

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

CIV-2004-404-1331

IN THE MATTER OF the Defamation Act 1992

BETWEEN DENIS FRANK FABIAN
 Plaintiff

AND CANWEST TV WORKS LIMITED
 Defendant

Hearing: 3 October 2005

Appearances: Mr D F Fabian in person
 Ms C Bradley for defendant

Judgment: 5 October 2005

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

Solicitors:

C F Bradley, CanWest TV Works Limited, Private Bag 96 624, Auckland

Parties:

Mr D F Fabian, c/- HBL Wylie McDonald Ltd, Level 6, L J Hooker House, 57 Symonds Street, Auckland

Background

[1] The plaintiff seeks leave to bring defamation proceedings against Canwest TV Works Limited (“TV3”). The basis of his claim is that TV3 defamed him when it reported on the circumstances surrounding the prosecution of the plaintiff for cruelty to animals. Essentially the charges asserted that he neglected 14 horses in his care. He was found guilty of these charges in the Levin District Court on 22 December 1998. Since then he has been indefatigable in attempting to challenge his conviction. He has appealed to the High Court and sought leave to appeal to the Court of Appeal (in both cases unsuccessfully). He has made two applications for the Royal Perogative of Mercy to be extended to him. He has issued civil proceedings against his original legal advisors in the District Court case, claiming negligence on their part.

[2] There is no doubt that during 1998 TV3 did broadcast some material about Mr Fabian’s involvement in the Court proceedings. It may tentatively be concluded that broadcasts took place on 24 March, 6 November, 9 December and 22 December 1998. I will say something more about the evidence relating to those broadcasts shortly.

[3] Mr Fabian says that after the broadcasts took place he contacted TV3. He said he spoke to someone at the “switchboard” who said that they would arrange for someone to call him back about his complaints. He says no one in fact called him back. Beyond that, he agrees that he never gave notice to TV3 that he was going to take defamation proceedings against them. He specifically accepts that he has never written to TV3.

[4] The plaintiff drafted his statement of claim without the benefit of legal assistance. It was apparently filed in the High Court at Auckland on 18 March 2004. The Registrar accepting the document for filing noted that the document was accepted:

Notwithstanding non-compliance with certain form and content rules pursuant to HCR23(1).

[5] Mr Fabian's statement of claim in condensed form alleges that TV3 showed television footage concerning the horses that were the subject of the cruelty claim on a number of occasions. In condensed form he said that the TV3 coverage:

- claimed that he had starved horses (paragraph 1)
- showed footage of a horse falling over for starvation and claimed that he starved it to death
- showed an area of sand claiming that is where the horses were kept
- that the horses had no water
- showed a bucket and hose and said it was the water horse

[6] The plaintiff claims that all of this television coverage took place prior to the Court proceedings. On the critical question of dates he said:

9. TV3 aired it, not only on the night but also three times on network news at 6.30 pm in the last week of March 1998.

[7] The statement of claim recorded that he was a horse trainer and that his credibility in the racing industry had been destroyed. He said TV3 acted with malice (paragraph 15). He says that he wishes to recover damages of \$4 million for defamation of character, loss of income and destruction of credibility in the racing industry. There seems to be an allegation in his statement of claim as well that TV3 failed to put his side of the story.

[8] The proceedings were served on the defendant on 19 June 2004.

[9] Because his claim was barred by the provisions of s4(6A) of the Limitation Act 1950, it was necessary for Mr Fabian to seek leave to bring his claim out of time. TV3 by its counsel, admits that Mr Fabian did file and serve an application to extend proceedings but that cannot now be located. TV3 is prepared to accept that this occurred in June 2004. It opposes the granting of leave to bring the proceedings.

[10] My approach is to proceed on the basis that an application to bring proceedings out of time was filed and served by June 2004.

Screening of TV coverage

[11] TV3 no longer holds copy of the film as broadcast on its news programmes which referred to the plaintiff. Tv3 refers to material in the form that it was actually broadcast as “off-air” material.

[12] An affidavit has been filed by Meagan Stewart who is the librarian for the news library at TV3. The search that she had made has located written records which summarise the news coverage of the plaintiff’s treatment of the horses and his court appearances.

[13] The first of the written abstracts indicates that on 24 March 1998 there was news coverage alleging that 22 horses had been seized because of alleged ill-treatment. The summary said that 15 horses were said to be in very poor condition with one so bad it was put down. The plaintiff was apparently identified in the programme.

[14] On 6 November 1998 TV3’s news coverage apparently referred to the fact that “an unemployed Manawatu man” appeared charged with 15 counts of cruelty in the Levin District Court. It was stated that in March the SPCA confiscated 22 horses from the man because they were grossly under-nourished. The summary does not make any mention of Mr Fabian’s name.

