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**IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY**

CP2/01

BETWEEN TAIRAWHITI DISTRICT HEALTH BOARD
First Plaintiff

A N D WAYNE KELVIN FORREST BROWN
Second Plaintiff

A N D MICHAEL DONOVAN GRANT
Third Plaintiff

A N D BRIAN COWPER
Fourth Plaintiff

**A N D STEPHEN PERKS (trading as Goblin
Productions Ltd)**
Defendant

Hearing: 28 February 2002

Counsel: J R F Fardell for the Plaintiffs
N Weatherhead for the Defendant

Judgment: 11 March 2002

RESERVED JUDGMENT OF PATERSON J

Solicitors:

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[1] During 2000, the defendant Mr Perks published three newsletters and a letter which the plaintiffs allege defamed them. The first plaintiff, The Tairawhiti District Health Board (Tairawhiti) sues as the successor of Tairawhiti Healthcare Ltd (the company) which at the relevant time provided hospital and health services in the Gisborne and surrounding districts, while the other three plaintiffs were officers or employees of the company. Mr Brown, the second plaintiff, was the Chairman of the Board of Directors of the company, Mr Grant, the third plaintiff, was employed by the company as Group Manager of Community and Support Services, and Mr Cowper, the fourth plaintiff, was a senior manager with the company. Mr Perks had been a former employee of the company but at the relevant times was contracted by it to assist with policy development.

[2] Although the plaintiffs originally claimed damages, they no longer seek damages or costs against Mr Perks. In an amended statement of claim filed in October last, they all seek a declaration that Mr Perks is liable to them in defamation. In an interlocutory application Mr Perks sought to have the proceedings dismissed. At the same time, the plaintiffs sought 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 was defamatory, untrue and was published maliciously. In a judgment given on 26 September 2001, Williams J declined to strike out the statement of claim and was not prepared to grant the plaintiffs an order recommending that Mr Perks publish a retraction and apology.

[3] Although Mr Perks took part in the interlocutory proceedings, he has not filed a statement of defence and the matter comes back before the Court by way of formal proof on affidavit evidence pursuant to a direction of Potter J. Mr Weatherhead, counsel for Mr Perks in the interlocutory applications, attended at this hearing but did not make any submissions on behalf of Mr Perks.

Background

[4] In view of the manner in which this matter comes before the Court it is not necessary, in my view, to deal with each statement which is alleged to be defamatory. In my view, there are several defamatory statements and it is sufficient just to indicate some of those on which I come to this conclusion. Several others, which will not be mentioned, were in my view, equally defamatory.

[5] In a September newsletter under a heading “**Discussion with Chairman Mao**” there appeared the statement:

“... not in favour with persons of power and corruption?”

Two further statements under the same heading were:

“We also asked about his surfing skills since arriving here, how long he had been drinking with Mr Grant, and who are the candidates for the post apart from buddy mike.” and

“We continued that health & disabilities commission should be keeping an eye on him, considering his responsibilities to the public in light of recent reports. Mr Brown replied by saying did I surf in Gisborne often? and that I should meet him and Mr Grant later that night in the wharf to discuss my future employment working as one of the new board members! ...

We point out that, although, quote the people who fixed the hospital are already there, **THEY WON'T BE FOR LONG!**”

[6] In an October newsletter, there were several further critical comments. One, in particular, said:

“If you think of corrupt political systems around the earth, they always appear to have these common aspects to the people involved in them. But don't forget the ‘hangers-on’ the like-minded person's who closely follow, obey their ‘leader’. The common threats are, 1] tyrant 2] persuasive 3] single-mindedness – is that a word? 4] ruthless 5] cunning. Here's the list of those persons see if you can spot the odd one out???? Answer at the end of the list.

Idi Armin
CI Gaddaffii
Adolf Hitler
Mike Grant

Mr Jones
Jack the ripper
Charles Manson
Una bomber
Dr Crippen
Rasputin
Robert Mgararbe
Vlad the Impaler

You get the idea.

You have all heard of paper trails, well here at goblin, we say; you know what they say about slugs They always leave slime in their trail.

ANSWER: Adolf.”

