IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.476-SD/00

NOT RECOMMENDED

	BETWEEN	DONNA MARIE TAI TOKERAU HALL of Wellington, Solicitor Plaintiff
1453	AND	FOURTH ESTATE HOLDINGS LIMITED a duly incorporated company having its registered office in Auckland Defendant

Hearing: 5 November 2001

Counsel: J. R. Billington QC for Plaintiff
J. G. Miles QC and D. H. McLellan for Defendant

Judgment: 3 December 2001

JUDGMENT OF SALMON J.

Solicitors: Izard Weston, PO Box 5348, Wellington (Counsel: J. R. Billington QC, PO Box 4338, Shortland Street, Auckland)
Jones Fee, PO Box 1801, Auckland (Counsel: J. G. Miles QC, PO Box 4338, Auckland)

[1] In these proceedings the plaintiff alleges that the defendant has defamed her and seeks damages, including aggravated damages and punitive damages.

[2] This judgment is concerned with an application by the defendant for an order that a preliminary issue be determined. The preliminary issue which the defendant seeks to have determined is:

> Whether the particulars pleaded at paragraphs 7.1, 7.2, 7.3 (insofar as it relates to articles other than the articles sued on) and 7.4 to 7.10 of the second amended statement of claim dated 21 August 2001 can at law support the plaintiff's claim for punitive damages.

[3] Since the application was lodged a third amended statement of claim has been filed. The equivalent paragraph in the third amended statement of claim is paragraph 8. However, there is an important distinction between the two statements of claim. In the second statement of claim the pleading in paragraph 7 relates specifically to the claim for punitive damages. In the third statement of claim it relates to the claim for aggravated damages. In the third amended statement of claim the pleading in relation to punitive damages is paragraph 9 which provides:

> The publication of the Article and the behaviour of the defendant since publication of the Article have both been in flagrant disregard of the rights of the plaintiff and as such, warrants an award of punitive damages:
>
> Particulars
>
> The plaintiff repeats paragraphs 8.1 to 8.10 above.

[4] The Article was published on 31 March 2000. All but three of the 21 Articles referred to in paragraph 8 were published prior to that date. Thus, the third amended statement of claim, unlike the second, limits the actions said to warrant an award of punitive damages to the Article published on 31 March and the three subsequent Articles dated 7 April, 18 May and 25 May. No other behaviour of the defendant since publication is referred to.

[5] Upon this position being brought to the attention of the plaintiff a fourth amended statement of claim was filed together with a memorandum confirming that it was not the intention of the plaintiff to limit the third amended statement of claim in the manner outlined above. Paragraph 9 now reads:

> The publication of the Article and the behaviour of the defendant both prior to and following the publication of the Article has been in flagrant disregard of the rights of the plaintiff and as such warrants an award of punitive damages.
>
> **Particulars**
>
> The plaintiff repeats paragraphs 8.1 to 8.10 above.

[6] Thus, all the material referred to in the preliminary issue is relevant to the defendant's application.

[7] Since the hearing, and as the result of leave reserved, the defendant has filed an amended application expanding the scope of the preliminary issue to refer to "aggravated" as well as "punitive" damages.

The pleadings

[8] The publication alleged to be defamatory was one of a number commencing in May 1999 which the plaintiff alleges were intended to portray her in a negative light. The Article on which the claim is based was published on 31 March 2000. Prior to that there were 18 articles, all published during 1999, concerning the plaintiff. Since then there have been three further articles which the plaintiff claims are critical of her.

[9] The 31 March Article, which it is alleged appeared in a prominent position on page 1 of the *National Business Review*, concluded with the following sentence:

> Last week NBR reported Justice Colin Nicholson's gagging of a story being investigated by the *Sunday Star Times* about a high profile lawyer's mental health.

[10] The claim is that the manner in which these words appeared suggested that it was the plaintiff who was having mental health problems. In fact the defendant published a retraction on 7 April in which it was said that the plaintiff

> ... was not the high profile lawyer whose mental health was the subject of the *Sunday Star Times* story gagged.

[11] The plaintiff claims that this did not dispel the defamatory effect of the original Article because it was on page 7, it was included at the end of another article critical of the plaintiff and there was no apology.

[12] The statement of claim summarises the earlier articles under the following headings.

1. Those alleged to bring into question the integrity, independence and partiality of the plaintiff in her professional capacity as the lawyer representing Waitangi Tribunal claimants.

2. Articles attacking the plaintiff for receiving legal aid alleging that the plaintiff abused the legal aid process and bringing into question her capacity to act for underprivileged persons.

