IN THE COURT OF APPEAL OF NEW ZEALAND CA67/01

BETWEEN	MIDLAND METALS OVERSEAS PTE LIMITED Appellant
AND	THE CHRISTCHURCH PRESS COMPANY LIMITED First Respondent
AND	ORION NEW ZEALAND LIMITED Second Respondent
AND	T L SCOTT Third Respondent
AND	S J J HIRSCH Fourth Respondent
AND	WELLINGTON NEWSPAPERS LIMITED Fifth Respondent
AND	THE NEW ZEALAND PRESS ASSOCIATION Sixth Respondent

Hearing: 5 September 2001

Coram: Gault J
Keith J
Blanchard J
Tipping J
McGrath J

Appearances: J T R Fardell and J M Harkess for Appellant
J B Stevenson and J O Atkinson for First Respondent
F Miller and J S Baguley for Second, Third and Fourth Respondents
M J Mallon for Fifth and Sixth Respondents

Judgment: 24 October 2001

JUDGMENTS OF THE COURT

Judgments

	Para No
Gault, Keith and McGrath JJ	**[1] –[44]**
Blanchard J	**[45] – [57]**
Tipping J	**[58] – [66]**

GAULT, KEITH AND McGRATH JJ
(DELIVERED BY GAULT J)

[1] This is an appeal against the judgment of Chisholm J delivered in the High Court at Christchurch on 11 December 2000 on review of a decision of Master Venning delivered on 8 March 2000.

[2] The appeal is against orders striking out pleadings. The respondents have cross-appealed seeking to reinstate an order striking out parts of a pleading made by the Master which was reversed by Chisholm J to the extent of giving the plaintiff leave to reformulate that pleading.

[3] The appellant, Midland Metals, is a Singaporean company that supplied cables for electrical networks to a subsidiary of Orion New Zealand Limited, the second respondent, of which the third and fourth respondents, Messrs Scott and Hirsch, are employees. These three respondents are together referred to as the Orion Respondents. The first respondent is a publisher of *The Press,* the fifth respondent is the publisher of *The Dominion* and *The Evening Post* and the sixth respondent publishes a newswire service. These three respondents can be referred to conveniently as the media respondents.

[4] By a second amended statement of claim it is 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 is 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.

[5] Midland Metals commenced the present proceeding. It alleged defamation and malicious falsehood against all of the respondents. Breach of the Fair Trading Act was pleaded against Orion and its two employees and negligence was pleaded against all respondents except Mr Hirsch. Special, general and punitive damages were sought. In addition aggravated damages were sought.

[6] Three matters arise for our consideration. One is whether the allegations in negligence were rightly struck out by the Master as affirmed by Chisholm J. The other two matters arise from the pleading in para 32 of the Statement of Claim which is part of the pleaded cause of action in defamation against the first, second, third, fifth and sixth defendants but is repeated also in the second cause of action alleging defamation against the second and fourth defendant and in the allegations of malicious falsehood. The relevant parts of the clause read:

> The First, Second, Third, Fifth and Sixth Defendants have acted in flagrant disregard of the Plaintiff's rights, and have exacerbated the harm to the Plaintiff of the Articles, in all or any of the following respects.
>
> **First, Fifth and Sixth Defendants**
>
> (a) Failed or refused to apologise as pleaded in paragraph 31 herein.
>
> (b) Took no steps to verify the facts it was publishing and/or was reckless as to the truth or falsity of the articles content.
>
> (c) Breached or permitted a breach of the Journalist's Code of Ethics in that:

(i) failed to fully and properly investigate the facts behind the Articles, and at no stage approached or sought comment from the Plaintiff or the manufacturer of the cables;

(ii) distorted the true position by providing an incorrect emphasis on the cables as the source of the problem, rather than the terminations and joints used with the cables; and

(iii) placed unnecessary and inflammatory emphasis on the Chinese origin of the cables.

(d) Breached or permitted a breach of the Human Rights Act through the emphasis throughout the Articles placed on the Chinese origin of the cables, and bearing implications that denigrate an ethnic group's manufacturing abilities and ethics.

The points at issue are first, whether the allegation of exacerbation of harm to the plaintiff should have been struck out or may be reformulated to clarify that it is directed only to the claim for compensatory damages as Chisholm J directed (the earlier allegation of aggravated damages having been abandoned) and secondly whether the allegation of breach of the Human Rights Act was rightly struck out.