[15] The next summary is of coverage on 6 November 1998. The report is an account of Mr Fabian’s appearance in Court. It records that 50 year old Denis Fabian “faces 14 charges of cruelty to animals by neglect and one of aggravated cruelty”. Amongst other things it says that he did not supply proper food and water to the horses and failed to terminate their suffering. It noted that the hearing had been adjourned for a fortnight.

[16] The next summary for 9 December 1998 records that TV3 reported on continuation of the animal cruelty charges against the plaintiff.

[17] The final summary which refers to 22 December 1998 discloses that Mr Fabian was sentenced to 100 hours of community service for neglecting 15 horses in his care.

[18] Ms Stewart in her affidavit says that also found library tapes with “some footage relating to these items”. I understand that footage is of background film some of which may have been incorporated into the news items. The fact that TV3 has footage in his possession does not necessarily mean that it screened all or part of each portion of film material held in its archives.

[19] Mr Fabian himself confirms that he has obtained some copies of film from TV3 but he has provided no particulars of what the content of the film is.

[20] In another affidavit this time by Ms Janine Sinclair, a manager employed by TV3, says that she had cause to carry out a search of records under her control in 1996 and there is no evidence that the plaintiff contacted the defendant at any time prior to the receipt of the proceedings in June 2004. To like effect is an affidavit by Diana Winkes who works as Executive Assistant to the manager of TV3.

The Limitation Act 1950

[21] Sections 4(6)(A) and (B) of the Limitation Act 1950 provide:

[(6A) Subject to subsection (6B) of this section, a defamation action shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.

(6B) Notwithstanding anything in subsection (6A) of this section, any person may apply to the Court, after notice to the intended defendant, for leave to bring a defamation action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law (other than the provisions of subsection (6A) of this section), or by any other reasonable cause.]

[22] A chronology of dates discloses the following:

24.03.98	Tv3 broadcast #1
06.11.98	Tv3 broadcast #2
09.12.98	Tv3 broadcast #3
22.12.98	Tv3 broadcast #4
24.03.00	Time expires broadcast 1
06.11.00	Time expires broadcast 2
09.12.00	Time expires broadcast 3
22.12.00	Time expires broadcast 4
31.08.03	Plaintiff learns of two year limitation period
24.03.04	Time expires to apply broadcast #1
19.06.04	Application to proceed out of time commenced
06.11.04	Time expires to apply broadcast # 2
09.12.04	Time expires to apply broadcast #3
22.12.04	Time expires to apply broadcast #4

[23] The plaintiff has not particularised any of the dates of when the broadcasts occurred. The dates in the table are taken from TV3's records – see the affidavit of Ms Stewart referred to above. It will be seen that he could not obtain leave to bring proceedings in respect of broadcast one because time for seeking leave had expired before he filed and served his application. There is, however, an issue as to whether or not leave should be granted to bring proceedings arising out of broadcasts two, three and four.

[24] In his affidavit sworn 23 August 2004 the plaintiff says the following:

I, Denis Fabian was not aware that the statute of limitations was only two years. I was under the impression that it was six years. I only learnt that the statute of limitation was two years in August 2003. That was about the time that the last set of documents that I sent into the High Court at Auckland were sent back because the format was incorrect. I phoned by family Solicitor Jackson Russell and I spoke to a Mr Hawk. It was then that I learnt that the Statute of Limitations was only two years but there was an Ammendment to Limitation Act 1950 which said that the two year limitation could be increased from two years to six years. With some advice from Mr Hawk I decided to submit a new set of documents and with some help from the Court I finally managed to get a Statement of Claim registered along with a Notice of Proceeding and an Affidavit. As you know this Affidavit is in support of Interlocutory Application to extend the Statute of Limitations from two years to six years for this case.

I Denis Fabian have had to learn how to prepare these documents in the correct format. I have sent documents into the Court on several times only to have them returned and each time I have had to replace much of the documentation. It has really been a nightmare. Many times I just wanted to give up, and if it wasn't for the help of the Court Registrars the documents may never have been registered in time [sic].

[25] In fairness to Mr Fabian I should also note the submission that he made to me at the hearing that his efforts to get what he described as justice, the appeals etc, have taken up much of his time, attention and energy over the years since he was convicted in the District Court.

Assessment

[26] Mr Fabian always knew that he had entitlement to bring defamation proceedings against TV3. It is not a case of his only learning later in the day that he had a right to sue. It is correct that he did not find out about the Limitation Act provisions until August 2003. Even after he learned about the limitation period, a further ten months, approximately, were to elapse before he commenced his application to proceed out of time.

[27] I turn now to the first ground that he relies upon which is his ignorance of the limitation period. This is not a mistake of fact or law that he can rely on. Section 4(6)(b) expressly rules out the possibility of relying on such a mistake.

