IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2010-485-1274
[2012] NZHC 3055

BETWEEN	DANIEL FRANCIS AYERS First Plaintiff
AND	ELEMENTARY SOLUTIONS LIMITED Second Plaintiff
AND	LEXISNEXIS NZ LIMITED Defendant

Hearing: 12 September 2012

Counsel: C A McVeigh QC with J P M Scott for Plaintiffs
D H McLellan for Defendant

Judgment: 16 November 2012

JUDGMENT OF THE HON JUSTICE KÓS

---

[1] A plaintiff in a defamation case claims general damages and "damages for pecuniary loss in a sum yet to be quantified". The defendant seeks particulars of that pecuniary loss, in accordance with High Court Rule 5.33.

[2] Must the plaintiff give particulars? Or does s 43 of the Defamation Act 1992 (Act) prohibit particularisation of pecuniary loss because the defendant is a "news medium"?

[3] Section 43 prohibits a plaintiff in a defamation claim against a news media defendant from specifying the amount of damages claimed in its statement of claim. It was enacted to protect news media from extravagant gagging writs. But in this case the defendant, a news medium, eschews that protection. It wants the pecuniary loss claimed particularised. An Associate Judge decided particulars must be given by the plaintiffs. They now apply for review of that decision.

Background

[4] The defendant, LexisNexis, is the publisher of the *NZ Lawyer* magazine. Its 1 May 2009 issue included an article authored by the first plaintiff, Mr Ayers. The title of the article was "*Flaws found in "EnCase®" computer forensic software*". The article was critical of a product developed and sold by a company called Guidance Software. It is used by computer forensic consultants to automate parts of their analysis. Mr Ayers is the sole shareholder and director of the second plaintiff, Elementary Solutions Limited (Elementary). Elementary's business involves conducting computer forensic examinations and giving expert evidence in Court. The majority of its work is referred by lawyers. They are of course the principal target audience of *NZ Lawyer*. Each issue has an estimated readership of 12,500.

[5] LexisNexis says that it published Mr Ayers' article pursuant to a specific agreement with him that it would also publish any responses received.

[6] LexisNexis then received responses from a Mr Victor Limongelli, Chief Executive of Guidance Software, and from a Mr Campbell McKenzie, an associate director of PricewaterhouseCoopers. PricewaterhouseCoopers competes with Elementary in the field of computer forensic analysis. The responses were published in the 29 May 2009 issue.

[7] The responding articles were critical of Mr Ayers' 1 May 2009 article. The plaintiffs allege that the articles bear a number of meanings defamatory of the plaintiffs. These include that they knowingly published false and deceptive statements about the *EnCase*® software, acted unethically and were incompetent in their claimed field of expertise.

[8] The plaintiffs have reached out of court settlements with both Guidance Software and PricewaterhouseCoopers. In July 2010 they brought the present proceeding against LexisNexis. Paragraph [24] of the statement of claim reads:

> As a result of the publication of the first and second letters by the defendant, the second plaintiff [Elementary] has also been exposed and held up to ridicule and contempt and its reputation has been very seriously injured. *It*

has also suffered and will continue to suffer pecuniary loss in a sum yet to be quantified. (My emphasis).

[9] After protracted correspondence, an application was made by the defendant for particulars as to:

(a) the respects in which Elementary's reputation has been "very seriously injured" and

(b) the pecuniary loss it has allegedly suffered, and will continue to suffer.

[10] On 15 July 2011 the plaintiffs advised that Elementary would provide particulars of the quantum of its pecuniary loss, but needed time to take expert advice. Thereafter, though, they opposed the application. They contended that particulars were unnecessary, had already been provided, and were in any case prohibited by s 43 of the Act.

Statutory framework

[11] Section 43(1) of the Act provides:

Claims for damages

(1) In any proceedings for defamation in which a news medium is the defendant, the plaintiff shall not specify in the plaintiff's statement of claim the amount of any damages claimed by the plaintiff in the proceedings.

[12] Relevant also are ss 4, 6 and 44:

4 Defamation actionable without proof of special damage

In proceedings for defamation, it is not necessary to allege or prove special damage.

6 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.

