IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV-2011-442-000116

BETWEEN	TONY WAYNE KATAVICH Plaintiff
AND	TV WORKS LIMITED Defendant

Hearing: 20 July 2011 (On the Papers)

Counsel: R Moodie for Plaintiff
M R Heron for Defendant

Judgment: 20 July 2011

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] The defendant has applied to the Court under r.5.1(4) for an order that the proceeding be transferred to the High Court at Auckland. The issue in this case is whether the High Court at Auckland is the proper Registry of the Court for the purposes of this proceeding.

[2] The registered office of the defendant is in Auckland. Under r.5.1(1)(a), Auckland would be the proper Registry of the Court. When the proceeding was filed in the Nelson Registry of the Court an affidavit was also filed deposing to matters covered by r.5.1(2). The plaintiff deposed that the web pages of TV3 *Campbell Live*, entries on which are the subject of the first and second causes of action, were published on his own and other computers at Nelson and throughout New Zealand. Mr Katavich further deposed that the TV3 *Campbell Live* programmes on which the material which is the subject of the third, fourth and fifth causes of action were published, was received on his own and other television receivers at Nelson and throughout New Zealand. On that basis Mr Katavich deposed that the causes of action in the proceeding, a material part of them, arose in Nelson which is nearer to

his residence than to the registered offices of the defendant, thereby exercising the option given to him under r.5.1(2) of the High Court Rules.

[3] In submissions for the defendant, counsel for the defendant noted that TV3 is broadcast nationwide and the *Campbell Live* website can be viewed from anywhere in New Zealand. He submitted that no evidence of the publication of the allegedly defamatory statements in Nelson had been given, but even if it were to be provided the fact that publication took place nationwide means that there is nothing to take the matter outside of the general rule set out in r.5.1(1)(a). He submitted that it cannot sensibly be said that a cause of action in defamation arising from a nationwide publication arose in Nelson, as opposed to any other place in New Zealand. I note that the test is not whether the cause of action arose at a certain place but whether a material part of it arose there.

[4] In *Nicholls v Carter*,[1] the plaintiff claimed damages for alleged defamation by the defendant who resided in Auckland, on Radio 1ZB which had its prime base in that city. The plaintiff resided in Palmerston North and claimed that because the alleged broadcast could be received there, a material part of the cause of action arose in the Manawatu. An application was made to transfer the proceeding either to Auckland as the proper office of the Court or alternatively to the Wellington Registry on the ground of convenience.

[5] Having noted that as the claim is in defamation, the cause of action is not the creation of defamatory matter but its publication to some person capable of receiving it, Master Williams QC noted that there was no evidence before him that any person in the Manawatu heard the broadcast complained of and accordingly it had not been shown that any part of the cause of action had arisen in the Manawatu.

[6] In this case the plaintiff relies not only on a broadcast on television, which he has deposed was published on his own and on other television receivers at Nelson, but also on statements on a website which was published on his own and other computers at Nelson. There was no substantiation of the view expressed by

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1 *Nicholls v Carter* (1991) 4 PRNZ 656

Mr Katavich that the allegedly defamatory statements had been published to persons other than himself, and of course publication to the plaintiff is not defamation.

[7] If one were to assume, however, that there was publication to other persons within the Nelson region, that is not decisive of the issue. In *Colman v Attorney-General*,[2] the Court considered the meaning of the word "material". In this case, the alleged defamation comprised remarks alleged to have been made to the Wanganui City Council Works Committee and published in the Wanganui Chronicle. The proceedings were issued in the Court at Wellington. The evidence showed that 38 copies of the newspaper were sent from Wanganui to Wellington daily, eight of them to paid subscribers and the rest to libraries, newspaper cuttings services and similar organisations. The circulation of the newspaper was 11,802.

