IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-000843

BETWEEN	B HOWARD-SMITH Plaintiff
AND	TRUTH WEEKENDER LTD First Defendant
AND	S COOK Second Defendant
AND	C BALDOCK Third Defendant
AND	HORTON MEDIA LTD Fourth Defendant

Hearing: 12 July 2010

Appearances: A E Ferguson and J S Langston for the Plaintiff
P A McKnight for the First, Second and Third Defendants

Judgment: 12 July 2010

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors:
Wilson Harle, PO Box 4539, Shortland Street, Auckland
Langford Law, PO Box 344, Wellington

[1] The substantive proceeding is a claim for defamation. The first defendant is the publisher of a weekly newspaper called *The Truth Weekender*. The second defendant is a journalist with the newspaper, and the third defendant is the editor of the newspaper. The fourth defendant is the printer. The plaintiff is a media presenter who also undertakes promotional and endorsement work for businesses, including an establishment in central Auckland called the Pony Club, a night club.

[2] The proceeding is about two articles the first defendant ran, the first on 22 January 2010 and the second on 5 February 2010. The articles are about an incident in the Pony Club. The statement of claim contains a separate cause of action for each article. The first cause of action is about the first article. Paragraph 13 sets out extracts from the article published on 22 January 2010. Paragraph 13 records some 14 paragraphs from the article, and there are said to be 422 words from that article. Paragraph 14 of the statement of claim says this:

> In their natural and ordinary meaning the statements contained in the article and referred to in paragraph 13 were, as a whole, false and defamatory of the plaintiff in that they meant or were intended to mean that:
>
> (a) the plaintiff is under police investigation for a violent assault;
>
> (b) the plaintiff had engaged in, encouraged and/or condoned, violent criminal conduct;
>
> (c) the plaintiff had a history of involvement in, and encouragement of, violent criminal conduct;
>
> (d) the plaintiff operated a licensed premise in an improper, irresponsible and unlawful manner;
>
> (e) the plaintiff acted in an unprofessional and improper manner by instructing security staff to eject an innocent patron instead of ejecting another patron who was a well known social figure and who was behaving inappropriately;
>
> (f) the plaintiff operated the Pony club improperly and unlawfully by encouraging consumption of alcohol in a manner contrary to liquor laws;
>
> (g) the plaintiff is violent and aggressive by nature but is also cowardly and dishonest;
>
> (h) the plaintiff is unfit to operate licensed premises; and
>
> (i) the plaintiff is unfit to be employed as a presenter and/or promotional spokesperson.

[3] The second cause of action is about the second article. Paragraph 33 of the statement of claim sets out extracts from the article. There are said to be some 879 words from that article recited in paragraph 33. Paragraph 34 then goes on to say:

> The statements contained in the second article and referred to in paragraph 33 above meant or were intended to mean that ...

And then the nine meanings in paragraph 14 are repeated in paragraph 34.

[4] Paragraph 35 says:

> The said statements were false and defamatory of the plaintiff.

[5] The plaintiff filed the present proceeding on 15 February this year. None of the defendants have filed a statement of defence yet. The first, second and third defendants applied for further particulars of the statement of claim at the end of March, and on 20 April they filed an amended application for further particulars. It is that application that is for consideration today.

[6] The orders that the first, second and third defendants seek are that:

> 1.1 In relation to paragraphs 14 and 34 of the statement of claim, the defendants identify the nine meanings that they have pleaded which the plaintiff alleges arise from the two articles complained about, with the particular words the plaintiff alleges can be identified with each of the nine meanings they have pleaded in paragraphs 14 and 34 of the statement of claim.
>
> 1.2 The plaintiff identify in the words complained about what the plaintiff alleges to be untrue.

[7] The first three defendants rely primarily on s 37 of the Defamation Act 1992:

> **37 Particulars of defamatory meaning**
>
> (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.
>
> (2) Where the plaintiff alleges that the matter that is the subject of the proceedings is defamatory in its natural and ordinary meaning, the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself.
>
> (3) Where the plaintiff alleges that the matter that is the subject of the proceedings was used in a defamatory sense other than its natural and ordinary meaning, the plaintiff shall give particulars specifying—

(a) The persons or class of persons to whom the defamatory meaning is alleged is alleged to be known; and

(b) The other facts and circumstances on which the plaintiff relies in support of the plaintiff's allegations.