44 Particulars in support of claim for punitive damages

In any proceedings for defamation, where the plaintiff claims punitive damages, the plaintiff shall give particulars specifying the facts or circumstances that the plaintiff alleges would justify an award of punitive damages against the defendant.

[13] In addition, s 28 provides that punitive damages may be awarded only where the defendant has acted in flagrant disregard of the plaintiff's rights. Section 29 provides matters to be taken into account in "mitigation of damages".

[14] The primary background to s 43 is a report of the McKay Committee on Defamation, delivered in December 1977. The committee was appointed by the then Minister of Justice, the Hon Martyn Finlay QC. Its terms of reference were left broad: "to study and make recommendations on the law of defamation". Membership of the committee included the Chairman, Mr Ian McKay (as he then was), Messrs Brian McClelland QC and Stuart Ennor, Prof Geoffrey Palmer and representatives from the journalists' profession and newspaper publishing industry.

[15] One of the topics addressed by the committee was gagging writs. The committee noted that such writs commonly claimed very substantial damages but were really intended only to stifle publication. Determination of rights and remedies at trial was not intended. The use of such writs had increased in recent years and had been of particular concern to the news media.[1] A number of writs issued in the 1973-75 years, filed against media, involved large sums: $950,000, $500,000 (twice), $400,000, $300,000, $250,000 and $200,000 (twice).[2] None of those cases went on to trial.

[16] On what became s 43, the committee's report was crisp:[3]

---

1 Report on the Committee of Defamation *Recommendations on the Law of Defamation* (December 1977) at [412].

2 The diminution in value of money over time means that those amounts need to be multiplied tenfold to express their value in today's currency.

3 At [422].

> Our primary recommendation is that the plaintiff in an action for defamation in which there is a news media defendant should not be permitted to specify in his statement of claim the amount of damages claimed. This should go some distance towards removing the gagging effect of large claims. The enactment of such a provision would not prevent counsel specifying during the trial the amount of damages sought. Nor would it prevent discussion of damages in settlement negotiations.

[17] The committee prepared a draft Bill. For practical purposes, cl 35(1) of the draft bill is essentially the same as s 43(1) of the eventual Act. There is however one key difference: the committee's draft Bill dealt expressly with the situation where a news medium was "*a* defendant" – i.e. one of a number of defendants. Section 43(1) is less clear, by referring to the news medium as "*the* defendant". I will return to that topic.

[18] The Act had a lengthy gestation. The committee's report was delivered in December 1977. The Defamation Bill was introduced into Parliament only in August 1988. As to what became s 43(1), the explanatory note to the Bill noted that it was an adoption of the committee's report:

> ... to deal with the problem of "gagging writs", where proceedings of defamation are brought against a news media defendant, the plaintiff should be prevented from specifying the amount of damages claimed.

The Minister who introduced the Bill in August 1988 was now the Rt Hon Geoffrey Palmer. He had of course been a member of the McKay Committee. The Select Committee report was delivered in October 1989, but the second reading of the Bill did not occur until November 1992. By then of course there had been a change of Government (in October 1990). A new Minister of Justice had taken the helm. The parliamentary debates are not particularly revealing. There was broad cross-party support for the legislation. The problem of gagging writs was perceived by members on both sides of the House. One opposition MP, the Hon David Caygill, had some doubts about how effective the Bill's provisions against gagging writs would be, but did not regard them as inappropriate. He went on to say:[4]

> As the committee recommended so many years ago, the Bill provides that damages should not be able to be specified when the news medium is the defendants. If a plaintiff alleges that he or she has been defamed by the publication of some statement by a news medium, that plaintiff may sue for

[4] (10 November 1992) 531 NZPD 12149.

defamation. If the matter cannot be adequately settled and it comes to trial, that is fine, and it will be judged one way or the other, but the plaintiff will not be able to claim a specific sum of money in the original writ. Damages will have to be determined without that claim having been made. That is a small step but one that, as it may assist freedom of expression, in a way is an important step forward.

