IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CP 2/01

1231

[redacted]

BETWEEN: **TAIRAWHITI DISTRICT HEALTH BOARD** a duly incorporated body under the New Zealand Public Health and Disability Act 2000 and carrying on business as a provider of hospital and health services at Gisborne
First Plaintiff

AND **WAYNE KELVIN FORREST BROWN** of Gisborne, Chairman
Second Plaintiff

AND **MICHAEL DONOVAN GRANT** of Gisborne, Group Manager
Third Plaintiff

AND **BRIAN COWPER** of Gisborne, Manager
Fourth Plaintiff

A N D: **STEPHEN PERKS** **(trading as "Goblin Productions Limited")** 18 Heatherlea Street, Gisborne, Publisher
Defendant

Hearing: **10 August 2001**

Judgment: **26 September 2001**

Counsel: ***Robert Fardell* for plaintiffs**
***Neil Weatherhead* for defendant**

JUDGMENT OF WILLIAMS J

Solicitors:
Nolans, P O Box 1141 Gisborne, for plaintiffs
Wilson Barber & Co, DX LP78520 Gisborne, for defendant

Copy for:
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Issues

[1] In this proceeding the plaintiffs, Tairawhiti District Health Board, its Chairman Mr Brown and other employees, sue the defendant, Mr Perks, for newsletters which he published in June, September and October 2000 (two issues in October), parts of which they say were defamatory of them. The four plaintiffs seek general damages in respect of the various causes of action of $500,000, $150,000, $200,000 and $50,000 respectively plus exemplary damages of $250,000, $100,000, $150,000 and $50,000 respectively. Messrs Brown, Grant and Cowper also seek aggravated damages of $100,000, $200,000 and $25,000 respectively. All four plaintiffs seek solicitor and client costs and interest.

[2] This judgment deals with Mr Perks' application to dismiss the proceedings on the basis of all the grounds appearing in R 477 asserting that the publications had no defamatory meaning, the first plaintiff as successor to Tairawhiti Healthcare Limited has no cause of action against him, the plaintiffs had no intention of proceeding to trial when proceedings were commenced and the amount of damages claimed is unrealistic and imply that the claim has been brought *in terrorem*.

[3] The judgment also deals with an application by the plaintiffs for an order recommending that Mr Perks publish a retraction and apology in relation to the matters raised in the claim on the basis that the published material is defamatory, untrue and was published maliciously. Mr Perks opposes that application on the ground, amongst others, that the Court has no power to recommend the publication of a retraction and apology and that the sections on which the plaintiffs rely, the Defamation Act 1992 ss 25 and 26 (unless otherwise specified all sections mentioned refer to the Defamation Act 1992) are either inapplicable or arise only once the defamatory nature of the published material has been established.

Striking-out Principles

[4] Since the principles in relation to striking-out applications are now so well-settled, it is necessary only to record them briefly. The allegations in the statement

are assumed to be capable of proof. The pleading is then considered against the test of deciding whether it is so clearly untenable as to be incapable of success, that test having been set by the Courts as deliberately difficult to attain so as to preserve litigants' right to their day in Court. The jurisdiction is exercised sparingly. Pleadings or proceedings may be struck out even though such applications raise difficult questions of law requiring extensive argument, provided the Court can be persuaded to the required standard that the pleading is unsound and cannot be amended satisfactorily, and such an order will obviate the necessity for trial. Affidavits are not admitted except on uncontentious subjects in applications based on R 477(a) (and R186(a)) but affidavits may be read in relation to applications based on other provisions of the Rule.

[5] In striking-out applications based on R 477(b) a factor which can arise peculiar to defamation claims is s 45 which reads :

> The commencement of proceedings to recover damages for defamation shall be deemed to be a vexatious proceeding if, when those proceedings are commenced, the plaintiff has no intention of proceeding to trial.

