IN THE DISTRICT COURT
AT PALMERSTON NORTH

NP No 79/00

BETWEEN **PATRICK O'BRIEN formerly of Wellington, Chief Executive**

Plaintiff

A N D **ALAN BROWN of Palmerston North, Manager**

Defendant

Date of Hearing: 3 May 2001

Date of Judgment: 31 August 2001

Counsel:

P McKnight for Plaintiff
P J Drummond for Defendant
(Granted leave to withdraw upon adjournment application being declined, thereafter Defendant in person)

RESERVED JUDGMENT OF JUDGE G M ROSS

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1 Introduction

The plaintiff seeks general and punitive damages from the defendant for the publication of words false and defamatory of the plaintiff, posted to an electronic news bulletin and an e-mail list accessible via the World Wide Web. The defendant admits publication in this manner but denies that the words used were defamatory and says that they were

truthful, or were his honest opinion about the plaintiff, or that in the context of publication he could claim a qualified privilege as to the use of the words.

2 Background

2.01 At all relevant times the plaintiff was the Chief Executive Officer of the New Zealand Internet Registry Limited. This is a duly incorporated company trading as DOMAINZ, and provides the central domain name registry service for the New Zealand country code ".nz". DOMAINZ operates under licence issued by the Internet Society of New Zealand Incorporated (ISOCNZ). ISOCNZ is itself the sole shareholder of the New Zealand Internet Registry Limited (DOMAINZ).

2.02 ISOCNZ thus operated the .nz domain space through DOMAINZ, which was its management arm for this purpose of operating a register of .nz names. It was the organisation to which a potential name holder, either by itself directly, or through an agent, sought a domain name. When such a name is registered, then the person or organisation given the domain name is the legal holder or person with sole rights in the use of the domain name.

2.03 The defendant at all relevant times was a director and manager of Manawatu Internet Services Limited. This company was an Internet Service Provider ("ISP"). Amongst the provision of other services to its customers it acted as an agent in submitting new registration and change of registration details through DOMAINZ. Included in this part of the work was an ongoing liability on the part of the ISP for payment for DOMAINZ invoices if the ISP had indicated that DOMAINZ should so bill them directly on behalf of their customers.

3 The First Allegedly Defamatory Remarks

3.01 On 22 December 1999 a Wellington City Council employee took issue with DOMAINZ and the plaintiff over a customer services matter between the two parties, and in particular, how the changing of certain client information, a fax number, was achieved in DOMAINZ records. The suggestion was made that the

appropriate authorisation codes were not followed for this procedure. That, however, is not what is particularly relevant for present purposes. What is relevant is that the employee posted his complaint and criticism on an electronic newsgroup and e-mail list entitled "isocnz@isocnz.org.nz". Not only was it now accessible to ISOCNZ members, but this site is accessible via the World Wide Web.

3.02 The plaintiff took objection to the criticism and raised it with the employee's superior, and the issue appeared to have been resolved with the superior's apology to DOMAINZ and the plaintiff, and an assurance that they had acted appropriately in terms of the Wellington City Council instructions.

3.03 But the defendant picked up the matter then. On 23 December 1999, he posted the following statement on the same site.

> *"I wonder how long it will take Patrick to start wasting more DOMAINZ and ISOCNZ money by again threatening baseless legal action in order to gag public criticism.*
>
> *Patrick: I suggest you look up the law books on the subject of "barratry".*
>
> *As far as I'm, aware, it's still a criminal offence and your continued threats against people who criticise you publicly come under that definition.*
>
> *Why does ISOCNZ still employ this buffoon as CEO of DOMAINZ? He's proved time and again that all he's interested in is himself and not the welfare of the internet in New Zealand?*
>
> *Roll on the Govt removal of the ISOCNZ/DOMAINZ profit driven monopoly.*
>
> *AB".*

That is the first statement complained of by the plaintiff.