[19] Three provisions of the High Court Rules are also relevant:

> **5.21 Notice requiring further particulars or more explicit pleading**
>
> (1) A party may, by notice, require any other party—
>
> (a) to give any further particulars that may be necessary to give fair notice of—
>
> (i) the cause of action or ground of defence; or
>
> (ii) the particulars required by these rules; or
>
> (b) to file and serve a more explicit statement of claim or of defence or counterclaim
>
> **...**
>
> (3) If the party on whom a notice is served neglects or refuses to comply with the notice within 5 working days after its service, the court may, if it considers that the pleading objected to is defective or does not give particulars properly required by the notice, order a more explicit pleading to be filed and served.
>
> **5.33 Special damages**
>
> A plaintiff seeking to recover special damages must state their nature, particulars, and amount in the statement of claim.
>
> ...

And of course r 1.4(3)(c) provides that the rules are subject to any statutory provision as to procedure of the Court.

Decision appealed from

[20] Associate Judge Gendall noted the policy underlying s 43(1) might be said to

have lost some relevance in modern times.[5] In some cases (which I will discuss later) damages claimed had been disclosed in a statement of claim against a news media defendant. A residual issue existed where there were multiple defendants, only one of which was a news medium. (That problem was of course addressed in the Bill drafted by the committee.[6] However it does not arise in this case and need not detain us.) Moreover recent studies (cited in the judgment) suggested that the "chilling effect" of gagging writs was somewhat overstated in the present age. Certainly, this is a case where such a defendant is sanguine about the temperature.

[21] The Associate Judge concluded two things. First, that section 43(1) applied to special as well as general damages. Neither could be expressed in a statement of claim.[7] Secondly, however, s 43(1) did not preclude a defendant from seeking particulars of pecuniary loss under r 5.21, or such an order being made under r 5.33.[8]

[22] Those two conclusions also form the issues in this review.

Approach on review

[23] It is common ground that inasmuch as the Associate Judge's decision is a reasoned one following a defended hearing, the approach on review is essentially appellate. The applicant has the burden of persuading the Court that the decision was wrong – i.e. rested on insupportable findings of fact or applied wrong principles of law. The reviewing court has to make its own decision on these matters.[9]

---

5 *Ayers v LexisNexis NZ Limited* HC Wellington CIV-2010-485-1274, 29 November 2011 at [57]–[58].

6 See [17] above.

7 At [66].

8 At [78].

9 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 [2007] 18 PRNZ 768 (SC); *Burmeister v O'Brien* [2008] 3 NZLR 842 (HC) at [29].

Discussion

News medium?

[24] Before the Associate Judge LexisNexis contended that it was not a news medium at all, so that s 43(1) was inapplicable. The term "news medium" is defined in s 2. The Associate Judge rejected the argument that LexisNexis was not a news medium, at least in relation to the publication complained of. The argument was not renewed by LexisNexis on review.

Function of damages in defamation

[25] The function of damages in defamation is primarily compensatory. In rare cases punitive damages may also be awarded.[10] The compensatory function of defamation damages is the normal one in tort: of restoring the plaintiff to the position he/she or it would have been in if the tortious act had not occurred. As Todd points out, damage to reputation is difficult to assess in monetary terms.[11]

[26] Where libel is proved, the law presumes some damage by reason of the unlawful interference of a plaintiff's "right to reputation".[12] However, at common law there were restrictions on the right to sue for slander. Some slanders were actionable per se.[13] Those categories apart, slander was actionable only on proof of special damage.[14] That limitation was removed in New Zealand by s 4 of the Defamation Act 1954, and continued in s 4 of the 1992 Act. The 1954 change was made specifically to remove the distinction between libel and slander, and to provide that it was unnecessary to prove special damage.[15] The New Zealand reform was broader than its English counterpart in the Defamation Act 1952.

---

10 *Television New Zealand v Quinn* [1996] 3 NZLR 24 (CA).
11 Todd *Law of Torts in New Zealand* (5 ed, Brookers 2009) at 764.
12 *Ratcliffe v Evans* (1892) 2 QB 524 (CA) at 528.
13 Statements implying criminality, unchastity on the part of women, the harbouring of a contagious disease and the words calculated to disparage the plaintiff in a calling, business or profession.
14 *Gatley on Libel and Slander* (11 ed, Sweet & Maxwell, London, 2008) at [155].
15 (22 September 1954) 304 NZPD 1878.