Background

[6] Mr Perks said that he was employed by Tairawhiti Healthcare from the beginning of 1999 until 17 May 2000 as a team leader in the mental health area and during that period reached the view that the relationship between management and staff was strained. To boost what he saw as low staff morale, in June 2000 he prepared and distributed 10-15 copies of a newsletter within the hospital complex. On Tairawhiti Healthcare letterhead it purported to be a letter to the Manager of Mental Health Services expressing concern as to the manner in which the third plaintiff, Mr Grant, and his associates were running Tairawhiti Healthcare. It made accusations of bullying opponents, ignoring problems and "leaves many of us feeling powerless in a dangerous management structure". It was critical of the "horrendous retention problem of clinical staff" and raised doubts as to the manner of Mr Grant's appointment.

[7] In about September 2000 the second newsletter was published, apparently by Goblin Productions Ltd but signed by one "Louis de Cypher". It is unnecessary to recount the detail save to say that on its face it was critical of the intelligence and human resource policies of Messrs Brown and Grant, both in relation to retaining and dismissing staff. Mr Perks said he distributed about twenty copies within the hospital complex (although that figure may relate to the third publication given that Mr Perks' affidavit speaks of the "second" newsletter but of his distribution taking place in October).

[8] Two newsletters were prepared in October 2000. The earlier, again bearing Goblin Productions Limited name and this time with a printed signature "Louis de Cypher" followed much the same theme of criticising management, impugning their character, possibly suggesting that its leaders were tyrannical or ruthless and publishing a list of persons such as Hitler and including "Mike Grant". The publication was again critical of management and planning at Tairawhiti Healthcare.

[9] The final newsletter was also distributed in October. Under a heading "The Undercover Section" it spoke of persons "drinking and driving in a THL car" and of sexually inappropriate actions. It included what purported to be a request to participate in a workplace survey and a response, again asserting overbearing conduct on the part of Mr Grant and what purported to be a debt collection letter on Goblin Publications Ltd letterhead dated 4 October 2000 addressed to Mr Grant and signed by "Louis de Cypher" seeking payment from him of $500,000 for poor management and oversight of hospital contracts, poor recruitment and lack of skills in handling morale.

[10] Mr Brown said that, despite Mr Perks' assertions of limited distribution, the newsletters were photocopied and distributed widely within Gisborne Hospital and became common knowledge amongst staff.

[11] According to Mr Perks, on 30 June 2000, acting pursuant to the Health & Disability Commissioner Act 1994 s 35(2), the Commissioner instigated an investigation into patient care and quality assurance systems at Gisborne Hospital. Particular matters investigated included whether patients' rights under the Code of

Health and Disability Services Consumers' Rights had been infringed in relation to operating theatre protocols, quality assurance systems, the handling of incidents reported by staff, allegations of inadequate standards of patient care and certain testing procedures. The Commissioner's report was apparently issued in March 2001. The Executive Summary was put in evidence by affidavit, and other parts of the report attached to submissions made by Mr Weatherhead, counsel for Mr Perks.

[12] In addition, according to Mr Perks, on 12 July 2000 the Minister of Health dismissed the Board of Tairawhiti Healthcare and appointed Mr Brown as interim Chairman of its replacement.

[13] For Mr Perks, Mr Weatherhead relied on a number of the Commissioner's recommendations and other passages in the report which, he submitted, showed that the views expressed in the newsletters had a basis in fact. He also submitted that the contents of the newsletters were intended to be humorous, satirical, wry or sardonic comments on the general question of management at the Gisborne Hospital and would not have been seen by readers as reflecting on the plaintiffs, still less as being defamatory. It is not possible at this stage of the case for the Court to be able to reach any conclusions on those matters on the material before it.

Whether Plaintiffs Intend to Proceed to Trial

[14] The short answer to the question as to whether the plaintiffs intend to proceed to trial is that all the evidence put before this Court by the plaintiffs is to the effect that the proceedings were commenced with that intention and the plaintiffs currently have no intention of desisting. Those assertions require to be accepted at their face value.

[15] That notwithstanding, Mr Weatherhead submitted that Mr Perks' modest financial resources as set out in his affidavit would have been known to the plaintiffs and accordingly, against the background of the Commissioner's report and the limited distribution of the newsletters, a claim for damages totalling $1.775m was, as he put it, "irrational, absurd and ridiculous" and accordingly should be struck out.