4 The Second and Subsequent Statements

4.01 Subsequent to the publication of the first statement (see para 3.03 above) the plaintiff's solicitors wrote to the defendant on 14 February 2000 with a copy of

the original Statement of Claim in these proceedings, then filed but not served, and offered the defendant the opportunity to publish an apology and a correction in the same manner as he had published the first statement; and to pay the plaintiff's legal costs, in which events the proceedings would go no further.

4.02 The defendant's response was to publish a second statement in the same manner as the first. This statement was under a subject heading "Patrick O'Brian (sic) up to his usual tactics" and said as follows:

> *"As predicted by me in late December 1999, Patrick O'Brian (sic), CEO of DOMAINZ is up to his previously documented tactics in response to criticism from members of the Incorporated Society which owns DOMAINZ.*
>
> *I have just received a letter from Sarah Bacon (sarah.bacon@izardweston.co.nz) of Izard Weston lawyers, claiming Defamation proceedings have been filed, but not served, against me for statements made on December 23rd 1999.*
>
> *This is related to David Zanetti criticising DOMAINZ for not following published technical procedures.*
>
> *In my opinion there is not basis for the claims about "defamatory" comments, and Patrick has actually confirmed the criticism by trying what I can only see as a gagging tactic designed to prevent further criticism and/or discussion of DOMAINZ procedures in open forum.*
>
> *I call for the sacking of Patrick O'Brian (sic) from DOMAINZ as a member of ISOCNZ.*
>
> *In my personal opinion he is unfit to be CEO of the company with monopoly control over *.nz name space – because he seems to have major personal insecurity issues whenever anyone criticises him or his handling of the operation of DOMAINZ and he also seems to be unable to separate his public figure position from his responsibilities as CEO of DOMAINZ and to ISOCNZ, which we all know are, owns DOMAINZ.*
>
> *AB".*

4.03 Immediately, another person made a posting on the same site querying whether the lawyers named in the second statement (4.02 above) were acting on behalf of DOMAINZ or on behalf of the plaintiff personally. The defendant almost immediately replied with the posted message to the same site:

"On behalf of Domainz, so he really is wasting DOMAINZ/ISOCNZ money again.

AB".

4.04 Subsequently, on the same night (15 February 2000) the defendant made a further posting (the fourth statement) to the same site in which he said, amongst other things:

"The complete legal threats can be viewed on-line.

http://homepages.manawatu.net.nz/alanb/domainz-buffoonery/

Again, I call for removal of Patrick O'Brian (sic) as an employee of DOMAINZ.

AB".

5 Defamatory

5.01 The plaintiff alleges that the words in the first statement of the defendant are false and defamatory of him in their natural and ordinary meaning, and in their natural and ordinary meaning, the words used mean and were meant to mean that the plaintiff:

5.02 Used DOMAINZ money for private gain.

5.03 Is threatening.

5.04 Has threatened to gag public criticism.

5.05 Has committed a criminal offence.

5.06 Is a buffoon.

5.07 Should not be employed by DOMAINZ as CEO.

5.08 Is self interested.

5.09 Does not have the interests of DOMAINZ as a priority.

6 The defendant has, by admission, accepted that he has published these words, and also that they refer to the plaintiff. However, he denies that they carry the meanings as pleaded, and he further denies that such words and meanings were defamatory of the plaintiff.

6.01 Has the plaintiff proven that the words complained about have the meaning as pleaded? In my view, this is a clear cut case. The claim is effectively that the words used are defamatory in their natural and ordinary meaning. This meaning it was submitted, is so clear and so evident from the plain or literal use of the particular words themselves, to any fair-minded or reasonable person, that it is scarcely necessary to actually plead the meanings any further. I agree. The words have been simply if graphically put. Could they have any other meaning?

