

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

CIV-2007-485-2212

BETWEEN	ROBERT ALEXANDER MOODIE Plaintiff
AND	ANTHONY JOSEPH ELLIS First Defendant
AND	ELIZABETH GRACE STRACHAN Second Defendant
AND	APN SPECIALIST PUBLICATIONS NZ LIMITED Third Defendant

Hearing: 18 March 2009

Appearances: Mr Moodie appears in person
No appearance for first defendant
Mr Upton QC with Ms Vokes for second defendant
No appearance for third defendant

Judgment: 18 March 2009 at 3.30 pm

JUDGMENT OF MALLON J

[1] Dr Moodie sues the defendants for defamation. The claim arises out of a *New Zealand Listener* article entitled “Moodie blues”, authored by Joanne Black, which appeared in the 17 March 2007 edition of the *New Zealand Listener*. The article reported on comments made by the first and second defendants to Ms Black. The third defendant is the publisher of the *New Zealand Listener*.

[2] There are two causes of action pleaded against the second defendant. The first cause of action sues on the words published by the second defendant to Ms Black. The second cause of action sues in respect of the statements published in the *New Zealand Listener* that are attributable to the second defendant.

[3] The second defendant applies for an order that the plaintiff file a more explicit statement of claim. This application is in respect of the second cause of action against the second defendant. The application follows a request made by the second defendant for further particulars of the allegation (in para 47 of the second amended statement of claim) that certain words that appeared in the “Moodie blues” article “... were published or caused to be published by the second defendant”. Further particulars were sought as to how it was alleged that the second defendant published the words authored by Joanne Black and how it was alleged that the second defendant caused such words to be published.

[4] The plaintiff’s response was to say that the conduct of the second defendant that was relied upon was already sufficiently particularised in the statement of claim. For the avoidance of doubt, however, a third amended statement of claim was filed. For present purposes the relevant amendments in the third amended statement of claim are paragraphs 11A and 46A. Paragraph 11A pleads the basis on which it is alleged that the second defendant was the source of the information that gave rise to the concerns about which the first defendant then spoke to Ms Black. Paragraph 41A repeats all earlier allegations in the statement of claim for the purposes of the second cause of action against the second defendant.

[5] The relevant principles upon which a party may sue a defendant for republication of defamatory statements are set out in *Gatley on Libel and Slander* (11ed 2008) at 6.36 to 6.40:

- a) A plaintiff may sue the defendant “both for the original publication and for republication as two separate causes of action”; or a plaintiff may sue the defendant “in respect of the original publication only, but seek to recover as a consequence of that publication the damage which he [or she] has suffered by reason of its repetition, so long as such damage is not too remote”;
- b) There are different ways in which it may be established that a defendant is responsible for the consequences of republication. One way this may be established is where the defendant authorised or intended the republication. Alternatively the defendant will be liable if he or she “is actually aware that what he [or she] says or does is likely to be reported or if a reasonable person in his [or her] position should have appreciated that there was a significant risk that what he [or she] said would be repeated in whole or in part and that would increase the damage caused by what he [or she] said”.

[6] The leading authority in the United Kingdom on this issue is *McManus v Beckham* [2002] 4 All ER 497 (CA). It is not contended that the position in New Zealand is different but, for completeness, Mr Upton QC referred to *Osmose New Zealand v Wakeling* [2007] NZLR 841 at [84] (where *McManus* is referred to) and Todd *The Law of Torts in New Zealand* (4ed 2005) at para 17.5.03 where *McManus v Beckham* is discussed.

[7] Turning to the requirements for pleadings, a statement of claim must give sufficient particulars of circumstances to inform the court and the party against whom relief is sought of the plaintiff’s cause of action (r 5.26 High Court Rules). The purpose of this requirement from a defendant’s perspective is so that she is informed as to the case she needs to meet.