[27] A body corporate plaintiff must still allege and prove actual or likely pecuniary loss: s 6 of the Act. That is simply a statutory enactment of Lord Reid's dictum in *Lewis v Daily Telegraph* that:[16]

> A company cannot be injured in its feelings, it can only be injured in its pocket.

The McKay Committee said that that was good law and should be enacted.[17] It deliberately recommended the expression "pecuniary loss" be used in what is now s 6, rather than "special damages". That was because special damage:[18]

> ... includes not only financial loss but also the loss of some temporal or material advantage estimable in money.

So pecuniary loss was chosen, as a subset of special damage. But the language of s 6 does not of itself require particularisation of pecuniary loss in numerical terms.

Particularisation of damages in defamation

[28] Section 43(1) apart, the common law has always required that a plaintiff claiming to have suffered an injury going beyond the usual damage presumed to result from a defamatory publication must give particulars of "the facts and matters relied upon in support of that claim, including details of any conduct by the defendant which it is alleged has increased the loss suffered and of any loss which is peculiar to the plaintiff's own circumstances."[19]

[29] That is, while it is not essential to allege special damage (other than pecuniary loss in the case of a body corporate plaintiff), where special damages *are* claimed, adequate particulars must be given.

[30] The purpose of that principle is to ensure the defendant has adequate notice of the case faced. That is the normal function of particulars. It is normal therefore to require adequate particulars of special and aggravated general damages, but not

---

16 *Lewis v Daily Telegraph* [1964] AC 234 (HC) at 262.
17 At [360].
18 At [362].
19 *Gatley on Libel and Slander* (11 ed, Sweet & Maxwell, London, 2008) at [984].

general damages simpliciter. In the case of punitive damages sought in defamation, s 44 is explicit in requiring particulars.

[31] With that background I turn to the first issue arising on review.

Is s 43(1) confined to general damages?

[32] For LexisNexis Mr McLellan submits that "notwithstanding the general wording of [s 43(1)], it is only concerned with general damages". He refers to the history of s 43(1)'s enactment. I have already reviewed that. Mr McLellan then submits that it is not suggested in the McKay Committee report, or any authority he could find, that gagging writs claiming high special damages had ever been contemplated as a problem requiring a solution. He referred also to a number of cases where s 43(1) had not precluded the pleading of special damages against news media defendants. I will discuss those cases later in this judgment.

[33] On the other hand, Mr McVeigh QC submits for the plaintiffs that s 43(1) is plain in its own terms. It was not limited to general damages. If the restriction was to general damages only, the statute would have said so. The choice of language was deliberate. In terms of prohibiting the chilling or gagging effect of a defamation proceeding, it made no practical difference whether the restriction was against general or special damages. The latter could be inflated to have prohibitive effects.

[34] The Associate Judge held that s 43(1) was *not* confined to general damages. I think on reflection that he was right to do so.

[35] First, I accept the submission by Mr McVeigh that the words of s 43(1) are plain in their own terms. They refer to non-specification of "the amount of any damages claimed ... in the proceedings". They are not expressly limited to general damages. The drafting suggests the opposite.

[36] Secondly, s 43(1) is not as a matter of necessary implication limited to general damages. The reverse, in fact. The distinction between special damages and general damages in defamation had, by the 1992 enactment for almost 40 years been

of reduced importance. Section 4 speaks for itself and repeats s 4 of the 1954 Act. Compensatory damages wrap up all general, aggravated and special damages. Punitive damages remain a class apart, although the recommendation of the McKay Committee that they be determined by Judge alone was not adopted.[20] There is therefore no particular reason to imagine that Parliament had a distinction in mind, apart only from the subset of special damages, pecuniary loss, provided for in s 6.

[37] Thirdly, I accept Mr McVeigh's submission that special damages, if stated, could be inflated and also have the chilling effect the Act was seeking to avert in the case of news media organisations. Thus, as a matter of policy, introduction of the distinction seems contrary to the intent of Parliament in 1992. It cannot be inferred that Parliament intended to turn the thermometer down even partially in the case of news media.