3. Articles presenting a biased view against parties whose interests are represented by the plaintiff, including urban Maori and Waitangi Tribunal claimants.

4. Those accusing the plaintiff of being the "mouth piece" for her husband.

5. Those accusing the plaintiff of impropriety.

6. Those speculating that the plaintiff may have acted in contempt of Court.

Rule 418

[13] Rule 418 enables the Court whether or not the decision will dispose of the proceeding to make orders for the decision of any question before trial. The power is discretionary. In *Rio Beverages Ltd v The Golden Circle Cannery* noted at [1992 BCL 569], Barker J considered factors relevant to the exercise of the discretion as including:

(a) Delay in finally resolving the proceeding;

(b) Length of the hearing of the preliminary question;

(c) Whether a decision one way or the other would result in the end of the litigation;

(d) Length of any subsequent hearing and in particular whether any subsequent hearing time would be shortened by a preliminary question; and

(e) A balancing of the advantages to the parties and the public interest in shortening litigation as against any disadvantages asserted by the defendant.

[14] The principal criterion will be referenced to the underlying purpose of the rule, namely whether the procedure is likely to expedite a proceeding saving inconvenience and expense without any countervailing injustice.

[15] The central issue in this case is whether there is really an issue of law to be determined. Mr Miles QC submits that the starting point is s.28 of the Defamation Act 1992 which provides:

> Punitive damages
>
> In any proceedings for defamation, punitive damages may be awarded against a defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff.

[16] He submits that the legislative and common law constraints on the remedy of punitive damages mean that they can only be awarded if the defendant has

intentionally or deliberately (in the sense of having subjective knowledge) disregarded the rights of the plaintiff by committing the tort complained of. The tort is the publication of the Article in March 2000. He submits that the publication of articles before that date cannot engage punitive damages because they are not connected with the tort.

[17] There is certainly a question of law involved in this contention, although to succeed the defendant would need to overcome what appear to be some strong statements suggesting the contrary. For example, in *Gatley on Libel and Slander* (9th ed) para.32.49 in relation to aggravated damages this statement appears:

> Where the plaintiff has alleged that the damage has been aggravated by the conduct of the defendant and given details of such conduct in the statement of claim evidence of such matters may be led by the plaintiff.

[18] The passage goes on to illustrate the broad ambit of the inquiry. It is said that evidence may be given that the defendant has published other defamatory words about the plaintiff, whether such words were or were not connected with the subject matter of the action, whether they were similar to or different from the words complained of, and whether publication took place prior or subsequent to the publication giving rise to the action. In support of the proposition that publication prior to that giving rise to the action may be relied upon, reference is made to *Barrett v Long* (1851) 3 HLC 395.

[19] The text goes on to say that evidence of matters tending to establish malice on the part of the defendant is, as a general rule, admissible to support a claim for aggravated damages. I can see no reason why a different principle should apply in the case of a claim for punitive damages. Notwithstanding the above comments I would certainly be prepared to allow the defendant to argue as a preliminary point the question as to whether articles published prior in time to that the subject of the article relied upon to support the claim are admissible in evidence.

[20] Mr Miles, for the defendant, goes further and submits that the Court should also determine as a preliminary question whether the content of the articles is capable of supporting a claim for exemplary or aggravated damages. Such an

examination, it seems to me, would potentially require production of a considerable amount of evidence not only as to the content of the articles themselves, but as to their truthfulness and the circumstances of their publication. I cannot see how such issues can be determined on the pleadings.

[21] Mr Miles referred in support of his submissions to a series of judgments, including *Charleston & Another v News Group Newspapers Ltd & Another* [1995] 2 All ER 313 and *New Zealand Magazines Ltd v Hadley* (CA74/96, 24 October 1996). These and the other cases cited were examples of applications to argue before trial well established principles of law.

[22] In general terms the articles in this case seem to be covered by the dictum of Lord Devlin in *Rookes v Barnard* [1964] AC 1129 at 1227:

> It is very well established that in cases where the damages are at large the jury (or the Judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.

[23] If prior articles are admissible as a matter of law it seems to me that they are relevant to issues such as those referred to in that passage. They go to an assessment of the defendant's motivation in publishing the Article.

[24] At this stage, therefore, the only question I would allow to be argued (if indeed, the defendant wishes to argue it) is whether, as a matter of law, prior publications may be relied upon to support a claim for aggravated or punitive damages.

[25] I order accordingly.

Delivered at 9.30 a.m./~~p.m.~~ on 3/12/ 2001.

J.