[16] If this case goes to trial, it may perhaps turn out to be the case that there is force in Mr Weatherhead's last submission. Some of the amounts claimed seem very high by comparison with the level of damages commonly awarded in defamation cases in this country. As against that, however, Mr Fardell, counsel for the plaintiffs, drew attention to some awards in defamation cases where amounts not markedly dissimilar from those sought by the individual plaintiffs in this case have been awarded.

[17] In this case no statement of defence has as yet been filed so the Court is unaware of the defences Mr Perks will raise, the factual background is largely unknown to the Court and accordingly it could not at this stage be confidently predicted that the amount of the damages sought by each of the plaintiffs is unrealistically high. It should be noted, however, that if it turns out to be the case at trial that the amounts claimed appear grossly excessive, the plaintiffs run the risk of being required to pay Mr Perks his costs on a solicitor and client basis even if they succeed in obtaining judgment under s 43(2).

[18] Counsel for Mr Perks also raised a submission that Tairawhiti District Health Board was obliged under the New Zealand Public Health and Disability Act 2000 s 27(2)(d) to have regard to the interest of its creditors in carrying out its functions and was required to operate in a financially responsible manner under that section and under s 41. It was submitted that jeopardising its funds by risking the award of solicitor and client costs against it under s 43(2) and in continuing with what is likely to be an expensive proceeding, was in breach of those sections. This ground was not raised in the application to strike out and the Court accordingly does no more than note it.

Aggravated Damages

[19] A separate argument propounded by Mr Weatherhead was that the claim for aggravated damages by Messrs Brown Grant and Cowper in the sums of $100,000, $200,000 and $25,000 respectively did not lie, relying on ***Attorney-General v Niania*** [1994] 3 NZLR 106, 111-112 where, in a false imprisonment case, Tipping J held that :

> So-called aggravated damages apply particularly to torts which cause injury to feelings or reputation; for example defamation and, as in this case, false imprisonment. Rather than treating compensatory and aggravated damages as distinct categories of damage, it is in my view better to concentrate on the compensatory function of damages (other than exemplary). Where appropriate a greater sum is necessary to compensate the plaintiff for the injury suffered because of the way in which or the circumstances in which the tort was committed.
>
> Relevant authorities in this field include *Rookes v Barnard* [1964] AC 1129; *Australian Consolidated Press Ltd v Uren* [1967] 3 All ER 523 (PC) per Lord Morris of Borth-y-gest and *Fogg v McKnight* [1968] NZLR 330 ...
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> Also of assistance is the comment in *Salmond and Heuston* at p 594:
>
> > "Aggravated damages are given for conduct which shocks the plaintiff: exemplary damages for conduct which shocks the jury."
>
> That is said in a paragraph which talks about aggravated damages being "in a distinct category". With respect, as is already evident, I am not in favour of such an approach.

[20] The uncertain state of the law in New Zealand on this topic is also mentioned in ***McLaren Transport Ltd v Somerville*** [1996] 3 NZLR 424, 431; ***Manga v Attorney-General*** [2000] 2 NZLR 65, 72 para 50; and ***Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd*** (HC Christchurch CP.68/99 11 December 2000 Chisholm J para 10 p 7.

[21] Whilst the learned authors of Todd et al ***The Law of Torts in New Zealand*** (3rd ed (2001) para 25.3.3 p 1186) support Tipping J's views saying

> The notion of aggravated damages is a rather confusing one. The idea is that a damages award is increased because of the manner or motive of the tortfeasor, which has, therefore, resulted in greater injury to the plaintiff. The courts have made it clear, however, that such damages are compensatory and not punitive [*Fogg v McKnight* [1968] NZLR 330 at 332; *A-G v Niania* [1994] 3 NZLR 106; (1994) 2 HRNZ 430]. In order for such damages to be claimed, the plaintiff must establish some injury for which compensation is appropriate. If this is the case, however, it is difficult to see why such damages should be treated separately from the established categories of general and special damages.

for striking-out purposes, in this Court's view it has to be accepted that while there is considerable force in the views expressed in those authorities, there is not yet appellate authority to the effect that aggravated damages cannot be separately claimed in defamation cases. In any event, even were the Court to strike out the present claims for aggravated damages as suggested in the authorities it would be open to the plaintiffs to re-plead their claims for general damages to take account of elements of aggravation.

