone fixture had tentatively been allocated before me commencing on 11 September, Mr Tizard filed and served the defendants' jury notice on 10 July. I add that I was not involved in any of those procedural steps.

[9] The tentative 11 September was vacated until mode of trial was determined. Thus, this present hearing.

Relevant legislation

Defamation Act 1992 ("the Act")

[10] Two sections in the Act are relevant. The first is s 26 which provides:

> **"26. Court may recommend correction-**
>
> (1) In any proceedings for defamation, the plaintiff may seek a recommendation from the Court that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings, and the Court may make such a recommendation.
>
> (2) Where, in any proceedings for defamation,--
>
> (a) The Court recommends that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings; and
>
> (b) The defendant publishes or causes to be published a correction in accordance with the terms of that recommendation,--
>
> then--
>
> (c) The plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise; and
>
> (d) The plaintiff shall be entitled to no other relief or remedy against that defendant in those proceedings; and
>
> (e) The proceedings, so far as they relate to that defendant, shall be deemed to be finally determined by virtue of this section.
>
> (3) Where, in any proceedings for defamation,--
>
> (a) The Court recommends that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings; and
>
> (b) The defendant fails to publish or cause to be published a correction in accordance with the terms of that recommendation,--
>
> then, if the Court gives final judgment in favour of the plaintiff in those proceedings,--

(c) That failure shall be taken into account in the assessment of any damages awarded against the defendant; and

(d) The plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise."

[11] The second is s 35 which, relevantly, provides:

"**35. Powers of Judge to call conference and give directions** – (1) For the purpose of ensuring the just, expeditious, and economical disposal of any proceedings for defamation, a Judge may at any time, either on the application of any party or without such application, and on such terms as the Judge thinks fit, direct the holding of a conference of parties or their counsel, presided over by a Judge.

(2) At any such conference, the Judge presiding may –

(a) ...

(b) With the consent of the parties, or on the application of the plaintiff, exercise the powers conferred on a Court by sections 26 and 27 of this Act:

..."

Judicature Act 1908

[12] Section 19A(1) and (2) provide:

"**19A. Certain civil proceedings may be tried by jury-**

(1) This section applies to civil proceedings in which the only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels.

(2) If the ... damages ... claimed in any civil proceedings to which this section applies exceeds $3,000, either party may have the civil proceedings tried before a Judge and a jury on giving notice to the Court and to the other party, within the time and in the manner prescribed by the High Court Rules, that he requires the civil proceedings to be tried before a jury.

..."

[13] And s 19B(1) and (2) provide:

> "**19B. All other civil proceedings to be tried before judge alone, unless court otherwise orders--**
>
> (1) Except as provided in section 19A of this Act, civil proceedings shall be tried before a Judge alone.
>
> (2) Notwithstanding subsection (1) of this section, if it appears to the Court at the trial, or to a Judge before the trial, that the civil proceedings or any issue therein can be tried more conveniently before a Judge with a jury the Court or Judge may order that the civil proceedings or issue be so tried.
>
> ..."

Sir Tipene's submissions

Outline

[14] Mr Knight's submissions for Sir Tipene, opposing the defendants' jury notice, raised three issues:

[a] The defendants' jury notice was out of time.

[b] There is no jurisdiction under s 19A Judicature Act for a jury trial of this proceeding.

[c] The criterion under s 19B Judicature Act, allowing the Court in its discretion to order a jury trial, is not met.

[15] I will deal with the time point first, then return to deal in order with the two more substantial points.

Jury notice out of time

[16] Mr Knight argued, and Mr Tizard on reflection conceded, that the jury notice should at the latest have been filed by 17 June 2000. That is, it should have been filed within four days from 13 June, the day on which the defendants received the

Registrar's letter informing them that he had set the proceeding down for trial. Thus, the defendants' jury notice was about three weeks out of time (17 June to 10 July).

[17] Mr Knight could not point to any prejudice resulting from this delay. I therefore exercise my discretion under r 6 to enlarge time to encompass the defendants' jury notice. I do so because the notice was not much out of time, its late filing was in part due to a misunderstanding on Mr Tizard's part, there is no resulting prejudice, and in order to preserve both parties' rights in relation to the important question of mode of trial, enabling that to be properly argued and ruled upon, rather than go by default.