6.02 Are these words then defamatory of the plaintiff? In this regard, Judge Cadenhead in *Communications Trumps Ltd v Rural Newsgroup Ltd*, DC, Auckland, 11/12/00, regarded the following passage from "Halsburys Laws of England" 4th Edition, para 43, as pertinent:

> *"In deciding whether or not a statement is defamatory, the Court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense."*

After citing the traditional authorities of *Capital & County Bank v Henty* (1882) 7 App Cas 741 ("Holding the plaintiffs up to hatred, contempt or ridicule") and *Sim v Stretch* [1936] 2 All ER 1237, His Honour referred to the summary of the principles by the New Zealand Court of Appeal in *New Zealand Magazines v Hadlee* (CA 74/96, 24/10/96).

> *"1 The test is objective; under the circumstances in which the words were published, what would the ordinary, reasonable person understand by them?*

2 *The reasonable person reading the publication is to be taken as one of ordinary intelligence, general knowledge and experience of worldly affairs.*

3 *The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary, reasonable person would, as a matter of impression, carry away in his or her head after reading the publication.*

4 *The meaning includes what the ordinary, reasonable person would infer from the words used in the publication.*

5 *The Court will reject those meanings which only emerge as the product of some strained or forced interpretation or groundless speculation."*

Then His Honour Judge Cadenhead refers to Todd, "The Law of Torts in New Zealand", 2nd Edition, where, at page 859 the learned authors say:

> *"If the allegation (is one) of....engaging in dishonest conduct in one's employment, then the case is clear cut."*

6.03 Applying these principles to the present case, I have no hesitation in concluding on the face of the words used themselves, that the words were capable of a defamatory meaning of the plaintiff and that they were in fact defamatory of him. This is in the ordinary meaning and sense of the words even allowing that the defendant subsequently withdrew any suggestion that might be contained in the words that the plaintiff had committed a criminal offence. The other allegations are plainly said and meant. The clear effect of the balance of the words as a whole and in their ordinary and natural meaning, is that ordinary people of reasonable intelligence would tend to think less of the plaintiff.

7 The Defences

7.01 *Truth*

If the plaintiff has, as I have found, established that remarks were made which were defamatory, then the defendant may prove that the remarks were true. If he succeeds in doing this, this can amount to a complete defence.

7.02 In the present case, the defendant has pleaded certain particulars in support of his defence of truth. These are set out in paragraph 11.1 to 11.18 inclusive of the Amended Statement of Defence. In the ordinary course in respect of such a defence, further particulars would be sought by the plaintiff, and the proposed evidence in relation to such a defence, advised to it. This has not happened in the present case, for what I am satisfied have been good and practical and sufficient reasons: but the effect has been that the defendant, acting for himself, has lead evidence from not only himself, but also three other witnesses, a Mr Harpham, a Mr Annear and a Mr Anderson.

7.03 Of these four witnesses, in reality only the evidence of the defendant himself and Mr Harpham touched upon the defence of truth. Mr Harpham was a former employee of the plaintiff at DOMAINZ or a consultant to DOMAINZ – clearly he did not see eye to eye with the plaintiff over a number of issues. On what I apprehend were issues determinative of his connection with DOMAINZ he felt bound by the confidentiality of a settlement reached with them. However, the onus, which is upon the defendant, of establishing truth in fact of the defamatory words has just not been reached by him. Moreover, the plaintiff, in his own evidence in chief (he was scarcely cross-examined on the truth of the allegations in the words used) in any event denied emphatically that they were true.

7.04 *The Defence of Honest Opinion*

As the evidence unfolded, this defence fell into much the same category as the defence of truth. The evidence adduced by the defendant that the words complained of were his honest opinion was again from the defendant himself, and from Mr Harpham, with the further evidence of Mr Anderson. However, no effort was made to distinguish what was said to be the opinion of the defendant, from what he alleged as a fact against the plaintiff. In some ways, perhaps, this failure is less significant in the present case than in some defamation actions. The reason for this is that the words used in some instances would appear to more clearly fall into the opinion category than the fact category. An example of this is the expression by the defendant that the plaintiff is a buffoon.