[22] It follows as a matter of law that the Court does not accept Mr Weatherhead's submission that claims for aggravated damages in defamation do not lie.

Exemplary Damages

[23] Mr Weatherhead next submitted that the claims for exemplary damages of $250,000, $100,000, $150,000 and $50,000 by the four plaintiffs respectively should be struck out as being grossly excessive, contrary to principle and failing to specify facts and circumstances where Mr Perks' action might justify such an award by his acting in flagrant disregard of the plaintiff's rights. Apart from the authorities to which reference is about to be made, he also relied on s 28 prohibiting punitive damages in defamation other than in circumstances where a defendant has acted in flagrant disregard of a plaintiff's rights and s 44 which requires claims for punitive damages to specify justifying facts and circumstances.

[24] It is, of course, clear that punitive or exemplary damages can be claimed in defamation but in ***Cable v Robertson*** (CA125/95 10 May 1996 p 15) the Court of Appeal reiterated New Zealand Courts' conservative approach to general damages "reserving them for cases of truly outrageous conduct which cannot be adequately punished in any other way" and saying that they are "awarded only in serious and exceptional cases" and that they are "not to be trivialised".

[25] The Court of Appeal followed that decision in ***Ellison v L*** [1998] 1 NZLR 416, 418-419 commenting, in a negligence context, that exemplary damages may be rarely awarded in such cases to "punish a defendant for high-handed disregard of the

rights of a plaintiff or for acting in bad faith or for abusing a public position or behaving in some other outrageous manner".

[26] It was submitted on Mr Perks' behalf that the plaintiffs' claim in respect of each publication that Mr Perks' actions amounted to intentional and malicious publication of "patently false and defamatory material ... causing offence, humiliation and general upset" were insufficient to comply with s 44. The particulars pleaded include his failure to apologise, his defending the claim and the fact that he is "apparently enjoying himself in the course of all such behaviour".

[27] Whilst his defending this claim cannot justify claims for exemplary damages and those aspects of the particulars should be struck out, the other particulars satisfy the statutory requirement though the allegation of enjoyment may be only peripherally an aspect reflecting back on the claimed outrageous conduct.

[28] The Court repeats its earlier comments about the amounts of the damages claimed. They certainly appear high by comparison with most such awards in New Zealand but, without full knowledge of the factual background, the Court is unable to conclude that the claims are clearly incapable of success.

[29] With the minor exception appearing in para [27] the Court declines to accept Mr Perks' application in relation to exemplary damages.

Other Matters

[30] Before passing to the last remaining issues, it is appropriate to note that Mr Perks' striking-out application alleged that the publications were incapable of a defamatory meaning. Although that ground was developed to an extent by Mr Weatherhead, he acknowledged that the defendant's objection was global and that there was no individual complaint about any particular meaning ascribed.

[31] It is well-settled that the tests to be applied are what would the ordinary reasonable reader understand as a matter of impression was meant by the words in the circumstances in which they were published, that reader being of ordinary

intelligence, knowledge and experience and including inferences taken from the words as read in context (***New Zealand Magazines Ltd v Hadlee*** CA74/96 24 October 1996 per Blanchard J pp5-6). Whether the words complained of are reasonably capable of bearing the defamatory meanings alleged is a question of law which can be dealt with on striking-out (***Morgan v Odhams Press Ltd*** [1971] 2 All ER 1156).

