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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY CP.476/00

BETWEEN DONNA MARIE TE TOKERAU HALL

Plaintiff

AND FOURTH ESTATE HOLDINGS LTD

Respondent

Hearing: 8 and 9 August 2002

Counsel: J R Billington QC and P A McKnight for Plaintiff
J G Miles QC and D H McLellan for Defendant

Date of judgment: 9 August 2002

ORAL JUDGMENT OF RANDERSON J

Solicitors:
Izard Weston, P O Box 5348, Wellington for Plaintiff
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Counsel:
J R Billington QC, P O Box 4338, Auckland for Plaintiff
J G Miles QC, P O Box 4338, Auckland for Defendant

[1] Yesterday and today, I have heard argument as to the scope of the pleadings and evidence in relation to a defamation trial which is due to begin before a jury and myself on Monday.

[2] As a result of the argument yesterday, the plaintiff has now abandoned reliance on a number of articles published by the defendant prior to the defamation which is the subject of the litigation, that article being published on 31 March 2000. No reliance is placed on those articles as aggravating the damages claimed. The sole reliance or the prior articles is now the issue of identity, that is whether the words used in the subject article are reasonably capable of being understood as referring to the plaintiff.

[3] An amended statement of claim (numbered as the eighth such amendment) has been tendered and no objection is taken to its amended form except the question of whether the plaintiff may rely on an article published by the defendant subsequent to the subject article on 7 June 2002. The plaintiff seeks to rely on that article as aggravating damages in relation to the subject article.

[4] It is necessary to analyse briefly the terms of the subject article and the June article. The subject article published on 31 March 2000 by the defendant refers to a legal attempt to stop publication of a complaint about aspects of a claim to the Waitangi Tribunal by a group of iwi known as the Volcanic Interior Plateau Group which was said to be represented by the plaintiff in her capacity as a Wellington lawyer. Reference was made in the article to the plaintiff on two occasions in her capacity as a lawyer and to the size of the claim which was said to involve as much as $2 billion in cash and in land. The article concluded with a reference to another "gagging story" about "a high profile lawyer's mental health". The defamatory meaning now pleaded in relation to this article is that the words were in their natural and ordinary meaning and were understood to mean, that the plaintiff was having mental health problems. The statement of claim pleads that, by reason of the article, the plaintiff has been injured in her professional and personal reputation, exposed to public odium, and contempt and damaged in her reputation and character.

[5] The article in June this year was of course published after this litigation commenced and within two months of the hearing date. It was published under the heading *Legal Aid Fuels Fisheries' Gravy Boat.* A photograph of the plaintiff was prominently displayed alongside that of Winston Peters. The by-line beneath the plaintiff's photograph reads, "More legal aid" and that beside Mr Peters' photograph reads "Treaty lunacy". The article contains material relating to various claims to do with Treaty issues. Reference is also made to legal aid action taken against the Treaty of Waitangi Fisheries Commission which was said to have been "one man's unsuccessful lawyer-inspired legal action ...". A statement was made that the Legal Aid Services Agency had paid over $1 million in legal aid to the lawyer for the plaintiff in that case (who is the plaintiff in this case). Reference was made to the plaintiff being the wife of Justice Durie, a High Court Judge and Waitangi Tribunal Chairman. Reference was also made in passing to the Crown Forestry Rental Trust and payments which were expected to be made from that Trust to the plaintiff to fund the Volcanic Interior Plateau claim. The Fisheries Commission was mentioned, including amounts of $9.6 million, said to have been spent on legal costs since 1993 and including amounts spent defending legal action brought by the plaintiff's firm. The article concluded with a report of remarks made by Mr Peters, describing the Treaty industry and what he termed "treaty lunacy and treaty people".

[6] Initially, Mr Billington QC for the plaintiff sought to argue that the reference to "Treaty lunacy" was intended to reflect adversely upon the plaintiff and to suggest again that she was mentally unwell. However, during the course of argument Mr Billington quite properly accepted that the article was not capable of bearing the meaning that the plaintiff was mentally unwell. Nevertheless, he submitted that the article could be relied upon as increasing the hurt to the plaintiff arising from the subject article in three respects:

[a] That the article conveyed the meaning that the plaintiff was associated with "a lawyer-inspired legal action".