7.05 But some analysis of the defendant's evidence is perhaps required, even if the necessary severance has not been undertaken by the defendant himself. I apprehend the thrust of the defendant's case to be, from his evidence and that of his witnesses, that he does not agree with the manner in which the plaintiff has carried out his role as CEO of DOMAINZ. There were clearly a number of reasons for this. The defendant's own evidence, and that of his colleague, Mr Annear, was that one clear basis for dissatisfaction was financial. The apparent consequences of one policy of DOMAINZ in respect of fee charging in relation to the role of ISPs such as the defendant's company, was apparently to leave his company with bad or irrecoverable debts. Another reason related to what the defendant regarded as an unsatisfactory base operating system for the .nz registry names. Then there was the purported adoption of protocols adverse to the proper interests of involved parties, involving amongst other things, security issues. Then other reasons related allegedly to the capture amidst secrecy of the internet society by a small group of people including the plaintiff. Then there were some operational issues. And then things descended from there to the personal criticisms of the plaintiff, his technical ignorance, and other matters.

7.06 This is the general background then from which the defendant postulates his right to assert an honestly held opinion about the plaintiff and his work. It will be obvious that there is both a professional and a personal animus here. I obtained the distinct impression when listening to the defendant giving his evidence that in the area of the development of the .nz domain registration, something new and genuinely original and fresh so far as this country was concerned, that it was a subject about which he had knowledge and views, and some skill and experience, but that it was dear to his heart that the system develop along lines which he thought best. His belief system in this regard seemed deeply and strongly held – something of a religion to him – and it is fair to say, looking at the other evidence he called, that he was not alone in his views. The distinction between himself and others, however, is that the depth of his feeling about the matter led to his giving vent to his views in the manner already described. Nonetheless, in arguing that he is entitled to give his honest opinion, it does seem to me that in the words complained of, there is far more by

way of personal attack and assertion than any amount of honest opinion or fair comment on the basis of informed argument.

7.07 *Qualified Privilege*

The defendant's next defence is that the occasion of the publication of the subject words was one of qualified privilege in two respects: -

Firstly, that they were published in good faith to the persons to whom they were published, namely those persons who were members of ISOCNZ who had a legitimate interest in receiving those words and

Secondly, they were published by the defendant who is a member of ISOCNZ who had legitimate concerns as to the behaviour of the plaintiff in the performance by the plaintiff of the plaintiff's duties to DOMAINZ and ISOCNZ.

There are three limbs to this defence. The first is that, as it has been pleaded by the defendant and is relied upon by him, it has been the subject of a statutory notice pursuant to s 19 and s 41, Defamation Act, negating any privilege and alleging ill-will and malice towards the plaintiff; the second limb is that the defendant was given the opportunity to publish a correction and an apology in respect of the words the subject of these proceedings, but failed to do so, and, worse, aggravated the position by further defamatory words published in the same manner subsequently, allegedly in contemptuous disregard for the reputation of the plaintiff, and amounting to ill-will; and the third limb is, not as pleaded, but nonetheless the subject of evidence from the defendant and his witnesses, a claimed special quality of freedom of communication said to attach to cyberspace communications protecting them from action in defamation.

7.08 *The First Limb*

The notice of the plaintiff is filed and served on 25 July 2000. It refers to conduct of the defendant towards the plaintiff both prior to the subject words, and after that publication also. It is not necessary for me to traverse all of the communications prior. They were by e-mail between the defendant and the plaintiff. Suffice to say that they pointed to a total breakdown in understanding between the parties on apparently irresolvable issues of the like set out in para 7.06 above. Amongst communications of a heightening tone in personal

criticism towards the end of the 1999 series (still e-mail at this stage) was a response of the defendant on 12 July 1997 when he said to the plaintiff:

> *"This is about the response I'd have expected from an officious little pommy git."*