[32] Mr Weatherhead submitted that the newsletters were generally incapable of conveying the defamatory meanings alleged being circulated in small numbers in a restricted environment, namely the workplace, and to a restricted number of people. He submitted that the amateurish format and the content would clearly convey to readers that they were not intended to be taken seriously and accordingly they were incapable of being defamatory. He submitted that "no reader of the newsletters would think they were anything but a joke" and that, by suing for the amount sought, the plaintiff was guilty of a "gross over-reaction".

[33] It is sufficient to deal with part of that contention by recalling the rather picturesque way in which Lord Blackburn dealt with a claim that allegedly defamatory material was published only in jest in ***Re Capital & Counties Bank Ltd v George Henty & Sons*** (1882) 7 AC 741, 772: "No one can caste about firebrands and death, and then escape from being responsible by saying he was in sport". (See also ***Boyd v Mirror Newspapers Ltd*** [1980] 2 NSWLR 449, 456).

[34] Further, the Court has carefully re-read the statement of claim and reaches the view that it was prudent for the defendant to resile from this aspect of the striking-out application on a line by line basis. Whilst the way in which some of the defamatory meanings pleaded could arguably be seen as over-blown, as a matter of law the meanings pleaded appear to be open when seen against the test earlier described. It follows that again without a full appreciation of the factual background, the Court is unable to reach a conclusion that the words complained of are incapable of bearing the meanings alleged.

[35] A further matter raised by Mr Weatherhead was that Tairawhiti District Health Board had agreed to finance the proceedings for the other plaintiffs on the

basis that any recovery would go to it and that offended against the torts of maintenance and champerty.

[36] Mr Perks relied on his assertions that twice in May this year Mr Brown apparently said that any damages recovered in these proceedings would be returned to the hospital without private gain by the individual plaintiffs and the fact that the affidavits filed in opposition did not dispute his assertion. However, the manner in which those statements were said to be made did not appear from the affidavit. If they were oral, the circumstances were not put in evidence. If they were made in writing, the statement was not put before the Court. Since an affidavit has only a limited part to play in striking-out applications and the plaintiffs' affidavit in response declined to answer every aspect of Mr Perks' affidavit on the grounds that many of his assertions were irrelevant to striking-out, no confident inference could be drawn such as that on which Mr Perks relied. Further, maintenance and champerty were not pleaded as grounds in the striking-out application. Accordingly, the Court declines to deal with that matter.

[37] In any event, whilst the current state of maintenance and champerty in New Zealand law is somewhat uncertain (***re Nautilus Developments Ltd (In Liquidation)*** [2000] 2 NZLR 505, 509-511) there is nonetheless authority to the effect that if an employer has a legitimate interest in a defamation action it is not champertous and the employer is not guilty of maintenance in agreeing to pay the employee's costs (***Hill v Archbold*** [1968] 1 QB 686, 693-695 distinguishing ***Oram v Hutt*** [1914] 1 Ch 98). In any event, it is for the individual plaintiffs, if successful to decide what to do with any damages they may receive.

[38] Finally, in his affidavit, Mr Perks raised the fact that a search warrant was executed on his home on 1 November 2000 and certain material uplifted. It was suggested that this might amount to an unreasonable search and seizure under the New Zealand Bill of Rights Act 1990 s 21. Affidavits on behalf of the plaintiffs asserted that a search warrant had been obtained following complaints by the plaintiffs that Mr Perks retained custody of property belonging to the Tairawhiti District Health Board. This was a further matter not raised in the striking-out application. The Court is accordingly not prepared to rule on it.

Standing of Tairawhiti District Health Board

[39] The remaining issue raised by Mr Perks is the status of Tairawhiti District Health Board as a plaintiff.

[40] Counsel for Mr Perks pointed to the allegation in the statement of claim to the effect that Tairawhiti Healthcare was struck off the Companies Register on 24 January 2001 pursuant to the New Zealand Public Health and Disability Act 2000 s 95(5). Tairawhiti District Health Board is a statutory body constituted under that Act and asserts that it is suing in its capacity as successor in title to all of Tairawhiti Healthcare's assets. Section 95(3) provides that on the Act coming into force on 1 January 2001 the "assets and liabilities of each hospital and health service" were to vest in the relevant District Health Board, "assets" and "liabilities" being defined by s 93 as having the same meaning as in the Health Sector (Transfers) Act 1993 s 2 (formerly the Health Reforms (Transitional Provisions) Act 1993) which includes "any real or personal property of any kind" in the definition of "assets", and includes "all rights of any kind".