[38] Fourthly, care is needed in drawing any interpretive conclusion from the authorities. This appears to be the first occasion on which the scope of s 43(1) has required direct consideration. The cases do not limit s 43(1)'s application in the way LexisNexis suggests. The authorities are more consistent with the s 43(1) prohibition being sometimes disregarded by the parties, but without the point being taken.

(a) *Hubbard v Fourth Estate Holdings Limited*[21] is a case in which s 43(1) was directly considered, there by Venning J. But it was a case in which the plaintiff had breached the section by filing a statement of claim specifying that damages of $1.5 million were sought against the *National Business Review*. The point was taken, the plaintiff was contrite and it immediately filed an amended statement of claim omitting the offending figure. The defendant however sought to strike out or stay the proceeding on the basis of the breach of s 43(1). Venning J declined to do so. That was not a proportionate or necessary response to the breach.

---

20 At [391].

21 *Hubbard v Fourth Estate Holdings Limited* HC Auckland CIV 2004-404-5152, 16 February 2005.

(b) *Simunovich v Television New Zealand*[22] is a curious case in which a notice of further particulars of special damages was filed by the plaintiff on 28 February 2005. It gave notice that the plaintiffs would be seeking special damages of not less than $29 million. The notice does not seem to have been the product of any particular application. Nor was the point taken that two of the five defendants were news media. The fact of the notice is adverted to without comment in the High Court and in the Court of Appeal.[23] But the case is not authority on the point now directly in issue here.

(c) In *Romana v McKenzie*[24] the plaintiff was a litigant in person. A bald claim for $50 million special damages for loss of business opportunities arising from the defamation was made. The defendants were news media participants. However the s 43(1) point was not taken. Other and better points were. The same comments apply to this case as to *Simunovich*.

(d) Last, there is *Moodie v Ellis*.[25] That case concerned articles published in the *New Zealand Listener* reporting statements attributed to the first and second defendants. Those defendants were not news media participants, but the third defendant was. The plaintiff's statement of claim included prayers for "special damages for loss of business and profits in an amount to be determined before trial". Not unlike this case. One of the non-news media defendants sought particulars. His application was supported by all defendants. After referring to r 5.33, the Associate Judge ordered that particulars should be given. There was no discussion of s 43(1). The case bears a passing resemblance to the present one, because it involved a defendant for whose benefit s 43(1) was enacted eschewing its protection. The case again is no particular authority on the issue here.

---

22 *Simunovich v Television New Zealand* HC Auckland CIV 2004-404-3903, 5 May 2005.
23 [2008] NZCA 350 at [7].
24 *Romana v McKenzie* (2008) 18 PRNZ 826.
25 *Moodie v Ellis* HC Wellington CIV 2007-485-2212, 19 March 2009.

[39] Fifthly, despite the fact that s 43(1) was enacted for the benefit of news media organisations, it is imperative in its own terms. It does not permit waiver by a news medium defendant. Section 43(1) is not a provision "made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing the public right or public policy."[26] The provision contains an important public function (promoting the freedom of expression by news media). And it may arguably be seen to serve the benefit of the plaintiff as well as the defendant. I was not addressed on this topic in argument and say no more about it here.

[40] Finally, there are practical alternatives that enable access to underlying information as to the loss claimed. I leave to one side for the moment the discrete issue of whether particulars outside pleadings might be directed. I address that below. That apart there are these options: first, discovery of documents. Secondly, interrogatories. Thirdly, loss is required to be proven by evidence, and witness statements need to be exchanged in advance of trial specifying any pecuniary loss or special damage. The absence of prior particularisation of special damage might justify additional advance time for exchange. Those are the mechanisms available to an inquiring defendant. In the case of plaintiffs that, unlike the present ones, want to unburden themselves on the topic there is nothing to preclude voluntary disclosure in negotiations, settlement conferences or in the course of trial itself (including in opening). The McKay Committee made that clear in 1977.[27]

[41] I therefore conclude that the prohibition against pleading damages against a news media defendant in s 43(1) applies to special as well as general damages.

[42] I turn now to the second issue.

