J4

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP NO. 86/2001

1681

BETWEEN PHILIP RUSSELL KING

Plaintiff

AND TV3 NETWORK SERVICES LIMITED

First Defendant

AND TOP SHELF PRODUCTIONS LIMITED

Second Defendant

Date of hearing: 15 August 2001

Counsel: R Cullen and D G Dewar for Plaintiffs
T Allan for First Defendant
N J Russell for Second Defendant

Judgment date: 20 December 2001

JUDGMENT OF MASTER J C A THOMSON

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[1] This is a strike out application, by the defendants.

[2] The plaintiff, Philip Russell King, is a motor vehicle mechanic trading under the name of Capital Auto Repair Services ("CARS").

[3] The first defendant ("TV3") operates a television network in New Zealand, on which is screened a consumer affairs programme called "Target".

[4] The second defendant ("Top Shelf") is a company that makes Target for TV3. It has a share capital of 100 ordinary shares that are owned by Eric Vincent Burke, who doubles as the producer of Target.

[5] In December 1998 an employee of Top Shelf contracted CARS to tune a 1984 Toyota Corolla. That employee did not divulge the identity of her employer to CARS, who assumed that she was just another customer. As arranged a CARS mechanic attended an address in order to conduct the tune-up. What he did not know was that he was being filmed by a hidden camera set up to record images and sound. The mechanic also did not know that the engine of the vehicle had been deliberately altered by Top Shelf.

[6] In the course of the tune up, CARS replaced a blocked vacuum hose and corrected the settings of various engine parts that had been altered by Top Shelf so that, with one exception (the "dwell"), they corresponded to the manufacturer's specifications. The plaintiff advises that it set the dwell to outside the manufacturer's specified range in order to increase the amount of use before a further tune-up is required. CARS tendered a bill of $61.50, which was paid by Top Shelf.

[7] Top Shelf examined CARS' work on the Toyota Corolla, and in a letter dated 26 February 1999 Mr Burke revealed to the plaintiff what it had done, and criticised CARS' work in a number of respects. In particular, he suggested that the settings for all of the relevant engine parts were not set to the manufacturer's specifications, and that the replacement hose was of an incorrect type. Mr Burke invited the plaintiff to respond before the episode of Target that was to report these findings went to air, and in an undated letter the plaintiff replied essentially disputing Top shelf's findings.

[8] On 25 April 1999 Top Shelf's conclusions regarding CARS' work on the Toyota Corolla was broadcast in an episode of Target ("the broadcast"). The

presenters made essentially the same allegations as those made by Mr Burke in his letter of 26 February, and considered CARS' performance, as well as that of the three mechanics from other companies that were tested, "very disappointing". One of the presenters suggested it was "just as well that this car has got to go back for another tune-up tomorrow".

[9] In letters dated 28 April, 29 April and 10 May 1999 the plaintiff objected strongly to the Target programme and the irreparable damage he said that it had done to his business. He also requested an opportunity to demonstrate errors made by Top Shelf and reported in the broadcast. TV3 and Top shelf agreed to convene a "challenge", to be overseen by an impartial judge. On the agreed day the plaintiff was presented with a Toyota Starlet vehicle that required tuning. He tuned the vehicle, and the result was subsequently broadcast on 29 August 1999 to be a "draw". No apology or retraction, however, was forthcoming.

[10] The plaintiff claims that the defendants made a number of errors in the broadcast, including incorrectly recording the manufacturer's specifications and therefore wrongly impugning the plaintiff's settings. He also says that the defendants incorrectly measured the plaintiff's settings, and wrongly refused to accept the plaintiff's claim that the replacement hose was appropriate. These errors were then broadcast to the nation. This, the plaintiff says, caused loss to him. He provides a breakdown of CARS' monthly gross earnings from April 1998 to February 2001 which show a dramatic downturn in turnover. The plaintiff also objects to the various statements made by the presenters in the broadcast.

Causes of action

[11] The plaintiff pleads four causes of action: breach of economic freedom, breach of the Fair Trading Act, negligence, and defamation. In relation to each of the plaintiff's claims damages of $500,000 in respect of loss of business and future earnings, $50,000 in respect of humiliation, distress, pain and suffering, and exemplary damages of $50,000 because the defendants ignored the plaintiff's advice as to inaccuracies and proceeded with the broadcast.