[41] Mr Weatherhead submitted that because causes of action in defamation are terminated by the "death of any person" pursuant to the Law Reform Act 1936 s 3(1), and because the Interpretation Act 1999 s 29 includes body corporates in the definition of "person", any cause of action subsisting in Tairawhiti Healthcare prior to 1 January 2001 should be regarded as terminated on its "death", that is to say its removal from the Companies Register. Tairawhiti District Health Board was, he submitted, incapable of succeeding to Tairawhiti Healthcare's cause of action in defamation.

[42] For Tairawhiti District Health Board, Mr Fardell submitted that the argument was misconceived and that, by succeeding by statute to all Tairawhiti Healthcare's assets and liabilities, Tairawhiti District Health Board succeeded to Tairawhiti Healthcare's cause of action in defamation. He submitted that the concept of "death" was inapplicable to the removal of a company from the Companies Register and pointed to the fact that the Interpretation Act definition was inclusive not exclusive. He relied on a decision of Ebrahim J in the Zimbabwe High Court in ***Boka***

Enterprises (Ptt) Ltd v Manatse (1990) (3) SA 626, 631 where the question was whether an incorporated company lacked capacity to sue for defamation. Relying on South African authority, the learned Judge held that the company had status to sue. Mr Fardell also submitted that Tairawhiti District Health Board had suffered the required pecuniary loss – it pleads as much - in the sense of loss being caused to its predecessor, Tairawhiti Healthcare (s 6(a)), and that it was consistent with s 6 for this Court to hold that the first plaintiff had the right to maintain this action.

[43] The concept of death is plainly inapplicable to striking a company from the Register. There is nothing in the New Zealand Public Health and Disability Act 2001 ss 93 and 95 to suggest that the meaning of those sections should be affected by the Law Reform Act 1936 s3(1) The heading to s 95 – "Hospital and Health Services Dissolved and Assets and Liabilities Vested in DHBs" – does not indicate otherwise notwithstanding the inclusive provisions of the definition of "person". (Interpretation Act 1999 ss 5 and 29). Whilst the decision in ***Boka Enterprises*** is not binding on this Court, it is nonetheless deserving of respect.

[44] Subject to the necessity for Tairawhiti District Health Board to prove pecuniary loss to Tairawhiti Healthcare up to 1 January 2001 and pecuniary loss to itself after that date – matters which are for trial - this Court is of the view that the defendant's submission has no basis in law and that, having regard to the succession provisions of the New Zealand Public Health and Disability Act 2000, the first plaintiff has the right to bring and maintain this action.

Plaintiffs' application for Order recommending Defendant publish retraction and apology

[45] The plaintiffs sought an order that the Court recommend that Mr Perks publish a retraction or apology in respect of the matters in issue in this proceeding on the grounds that the published material and the imputations contained therein were defamatory and untrue and that the plaintiffs had unsuccessfully requested Mr Perks on several occasions to agree to the publication of a retraction and apology.

[46] Mr Perks opposed the application on the ground that the Court had no power to recommend the publication of a retraction and an apology, ss 25 and 26 having no

present application. Section 25 entitles a person who claims to have been defamed, within five working days after becoming aware of the publication, to request the person responsible to publish a retraction or reply while s 26 entitles a plaintiff to seek a recommendation from the Court that the defendant publish a correction of the matter the subject of the proceedings with consequential orders as to costs and damages in the event that the recommendation is or is not complied with.