A second relevant comment under the heading **“Why are we so hard on the management at T.H.L.? was:**

“Answer: it hard not to really look at the baffoons, can’t even cover up crappy problems after themselves, it’s ‘run for cover and blame someone else [usually the last manager appointed] ...”

[7] There was then a second October newsletter. This also contained further statements which were capable of being defamatory including the following two:

“THE UNDERCOVER SECTION; WE here at ‘Goblin’ take our work seriously, so when we find out thinks like ‘drinking and driving’ in a T.H.L. car, and we all know who we are talking about here. That does not set any example for senior management to set, and it begs the question?, why oh why do they get away with it everytime, if it’s not that it’s drunk while being at work, or sexually inappropriate with females at a company function. Other actions of his partner in crime, is handy with his fists, nice people to have power eh? – think not!!”

There was also what purported to be an e-mail from a person at the Newcastle University in Australia which read:

“Hello there Bruce, I was quite interested to read about the ‘trust’ survey that’s been sent around T.H.L. areas of work. I presume that you are not aware of the difficulties, problems, bullying, and down right underhand tactics in getting his own way and ‘keeping’ his control over people, staff have complained to the local M.P. and Annette King AND the health and disabilities commission have been Notifies on this man’s behaviours, so the best way of restoring faith or dare I say TRUST is to get rid of the Cancer of T.H.L. which is Mr

Mike Grant, please investigate for yourself, without the influence of Grants 'G' system do not be fooled Mr Cheek!

Yours Louis De Cyper.”

[8] Finally, there was a letter dated June but it was not clear precisely when it was circulated. This letter was purportedly written to Mrs Mackey, the local Member of Parliament, and relevant extracts from it include:

“... I had planned to come and discuss my observations and first hand experience whilst working for ...

I have even before I left had and still have gave concerns on how the service has been run by Mr Grant and his associates. I know of instances of outright bullying tactics to remove anybody who basically gets in the way, or who opposes his views. It seems he has become a powerful man there, and was always futile to raise matters pertaining to his behaviour to the CEO. Historically its letters or support without investigation, so in turn leaves many of us feeling powerless in a dangerous management structure parts [as you know] have started to surface now.

... it's a generally known fact that Mr Grant calls the shots over Ms Smail, and the dubious nature on how Mr Grant was appointed to his present post. It truly amazes me how this structure continued for so long without an outside [the control of 'the management system, probably developed in sicily earlier last century] could continue in its damaged form for so long!”

Issues

[9] There are, in effect, four issues to be determined:

- (a) were defamatory statements made?
- (b) were the statements about the plaintiffs?
- (c) were the statements published by Mr Perks;
- (d) does s 6 of the Defamation Act 1992 prevent Tairawhiti from obtaining a declaration?

Were defamatory statements made?

[10] The evidence establishes that many of the statements, including but not limited to those referred to above, were unfounded and/or false, and had the effect of impugning the reputation of the plaintiffs. In the September newsletter the statements under the heading "Discussion with Chairman Mao" carried the imputation that Mr Brown was corrupt and/or tyrannical in carrying out his duties as Chairman of Tairawhiti and, consequently, the management of Tairawhiti was also corrupt. The reference to drinking with Mr Grant carries the inference that Mr Brown indulged in nepotism and gives jobs to his friends irrespective of their qualifications or suitability for the position and that he otherwise engages in underhand and morally reprehensible conduct. Further, it carries the innuendo that Mr Grant's candidacy for the position of Chief Executive Officer was solely attributable to a friendship he had with Mr Brown, as opposed to personal and professional merit. Consequently, there was an imputation that the management of Tairawhiti was corrupt and lacked integrity. The other comments quoted in para 4 above carry the imputation that the management of Tairawhiti was seriously deficient.

[11] The statements in the 1 October newsletter, referred to in para 5 above, were clearly false and discredited Mr Brown, Mr Grant and the Tairawhiti management.

[12] The 2 October newsletter not only carried imputations adverse to the Tairawhiti management, but carried some serious allegations against Mr Cowper. Mr Cowper had been charged with exceeding the prescribed limit of alcohol while driving a car, but he was not at the time driving a Tairawhiti car. The article also carried an imputation that he was drunk at work and that he had been sexually inappropriate with females at a company function. As the evidence satisfies me this was a reference to Mr Cowper, and that the suggestions about driving a Tairawhiti car, being drunk at work and behaving sexually inappropriately with females at a company function are completely false, there can be no doubt that these were defamatory statements.