[7] The context in which the questions arise can be briefly described by reference to the background.

The Master's Decision

[8] The first respondent sought orders striking out the claim for exemplary/punitive damages in the claim for defamation and injurious falsehood and an order striking out the cause of action in negligence. Orion and Mr Hirsch sought an order striking out the separate defamation cause of action against them. All of the respondents, in addition to the first respondent, sought orders striking out against them the pleading of exacerbation of harm, the claims for exemplary/punitive damages and the causes of action in negligence. All respondents sought certain further particulars and security for costs. There was a cross-application before the Master on behalf of Midland Metals to strike out part of the statements of defence.

[9] In summary the Master's orders were as follows:

(a) The plaintiff's pleading that the actions of the defendants had exacerbated the harm to the plaintiff should be struck out. This followed from his finding that the plaintiff could not claim aggravated damages because, being a corporation, it could not claim in respect of hurt and injured feelings.

(b) The plaintiff's pleadings relying on the Human Rights Act should be struck out because the words published did not come within s61 of the Human Rights Act (racial disharmony). While the Master thought that the use of the description in the published articles of "Chinese Cables" might potentially be insulting, the articles could not be construed as "likely to excite hostility against" or "bring into contempt" the Chinese community within New Zealand.

(c) The remaining strike out applications in relation to the causes of action in defamation and injurious falsehood were dismissed.

(d) The causes of action in negligence should be struck out on the basis that the pleadings were an attempt to establish a concurrent liability in negligence for injury to reputation contrary to the decisions of this Court in *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148, *Balfour v Attorney-General* [1991] 1 NZLR 519 and *South Pacific Manufacturing Co Ltd v NZ Securities, Consultants and Investigations Ltd* [1992] 2 NZLR 282, 298.

(e) The plaintiff's applications to strike out the defences were dismissed.

(f) The requests for further particulars were granted in part.

(g) The plaintiff was required to provide security for costs.

The High Court Decision

[10] Midland Metals sought review of the Master's decision seeking to have reinstated the pleading of exacerbation of harm, the pleading relying upon breach of the Human Rights Act and the claims in negligence. Relevant for present purposes are the conclusions of Chisholm J that:

(a) Midland Metals was entitled to refer to exacerbation of harm in support of a claim for higher compensatory damages notwithstanding that it was a corporation, but that the pleading could not be relied upon in support of a claim for punitive damages. Accordingly leave was given to reformulate the claim so that exacerbation of harm should be confined as going to the claim for compensatory damages.

(b) The plaintiff's claim to rely on the Human Rights Act was rightly struck out. Although the Master failed to apply the correct test, namely whether the words were capable of bearing the meaning alleged, even on the correct test the claim would have been struck out.

(c) The claims in negligence were rightly struck out.

Decision

[11] The issue concerning the plea of exacerbation of harm to the plaintiff arises on the cross-appeals of the respondents. That conduct surrounding the defamatory publication exacerbated the harm to a plaintiff is a familiar allegation. However under s28 Defamation Act 1992 punitive damages may be awarded only where the defendant has acted in flagrant disregard of the rights of the plaintiff. That is separately pleaded in this case. There is thus no room for an allegation of exacerbation of exemplary damages. No claim for aggravated damages was, or could be, advanced. As the Master held, and the Judge agreed, in its context in para 32 the allegation of exacerbation of harm could not stand. However, Chisholm J accepted a submission on behalf of the plaintiff that exacerbation of harm could be pleaded as a material fact to support a higher level of compensatory damages. He therefore gave leave to reformulate the pleading to that effect.

[12] Section 6 of the Defamation Act provides that a defamation proceeding against a body corporate will fail unless the publication caused or is likely to cause pecuniary loss. Although not entirely clear on its wording, we have no doubt that the legislative intent was to limit compensatory relief for a corporate plaintiff to pecuniary loss. That would be consistent with the previous law: *Gatley on Libel and Slander* (9th Ed) para 8.16 and reflects the view of the McKay Committee; *Report of the Committee on Defamation* (1977). Pecuniary loss to a corporate plaintiff, including of course loss in the value of its goodwill, will be a matter for

proof at trial. It cannot affect the outcome of that whether or not there has been pleaded conduct exacerbating the harm to the plaintiff. The harm will be provable in either event. We think it was unnecessary for the plaintiff to have leave to reformulate the claim for compensatory damages. Its only effect would be to risk perception of re-introduction of a claim for aggravated damages which would be confusing. The cross-appeals are allowed. The order granting leave to reformulate the pleading is quashed.