---

[26] Burrows *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 36, citing *Maxwell on the Interpretation of Statutes* (12 ed, Sweet & Maxwell, London, 1969) at 328; *Reckitt & Colman NZ Limited v Taxation Board of Review* [1966] 1 NZLR 1032 (CA) at 1042.

[27] Burrows & Cheer *Media Law in New Zealand* (6 ed, LexisNexis, Wellington, 2010) at 100.

Can the Court order particulars, despite s 43(1)?

[43] The Associate Judge had reservations. He took the function of r 5.21 to be to remedy defective pleadings (for example, the statement of claim), rather than to allow particulars in circumstances where they are prevented from being included in that statement of claim.[28] To allow the plaintiff to specify damages outside a statement of claim would defeat the purpose in s 43(1) of preventing gagging writs. It would create the "unattractive" result that pecuniary loss would be pleaded outside the statement of claim. And it would undermine s 43(2) (providing for indemnity costs where a damages claim exceeds the actual award), which did not seem to apply to a news media defendant.[29]

[44] However, despite those reservations the Associate Judge held that particulars of pecuniary loss in this case should be ordered. Essentially, the Associate Judge held that a news medium defendant, like any other defendant, that wished to have particulars of the case it faced should be entitled to have them.[30]

[45] I consider the Associate Judge was right in reaching that conclusion. But I get there without the reservations that prefaced it.

[46] First, it is important to bear in mind that the prohibition in s 43(1) is against specification *in the statement of claim*. That is, the primary pleading filed by the plaintiffs. Section 43(1) clearly trumps r 5.33: r 1.4(3)(c). But that prohibition does not in my view prevent a *defendant* otherwise protected by s 43(1) from requisitioning particulars of pecuniary loss which would be required under normal pleading principles entirely.

[47] Secondly, in this respect it is important to remember that particulars are *of* pleadings. But they are not themselves pleadings. That is so whether they are expressed within a statement of claim or statement of defence or in a separate instrument. Before the civil procedure reforms in the 1870s, it was not the practice for a plaintiff to set out in pleadings any details not a necessary part of the cause of

---

28 At [74].
29 At [77].
30 At [78].

action. Those additional details were specified, if at all, in a separate document, delivered later and called "particulars".[31] That document would not then be pleaded to. After the Judicature Act reforms, particulars came to be included within a statement of claim. But until the Woolf reforms at the beginning of this century, the English practice remained that where it was necessary to give particulars of debt, expenses or damages that exceeded "three folios" (i.e. 216 words), they had to be set out in a separate instrument.[32]

[48] Whether or not the particulars are found in the pleading itself, or in a separate instrument, their distinct status is reinforced by the fact that the opposing party does not plead to particulars.[33] Likewise, a defendant does not plead to the prayer for relief. Neither particulars nor prayer are pleadings requiring traversal.

[49] Particulars lie in a sometimes uncomfortable no-man's land between material or essential facts (which must be pleaded and traversed) and evidence (which must not).[34] As Drummond J put it in *Queensland v Pioneer Concrete (Qld) Pty Limited:*[35]

> ... a pleading must contain only a statement in summary form of the material facts, but not the evidence by which those facts are to be proved, while the primary function of particulars is to ensure that effect is given to "the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs".

They therefore serve a different function from pleadings; their role is to illuminate, but that is all.[36] While it is correct, as von Doussa J said in *Beach Petroleum NL v Johnson*[37] that there is a "tendency now ... towards narrative pleading", the fact remains that a prohibition in s 43(1) on pleading is not necessarily to be construed as a prohibition on particularisation. It is not, as Mr McVeigh put it, "casuistry" to

---

31 Casson & Dennis *Odgers' Principles of Pleading and Practice* (22 ed, Stevens, London, 1981) at 183-184.

32 Rules of Supreme Court, 0.18, r 12(2).

33 *Pinson v Lloyds National Provincial Foreign Bank Limited* [1941] 2 KB 72 (CA) at 75;*Walker v Bennett* (2009) 19 PRNZ 350 (HC).

34 *Pinson* at 75; *Bruce v Odhams Press Limited* [1936] 1 KB 697 (CA) at 712.