[18] In enlarging time, I draw support from *Smith v Television New Zealand Ltd* (1994) 7 PRNZ 456. That case involved an allegedly defamatory telecast. Heron J granted an extension under r 6, and the factors which influenced him apply equally here, although here it is the defendants who require trial by jury.

No s 19A jurisdiction

[19] Mr Knight's initial submission was bald. He pointed out that s 19A applied to a proceeding in which the only relief claimed was damages. His point was that, against Radio 1ZB, Sir Tipene was claiming also a recommendation under s 26 of the Act. He submitted this took the proceeding out of s 19A.

[20] Mr Tizard's responded that it would be remarkable if a defamation plaintiff could deprive a defendant of its s 19A right to require the claim to be tried before a jury, simply by including in its statement of claim a prayer for a s 26 recommendation. That, Mr Tizard submitted, cannot have been Parliament's intention. An exchange of oral submissions ensued. I will summarise Mr Tizard's argument first, and then Mr Knight's, that being the order in which they were put to me. Mr Tizard's points were these:

[a] Section 26 is, strictly, an alternative to damages, or at least is a first step in a damages claim. Implicit if not explicit in s 26 is that a claim

for damages should proceed only if a correction is not published in the terms recommended by the Court.

[b] The defendants are entitled to know what claim (in terms of relief) they will face at trial. If the claim is primarily for a s 26 correction, then the defendants' approach will differ from that they will take if the claim is for damages.

[c] Because of [a] and [b], and also because s 26 is aimed at achieving a speedy resolution, Sir Tipene should be required to elect now – well before trial – whether he seeks a s 26 correction or whether he seeks damages.

[d] Notwithstanding [a] to [c], a trial in which Sir Tipene seeks both damages and a s 26 correction could proceed satisfactorily before a jury. The steps would be:

[i] The jury finds what if any part of the publication was defamatory.

[ii] The jury assesses damages.

[iii] I discharge the jury, it having completed its task.

[iv] I decide whether or not to recommend a correction under s 26.

[v] If I recommend a correction, Radio 1ZB either broadcasts or does not broadcast that recommendation.

[vi] If Radio 1ZB broadcasts the correction, Sir Tipene is entitled only to indemnity costs in terms of s 26(2)(c) – (e), unless the Court otherwise orders.

[vii] If Radio 1ZB does not broadcast the correction, then the Court gives final judgment for damages.

[e] A defendant could refuse to publish a correction recommended at an early stage of the proceeding, and then successfully defend the plaintiff's claim at trial. That may explain why s 26 is framed as it is, in particular the reference in s 26(3) to "final judgment".

[21] A little later in argument, Mr Tizard drew my attention to s 35(1) and (2)(b) of the Act which I have set out in paragraph [11] above.

[22] Mr Tizard submitted that, if a Judge saw in a plaintiff's statement of claim a prayer for a s 26 recommendation, then the Judge would likely convene a s 35 conference and ask the plaintiff whether the plaintiff sought that recommendation then. If the plaintiff did not, the Judge would hardly be likely at some later stage in the proceeding to make a s 26 recommendation, and would be most unlikely to recommend one in the context of a trial.

[23] Replying for Sir Tipene, Mr Knight submitted:

[a] To put Sir Tipene to an election before trial is inappropriate: it conflicts with the language and structure of s 26. The "election" is implicit in s 26 itself.

[b] Mr Tizard is correct in saying that s 26 involves a two-stage inquiry. But, as McKay J commented in *TV3 Network Ltd v Ever Ready New Zealand Ltd* [1993] 3 NZLR 435 (CA) at 425, before the plaintiff can get a s 26 recommendation there must be a finding of liability.

[c] Otherwise, in making a s 26 recommendation, the Court is determining that there was a publication (admittedly not disputed here) about the plaintiff (also admitted here) which was defamatory of the plaintiff (denied here).

[d] Before properly exercising its s 26 power, the Court needs to hear evidence about all the elements of the defamation, including the

defences advanced by the defendants i.e. the s 26 recommendation can only properly be dealt with in the context of the trial.