[13] The allegation of breach of the Human Rights Act involves two separate allegations. They are both matters presently pleaded as warranting punitive damages. The first is of breach of the Act (unlawfulness), the second is of slur on a racial (ethnic) group.

[14] We are satisfied that use of the description "Chinese cables" in contexts referring to the price and suitability of cables in use by a power network company rightly has been held not capable of exciting hostility against or bringing into contempt persons in, or coming to, New Zealand on the ground of race or ethnic origin so as to contravene s61. Nor do we consider such use is capable of "bearing implications that denigrate an ethnic group's manufacturing abilities and ethics". The allegation simply raises racism that is not there and tends to trivialise the human rights legislation and the values underlying it.

[15] Notwithstanding all Mr Harkess was able to say on possible implications that might be attributed to the expression, we are satisfied the clause in the pleading was rightly struck out.

[16] There remain the allegations of negligence. To be clear, we emphasise that the allegations the appellant wishes to retain are of negligence giving rise to damages for injury to reputation. Mr Fardell fairly acknowledged that unless he could persuade the Court to overrule or narrow the generally recognised scope of its previous decisions, they preclude the course he wishes to take.

[17] The effect of the previous decisions are summarised in the judgment of Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* (p298) as follows:

> Conversely, a point telling against recognising a new common law duty of care arises when such a duty would cut across established patterns of law in special fields wherein experience has shown that certain defences, not dependent on absence of negligence, are needed; or wherein an adequate remedy is already available to a party who takes the necessary steps. A leading instance of the latter situation is to be found in the speech of Lord Brandon of Oakbrook in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785, 819: his Lordship indicated that the ordinary law of contract and assignability of rights, in an intricate area of commercial law, would have sufficiently protected the buyers if they had been properly advised. As to the former situation, in *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 this Court declined to extend negligence law to a claim that the reputation of the plaintiffs had been damaged by a television broadcast. In the field of injury to reputation the defences of justification, privilege and fair comment, and the balance of competing interests represented thereby, would have been undermined by superimposing a right to sue in negligence. The approach was taken a degree further in this Court in *Balfour v Attorney-General* [1991] 1 NZLR 519, 529, where it was said that the cause of action unsuccessfully alleged came "perilously close to defamation" and that any attempt to merge defamation and negligence is to be resisted.

[18] Mr Fardell submitted that this line of New Zealand authorities should be revisited in light of the decision of the House of Lords in *Spring v Guardian Assurance Plc* [1995] 2 AC 296, a case in which a former employer was held to be liable in negligence to the plaintiff, in respect of whom a defamatory reference written without reasonable care was provided on request to prospective new employers.

[19] The facts of the *Spring* case are a long way away from those of the present case, but the decision represents an instance where a claim in negligence succeeded in respect of negligent statements damaging to the plaintiff's reputation. The circumstances were such that the defence of qualified privilege would have been raised to a claim in defamation and the need to prove malice seemingly would have defeated the plaintiff. All but one of the members of the House of Lords referred to the decisions of this Court and, while not disagreeing with the outcome of the

particular cases, the majority found that they should not preclude relief in the case before them.

[20] In the course of argument two principal matters were canvassed. The first was whether there are policy justifications for this Court to depart from the position taken in the series of relatively recent cases. The second was whether, if we were to do so, the circumstances of the case are such as to give rise to the pleaded duties of care.

[21] Mr Fardell argued that just as in the *Spring* case, the availability of a claim in negligence may be necessary to do justice in the particular case, even though this is not a case giving rise to qualified privilege. He outlined the case for the appellant as importer of the cable, which, because of the public criticism of its quality, has suffered serious harm in that orders were cancelled and its business in cables has been effectively destroyed, yet there may be no means for securing a remedy even if the statements are shown to be false and to have been made or published without reasonable care. He referred additionally to the defences already raised that the published articles do not identify the plaintiff. They refer only to imported "Chinese cables". This he said, indicates the possibility that damages for the serious harm to the goodwill of Midland Metals will be unobtainable.

[22] It was submitted that unless able to sue in negligence Midland Metals risks falling between available causes of action even though its business has been seriously damaged by the publication of false statements. The defamation cause of action may prove futile because the publications did not identify the plaintiff, and slander of goods (malicious falsehood) may not succeed because the statements may have been negligent but not malicious.