Breach of economic freedom

[12] This tort does not actually exist, at least in those terms. Like the defendants, I will proceed on the basis that the plaintiff is referring to the tort of unlawful interference with trade. The ambit of this tort in New Zealand was considered in *Van Camp Chocolates Ltd v Aulsebrooks* [1984] 1 NZLR 354 (CA). The Court confirmed that unlawful interference with trade is an established tort in New Zealand, the essence of which is deliberate interference with the plaintiff's interests by unlawful means.

[13] The plaintiff says that the defendants aired the broadcast for their own profit, and because of inaccuracies about which they knew or should have known, the plaintiff's previously successful business was damaged. The plaintiff says that the defendants:

> "Deliberately set out by way of an entrapment process ... and the reckless making of incorrect allegations to damage and ridicule of [sic] the plaintiff's business in the interests of entertaining the defendant's TV viewing audience."

[14] The first requirement of this tort, then, is that the interference with the plaintiff's trade be deliberate. In *Van Camp*, the Court said:

> "In principle, as we see it, an intent to harm a plaintiff's economic interests should not transmute the defendant's conduct into a tort actionable by the plaintiff unless that intent is a cause of his conduct. If the defendant would have used the unlawful means in question without that intent and if that intent alone would not have led him to act as he did, the mere existence of the purely collateral and extraneous malicious motive should not make all the difference. The essence of the tort is deliberate interference with the plaintiff's interests by unlawful means. If the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far. Moreover it would entail minute and refined exploration of the defendant's precise state of mind – an inquiry of a kind [which] the law should not call for when a more practicable rule can be adopted."

[15] To succeed, the plaintiff must show that the defendants intended to harm his economic interests, and that this intent motivated their conduct. It would seem that such intent need be the sole purpose, or even the primary purpose. But it must be a cause of the conduct, and the fact that the defendants may have foreseen that harm may result to the plaintiff as a result of the broadcast is insufficient.

[16] In my view, the plaintiff cannot show that the defendants had any intention to harm his business interests at all, let alone that this intent "caused" its conduct. The defendants clearly engineered the broadcast in an attempt to inform and entertain their audience. The plaintiff in submissions suggests that the defendants "conspired deliberately to interfere with [the plaintiff's] business and to thereby cause him damage". I accept that if the plaintiff could show this, the requirements of the tort would be satisfied. But there is no evidence of this, and while for the purpose of a strike out application the plaintiff's allegations are assumed to be true, this does not apply to allegations that are entirely speculative and without foundation: *Collier v Panckhurst* (CA136/97, 6 September 1999). As TV3 points out, there is simply no nexus between the plaintiff and the defendants to justify a conclusion that the defendants had the requisite intent. This cause of action should be struck out for this reason. I should say that if this cause of action is intended to be one of conspiracy (and it is hard to see how it could be) it is certainly, to my mind, not pleaded as such.

Breach of the Fair Trading Act

[17] The plaintiff says that in airing the broadcast the defendants engaged in misleading and deceptive conduct and made statements to mislead the public as to

the quality of the plaintiff's services. Sections 9 and 11 are relied on. In reply, the defendants cite s15(2), which provides:

> "Nothing in sections 9 to 14 of this Act applies to the broadcasting of any information or matter by a broadcasting body, not being –
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> (a) The broadcasting of an advertisement; or
>
> (b) The broadcasting of any information or matter relating to the supply or possible supply or the promotion of the supply or use of goods or services or the sale or grant or the possible sale or grant or the promotion of the sale or grant of an interest in land by –
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> (i) That broadcasting body, or where that broadcasting body is a body corporate, by any interconnected body corporate; or
>
> (ii) Any person who is a party to any contract, arrangement, or understanding with that broadcasting body relating to the content, nature or tenor of the information or matter.

[18] Section 15(3)(a) provides that "broadcasting" and "broadcasting body" have the same meanings as they have in section 2 of the Broadcasting Act 1976 (repealed by the Broadcasting Act 1989). The definition of "broadcasting" in that Act would appear to cover the airing of the broadcast. The expression "broadcasting body" is not defined in the 1989 Act, but is defined in the 1976 Act as "the holder of a warrant or authorisation in respect of a broadcasting station". This would appear to

cover TV3. Top Shelf made the episode of Target for TV3, so it would be anomalous if they were not also covered by the definition.