Decision

[24] I consider Parliament intended that the possibility of resolving the proceeding by publication of a correction recommended by the Court under s 26 be addressed wherever possible in the early stages of a defamation proceeding, and certainly well before trial. The reasons include these:

[a] A correction is most effective and appropriate when the defamation is still "stinging". Indeed, if left for too long, it can be counterproductive, serving only to remind those who receive it of a defamation by now stale and possibly even forgotten. This point was made in the Report of the Committee on Defamation in December 1977 (the "McKay Report"):

> "367. It has been suggested that one alternative to damages might be the "wholesale advertising" of an apology in the metropolitan press with a judge deciding on the nature and extent of the apology. The cost of widespread publication of an apology in the metropolitan press could be very substantial. A major difficulty with the suggestion is that an apology published several months, or even weeks, after the defamatory statement has been made is unlikely to reach the same people who read the original statement. An apology in such circumstances may increase the damage to the plaintiff's reputation by attracting fresh attention to the original statement."

[b] Publication of the correction resolves the matter, save as to costs. It is intended to obviate the need for a trial whenever possible.

[c] The specific mention of it in s 35(2)(b) of the Act.

[25] That a s 26 correction was intended where possible to be a "quick fix" is supported by the texts. Burrows & Cheer's *Media Law in New Zealand* (4th edition 1999) p 49 states:

> "There is little evidence that corrections are being sought in preference to damages. The judiciary has noted the intent of the Act's drafters, however. In one recent District Court case, the judge noted that the remedial provisions of the 1992 Act made plain a legislative intent that the seeking and offering of corrections and apologies should be a first priority and that damages should be secondary: *Cooper v Independent News Auckland Ltd* DC Auckland, 21 April 1997, NP 552/96. The plaintiff's failure to pay attention to matters of correction and apology was taken into account in mitigation of damages: see Judge Roderick Joyce QC at 25."

[26] And Gillooly's *The Law of Defamation in Australia and New Zealand* 1998 states at p 332:

> "It is envisaged that such an application will normally be made shortly after the defamatory publication and well before the trial: see *NZ Hansard* Vol 531, pp 12146 (10 November 1992) (2nd Reading Speech of Minister for Justice), and p 12331 (17 November 1992) (3rd Reading Speech of Minister for Justice). If a recommendation is made and the defendant complies with it, this brings the proceedings to an end and the plaintiff will normally be entitled to solicitor and client costs. If the defendant fails to comply, then the matter proceeds to trial: s 26(2) of the Act. If the defendant ultimately succeeds at the trial, no adverse consequences flow from the refusal to comply with the court's recommendation. ...
>
> The s 26 remedy may provide an attractive alternative to the fully blown damages action for a plaintiff who seeks merely a speedy vindication and costs.[17]"

[27] Burrows & Cheer quite properly makes the point that swift disposal of a proceeding by a s 26 recommendation is unlikely to be possible where essential facts are disputed e.g. where the plaintiff disputes that it published the defamatory remarks, or disputes that it published them about the plaintiff.

[28] Here, the defendants admit both that they published the remarks complained of, and that those remarks were about Sir Tipene. The issues are whether those remarks bore the alleged defamatory meanings and whether they were honest opinion and/or are protected by qualified privilege. In this case, I am surprised that Sir Tipene did not apply under s 35 for an early conference, and at that conference apply for the Court to recommend a correction pursuant to s 26. Had this proceeding been under my control when issued in September 1997, I would have convened a

conference and inquired of Sir Tipene whether he sought a s 26 recommendation. Unfortunately, none of that happened.

[29] In the circumstances, I think it now appropriate to require Sir Tipene to elect whether or not he genuinely wishes to pursue the prayer in his statement of claim for a s 26 recommendation in respect of Radio 1ZB. I require him to indicate his election to me by way of a memorandum to be filed and served by 5 pm on Friday 3 November.

[30] If Sir Tipene does not wish to pursue that prayer, then I intend striking it out of his statement of claim and directing that the proceeding be tried before a Judge and jury. Mr Knight conceded that, reduced to a claim for damages only, the defendants had a prima facie right under s 19A to have this proceeding tried by a jury, and that it was an appropriate proceeding for jury trial. I consider that concession is properly made, because none of the matters which might argue for trial before a Judge alone feature in this case. Those matters and the principles generally are conveniently summarised in the judgment of Heron J in *Wyatt v Iversen & Anor.* 30 June 2000 Napier Registry CP15/98.