[13] The June letter clearly carried imputations that there was something seriously wrong with the Tairawhiti management, that Tairawhiti was led by an irresponsible and incompetent Chief Executive Officer, and that Tairawhiti was in a state of disrepair to the detriment of the community's well-being.

[14] As noted, I have only given a sample of the defamatory statements and the imputations which they carried. There were many more statements in a similar vein and the overwhelming picture is one of a campaign against Tairawhiti, its Chairman, Mr Grant and, to a lesser extent, Mr Cowper. There was not one, but many defamatory statements.

Were the statements about the plaintiffs?

[15] This issue has been answered in the previous sections. There can be no doubt that Mr Perks was referring in several of the statements to the Chairman, Mr Brown and to Mr Grant who at that stage held the position of Group Manager but was, in effect, acting Chief Executive Officer. There can also be no doubt the June newsletter was referring to Mr Cowper. It is also noted there is no statement of defence denying the allegations.

Publication

[16] The evidence establishes both that Mr Perks was the author of the articles and that they were disseminated by him. Evidence was given tracing the source of the 1 October newsletter and the June letter to Mr Perks, and there was evidence he clearly acknowledged authorship in an interview with a journalist. An affidavit filed in the interlocutory application, by implication, also acknowledged authorship.

[17] There can be no doubt from the evidence that the publications were circulated. Copies appeared attached to the main door of the Gisborne Hospital, on the notice board in the main foyer of the hospital, in staff in-trays, in internal mail of hospital staff, under the cafeteria door at the hospital, on the cafeteria notice board, on the table in the cafeteria, and were received in the mail by friends of the plaintiffs.

In addition, the 1 October newsletter and the June letter were traced to Mr Perks. I am satisfied he was the author and the circulator of the statements.

[18] There was also evidence that the material had the effect of impugning the reputation of the plaintiffs. The nature of many of the articles would have been sufficient in themselves to draw this inference but there was evidence supporting this inference.

Tairawhiti's position

[19] One of the matters determined in the hearing before Williams J was the status of Tairawhiti as a plaintiff. At the time the statements were published, the company was the provider of the health services. It was struck off the Companies Register on 24 January 2001 pursuant to s 95(5) of the New Zealand Public Health and Disability Act 2000. Tairawhiti, the first plaintiff in this proceeding, is a statutory body constituted under that Act and sues in its capacity as successor in title to all of the company's assets. Williams J rejected a submission that because a cause of action in defamation is terminated by the "death of any person" the striking off of the company effectively prevented Tairawhiti from bringing the present claim. The issue of whether Tairawhiti can sue, because it is the successor of the company, has therefore already been determined. However, Williams J noted that it was still necessary for Tairawhiti to prove pecuniary loss to the company up to 1 January 2001 and pecuniary loss to itself after that date.

[20] While Tairawhiti is legally entitled to bring a claim in defamation, it must also establish pecuniary loss before it can succeed. The provisions of s 6 of the Defamation Act 1992 state:

S6. "Proceedings for defamation brought by body corporate

Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings—

- (a) Has caused pecuniary loss; or
- (b) Is likely to cause pecuniary loss—

to that body corporate.”

[21] Mr Fardell, on behalf of the plaintiffs, submitted that s 6 reflects the common law rule that a corporate plaintiff’s claim must sound in money and that s 6 imposes no obligation for a corporate plaintiff to plead “special damage.” With respect, I accept both these submissions, the latter being based on statements by Tipping J in *Mt Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488.