[23] As the hearing progressed it emerged that the effect of what is really sought by those advising Midland Metals is the substitution for the malice element in slander of goods of the lesser element of lack of reasonable care. Reference was made to the recent decision of this Court in *Lange v Atkinson* [2000] 3 NZLR 385 in which the Court recognised that absence of reasonable or responsible conduct might be a legitimate consideration in considering misuse of an occasion of privilege.

This, it was submitted, indicated a willingness on the part of the Court to move towards providing remedies in circumstances in which the media has published false statements causative of economic loss without taking reasonable care to investigate their accuracy. Counsel recognised, however, that the judgment in that case left him some distance short of his goal.

[24] The requirement of malice in the tort of slander of goods reflects a balancing of factors. The potential for damage to a trader's business by untrue statements has been weighed against the undesirability of constraining free expression in the ferment of trade. The contrast with strict liability for publication of false statements defamatory of a person reflects the lesser value attributed to commercial repute or standing. Having regard to what constitutes malice, and Lord Diplock's statement in *Horrocks v Lowe* [1975] AC 135, 150 has equal application to slander of goods, we are not convinced there is any need to disturb the present balance.

[25] Nor are we persuaded that there is a need to superimpose on the existing torts of defamation and slander of goods, a tort of negligent untrue statements causing damage to reputation. Certainly in the *Spring* case their Lordships were careful in various ways to limit the views expressed to the circumstances of the case before them. Lord Keith of Kinkel, who dissented, referred to the three New Zealand cases and concluded (p313):

> The views expressed in these three cases decided in a jurisdiction which is well known to be tender in its approach to claims in negligence involving pure economic loss are of great importance. The process of reasoning which they contain is in my opinion entirely sound and apt to be followed and applied in the present case.

[26] Lord Goff of Chieveley reasoned that a finding of liability was justified on the principle established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. But he said (p316):

> [I] have come to the conclusion that, if the *Hedley Byrne* principle cannot here be invoked, or a contractual term to that effect cannot be relied upon by the plaintiff, the appeal ought to be dismissed; because in those circumstances it would be a simple case of the defendants having negligently made a statement damaging to the plaintiff's reputation. In such a case, in agreement with the reasoning of the

> Court of Appeal, I do not see how there can be a liability upon the defendants in negligence consistently with the policy of the law established in the law of defamation in relation to the principle of qualified privilege which, in the absence of malice, protects from liability the maker of a statement made on the privileged occasion.

[27] Lord Lowry agreed with Lord Goff, Lord Slynn of Hadley and Lord Woolf on the issue of negligence (though they advanced different reasons). He expressly agreed with Lord Goff's interpretation of *Hedley Byrne* and focussed on public policy issues. He did not refer to the New Zealand cases though the tenor of his speech, so far as he upheld a cause of action in negligence, is inconsistent with them. He said (p325):

> The defendants have two main arguments. The first is that to confer on the plaintiff a cause of action in negligence would distort and subvert the law of defamation in cases where the defence relied on is one of qualified privilege, that is, where, on an occasion when he has either a duty to communicate information or a legitimate interest of his own to protect, the defendant in good faith and without malice defames the plaintiff. I believe that the answer to this argument is that a person owes a general duty, subject to the principles governing the law of defamation and to the relationship, if any, between the defamer and the defamed, not to defame any other person, whereas a liability based on negligent misstatement can exist only if (1) damage is foreseeable (and damage occurs) and (2) there is such proximity between the maker and the subject of the misstatement as will impose a duty of care on the former for the protection of the latter. The existence of that foreseeability and that proximity between the plaintiff and the defendant is a justification, not for *extending* the liability for *defamation* by dispensing with the need for malice, but for bringing into play a *different* principle of liability according to which, in a restricted class of situations, a plaintiff can rely on *negligence* as the ingredient of the defendant's conduct which is essential to the existence of that liability.

[28] Lord Slynn did deal with two of the New Zealand cases. He distinguished the *Bell-Booth* case as directed to negligently made true statements in respect of which he saw the decision as plainly right. He disapproved of the *Balfour* case the result of which he regarded as "extraordinary". He approached the case before him by reference to the established principles for assessing whether a new duty of care should be imposed and concluded (p337):

> I do not for my part consider that to recognise the existence of a duty of care in some situations when a reference is given necessarily means that the law of defamation has to be changed or that a substantial section of the law relating to defamation and malicious falsehood is "emasculated" (Court of Appeal, at p.437). They remain distinct torts. It may be that there will be less resort to these torts because a more realistic approach on the basis of a duty of care is adopted. If to recognise that such a duty of care exists means that there have to be such changes – either by excluding the defence of qualified privilege from the master-servant situation or by withdrawing the privilege where negligence as opposed to express malice is shown – then I would in the interests of recognising a fair, just and reasonable result in the master-servant situation accept such change.