[19] If both defendants are broadcasting bodies for the purposes of s15, the question is then whether they fall into one of the exceptions in s15(2)(b). Section 15(2)(b)(i) does not apply, because this provision relates to "promotional material and the like for the broadcasting body's own programmes": *Ron West Motors Ltd v Broadcasting Corporation of New Zealand* (No 2) [1989] 3 NZLR 520, 541 (CA). As regards TV3, s15(2)(b)(ii) would not seem to apply either, because the broadcast did not relate to the supply of services by any person with whom TV3 had entered into a contract. The plaintiff did (unknowingly) enter into a contract with Top Shelf for the supply of services and in a sense the broadcast "related" to this supply. However, the contract could not reasonably be said to relate to the "content, nature or tenor" of the information included in the broadcast. I consider s15 is primarily concerned with ensuring that misleading material related to advertisements or promotional material is actionable under the act, and this is not the situation with which we are concerned here. The cause of action based on the Fair Trading Act therefore should also be struck out in respect of both defendants.

Negligence

[20] The plaintiff says that the defendants owed him a duty of care to fairly and accurately present the quality of service he offered to the general public and his customers. It is said that this duty was breached because of the number of alleged errors made in the broadcast, and the disparaging remarks made by the presenters.

[21] Whether a novel duty of care exists is decided by the application of the principles enunciated by the Court of Appeal in *South Pacific Mfg Co Ltd v NZ Security Consultants Ltd and Mortensen v Laing* [1992] 2 NZLR 282. The Court considered there that the correct approach is to apply the two-stage test outlined in *Anns v London Borough of Merton* [1978] AC 728 (HL), which involves first considering whether there was a sufficient relationship of proximity between the plaintiff and defendant, and secondly whether there were any policy factors telling against the imposition of a duty of care. However, the ultimate question is whether in light of all the circumstances of the case it is just and reasonable that a duty of care of broad scope was incumbent on the defendant. See also *Connell v Odlum* [1993] 2 NZLR 257 (CA).

[22] I think the nature of the relationship between the plaintiff and defendants is arguably sufficiently proximate. The defendants were in a position to reasonably foresee that damage may result to the plaintiff if care was not taken when airing the broadcast. To that extent there is a degree of reliance by the plaintiff on the defendants to exercise care, and a failure to do so risked economic harm to the plaintiff.

[23] However, the problem that the plaintiff faces in maintaining this cause of action is the one identified by the Court of Appeal in *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 (CA) and *South Pacific*. To impose a duty of care here would cut across another tort, namely defamation, which is also pleaded. Where the pleaded injury is damage to reputation, an action in defamation is the appropriate remedy. In *Bell-Booth* the Court observed that the rules of defamation have been carefully worked out over many years to provide an appropriate balance between

liability for making statements about another, and freedom of expression. Superimposing a duty in negligence may well distort that balance, and there are thus good policy reasons for refusing to impose a duty of care in such situations.

[24] The plaintiff says that *Bell-Booth* should not be followed in the case because of the House of Lords decision in *Spring v Guardian Assurance Plc* [1995] 2 AC 296. In *Spring*, the issue was whether the employer who provides to an employee a defamatory reference without reasonable care can be liable in negligence. By a majority of 4-1 their Lordships answered that question in the affirmative. *Bell-Booth* was distinguished on the basis that the relevant statements in that case were true, and *South Pacific* appears to have been distinguished (by at least two of their Lordships) on the basis that contractual obligations between the defendants prevented any duty of care being owed to the plaintiff, although this was only one of the considerations taken into account by the Court of Appeal. However, where those considerations were not present, the majority held that the concern expressed by the Court of Appeal in *Bell-Booth* and *South Pacific* as to by-passing of defamation by allowing a concurrent pleading in negligence did not apply.

[25] Applying *Spring* the plaintiff says the pleading in negligence should not be struck out simply because defamation is also pleaded. However, in *Earl v Baddeley* (HC Auckland, CP583-SD00, 28 May 2001) Nicholson J considered that the judgments of the Court of Appeal in *Bell-Booth, South Pacific* and *Balfour v Attorney-General* [1991] 1 NZLR 519 represented the law in New Zealand, and that to the extent that the reasoning in *Spring* departs from that of those cases, he preferred to apply the law in the New Zealand cases. After hearing submissions and reserving my decision, the Court of Appeal delivered its judgment in Midland