35 *Queensland v Pioneer Concrete (Qld) Pty Limited* [1999] FCA 499 at [12].

36 *Commerce Commission v Qantas Airways Limited* (1992) 5 PRNZ 227 (HC) at 230.

37 *Beach Petroleum NL v Johnson* (1992) 105 ALR 456 (FCA) at 466.

differentiate between a r 5.21 notice of particulars and a statement of claim. It is merely conventional.

[50] Thirdly, it is important that r 5.21 does not permit *a plaintiff* to *volunteer* particulars of pecuniary loss in a situation in which s 43(1) prevents it from setting forth that loss in its statement of claim. It is that volunteering of a chilling (and often extravagant) monetary claim that is the vice s 43(1) is designed to correct. But to draw the conventional distinction between pleadings and particulars, and to permit a *defendant* to insist on the normal practice of particularisation where that defendant wants it, does not seem to me to offend the underlying principle behind s 43(1). It is not a question of permitting waiver of s 43(1). It is merely a case of not reading s 43(1) with unnecessarily expansive effect. When normal practice is to require particularisation of special damages in defamation, and where a defendant otherwise entitled to such particulars wants them, there seems to be no good reason to read s 43(1) so expansively as to prevent that requisition.

[51] To that extent I do not agree with the Associate Judge's first reservation that to allow a plaintiff to specify damages outside a statement of claim would defeat the purpose of s 43(1). The expression of those particulars depends on the act of a defendant, not a plaintiff.

[52] Nor do I accept the Associate Judge's second reservation that to require a plaintiff to plead outside its statement of claim is unattractive. Although the norm with narrative pleadings is to incorporate particulars into a statement of claim (and where further particulars are ordered, to require an amended statement of claim) r 5.21(1)(a) self-evidently does not make that an invariable requirement. Particulars may, and frequently are, given separately from pleadings. Although r 5.21(3) and (4) do not refer to an order other than the filing of a more explicit pleading, the Court has always had an inherent jurisdiction to order the provision of further particulars only.

[53] Thirdly, if this approach is taken, and extravagant particulars of loss are given, there seems no reason why the indemnity costs provisions in s 43(2) could not apply in favour of a news media defendant. Indeed, it is preferable as a matter of

policy that there be no distinction between defendants. A different approach would deny, disadvantageously and without apparent good policy reason, direct access by news media defendants to that additional protection.[38]

[54] I have thus reached the same conclusion as the Associate Judge on this issue, albeit for rather different reasons.

A secondary issue as to particulars

[55] There is, finally, a subsidiary issue as to particulars. The Associate Judge also directed that Elementary provide "full and proper particulars of the allegations in [24] ... as to the respects in which its reputation has been very seriously injured".

[56] As Mr McVeigh pointed out, that issue had received little airtime at the hearing. The main issue, there as here, was the question of whether particulars of *quantum* of pecuniary loss could and should be particularised. Nonetheless, the further order was part of LexisNexis' application, had not been abandoned, and the Judge had to deal with it.

[57] Mr McVeigh submits that a letter dated 15 December 2010 provided sufficient particulars of those matters. The Associate Judge did not seem to think it did, although he did not say exactly why.

[58] Mr McLellan submits, however, that the letter did not in fact provide any particulars of respects in which Elementary's reputation had been very seriously injured. As he put it, "It simply identifies three heads of alleged financial loss, and gives no particulars of damage to reputation".

[59] I have read the letter. Having done so, I am in agreement with Mr McLellan's submission. In any event, Elementary has not persuaded me that the Associate Judge's decision in this respect is wrong.

---

[38] See *Radio New Zealand v Harrison* CA119/98, 25 February 1999 and *Parris v Television New Zealand Ltd* (1999) 13 PRNZ 327 (HC). In those cases as a matter of fact s 43(2) was held not to apply, but an analogous approach was taken in setting costs.

Result

[60] The application for review is dismissed.

[61] LexisNexis is entitled to costs, although I note honours on the issues argued were essentially even. If not agreed, I will receive memoranda.

[62] I thank counsel for their submissions.

Stephen Kós J

Solicitors:
Izard Weston, Wellington for Plaintiffs
Bell Gully, Auckland for Defendant