[31] If, on the other hand, Sir Tipene does wish to pursue his prayer for a s 26 recommendation, then, when making his election, I invite him also to apply to me to convene a conference under s 35, for the purpose of considering an application by him for me to exercise my power under s 26 to recommend a correction. If he does not do that, or if that conference does not result in a recommendation for a correction which Radio 1ZB then publishes, I will try this proceeding sitting alone. I will do that for two reasons:

> [a] I accept Mr Knight's submission that Sir Tipene's claim against Radio 1ZB for a s 26 recommendation takes this proceeding outside s 19A. I do not know whether that was Parliament's intention, but it is the unavoidable outcome of s 19A Judicature Act. This proceeding will simply not be one "in which the only relief claimed is ... pecuniary damages ...".

[b] I accept also Mr Knight's submission that the s 19B criterion is not met. In my view this proceeding is not one which "can be tried more conveniently before a Judge with a jury", indeed I consider trial before a Judge and jury would be altogether impracticable. That is because, if I recommended a correction under s 26, an adjournment seems unavoidable to give Radio 1ZB an opportunity to consider whether to publish the correction and, if yes, to publish it, before the jury could assess damages. Section 26(3)(c) requires the jury, in assessing damages against Radio 1ZB, to take into account any failure by Radio 1ZB to publish any correction which I recommend. A jury cannot do that unless the assessment of damages succeeds the failure to publish the recommended correction. These trial difficulties were averted to by McKay J in *TV Network Ltd v Ever Ready New Zealand Ltd* at p 452 in this way:

> "Another factor relied upon in argument was that the inclusion of the prayer for a correction takes the proceedings outside s 19A of the Judicature Act 1908 and prevents the defendant from requiring trial to be before a jury. The appellant defendants indicated that they wished to have the proceedings tried by a jury. The same result would follow, however, if the proceedings had included a prayer for a declaration or for an injunction. The Court still has the power under s 19B to order trial before a Judge with a jury if it considers it appropriate to do so. There would be practical problems in the present case in that the Judge could not order the publication of a correction until the jury had found liability, but the jury in assessing damages would not know whether or not an order for correction would be made. While I understand the appellants' concern, I do not regard this as a reason for depriving the respondents of their right to claim the relief they consider most appropriate. The mode of trial must necessarily take account of the nature of the relief sought."

[32] I indicate that, once it has become clear that this proceeding is going to trial before me sitting alone, then I will not subsequently allow Sir Tipene to amend his statement of claim by deleting his prayer for a s 26 recommendation. That is because any such request would be consistent only with inclusion of the prayer as a

device to deprive the defendants of their s 19A right to trial before a Judge and jury, and would thus constitute an abuse of the process of the Court. In *TV3 Network Ltd v Ever Ready New Zealand Ltd* at p 438, Cooke P rejected TV3's submission that Ever Ready had inserted a prayer for a s 26 recommendation in its statement of claim to pre-empt TV3's right to seek a trial by jury. Whilst I respectfully agree with His Honour, pre-emption would become blatantly apparent if a plaintiff sought to drop the prayer shortly before or at the commencement of trial.

Result

[33] The effect of this judgment is:

[a] Sir Tipene is to elect by 3 November whether or not he pursues his prayer against Radio 1ZB for a s 26 recommendation.

[b] If he does not wish to pursue that prayer, then the proceeding will be tried by a jury.

[c] If he does, then I invite him, when indicating his election, to apply for a s 35 conference to consider an application by him for a s 26 recommendation.

[d] If he does not so apply, or if the conference does not result in the publication by Radio 1ZB of any correction I recommend, then this proceeding will be tried by me sitting alone.

Costs

[34] Under the costs regime effective since 1 January, the costs of each interlocutory step in a proceeding are to be fixed and are to become payable immediately. That regime does not apply comfortably to this mode of trial application, and I anyway did not hear the parties as to costs. I accordingly reserve them. If either party feels costs are appropriately dealt with at this stage, they may apply by memorandum.

J. R. and J.

Signed at 10.15 am on Wednesday 25 October 2000

Solicitors

Phillips Fox, Wellington for the Plaintiff

Oakley Moran, Wellington for the Defendants