[8] There is no question of true innuendo in this case, and accordingly s 37(3) does not require consideration.

[9] The plaintiff's response to the application is a simple but direct one. The plaintiff refers to s 37(1) of the Defamation Act and says that that section requires a plaintiff to specify every statement which the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceeding. The plaintiff says that he has not reproduced the entire articles as they appeared in the newspaper, but has chosen extracts which, he says, are untrue and defamatory. The plaintiff is confining his claim to those extracts in the pleadings. He says that he has satisfied s 37(1) by actually setting out the words complained of in paragraphs 13 and 33 of the statement of claim. He has specified by not relying on the articles in their entirety. He has also pleaded falsity.

[10] Similarly, the plaintiff says that he has satisfied s 37(2) because he is not relying on any true innuendo, but is only saying that the words in their natural and ordinary meaning are defamatory and he has given particulars of the meanings which he says the extracts bear. He has not left the articles to speak for themselves.

[11] The defendants say that that is not good enough. They say that for each particular meaning that the plaintiff has pleaded, the plaintiff must show which particular words within the extracts support the particular meaning the plaintiff relies on. They also say that the plaintiff must set out which matters in his pleading he says are untrue.

[12] I deal with the first point.

[13] The defendants say that it is not good enough simply to set out a series of extracts from the newspaper articles and then set out generally meanings said to be derived from the articles, without linking the meanings with particular words within

the articles. The defendants complain that unless the plaintiff shows the connections between particular words and pleaded meanings, then they are at a disadvantage because they will be unable to assess whether the words are capable of having the meanings pleaded, and unless they are able to do that, then they will be unable to make an application to strike out particular meanings.

[14] In defamation proceedings the meaning of an alleged defamatory matter can be of crucial importance. The plaintiff has the onus of establishing that the words complained of do have the meaning he alleges, and of showing that they are defamatory of a plaintiff. But it is important to appreciate that ascertaining the meaning of words in the context of a defamation proceeding is not a matter of narrow pedantic analysis. In ascertaining the meaning of alleged defamatory words, where the plaintiff relies on the natural and ordinary meaning of words, the issue is what those words would convey to ordinary, reasonable people. Ordinary people do read between the lines and they do draw inferences.

[15] The effect of alleged defamatory words on an ordinary reader is one of impression. It has often been said that the Court should be wary of an over-elaborate analysis. The kind of narrow analytical construction put on words by lawyers is inappropriate. That can be particularly the case with media, such as television, where visual impressions count, but it is also applicable to tabloid newspapers such as the present one where articles are written as much for their graphic impact as for their written impact. Ordinary readers do take notice of the circumstances and manner of publication, including the prominence given to allegations. It has been said that where a particular matter is given prominence in a newspaper, it may be assumed that it is significant, and therefore more likely to convey a defamatory meaning to an ordinary reader.

[16] In this case, there will be issues as to the meaning of the articles. By and large, the articles complained of purport to be reports of an incident in a bar. The meanings pleaded relate not just to the specific incident reported, but are general in nature. That is, the plaintiff is saying that from the reports of the incident, meanings can be drawn out which enable one to make inferences about the plaintiff generally. No doubt at trial it will be a question for the finder of fact whether the words do

support the general meanings claimed by the plaintiff, but the point I make at this stage is that that will be a question for the trier of fact.

[17] Both parties relied on this extract from Patrick Milmo (ed) and others *Gatley on Libel and Slander* (11th ed, Thomson Reuters, London, 2008) at 28.20:

> The claimant needs to set out not only his case as to the natural and ordinary meaning of the words but also (where appropriate) as to any innuendo meaning (i.e. any meaning alleged to be conveyed to some person by reason of that person's knowledge of facts extraneous to the words complained of). It is good practice also to make clear in appropriate cases (e.g. where the words complained of are very lengthy or difficult to comprehend) the part or parts of the words complained of from which each alleged meaning is derived.

[18] I find that passage of assistance in this case. It sets out what is good practice but in emphasising that it is good practice, it is not a rule of law. It will be a question in each case to decide whether the plaintiff should be required to make clear which words complained of are alleged to give rise to the particular alleged meanings.