7.09 *Qualified Privilege – The Second Limb*

These communications were all posted to the same site by the defendant subsequent to those to which I have referred in para 3.03, 4.02, 4.03 and 4.04 above, of 15 February 2000. Once again, there is an escalating trend in the stridency of the criticism of the plaintiff from April 2000 through to 29 June 2000. The nature of the publications is to allege unethical behaviour, dishonesty, and criminal offending on the part of the plaintiff and the DOMAINZ board. Arguably the worst of these words were (18 April 2000) and amongst other matters raised:

> *"It's time for the serious fraud squad to move in...".*

And, on 29 June 2000, (prior to a case conference before me of that day):

> *"The attached e-mail shows Patrick O'Brien is a lying bag of shit and should be sucked immediately... I call again for the immediate firing of Patrick O'Brien from his position as a DOMAINZ employee for lying to his employers....".*

These observations were followed by numerous others up until approximately August 2000. The nub of the matter from the plaintiff's point of view is that not only were these remarks made even following the opportunity to withdraw and apologise (15 February 2000) but also following the undertaking given personally by the defendant to the Court on 29 June 2000 that he would not continue with the publication of material of or about the plaintiff, nor in the same manner.

7.10 These two factors seem to me to dispose of any argument which the defendant might have that his publication was on a good faith basis, only to ISOCNZ members, and that he was acting pursuant to some kind of duty in drawing these matters affecting the plaintiff to their attention. The overall age of the matter,

the tenor of the remarks published, the defendant's failure to put the matters to the plaintiff privately prior to publication, the continuing after notice was given as to the effect of them, the continuing after a personal assurance that they would desist, and that the remarks were published far more widely than merely to ISOCNZ members, or potentially so through the World Wide Web, all dispel the good faith basis for publication claimed by the defendant.

7.11 *Qualified Privilege – The Third Limb*

This was a matter of evidence and not of pleading, but the defendant appeared to me to place a deal of emphasis upon it in his evidence. He postulated that one of the purposes of the newsgroup site on the electronic bulletin board was to foster a sharing of ideas and the promotion of healthy discussion. To this end, he says, ideas and thoughts are posted to the board with a view to obtaining responses, and that the opportunity thus exists to take part in an open forum, even a public forum. If I understood him correctly, the publication procedures he adopted in this case facilitated a trading in insults in a robust manner which was part of the culture of the internet. He regarded it so, as he said, having been with it from the start, and having himself been called far worse things than he ever said of the plaintiff.

I apprehend from his evidence that his intention by his use of the words complained of was to flush the plaintiff out and force him to respond by the same medium, so that the various criticisms made would be answered not only in the same medium as they were made, but also in the same open, transparent way, and publicly. By such a means, because in his own lights he was right and the plaintiff was wrong, he hoped that any rebuttal argument of the plaintiff would hopelessly expose him for the figure of ridicule the defendant believed him to be. A failure to respond to assertions made as forcefully as the defendant has done here might be thought to have had the effect of a deemed admission; but even if this was so, it has not caused the defendant to desist and indeed it was Mr Harpham's evidence that a lack of answers might have occasioned the increasingly aggressive tone adopted by the defendant towards DOMAINZ and the plaintiff.

7.12 I must say I know of no forum in which an individual citizen has the freedom to say what he likes and in any manner he wishes, about another individual citizen with immunity from suit for all consequences. Merely because the publication is being made to cyberspace does not alter this. I am not aware of any precedent for internet-type material deriving protection from action in the tort of defamation. There can be no question that publication on the internet counts as publication for defamation purposes – (see *Todd, Law of Torts in New Zealand, 3rd Edition*, para 16.5.1 and the English and American cases referred to in the footnote by Professor Burrows). The issue does not appear to have been yet canvassed in this country but can be no different. This view is again expressed by Professor Burrows in Media Law, [2000] *New Zealand Law Review*, at p 198. I respectfully agree with this opinion .