[29] Lord Woolf emphasised that the claim in the case was in respect of economic loss, and "not concerned with a claim for mere loss of reputation". He nevertheless considered the policy factors arising from the existence of the alternative causes of action in defamation and injurious falsehood. He began saying (p346):

> There would be no purpose in extending the tort of negligence to protect the subject of an inaccurate reference if he was already adequately protected by the law of defamation. However, because of the defence of qualified privilege, before an action for defamation can succeed (or, for that matter, an action for injurious falsehood) it is necessary to establish malice. In my judgment the result of this requirement is that an action for defamation provides a wholly inadequate remedy for an employee who is caused damage by a reference which due to negligence is inaccurate. This is because it places a wholly disproportionate burden on the employee. Malice is extremely difficult to establish. This is demonstrated by the facts of this case. The plaintiff was able to establish that one of his colleagues, who played a part in compiling the information on which the reference was based, had lied about interviewing him, but this was still insufficient to prove malice. Without an action for negligence the employee may, therefore, be left with no practical prospect of redress, even though the reference may have permanently prevented him from obtaining employment in his chosen vocation.

[30] Lord Woolf distinguished the *Bell-Booth* case agreeing that there should be no claim for damages for the publication of a true statement. But with reference to the broader statements of principle in *Bell-Booth* he said (p349):

> The principal point which the plaintiff has to overcome in respect of the reasoning of Sir Robin Cooke P. is the fact that to allow an action for negligence would be to introduce a "distorting element" into the law of defamation, that is, into the area of law which deals with

> unjustified injury to reputation, which is an area of the law which up to now defamation has had to itself. I can well understand why Sir Robin Cooke P. should have made the comment that he did about the case which was before him where there was publication on television, but in the case of a reference there is unlikely to be other than limited publication. If there is any republication this is unlikely to give rise to an action for negligence since the recipient of the reference will neither owe a duty of care to the subject of the reference nor, normally, be guilty of any lack of care in republishing the reference. The extent of any intrusion into the area of the law covered by defamation will therefore be circumscribed.

[31] Referring to the *South Pacific Manufacturing Co* case, Lord Woolf again distinguished the fact situations and commented on the greater proximity between an employee and an employer giving a reference. Because it was not a claim for mere loss of reputation he said (p350):

> I am afraid I do not accept the logic of the argument that to have an action for negligence will undermine the law of defamation. If this appeal is allowed, this will leave the law of defamation in exactly the same state as it was in previously. The plaintiff would not have succeeded in an action for defamation. Negligence has always been an irrelevant consideration (I am not referring to quantum of damages) and it will remain irrelevant in an action for defamation. In the present context the two causes of action are not primarily directed at the same mischief although they, admittedly, overlap. I have already indicated that an action for negligence is concerned with the care exercised in ascertaining the facts and defamation with the truth of the contents of what is published.

[32] Finally Lord Woolf did not consider the fundamental freedom of speech should outweigh the value for an individual of the opportunity to earn a livelihood in his chosen occupation.

[33] It is plain that there is not to be found in the speeches of their Lordships any general rejection of the principles running through the three decisions of this Court. At the highest, three of their Lordships must be regarded as confining them to the extent of allowing a claim in negligence by a former employee in respect of whom a reference was provided to a prospective new employer. Apart from that, some, perhaps a majority, appear to have supported the view that, save in a *Hedley Byrne* situation, a claim for injury to reputation should not be available in negligence.

[34] While we can readily accept the desirability of providing a remedy in Mr Spring's case and accept that such cases might justify imposing a duty of care in negligence, we do not see that referring to the harm in that case as economic loss distinguishes it from defamation cases. Nor do we find in the speeches of their Lordships guidance on when it might be appropriate to draw a new balance with the right of freedom of expression and circumvent the requirement to prove malice in order to secure a remedy for the publication of false statements injuring reputation. Certainly there is nothing in those speeches inviting an analogous approach in the circumstances of the present case.