Metals Overseas PTE Limited v The Christchurch Press Company Limited and Others, CA 67/01, judgment 24 December 2001 (consideration of that judgment delayed that of the Master). In that case in a Second Amended Statement of Claim it was alleged by Midland Metals that on or about 24 December 1998 Orion, by Mr Scott, made comments to a journalist about the quality of certain Chinese imported underground electric cables. On 26 December 1998 there was published in *The Press* an article reporting Mr Scott's comments relating to problems with the quality of the cables. Similar articles were then published in the Dominion, the Evening Post and in the NZPA newswire service. It was further alleged that at a meeting on 22 January 1999 Mr Hirsch, representing Orion, met with various people including representatives of Midland Metals and repeated the contents of the article published in The Press and made further disparaging comments concerning the electric cables which are in question. All the Judges held that *Spring* had not altered the law in New Zealand. For present purposes it is sufficient to cite from the judgment of Tipping J at pp21 and 22 where he said:

> **Negligence**
>
> Whichever way the case is framed, the reality is that the appellant wishes to claim damages for negligent infliction of harm to its trading interests and trading reputation. In essence it wishes to establish the tort of slander of goods or malicious falsehood by proof of negligence rather than malice. To adopt that approach would have two consequences. First, the careful balance struck between the parties in the development of these two torts would be materially altered in favour of plaintiffs. Second, the adoption of a negligence rather than a malice criterion would bypass any need for there to be a duty of care before a negligent statement becomes actionable. The careful balance between plaintiff and defendant achieved by the development of negligence law in relation to careless statements would also be materially altered in favour of plaintiffs. Mr Fardell endeavoured to resist these consequences but ultimately was constrained to accept that this would be the effect of his client's argument. It is fair to note that in recognition

> of the duty of care issue, Mr Fardell contended that there was an arguable duty of care between the relevant parties sufficient to avoid a strike out.
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> The case of Spring v Guardian Assurance Plc [1995] 2 AC 296, to which Gault J has referred in detail, does not provide any justification for adopting the course which Mr Fardell urged upon us. In that case a duty of care was held to exist because there was sufficient proximity between the former employer and former employee to justify a duty being imposed on the employer to take care when supplying a reference about the employee. There were no policy reasons to justify denying a duty of care. Indeed there were policy reasons why a duty of care should be recognised because qualified privilege would otherwise have defeated a claim which was seen as meritorious in policy terms.
>
> In the present case, there is clearly no sufficient proximity between those who published the words and those who are said to have been harmed by them. There was no relationship between them save that created by the publication in issue. To ascribe proximity on that basis would be circular and tend to beg the question. There are also major policy reasons why the law should decline to recognise a duty of care in these circumstances. These policy reasons relate to the undesirability of upsetting the careful balance between private interests and freedom of speech which the law of defamation and the associated torts have struck. In this respect I entirely agree with what was said by this Court in Bell Booth Group v Attorney-General [1989] 3 NZLR 148, 156. The common law rules relating to defamation and the associated torts, and the use of negligent words, represent compromises gradually worked out by the Courts over the years between the competing values of personal reputation and economic interests on the one hand, and freedom of speech on the other. There should not lightly be altered. They should certainly not be subject to the major realignment suggested by the appellant in this case which would bring about a new and significant fetter on freedom of speech affecting not only the news media but citizens generally.

[26] In my view, the present pleading of negligence would cut across the defamation claim, and is essentially a claim for loss of reputation. Defamation is therefore the appropriate cause of action. An example of how defamation is subsumed by the presence of a negligence claim is the pleading by the defendants of qualified privilege. Qualified privilege is a defence to defamation that reflects the public policy view that in certain circumstances a person should be liable for

statements that he or she makes only if the person about whom the statements are made can prove that they were made maliciously. Negligence, on the other hand, does not require the plaintiff to prove malice. Therefore, by allowing the plaintiff to sue in negligence over a loss of reputation would unacceptably cut across the tort of defamation, and therefore the defendants' right of free expression.

[27] A further policy consideration which told against the imposition of a duty of care in *South Pacific* was the availability of other remedies for the plaintiff. In this case, while the defendants did not refer to it, it seems likely that a further remedy was available to the plaintiff, although the time limits for exercising this remedy have presumably expired. Section 4 of the Broadcasting Act 1989 requires broadcasters to maintain in programmes and their presentation, standards which are consistent with, inter alia, the privacy of the individual and any approved code of broadcasting practice. The code applying to free-to-air television requires broadcasters, in the preparation and presentation of programmes, to be truthful and accurate on points of fact. If a broadcaster breaches this requirement, an aggrieved person can complain to the broadcaster and then to the Broadcasting Standards Authority, which may inter alia order the broadcaster to pay compensation of up to $5,000. Such compensation will be little comfort to the plaintiff, who claims he has lost his business, but if remedies in this area are to be increased this is a matter for Parliament.