[19] In this case, it is possible to read the articles and then see where specific incidents are referred to and see how they might be the foundation for the meanings pleaded by the plaintiff. For example, these passages in the first article:

> One of the witnesses spoke exclusively to *Truth Weekender* this week describing what went on at the club as a "premeditated and brutal bashing", allegedly with the full knowledge of Howard-Smith ...
>
> From there the victim was dragged up the stairs with Howard-Smith allegedly present in a "concealed area", and worked over for at least three minutes by security staff, the witness claims ...
>
> "This goes on for some time with Brooke Howard-Smith watching. When they (the security staff) realised the damage they had done, they dragged my friend out of the bar and chuck him on the street."

[20] Those words can be seen as supporting the meaning that the plaintiff had engaged, encouraged, or condoned violent criminal conduct.

[21] In my judgment, it is a relatively straightforward matter to find connections between the words in the articles and the alleged meanings. This does not mean that

I accept at this stage that all the alleged meanings are supported by the words. I emphasise that that is a matter for later decision by the trier of fact. But at this stage, from the defendant's point of view, the matter does not require further particularisation. The defendants know the wording of the articles, and they know what meanings the plaintiff alleges those words have. It is, in my view, unnecessarily pedantic to require the plaintiff to join the dots, as it were, between the words and the alleged meanings.

[22] The second part of the application is that the plaintiff identify which parts of the article he says are untrue. I state my reasons more briefly, but in short I understand the requirement of s 37(1) does not differ markedly from pleading practice as it was before the Defamation Act. That is, it was customary to plead the alleged defamatory words and to say that they were published falsely about the plaintiff. The allegation of a false publication was a matter of form. While there was an allegation of falsity, the defendant always carried the burden of proving the truth of any matter of fact if the defendant wished to rely on the defence of justification or the defence of truth as it is known today.

[23] There is support for this pleading practice from the text David Price and others *Defamation Law, Procedure and Practice* (4th ed, Thomson Reuters, London, 2009). This is an English text which describes English practice. It says, at 28.03:

> There is no need to prove that the publication is untrue. There is therefore no need to address it in the particulars of claim.

[24] I take that as indicating what past New Zealand practice was, as well as current English practice. I do not regard s 37(1) as requiring a departure from that practice. The position still remains that if the defendant wishes to show that any of the allegations made are true, the burden is on it to make out defences under s 8.

[25] The plaintiff has adequately satisfied the requirements of s 37(1) and (2) by setting out the parts of the articles he complains of, setting out the meanings he says arise and pleading that these statements are false and defamatory of him without further particulars.

[26] I add some general comments. This is not a particularly complicated defamation case. There are reports of an incident in a bar. The articles refer to the plaintiff. Whether the plaintiff has overstretched in contending for the meanings he has pleaded will be for the trier of fact to determine. Pre-trial determinations of these matters seem unnecessary in this case.

[27] In defamation proceedings, time and effort can be wasted on pre-trial skirmishes. These tactics are commonly used by media defendants. Invariably media defendants have more resources than plaintiffs. The use of these skirmishing tactics can be attritional, calculated to wear the plaintiff down. In my view, in a straightforward case like this, the use of such tactics should be discouraged.

[28] I have heard the parties as to costs. I fix costs for the plaintiff in the sum of $3008 plus disbursements of $18. That is on a 2B basis for filing a notice of opposition, preparation for the hearing and the hearing of the application. It does not take into account case management conferences. I accept Mr McKnight's argument that they should be regarded as costs in the cause generally rather than relating to this particular application.

[29] I also heard from the parties as to further directions that should be given for the proceeding. Mr McKnight says that he will file a statement of defence within 10 working days, that is by **26 July 2010**. The parties are to complete discovery by filing and serving affidavits of documents by **9 August 2010**. Inspection of documents is to be completed by **23 August 2010**. Any further interlocutory applications are to be filed and served by **13 September 2010**, and there is to be a further case management conference after 13 September 2010.

[30] Mr McKnight has instructions only from the first, second and third defendants. So far, the fourth defendant has not taken any step in the proceeding.

The timetabling directions only apply to the first, second and third defendants. The fourth defendant remains in peril if it takes no steps.

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R M Bell
Associate Judge