[8] In this case the second cause of action seeks to claim against the second defendant in respect of words that appeared in the *New Zealand Listener*. The pleading pleads the words in the publication that are relied upon (para 47), the alleged defamatory meanings (para 48) and the effect of the second defendant’s statements in the context of the whole article (para 49). What it does not do is

specifically plead the basis on which it is alleged that the second defendant is responsible for the statements attributed to her or others in that article.

[9] Dr Moodie says that all of the relevant facts are pleaded by reference to the pleading (at para 46A) that the plaintiff “repeats and relies upon the content of paragraphs 1 to 46 above”. The second defendant contends that she should not have to wade through all of those paragraphs to work out which particular paragraphs are relied upon. The second defendant emphasises that the interview notes annexed to the statement of claim indicate a reluctant interviewee, who asked for (at least some of) her comments to be off the record and who asked that the article be run past her (which did not happen). The second defendant says she is entitled to know specifically what is relied upon as to why she is said to be responsible for the statements published in the *New Zealand Listener*.

[10] Dr Moodie says that it is “obvious” what is relied upon. In his written submissions Dr Moodie referred to:

- a) The second defendant’s conversation with Ms Black (pleaded at para 42) and as annexed at F of the third amended statement of claim;
- b) The other conversations Ms Black had (pleaded and annexed);
- c) The order of the conversations that took place;
- d) A comparison between the interview and what was published;
- e) The interview notes indicate that the second defendant knew that Ms Black was interviewing her in the context of an intended publication in the *New Zealand Listener*;
- f) The second defendant stated that some comments were “off the record”;
- g) The article then published only those comments which were not said to be “off the record”; and

- h) The second defendant provided information to the first defendant (as pleaded in paragraph 11A) which led to the first defendant's concerns which he discussed with Ms Black (and so the second defendant was the source of the comments reported in the article).

[11] In my view, whether obvious or not, the second defendant is entitled to have these particulars, and any others relied upon, specifically identified in the pleading. It is insufficient to refer generally to paragraphs 1 to 46. The second defendant is also entitled to know whether it is alleged that she is responsible because she intended or authorised the publication of her statements in the *New Zealand Listener* article, or whether she knew it was likely that her statements would be published (on their own and/or with statements made by the first defendant), or whether she ought to have known this (ie. a reasonable person in her position would have appreciated that there was a significant risk that what she said would be repeated in whole or in part, with or without statements made by the first defendant) or whether all of these potential bases upon which responsibility for the publication could arise are relied upon.

[12] In discussion with counsel at the hearing Dr Moodie agreed to file a further pleading. Mr Upton indicated that from the second defendant's perspective what is required is as follows:

- a) An amended paragraph 47 making it clear that what is being pleaded is that the second defendant made the statements to Ms Black that are pleaded at paragraph 42;
- b) That these statements were published by the third defendant (deleting from the pleading the "published or caused to be published by the second defendant" wording);
- c) That the second defendant is responsible for the statements she made that were published in the *New Zealand Listener* (and/or for other statements in that article) because [one or more of the bases set out at [11] above];

- d) The particulars relied upon for that responsibility [which may be those set out at [10] above].

[13] The pleading would then go on to refer to the alleged defamatory meanings (as per para 48).

[14] I agree that the above would meet the requirements of r 5.26 of the High Court Rules. I order that the plaintiff file a more explicit pleading identifying the basis upon which it is alleged that the second defendant is responsible for (some or all of) the statements that appeared in the *New Zealand Listener* article and the particulars relied on for that alleged responsibility.

[15] I leave it to the plaintiff to decide whether to provide this pleading by way of further particulars or by the filing of a further amended statement of claim. It may be the case that further amendments are envisaged or are a possibility and, if that is so, it might be preferable to file a “final” amended statement of claim once any outstanding or contemplated interlocutories are resolved.

[16] The plaintiff submitted that costs should lie where they fall on the basis that this was an ongoing proceeding. The second defendant submitted that the usual rule, that costs follow the event, should apply. I do not see any sufficient basis to depart from the usual rule. In respect of the second defendant’s application I order costs on a category 2A basis.

Mallon J

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