[b] That the plaintiff was the recipient of the $1 million of legal aid referred to which he said was a false statement and the plaintiff had not received any part of that sum.

[c] That the plaintiff was associated with "Treaty lunacy" which suggests that the plaintiff has been associated with absurd or unnecessary Treaty litigation.

[7] In all those respects, Mr Billington submitted that they reflected upon the plaintiff's professional competence and integrity which aggravated the consequences to her in those respects arising from the subject defamation.

[8] Mr Miles QC for the defendant submitted that the June article could not in law be relied upon and that in any event, it had come late in the piece and ought to be excluded on that account, having regard to the difficulties in the defendant meeting these fresh allegations. He submitted further, that in order to be taken into account as aggravating the hurt from the earlier action, the subsequent statement must amount to an effective repetition of the earlier defamation. As it is now accepted that the latter article did not touch on the plaintiff's mental health as such, it did not repeat or refer to the original defamation.

[9] Counsel each cited a number of cases but in the time available to me, I am not able to cite extensively the arguments which were put. Suffice to say that I have decided that the matter must be decided as a matter of principle rather than by reference to specific cases in which this precise situation has arisen.

[10] There are a number of issues relating to aggravated damages which are either well established in law or which are common ground. Gillooly on *The Law of Defamation in Australia and New Zealand* p 282-283 has a helpful summary of the general principles relating to aggravated damages in defamation cases in particular. First, it is clear that aggravated damages are not a distinct category of damages. Rather, they are to be seen as increasing the damages which would otherwise be payable for the defamation in question. Second, aggravated damages are compensatory in nature. Third, the aggravating conduct must be improper in some respect. Gillooly refers to misconduct in the sense that it is unjustifiable or lacking in bona fides.

[11] There are a number of circumstances in which damages in defamation litigation may be aggravated. They can include the manner in which the publication was made, the extent of any negligence or ill will involved in the making of the statement, the absence of an apology or retraction or the manner in which that is carried out, and the conduct of the litigation including such matters as prolonged or hostile cross-examination or even "turgid speeches" to the jury. As well, in certain circumstances other defamatory publications made by the defendant between the making of the subject defamation and the end of the trial may aggravate damages.

[12] It is common ground that a repetition of the original defamation could be taken into account as a factor aggravating damages. But the issue for me is whether in the absence of a repetition as such, a fresh defamation, not directly related to the first, may be taken into account as an aggravating factor rather than sued upon as a fresh and independent defamation. Gatley on *Libel and Slander* (9th ed) at paragraph 32.49 contains the following passage:

> Where the plaintiff has alleged that the damage has been aggravated by the conduct of the defendant and given details of such conduct in the statement of claim, evidence of such matters may be led by the plaintiff. It can cover a broad ambit as "the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict". Evidence may be given that the defendant has published other defamatory words about the plaintiff, whether such words were or were not connected with the subject-matter of the action, whether they were similar to, or different from, the words complained of, and whether publication took place prior or subsequent to the publication giving rise to the action.

[13] It will be seen that the authors of Gatley are of the view that even unrelated subsequent defamatory words may amount to aggravating factors for the purposes of damages. A number of authorities are referred to but in the time available to me, none of them seem to be precisely in point.

[14] Having regard to the purpose of aggravated damages in a defamation claim, I am satisfied that subsequent defamations may be relied upon to aggravate damage, even where they are not directly related to the original defamation relied upon. The general principle is that any misconduct which follows the original defamation and

which bears upon the original defamation or the conduct of the litigation or which aggravates the hurt to the plaintiff's feelings arising from that original defamation, may be taken into account.