More than that though, in New Zealand it has been held that even a statement in an article in a magazine referring to a web site might be publication of defamatory material to be found on that web site (see *International Telephone Link Pty Ltd v IDG Communications Ltd* (20 February 1998, Master Kennedy-Grant, CP 344/97, Auckland)). The more pertinent argument is as to the position of an Internet Service Provider in respect of dissemination (see s 21 Defamation Act 1992 and *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342) but this issue just does not arise in the present case.

7.13 The defendant is grossly mistaken if he believes as part of the developing culture in the use of such communications that he is entitled to greater freedom of expression than would obtain in any other method of publication. Mr Harpham's evidence seemed to me to reflect as much in his own view, though he allowed for more or less assertive styles, believing that the style reflected more on the user, and not the person it was directed at. But I apprehend too from his evidence that even on a closed newsgroup basis, in a sense if a group were "in committee" (and that there was not, as here, public access to the site), that there could be robust discussion and debate taking place, and assertive, even forceful remarks – but that this would be more on a consensual basis in that the target was himself or herself, part of the forum, a player. This clearly does not apply to the circumstances of the present case.

7.14 For all of the above reasons, none of the defences avail the defendant.

8 The Plaintiff – Effect on Him

8.01 The plaintiff was the only witness in his own cause. His unchallenged evidence in relation to the first statement referred to above, and subsequent statements also referred to which also have a consideration to play in respect of any punitive damages, is that he has felt that his character and reputation have been attacked, particularly in respect of the way he does his job, and it is inferred that he is incompetent, and that he has been accused of being a liar. Moreover, bad enough though publication has been on a site where the defendant's comments would be seen by the plaintiff's customers and colleagues, the matter has been given wider publicity. For the plaintiff, the effect of this has been to transfer the issues raised by the defendant from the merely workplace, to everyday life; for example, questions have been asked of the plaintiff by "non-internet people" around the table at the Bridge Club, for example. In addition, the repeated nature of the statements of the defendant have had the effect of extending the currency and the market for those statements and assertions themselves.

9 Damages

9.01 Damages for defamation are awarded to compensate for injury to a plaintiff's reputation, for hurt to his feelings, and for the grief and distress caused by publication. Special damages are not sought in this case; this may be because no particular pecuniary loss has been pleaded or suffered by the plaintiff, in light of his more recent appointment to a somewhat similar job as he was involved in, in New Zealand, but now in Singapore. Nor did I understand him in any sense to suggest that because of damage or harm to his reputation within New Zealand, he elected to seek employment off-shore. But punitive damages are sought in addition to general damages.

9.02 In my view in the present case, by an accumulation of factors, the defendant attracts against himself an award of aggravated general damages. The factors

which I point to as justifying an increase in the general compensatory damages are these.

(i) Defendant's improper motive as demonstrated by publishing in the wider fashion referred to without prior reference to the plaintiff.

(ii) The nature and extent of the publications themselves, to a site where the comments were far more likely to be seen by the plaintiff's colleagues and customers, with World Wide Web accessibility giving potentially infinite circulation.

(iii) The failure of the defendant to cease and desist upon notice being given to him of the proceedings, and the opportunity, not taken, to apologise at that earlier stage..

(iv) An unsuccessful plea of truth is a further factor which I may take into account as tending to increase damages.

(v) The excessive nature and extravagance of the words themselves in the first statement, quite beyond words necessary to make the point sought to be made – these amount to a further aggravating feature.

(vi) Defendant's behaviour, since the matter referred to in (iii) above, appears to continue to be motivated by ill-will towards the plaintiff. This is shown in as much as even at trial he continued towards the plaintiff in an insulting manner, describing him during cross-examination as "a flaming idiot". By this stage the plaintiff was no longer even working in New Zealand, and there is no evidence of a continued connection between them.

9.03 As to the actual assessment of damages, they must bear some relation to the wrong done, and be adequate to compensate an indignant and injured man who was in a semi-public position of some responsibility whose feelings have been hurt and name tarnished. The defamation having been established, the damage

is in any event presumed. The level of damages, is an issue which is entirely for me.