[28] Clearly the real issue in this case is whether the defendants defamed the plaintiff. The plaintiff says that they did by expressly or implicitly stating that the plaintiff's business did not provide reasonable service and that it was unreliable. He says the defendants made a series of false statements about the plaintiff, in

particular that the plaintiff wrongly tuned the car originally supplied, and that is used an incorrect vacuum hose as a replacement part, and made incorrect settings.

[29] In submissions, the first defendant says that the statements relied on by the plaintiff do not bear any defamatory meaning, but simply criticise the work of the plaintiff's mechanic (not the plaintiff himself) as being substandard. Even if the statements bear the meanings pleaded by the plaintiff, and thereby criticise the plaintiff's business, the defendants say they are not sufficiently disparaging of the plaintiff personally to warrant a defamation action. In this regard I note that the plaintiff is suing in his personal capacity. The second defendant says that none of the impuned statements identify the plaintiff personally, and says that any pleaded innuendo confronts the difficulty that the plaintiff was not present during the tuning of the car, and played no part in it.

[30] There are three requirements of the tort of defamation. The plaintiff must establish that a defamatory statement has been made, that it was made about the plaintiff, and that it was published by the defendant. There is no doubt that the third requirement has been satisfied.

[31] The important question therefore is whether the statement is defamatory at all, and, if it is, whether it was made about the plaintiff. Generally, disparaging remarks about goods (and presumably services) provided by a trader will not be actionable: see Todd, The Law of Torts in New Zealand (at 808) and Gatley on Libel and Slander (at 62), and the cases cited therein. An exception was postulated by Cozens-Hardy MR in *Griffiths v Benn* (1911) 27 TLR 346 (CA):

> "On the other hand, the words used, though directly disparaging goods, may also impute such carelessness, misconduct, or want of skill in the conduct of his business by the trader as to justify an action of libel."

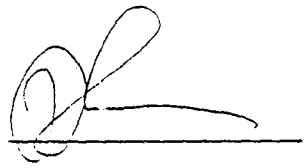
[32] As noted by Todd, such a line is very difficult to draw. After all, virtually any allegation of substandard work reflects on the person doing the work. The first defendant says that all we have here is an allegation by TV3 of substandard workmanship, with no additional slur of the character of the person concerned, whether as a man or as a tradesman. While in one sense the first defendant may be right, I keep in mind that to succeed in a strike out application the defendants must show that the plaintiff's cause of action is untenable and has no chance of success.

[33] The other requirement of the tort is defamation, that the impuned statement be about the plaintiff, can perhaps be disposed of in a similar way. I am assuming, although it is not said explicitly by the plaintiff, that he is pleading an innuendo in that people who knew that he was the owner of CARS would consider that the statements made by Target reflected personally on him. Clearly the plaintiff is suing personally because CARS is not an incorporated company, and therefore has no separate legal personality. The plaintiff is a small business owner who trades on his reputation. I consider a slur on the way his business trades could be said to be a slur on him personally. The plaintiff was also named personally in the second broadcast, although presumably much of the damage to his business was already done by then. It would, in my view, be premature to strike out the cause of action in defamation but the Statement of Claim clearly needs extensive amendment, particularly as to innuendo.

Other complaints about the Statement of Claim

[34] The first defendant says, first, that the Statement of Claim is prolix; that matters not related to a cause of action, and matters of evidence are pleaded, that the pleadings contain irrelevant material and are unintelligible, and that the damages claim is inflated. It is true that some of the pleading appears to relate to evidence, but matters of fact and matters of evidence are often difficult to distinguish. The first defendant says that the defendants should not be put to the time and expense of replying, although it is somewhat ironic that it has done just that. While it may be considered that amendments to the Statement of Claim should be made, these will (apart from the necessity to amend the defamation cause of action) be cosmetic only. However the result is that all causes of action against both defendants, apart from that pleaded in defamation, are struck out. The plaintiff is to file and serve an Amended Statement of Claim within 28 days hereof. Costs reserved.

Dated at Wellington this 20 day of December 2001 at 9 am/pm.



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