[28] The second ground essentially is that the plaintiff had difficulty in commencing proceedings because of his unfamiliarity with Court matters. Nearly six years had elapsed from the time when the allegedly offending broadcast took place until the plaintiff finally made application for hearing. He was right at the limits of the limitation period – assuming the court orders leave to proceed out of time, to seek leave.

[29] In *Lee v Wilson & Horton* 9 PRNZ 707, Robertson J said at p 715:

Overall, the question is whether the plaintiff can be said to have “slept on his rights” without reasonable excuse as was enunciated by Somers J *Moot v Crown Crystal*, (supra), p 276.

[30] If a plaintiff does not provide an adequate explanation for the delays, in circumstances where he knows that time is running against him, a strong inference must arise that he has slept on his rights. That is what has occurred in this case. It tells heavily against leave being granted to the plaintiff to now commence defamation proceedings against TV3.

[31] This is not a case where there was a mistake on the plaintiff's part which caused him to defer proceedings – or at least not one which is recognised by the statute as the type of mistake that he can rely on. It is not a case of the defamatory matter remaining concealed from him for many years. He knew of the events he complains about as soon as they occurred.

[32] The plaintiff has simply been tardy. His wish to draw and file his own proceedings – a process that he is understandably unfamiliar with – explains but does not justify the delay. He has not given any evidence as to why he did not retain legal advice or get legal assistance. Given the availability of legal aid I am not prepared to assume that he was not able to get legal help to formulate his claim.

[33] I consider it relevant to take into account the plaintiff's prospects of success. It seems likely that if a claim is brought by the plaintiff, the defendant could potentially have a defence of justification. It is not certain whether or not the defendant would defend the proceedings on that ground or what prospect of success such defence would have. It is not irrelevant, though, to note that Mr Fabian was convicted in the District Court on charges that seem to have involved the same factual matters as he has raised in his proposed defamation proceedings. Secondly, it is likely that the defendant will have a defence of privilege arising from the reporting of the Court proceedings.

[34] The next issue concerns the possibility of any prejudice to TV3. As I have mentioned, TV3 retains some written abstracts which describe the story as presented "off air". Mr Mark Jennings who is the director of news and current affairs for the defendant has given an affidavit. He said that he occupied his current position in March 1998 when this matter first arose. He has been the director of news and current affairs ever since. He said he recalled the present story in general terms but not in any detail. He said that since the first of these items was screened the defendant "will have presented more than 18,000 local stories as part of its news programming". He said at paragraph 6 of his affidavit:

The defendant holds no notes or records relating to these stories apart from the material that was found as a result of the news library. We retain the footage of the reports that the reporters have compiled and we have broadcast "but not the actual" off air material. Notes, field footage and our

“off air” recordings are not retained unless we are aware of an issue with the programme or item or unless it is likely to be significant on a national or international scale.

[35] A delay in bringing the proceedings, therefore, has not prejudiced the defendant in the sense that the defendant passed up an opportunity to retain material past a reasonable period because it had received notice from the plaintiff of a pending claim. Mr Jennings’ affidavit would suggest that the material is not retained for any period after it has been played.

[36] There could be some prejudice to the defendants in constructing a defence of justification after the passage of such a long period of time since the events occurred. Difficulties may be experienced in trying to track down witnesses and to locate items of real evidence. I do not of course overlook that some documentary evidence seems to be available which is contained in the defendant’s archives which might be of assistance of the defendant in mounting a defence to the proceedings.

[37] The delay may have theoretically caused problems with a possible defence of privilege attaching to a report of the court proceedings. It is difficult to know whether any record of the criminal proceedings brought against Mr Fabian has survived. It seems likely that copies of the Judge’s judgment finding the charges against Mr Fabian proved will be able to be located and there should be no great problem in establishing just what charges he was convicted on and what sentence was imposed. But beyond that, given that no verbatim record of the proceedings is likely to have been made apart from the Judge’s handwritten note, the question of whether or not TV3’s reporting of the Court proceedings was fair and balanced may not be straightforward. Delay is likely to have made it more difficult to obtain a record of the proceedings. But there is no evidence about whether the delay beyond the permissible limitation period has made it any more difficult than it would have been in any case. I conclude there is no ground to infer prejudice through the defendant’s delays so far as a defence of privilege is concerned.

[38] To summarise, the plaintiff has made application for leave some four years from the date when the limitation period expired. The only admissible explanation he is able to give is that he has had problems as an unrepresented litigant in getting

proceedings under way. In my view the grounds that he has advanced are inadequate.

[39] As well, there is a some risk of prejudice to the defendant caused by the four year delay in commencing these proceedings. For all of those reasons I decline to grant the plaintiff leave to bring the proceedings against the defendant. The application will be dismissed.

[40] I grant costs to the defendant on a 2B basis.

J P Doogue
Associate Judge