[15] There are, however, a number of qualifications to that broad principle. The first is that any subsequent defamatory statement prior to the conclusion of the litigation arising from the first does not in general enlarge the scope for reputational damage but only the scope of damages for hurt feelings: *TVNZ Ltd v Quinn* [1996] 3 NZLR 24, 68 (CA). Second, the existence of a subsequent defamatory statement does not permit a subsequent award of damages for the additional defamation but may only be taken into account as a factor tending to increase damages by reason of the additional hurt which is established by the later statement. Third, the defendant must be able to respond adequately to the subsequent defamatory remark in terms of justifying the statements made, why they were made, and the basis for making them. Fourth, wholly unrelated defamation not referable in any way to the first and not related to the conduct of the litigation may, as a matter of discretion, be excluded and sued upon independently, particularly if it would give rise to significant difficulties in the way in which the defendant may respond to the subsequent defamation. I have in mind that in some cases the absence of the usual pleading rules in relation to defamatory statements may unreasonably handicap a defendant if relied upon in the way sought in the present case.

[16] On the present facts, I do not accept that there is no sufficient nexus or connection between the subject statement and the June statement. It is clear from the original statement that the plaintiff's role in the Volcanic Interior Plateau claim was referred to, along with the plaintiff's role as the lawyer for that group. It is evident that the defamatory meaning relied upon is directly related to the mental health of the plaintiff in her capacity as a lawyer and it is claimed that this reflects on her professional integrity and competence. The June article was published in close proximity to the trial for the original defamation and once again contains material in it relating to the plaintiff's position as a lawyer in relation to Treaty claims and in particular, reference again to the Volcanic Interior Plateau claim. As well, it makes reference to the specific payment of legal aid in another Treaty related piece of litigation and the plaintiff is directly connected with that. It also refers to the

plaintiff's role as inspiring legal action against the Treaty of Waitangi Fisheries Commission and suggests that she has been associated with absurd or unnecessary Treaty litigation. All of those matters reflect upon her professionalism and integrity as a lawyer and in that sense raise very much the same issues as the subject article.

[17] I have considered Mr Miles' submission that he has not had adequate notice of reliance being placed on the June article. However, I am satisfied from correspondence produced that the plaintiff's solicitors drew the matter to the attention of the defendant's solicitors in early June and sought a response as to whether any amendment to the pleadings was required by the defendant. There was no response to that request. As it happens, the briefs delivered by both sides have dealt with the June article, although I accept Mr Miles' submission that it may be necessary to adduce some further evidence on that subject and there may be discovery issues relating to the payment of $1 million said to have been made to the plaintiff's firm for legal aid. It seems to me, however, that it should be possible to address any discovery issues such as the need for trust account records from the plaintiff's firm and that this should be capable of being completed promptly without undue difficulty for the defendant. However, if there is any problem arising from discovery issues in relation to the June article, then the matter can be raised again.

[18] However, I am satisfied that it is appropriate to permit the statement of claim to be amended in the form now submitted as the eighth amended statement of claim and leave is granted accordingly. The particular aspects of the complaint about the June article are to be expressly limited to the three matters which counsel identified and which are enumerated in paragraph [6] of this judgment. A statement of defence will need to be filed in relation to the amended pleading.

[19] The amendments to the pleadings and the ruling I have made will necessitate some changes to the briefs which have been exchanged. I propose to indicate in broad terms how those briefs should be amended, leaving it to counsel to settle the details. If there are difficulties or differences in this respect, then they can be brought to my attention for a ruling.

[20] Dealing first with the plaintiff's brief, I raised yesterday some concern about the background material which covers nearly 24 pages of the plaintiff's brief before addressing the subject article. Mr Billington indicated that he would address that material and reduce it to that which is properly relevant and necessary in terms of establishing the plaintiff's qualifications, experience, and achievements relevant to her role as a lawyer and the alleged defamatory statements. I make it clear however that I expect that a great deal of the detailed material be deleted, including reference to the plaintiff's views on issues of one kind or another (which is immaterial) and is to be deleted.

[21] As to the plaintiff's amended brief a portion of which was handed to me this morning containing new paragraphs 163 to 177, I record the following amendments agreed this morning:

[a] The fifth line of paragraph 167 is to be amended to read, "... an opportunity to correct the statements.".