My view is that, overall, and taking into account such aggravating features as I have referred to, nonetheless, some moderation and a conservative approach is required here. Indeed, the claim for damages seems to me to have been framed in this way, at a modest and not an exorbitant level. Nonetheless, it is claimed that the plaintiff has been greatly injured as to his professional and personal reputation. He has been injured, I find, but perhaps not greatly so. I find too that he has been exposed to some public odium and contempt; and that he has suffered some damage to reputation and character. As against these matters, none of the features of statutory mitigation of damages exist in this case, or are even pleaded. The matter is to be kept in balance, in my view. General damages are awarded in the sum of $30,000.

9.04 *Punitive Damages*

The Amended Statement of Claim included the special pleading required by s 44 Defamation Act 1992. Punitive damages have the function of punishing a defendant, and deterring others from similar wrongdoing. In this sense, the other description of them as exemplary damages is sometimes defined as a deterrent to others. They are reserved for a defendant only where a defendant has acted in flagrant disregard of the rights of a plaintiff (s 28 Defamation Act) As a general principle, the superior Courts have indicated that such an award should rarely be made.

9.05 I am satisfied, however, that in the present case it is appropriate to make an award of punitive damages against the defendant. His whole course of behaviour towards the plaintiff has displayed an arrogant highhandedness and a contemptuous disregard for the plaintiff's rights, reputation, or feelings. Such compels a separate and punitive award here.

9.06 I have already weighed a number of reasons which I find to be the aggravating features of general damages in this case. I do not propose to traverse those matters again. I am also conscious that in holding that there should be an award

of punitive damages, there should not be a double counting of those features aggravating the award of general damages.

However, since the statement giving rise to the cause of the defamation action, by his second, third and fourth statements (refer paras 4.01, 4.03, and 4.04 above) the defendant has shown a reckless audacity towards the plaintiff and the harm that the plaintiff had seriously and responsibly claimed he had suffered in the first statement. This has been occasioned, not only by the ensuing statements themselves; but by scanning into his computer and making available on the World Wide Web on a designated Home Page the solicitor's correspondence of 14 February 2000, and the Statement of Claim by then filed but not served. The address of the site for on-line viewing gives some clue as to the defendant's thoughts (see in particular, para 4.04 above). In this, he is trifling with the plaintiff's rights as asserted by his solicitors, and with the subject matter of the claim.

This, and the subsequent treatment by the other statements, is separate and distinct from those aggravating features earlier referred to. Over and above ordinary damages, it compels special recognition by way of punitive damages. Assessment of those damages is not an easy matter. Defamation is in any event, an intentional tort, and in this way is distinguished from other torts, and punitive damages awards in respect of them. Moreover, no issue arises as to any personal way in which the defendant might be said to profit from his treatment of the plaintiff – financially or in any other way. But in proceeding to exacerbate the existing defamation in the way I have described, the defendant has acted with deliberation and a calculated cleverness. He has ignored clear notice of the allegation of the tort of defamation, and in an entirely unrepentant manner, and ignoring warnings of plaintiff's Counsel and even the Court, and in breach of his own personal undertaking not to continue with like publication, he has carried on. The first statement is thus re-enlivened, in no way detracting from it but refreshing its currency and gilding it further.

His conduct has been quite outrageous and calls for condemnation by the Court. Punitive damages themselves are a form of punishment, but this is regarded as being able to be adequately achieved by a relatively modest penalty.

(See, though in the dissimilar context, *Ellison v L* [1998] 1 NZLR 416, and *A v B* (High Court, Auckland, CP 310/96, 11/5/99).

In all the circumstances an award of punitive damages is made against the defendant in the sum of $12,000.

10 Outcome

There will be judgment for the plaintiff in the sum of $30,000 for general damages, plus $12,000 for punitive damages, making a total of $42,000. The plaintiff seeks costs on a solicitor/client basis. I invite memoranda from counsel and the defendant in this regard.

G M Ross
District Court Judge

Signed at ..... am/pm on ..... 200..