[47] Mr Fardell submitted that a recommendation could be made at the interlocutory stage of proceedings, relying on ***TV3 Network Ltd v Eveready NZ Ltd*** [1993] 3 NZLR 435 and ***PPCS v NZ Rural Press Ltd*** (HC Auckland CP412-SD99 14 March 2000). ***TV3 Network*** was decided before the Defamation Act 1992 came into force and accordingly was concerned with the common law power for courts to issue injunctions to require retractions or corrections. The Act had, however, by then been passed and the Court's observations make it clear that the jurisdiction, whether at common law or under s26, is likely to be sparingly exercised, particularly if sought at an interlocutory stage before the issues in contest have been defined and before the facts of the case have been determined.

[48] It is true that in ***PPCS***, Cartwright J reached the view that the powers under s 26 could be exercised at an interlocutory stage – particularly as part of the Court's powers to call a conference and give directions under s 35 – but the judgment makes it clear that to do so at that stage of the proceedings and in advance of a final determination of the issues - either by admission or trial – would be exceptional. In fact, in that case the learned Judge declined to exercise the power under s26 holding that (para 24 p 12) "while there is still the possibility that a jury might find as a matter of fact that the words do not bear the meaning the plaintiff suggests" an order for the publication of the correction would be inappropriate as leaving the defendant "with no realistic defence".

[49] Mr Fardell suggested that the words of which the plaintiff complained were defamatory and bear the imputations pleaded and that it was "socially just and desirable" that the Court recommend the publication of a correction because of the "cruel and witless" nature of the defamatory matter. That, he submitted, would

bring about a swift and just result and was appropriate because Mr Perks continues to act irresponsibly.

[50] Mr Weatherhead submitted that the Court should not exercise its powers under s 26 at this stage when all matters between the parties remain at large.

[51] As noted, no statement of defence has as yet been filed in this matter so all matters pleaded by the plaintiff remain in issue. The Court is currently unaware whether Mr Perks intends to raise any positive defences. He is, of course, entitled to put the plaintiffs to proof of all the issues raised by them should he consider that to be the appropriate course for him to follow. In this case, as the Court understands it, part of Mr Perks' defence is likely to be that the contents of the newsletters were intended to be ironic or published in jest and were not intended to be taken seriously by readers. If that is the stance Mr Perks decides to take, it would be wrong to order him to publish a correction at this juncture, thus effectively holding both that the contents of the newsletters were indisputably defamatory and were intended to be taken seriously by readers. Mr Perks would thereby be deprived of both defences.

[52] Further, the Commissioner's report shows that there may well have been dissatisfaction with management at Gisborne Hospital at about the relevant time. For all the Court is currently aware, depending on the defences raised by Mr Perks, that matter may become part of the background against which the publication of the newsletters is to be seen. Were the Court to recommend the publishing of a correction, it may pre-empt a proper consideration of all the circumstances relevant to the matters likely to be in issue in these proceedings.

[53] In all those circumstances, the Court takes the view that even if there is jurisdiction to recommend a correction under s 26 at as early a stage of the proceedings as this, it is not prepared to grant the application at this juncture.

Conclusion

[54] In the light of all of that, the Court's formal orders are :

[a] That apart from in the minor way mentioned in para [27] the Court is not prepared to accede to Mr Perks' application to strike out the statement of claim and his application for an order to that effect is accordingly dismissed.

[b] The Court is not prepared to grant the plaintiffs' application for the Court to recommend the publication of a correction of the matter the subject of the proceedings and that application is likewise dismissed.

[c] The claim should now proceed towards completion of its interlocutory stages and hearing. To that end, the defendant is directed to file and serve his statement of defence within 28 days of the date of delivery of this judgment. The proceeding is then to be placed in a Callover at the sittings of the High Court in Gisborne beginning on 5 November 2001 at a date and time to be fixed by the Registrar.

[d] The Court's view is that the costs of these applications should lie where they fall but is open to persuasion otherwise. If costs are to be pursued other than on a 2B basis, memoranda may be filed with counsel certifying, if they consider it appropriate so to do, that the Court may determine all questions of costs without a further hearing. If memoranda are to be filed, that from the plaintiff is to be filed within 28 days of the date of delivery of this decision, with that from the defendant within 35 days of that date.

.....
WILLIAMS J.

Signed at 11.42 am/~~pm~~ this 26th day of September 2001.