[b] Paragraphs 170 to 173 are to be deleted.

[c] The second sentence in paragraph 176 and the whole of paragraph 177 is to be deleted.

[22] As to the defendant's briefs, the principal one is that of the author of the subject articles, Mr Anderson. Much of his brief deals with the articles prior to the subject article in March 2000. Unless there is any material that relates specifically to the issue of the plaintiff's identity, that material is now irrelevant and should be deleted.

[23] There is also a substantial body of material relating to alleged conflict of interest arising from the relationship of the plaintiff with Justice Durie and the latter's role, particularly as Chairman of the Waitangi Tribunal. No reference is made to Justice Durie in the subject article but there is a passing reference to him in the June 2002 article in that the plaintiff is described as "the wife of part-time High Court Judge and Waitangi Tribunal Chairman, Justice Eddie Durie". I see that as a

description of the Judge and I do not see in the article any issue arising or any implication of impropriety as far as the plaintiff is concerned in her relationship with her husband. The plaintiff does not seek to raise the issue and it follows that material in Mr Anderson's brief relating to the alleged actions of Justice Durie and conflict of interest issues is irrelevant and should be deleted. That extends to the allegations which arose in 1999 about Durie J's role in the preparation of submissions about the role of the Crown Forestry Rental Trust. Obviously, because there is now no reliance on two other articles presented subsequently to the subject article in April and May 2000, reference to those articles is now no longer relevant and is to be deleted.

[24] Similarly with the brief of evidence of Professor Taggart which is related to the alleged conflict of interest between the plaintiff and her husband. It is no longer relevant and is not to be led.

[25] There is a brief delivered by the defendant from Sir Tipene O'Regan. I regard most of that as relevant to the extent that it deals with his concerns about the manner in which Treaty litigation is being conducted and its importance as a matter of public interest. That is relevant to the submission to be made by the defendant that the matters raised in the articles, especially the June 2002 article, were important matters of public interest which require airing in public. There are, however, some aspects of his brief which are of only marginal relevance and I invite counsel to consider in that respect paragraphs 14, 16, and 17. There are other parts of his brief that relate directly to the conflict of interest issue. These are paragraphs 22 to 27 inclusive. They are irrelevant and are to be deleted. Paragraphs 28 and 29 appear to relate to articles prior to the subject article and also appear to be irrelevant.

[26] I will hear further from counsel if necessary on the contents of the briefs.

[27] An issue was raised with regard to the scope of cross-examination permitted in relation to the June 2002 article. As I see it, there could be no inhibition to cross-examination relevant to the issues arising with the exception of the conflict of interest issue which is no longer relevant. Nor is there any reason why counsel for the defendant may not cross-examine the plaintiff on changes to the pleadings or

statements made in prior briefs signed and delivered by her or on her behalf. However, the scope of cross-examination will need to be considered in the context of the trial and it may be necessary to make further rulings in that respect during the hearing.

[28] In conclusion:

[a] I grant leave to amend the statement of claim in the form now presented.

[b] Amended statements of claim and defence are to be filed and served not later than 9 am on Monday.

[c] Costs will be reserved.

[29] Finally, counsel have raised the possibility of an order being made preventing the media making reference to the abduction of the plaintiff's child which occurred earlier this year. Both counsel have agreed that there should be no reference at all to this matter during the course of the trial. It is not known to what extent there may be media interest in the trial but it seems likely there will be at least some.

[30] Counsel have advised that the *Sunday Star Times* intends to publish an article this weekend about the plaintiff's child and serious concern is expressed about the risk of prejudice to the trial about to commence. It is also possible that reference may be made to the abduction of the child by other media, either this weekend or during the trial next week. I wish to make it clear that any media organisation which publishes material relating to the plaintiff's children and the recent unfortunate abduction prior to the conclusion of the trial, risks prejudicing a fair trial of the case, as well as contempt of Court proceedings.

A P Randerson J. J.

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