[35] It must be emphasised that in the present case, as Mr Stevenson accepted, we are concerned only with claims in negligence for injury to reputation. We are not required to deal with claims in negligence giving rise to economic loss. In that circumstance we are not persuaded that there is in fact a gap in the law which ought to be filled either by modifying the tort of slander of goods to alter the requirements for plaintiffs to prove malice nor to condone claims in negligence to address injury to reputation by departing from the earlier decisions of the Court.

[36] We were also presented with arguments for and against recognising duties of care should claims in negligence be available.

[37] The allegations against the media respondents were that they owed to Midland Metals duties to adequately investigate before publishing and to seek comment from persons who, or whose goods, were disparaged. A further duty to publish truth was not pursued. The allegations against Orion and Mr Scott were that they owed duties to Midland Metals to refer journalists to the persons whose goods were disparaged and to communicate the truth.

[38] We are satisfied that the alleged duties of care are not maintainable either on *Hedley Byrne* principles or upon the general principles for determining the existence of duties of care in novel situations distilled in the *South Pacific Manufacturing Co* case.

[39] So far as the media respondents are concerned, there is not the necessary special relationship or proximity between a newspaper publisher and persons who (or whose goods) are referred to in a news item. That is clear from the judgments of this Court in *Fleming v Securities Commission* [1995] 2 NZLR 514, 533 (per Richardson J), 534 (per Casey J). To impose such duties would be to fundamentally change the business of newspaper publishing.

[40] The position with respect to Orion and Mr Scott is no different. They are alleged to have made untrue statements concerning the cables to a journalist without taking care to refer the journalist to Midland Metals. As Mr Miller, who appeared for the Orion respondents pointed out, the allegation seems to assume that persons interviewed have some control over the media and the steps they take prior to publication.

[41] Orion was not a purchaser of cables from Midland Metals. It was not asked by Midland Metals either for advice about the cables or to communicate information about them to the journalist. There was no reliance; Midland Metals did not even know of the journalist's approach. There can be no general proximity between an importer/supplier and an ultimate user of cables or other goods. There is just no sufficient basis for a duty of care of the kind alleged. The claims were rightly struck out.

[42] We agree with the judgments below. In the absence of a special relationship between the maker of the statement and the person about whom (or whose goods) the statements are made, or assumption of responsibility by the former, it would be an unwarranted intrusion upon freedom of expression to impose duties of the kind proposed.

[43] The appeal, accordingly, also is dismissed.

[44] The respondents are entitled to costs which we fix at $5,000 for each respondent or group of respondents represented respectively by Mr Stevenson, Mr Miller and Ms Mallon, in each case with disbursements including the reasonable travel and accommodation expenses of counsel as approved by the Registrar.

BLANCHARD J

[45] The law has long drawn a distinction between making a false statement about a trader and making a false statement about that trader's goods. If the disparagement relates to the goods alone and cannot fairly be taken to be an adverse reflection on the reputation of the trader, no tort is committed unless the statement about the goods was made with an improper motive (maliciously). I put to one side the possibility that a breach of the Fair Trading Act 1986 may in some circumstances have been committed.

[46] If the statement reflects badly on the trader's reputation a claim in defamation against the maker does not require proof of an improper motive unless the statement was made on an occasion of qualified privilege. It is necessary to show only that the statement was defamatory and referred to the plaintiff. The law presumes that it was made with malice. It is for the defendant then to prove that the statement was true or to prove that it was an honest expression of opinion based on facts which were true. However, where the plaintiff is a corporation it is not enough for it to show damage to its reputation (its good name). It cannot recover damages unless it can show that it has suffered or is likely to suffer pecuniary (economic) loss – damage to its goodwill reflecting business lost or likely to be lost as a result of the defamatory statement (see s6 of the Defamation Act 1992).

[47] In this case Midland says a false statement has been made about the cables which it supplied but is concerned that it cannot succeed in a claim for slander of goods (a species of injurious falsehood) because it cannot say that Orion and its representatives or the newspapers were maliciously motivated.

[48] The newspaper articles did not mention Midland by name as the supplier of the cables. Its legal advisers fear that notwithstanding the allegedly defamatory character and alleged falsity of the words, in its cause of action in defamation Midland may not be able to establish that they reflected on its reputation by implying that Midland was the type of organisation which was prepared to supply faulty power cables. If a reader of the publication is unable to make the connection

between Midland and the cables, it is argued, it may not be possible for Midland to show that its goodwill has suffered as a result.