[22] On behalf of Tairawhiti it was submitted that if a corporate entity has a good commercial reputation, any false attribution of responsibility for something that has a tendency to damage that reputation is capable of being defamatory even though such damages may be difficult to quantify. It was submitted that the pleadings and the evidence was sufficient to satisfy the requirements of s 6 of the Defamation Act. The particular evidence was that the effect of the statements had been to undermine the relationship between management and staff at the hospital, and that if people took at face value the contents of the documents, individual reputations within the hospital environment would be unfairly and unjustifiably impaired and the management of the hospital totally discredited in circumstances where there was no justification for this at all. The only reference to pecuniary matters was that Tairawhiti had incurred a cost of approximately \$150,000 in having to deal with this incident and that there had been a real cost in terms of management time and disruption to the proper conduct of Tairawhiti’s normal business in having to deal with Mr Perks’ actions.

[23] The company was constituted under s 19 of the New Zealand Public Health and Disability Act 2000. The objects of a health board are set out in s 22 of that Act and are primarily concerned with the provision of health services. A health board is obliged by the provisions of s 41 and 42 of the Act to operate in a financially responsible manner. However, the company was at the relevant times, a monopoly supplier of health services in the Gisborne area. I have difficulties in seeing how the company had a business or trading reputation. The evidence does not establish that it suffered financial loss as a direct result of the defamatory statements.

[24] Tipping J in the *Mt Cook* case, relying on common law authority, noted a corporate body may sue for defamation by reason of material calculated to damage the claimant's business interests or goodwill. Damages could be awarded to it for injury to its reputation in the way of its trade or business, but not for reputation as such. A corporate body cannot be injured in its feelings. It can only be injured in its pockets. Any injury must sound in money. That loss need not necessarily be confined to loss of income and can include the injuring of goodwill. In summary, damages can only be awarded to a corporate plaintiff in respect of commercial loss however suffered and not on account of other forms of harm and damage to reputation as are available when the plaintiff is a human being.

[25] In my view, s 6 in referring to "pecuniary loss" is referring to injury to reputation in the way of the plaintiff's trade or business. It is not referring to money spent on initiating the defamation proceeding. An example of the type of damage which allows a body corporate to succeed in a defamation action is illustrated by the judgment of Tipping J in the *Mt Cook* case.

[26] He found it was possible, if unlikely, that people would have decided to go to another skifield. It was also possible that people would have avoided the plaintiff's bus and airline fleet. In my view, it would have been necessary in this case for Tairawhiti to have shown that the defamatory statements caused people to shun its health services in Gisborne and take their money elsewhere, or for the funding authorities to reduce the funds available to Tairawhiti because of the defamatory statements.

[27] I have therefore concluded that although "defamatory statements" were made about Tairawhiti, it has not established pecuniary loss of the type required by s 6 of the Defamation Act and, as such, a declaration cannot be made in its favour.

[28] There was one relevant matter which was not raised in submissions and in view of my findings, does not need to be addressed. It is whether the House of Lords decision in *Derbyshire County Council v Times Newspaper Ltd* [1993] AC 534 has application in this case. The House of Lords there held that elected councils cannot sue for defamation because they must be open to free public criticism and the

threat of defamation actions would operate as an unreasonable fetter on such criticism. The decision has been followed in Australia in *Ballina SC v Ringland* (1994) 33 NSWLR 680. The learned authors of *The Law of Torts in New Zealand* (3rd ed 2001) suggest that the reasoning is applicable to New Zealand in light of s 14 of the New Zealand Bill of Rights Act 1990. The limits of the *Derbyshire* principle have not yet been settled. Lord Keith in that case referred to the principle applying to “any government body.” The reasoning in the *Derbyshire* decision may well apply to a district health board. However, this is a matter which will need to await determination in a case in which it is firmly at issue.

Relief

[29] Section 24 of the Defamation Act 1992 provides that in any proceeding for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation. This section authorises the making of the declarations sought by the plaintiffs in this case. Section 24 also provides that where the plaintiff seeks only a declaration and costs, and the Court makes the declaration sought, the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings unless the Court otherwise orders. In this case, the plaintiffs have clearly indicated they do not seek costs so the provisions of s 24(2) of the Defamation Act do not apply. In view of the assurances given by the plaintiffs, there will be no order of costs in this proceeding.

[30] There are declarations that the defendant Stephen Perks is liable to Wayne Kelvin Forrest Brown, Michael Donovan Grant and Brian Cowper in defamation.

Signed at 12.40 ~~am~~ pm on 11 March 2002



B J Paterson J