[8] The plaintiff in *Colman* argued that as the cause of action depended, in part, on publication the fact of publication itself is necessarily a material part of the cause of action so that where publication occurred, a material part of the cause of action had also occurred. In response to this, Quilliam J said:

> I consider that as a matter of construction the word "material" cannot be made to encompass any such comprehensive conclusion. I think the word was intended to have the kind of meaning ascribed to it as one of the definitions given in the *Shorter Oxford Dictionary*, namely, "pertinent, germane, or essential to". Plainly this must depend upon the circumstances of the case. The circumstances here are that the words complained of were first published in Wanganui at a meeting of the Works Committee of the Wanganui City Council and were republished in the issue of the *Wanganui Chronicle* newspaper which was distributed as to some 11,654 copies in the Wanganui district and as to 138 copies elsewhere. Those 138 copies go almost entirely to public libraries, advertising agencies, and newspaper cuttings services. It seems to me absurd to contemplate that a plaintiff who resides in Wanganui and who complains he has been defamed by an article in the *Wanganui Chronicle* could commence his action for damages in, for example, Invercargill simply because the Invercargill Public Library may take and exhibit a copy of the newspaper. This is the conclusion which the plaintiff's argument would require me to reach. There must, of course, be a dividing line in the particular circumstances of any individual case, but I am sure that the circumstances of the present case do not require me to hold that the distribution of the 38 copies in Wellington constitutes a material part of the plaintiff's cause of action.

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2 *Colman v Attorney-General* (1978) 3 PRNZ 577

[9] Publication via a website is not an action which may be emperically assessed in the same manner as the Court was able to assess publication in the Wanganui Chronicle in *Colman v Attorney-General*. Once posted, an entry on a website is available to all who peruse it wherever they may be. There was no evidence before me, beyond the statement of Mr Katavich which I have referred to, giving the Court any guidance on the extent of publication in that medium, in Nelson.

[10] Ms C F Bradley, legal counsel and company secretary of the defendant company, swore an affidavit in which she deposed that TV3 is broadcast nationwide and the *Campbell Live* website can be viewed from anywhere in New Zealand. There was no statistical information before me about the number of persons who were watching TV3 in Nelson at the material times, when compared with those watching it in the rest of New Zealand at the same times. Nor do I have evidence before me of the population of Nelson as a percentage of the country. I do not think, however, that this prevents me approaching the matter in the same way the learned Judge approached it in *Colman*. Nelson is, by comparison to Auckland, a very small city and by my estimate its population is but a small fraction of the population of New Zealand. Further, as noted above, Quilliam J adopted the definition of "material" as being "pertinent, germane or essential to". In my judgment publication in Nelson, as part of publication throughout New Zealand, cannot properly be described as a pertinent, germane or essential element of the cause of action.

[11] When the Court is considering the issue of publication via media available throughout the country, it is necessary in my view for a plaintiff seeking to maintain a proceeding in a Registry of the Court other than that closest to the defendant's residence or place of business, to demonstrate with precision how publication in the region of that Registry justifies its selection as the proper Registry for the proceeding. To require anything less would allow plaintiffs to select any Registry at will. That would accord with neither the intention of the rule, nor the approach to its application of Quilliam J.

[12] For those reasons I grant the application to transfer this proceeding to the High Court at Auckland.

[13] Secondly, and in case I am wrong in my above conclusion, the application was brought under r.5.1 generally, and r.5.1(5) provides that if it appears that a different registry of the Court would be more convenient to the parties I may direct that the proceeding be transferred to that registry.

[14] On this point, Ms Bradley deposed that the defendant's offices are in Auckland and its solicitors are in Auckland. Mr Heron, counsel for the defendant, also informed me that all intended witnesses for the defendant are in Auckland.

[15] Dr Moodie, counsel for the plaintiff, submitted that the real sting, as he put it, of the alleged defamation took place in Nelson. However, he accepted that none of the proposed witnesses for the plaintiff, apart from the plaintiff himself, are associated with Nelson. Counsel for the plaintiff, himself, lives some 2 to 3 hours drive north of Wellington and has no specific association with Nelson.

[16] The "sting" of the alleged defamation is not a matter of convenience, and the only inconvenience therefore seems to be to the plaintiff himself. Overall, the convenience to parties, both plaintiff and defendant, favours the proceeding being determined in Auckland. I am therefore satisfied that for these reasons, also, the proceedings should be transferred to Auckland.

[17] I direct the Registrar of the High Court at Nelson to transfer the proceeding to Auckland. I direct the Registrar of the High Court at Auckland to allocate a half day fixture for the plaintiff's application for further and better particulars of the counterclaim, referred to in paragraphs [4] and [5] of the Minute I have issued contemporaneously on this file, as soon as reasonably practicable. A Case Management Conference will be allocated after the outcome of that application is known, in accordance, also, with that Minute.

[18] The applicant is entitled to costs on this application on a 2B basis, together with disbursements as fixed by the Registrar of the Court at Auckland.

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J G Matthews
Associate Judge

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