[49] It might be thought, however, that those readers who make decisions about purchasing and installing power cables in New Zealand would be likely to know of Midland as the supplier and so be able make the connection. (Whether they would see the article as a reflection on Midland's general reputation is another issue). It is the decisions of such persons as to future purchases which have the potential for affecting Midland's trading position. The real "sting" in the article must therefore be taken to be in its impact on the minds of such persons. To the extent such a "sting" exists, Midland may be able to establish that the article is defamatory and has caused it pecuniary loss. So, if the matter is really as serious as Midland claims, it would not seem to be without a remedy.

[50] Arguing its case on the basis of a perceived necessity in the particular circumstances, the plaintiff did not appear fully to appreciate the fundamental alteration which acceptance of its argument would bring about in the careful balance which has been worked out in the law of defamation (and allied torts) over a long period of time. That balance represents an endeavour to accommodate to the greatest extent possible the often irreconcilable values of freedom of speech and individual reputation. Generally speaking, liability in defamation turns on questions of factual truth and honesty of opinion and the circumstances in which a publication is made, not upon the quality of the process of information gathering which led to the publication. It is true that in recent times the law of qualified privilege has proved problematical in some aspects and that some modification in the law has occurred, as in *Spring v Guardian Assurance PLC* [1995] 2 AC 296 and *Lange v Atkinson* [2000] 3 NZLR 385. In the first instance a negligence action was permitted for damage done by an incorrect reference; in the second the approach of the Court to the question of whether an occasion of privilege is exceeded has some resemblance to an assessment of whether there has been negligence, although couched in terms of irresponsibility or recklessness.

[51] But changes of this kind do not have the significant impact on the general balance of the law as would occur if, in response to the plaintiff's perception of a

particular problem, the Court were to allow its case to go to trial on the present pleading of negligence. The law of defamation would be in danger of being subsumed within the law of negligence. The defences normally available to a defamation defendant, as delineated in the Defamation Act, would be able to be circumvented.

[52] Counsel also accepted during the course of argument that, in practical effect, what was being sought would permit a proceeding equivalent to slander of goods in which it would be sufficient to show that the defendants had been careless in their statements about the plaintiff's goods, but without proving malice.

[53] The Court is urged to follow the example of the House of Lords in *Spring*. There negligence was allowed to make a small inroad into the law of defamation because it was considered that otherwise somebody who was the subject of a carelessly prepared reference would be left without any redress for the damage done to his employment prospects. But, in determining that a duty of care was owed to him by the giver of the reference, their Lordships were changing the law in an incremental and confined way. The relationship between the parties arose from a contract and was very close. Mr Spring intended his former employer to give a reference to the prospective new employer. In supplying the reference Guardian was doing something commonly done by employers and must have known that Mr Spring was relying upon it. It could be taken to have assumed a responsibility towards him. The analogy with *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 was obvious. The publication was of extremely limited extent – only to the new employer. In these circumstances it was understandable that the House of Lords considered that there was a relationship of proximity and that it was just and reasonable to impose liability in negligence. There were found to be no policy considerations pointing the other way

[54] What Midland now seeks from this Court is something of a different order of magnitude. It asks us to permit it to sue the defendants for damage caused by breach of alleged duties of care, namely, in the case of the newspapers, to adequately investigate the subject matter of the publication and to seek comment before publishing. (An alleged duty to publish only the truth was not pursued.) It would

appear that these duties would apply in the case of any media defendant. It seems also that any person being interviewed by a journalist in connection with a forthcoming story would be under a duty to refer the journalist to any person potentially affected by it. So, where there was to be a statement about goods in the story, the person being interviewed would be under a duty to refer the journalist to the supplier of the goods. These would be far reaching duties which a newspaper, its reporters and their interviewees would have to fulfil many times every day. They would extend apparently to Press Association members in receipt of material through that organisation.

[55] Mr Fardell, for Midland, was obliged to accept that the newspaper defendants had no connection with the plaintiff other than as a subject of an inquiry by a journalist. To them, it seems, this was a routine news story. Orion is an operator of an electricity distribution business and hence is a user of cables. An associated company had purchased and installed the allegedly faulty cables. There was no other connection between Orion and Midland. It therefore cannot plausibly be suggested that Midland was relying upon any of the defendants, as Mr Spring did on Guardian, or that any of the defendants assumed a responsibility to act in a particular way towards Midland. The more Mr Fardell pressed an argument along these lines, the more artificial it seemed.

[56] Accordingly, I agree with the conclusion reached by Gault J that the appeal should be dismissed, adding only that the appellant's argument invoking the Human Rights Act can with some moderation be described as unreal.

[57] I agree also that the cross-appeal succeeds. The calculation of pecuniary or economic loss is directed to the plaintiff's financial position. Any factor which has increased the loss will necessarily be taken into account in the calculation. There can be no additional claim for further damages as a result of "aggravation", which is a concept restricted to claims where damages are at large, rather than being merely the product of a monetary calculation, even if the calculation cannot be precise. Indeed, it may be doubted whether aggravated damages can be claimed by a corporation since it can have no feelings and cannot recover for loss of reputation (*Fleming, The Law of Torts* 9ed p660).

TIPPING J

[58] I agree that the appeal should be dismissed and the cross appeals allowed generally for the reasons given in the judgment prepared by Gault J. I wish to make the following further observations on two points, namely those involving aggravated damages and negligence.

Aggravated damages

[59] In *Attorney-General v Niania* [1994] 3 NZLR 106, I suggested that the expression aggravated damages was apt to cause difficulties and would be better removed from the legal lexicon to the extent that it suggests there are damages which fall into a discrete category called aggravated damages. I will not repeat the reasons I gave in *Niania* at 111-112. My suggestion is referred to with approval by the learned authors of *Todd (and others)* on the Law of Torts in New Zealand (3rd ed, 2001) at 25.3.3 (page 1186). This case demonstrates vividly how the continuing use of the expression aggravated damages can cause quite unnecessary problems.

[60] In reality damages fall into two categories only: compensatory and punitive. Compensatory damages are capable of being both general and special but that distinction is beside the present point. The amount of compensatory damages due to a successful plaintiff will depend on the extent of the loss or harm involved. That loss or harm may be economic or it may be in the form of damage to reputation, feelings and so on; in other words, it may be harm which is felt in the mind rather than in the pocket. Where the loss is economic it defines itself without there being any necessity to invoke concepts of aggravation or mitigation. In economic terms the loss is greater or less depending on the effect of the wrong on the victim's pocket.

[61] In cases where the damage is mental, the degree of harm will similarly be more or less according to the nature of the wrong and the way and circumstances in which it was inflicted. Again it was quite unnecessary to speak of aggravated damages. It is sufficient and indeed more helpful and accurate to speak, if necessary, of damages, the amount of which has been increased (or aggravated, if you like) by

reason of certain features of the case. Even in cases of so called aggravation no attempt can or should be made to fix a base figure and then add what is seen as necessary for the aggravation. Only one composite exercise and ultimate figure is involved.

[62] Prior to the enactment of the Defamation Act 1992 corporate plaintiffs could recover only such economic loss as had been caused by the defamatory statement; damages could be awarded to reflect injury to the corporate pocket but not injury to corporate feelings: see *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488, 497. Parliament ratified the common law in that respect by means of s6 of the Defamation Act. As Gault J has said, this section is not crystal clear but its intent must be to confine corporate plaintiffs to economic loss. I mention the point because as this is, of necessity, a case confined to economic loss, a concept which includes damage to goodwill, the loss is not logically susceptible to any concept of aggravated damages, even if use of that expression is to continue. The amount of harm caused by the wrong to the plaintiff's economic interests is simply a matter of proof on ordinary causation principles.

Negligence

[63] 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.

[64] 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.

[65] 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. They should not lightly be altered. They should certainly not be subject to the major re-alignment 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.

[66] The balance which exists in the present law is based on the fact that those who publish falsehoods which are damaging to others are strictly liable, subject to the availability of the conventional defences of honest opinion and qualified

privilege. Malice is implicit in defamation but has to be expressly proved in malicious falsehood. The proposal for a new negligence cause of action or an equivalent cause of action for negligent falsehood would admittedly reduce strict or malice liability to negligence liability. But the sweep of the new causes of action, if the need for a duty of care was dispensed with, would be indeterminate. In any event to dispense with the concept of duty of care in relation to a cause of action involving negligence would be revolutionary and it is difficult to see how the Court could approve a cause of action substituting negligent falsehood for malicious falsehood without producing that effect. Furthermore, the conventional defamation defences would not be available in a cause of action based on negligent falsehood or negligent words, and thus the controls necessary to preserve the balance appropriately between the competing interests would be absent. It is for these reasons that I join in dismissing the appeal and allowing the cross appeals

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