IN THE DISTRICT COURT
AT LEVIN

CIV-2011-031-000183

BETWEEN	G & C PATON Plaintiffs
AND	B VERTONGEN Defendant
AND	ANNE MARIE HUNT Third Party

Hearing: 23 November 2012

Appearances: S Price for Plaintiffs
P McKnight for Defendant
F Geiringer for Third Party

Judgment: 7 May 2013

RESERVED JUDGMENT OF JUDGE T J BROADMORE

Introduction

[1] This is an interlocutory judgment concerning the application by the third party to set aside the third party notice.

[2] In the proceeding, the Patons claim that Mr Vertongen defamed them. Mr Vertongen accepts that he behaved and spoke as asserted by the Patons, but denies that his actions and words were directed at them. He further maintains that publication of those actions and words, and accordingly any damage resulting from such publication, was attributable to the actions of Ms Hunt; and by his third party notice he therefore claims to be entitled to contribution and/or indemnity from Ms Hunt in respect of any damages he may be required to pay to the Patons.

[3] The stance jointly taken by the Patons and Ms Hunt is that such a claim can neither be sustained at law nor permitted under the relevant procedural rules.

[4] For reasons stated in this judgment, I agree.

More about the facts

[5] All parties essentially concur as to the circumstances giving rise to the litigation. Mr McKnight, counsel for Mr Vertongen, has identified four respects in which Mr Vertongen disputes the account given by the Patons; but, in my view, resolution of those matters in favour of Mr Vertongen would not affect the outcome of the claim, except perhaps in respect of damages.

[6] Both Mr Vertongen and Ms Hunt were at all relevant times members of the Foxton Community Board. In 2009, Mr Vertongen was the chairman. The Patons live at Foxton Beach and, in the words of their amended statement of claim, have been –

> ... active in community work and have displayed a particular concern for the environment.

[7] In the period between 2003 and 2006, the parties were at odds over a proposal for the construction of a seawall on the Foxton Beach beachfront. Mr Vertongen was a strong proponent of the proposal; the Patons were initially strongly opposed to it, but later were prepared to accept it if protective conditions were imposed.

[8] In 2003, the Community Board applied to a Joint Hearing Committee of the Horowhenua District Council and the Regional Council for consents to the construction of, first, a trial, and secondly, a full seawall. At the hearing of the application, there was opposition from a number of people including the Patons, and also from the Regional Council and the Department of Conservation. At the end of 2004, the Committee rejected the consent applications, apparently because there was –

> ... minimal evidence presented by the applicant on avoidance, mitigation or remediation of any adverse effects.

[9] At the request of the Community Board, the Horowhenua District Council appealed. However, the parties subsequently agreed to refer the dispute to

mediation. In December 2006 the Environment Court approved a consent order between the parties granting consent for the applications subject to conditions. The Community Board then went ahead with construction of the full seawall.

[10] On 20 November 2009, there was an official ceremony marking the completion of the seawall. A number of public figures attending, including the Minister for Internal Affairs, Mr Nathan Guy, who was and is the Member of Parliament for the District. Mr Vertongen was there, as was Ms Hunt, and other members of the public. The Patons were not there.

[11] In the course of the ceremony, Mr Vertongen participated in burning a clipping from a local paper, the *Horowhenua Mail*, containing a photograph of the Patons. He referred to this action in words specified explicitly[1] by the Patons in their amended statement of claim and admitted by him in his statement of defence, as follows:

> I have waited a long time to do this. Objections from 18 nagging people turned a simple job into a ridiculously complicated fiasco and cost the ratepayers $200,000. I am going to put this ghost to rest, that is the end of that.

But he denied that these words referred to the Patons.

[12] The photograph had appeared in the Horowhenua Mail after the Joint Hearing Committee had declined resource consent for the seawall. It depicted the Patons celebrating that outcome.

[13] Ms Hunt appears to have taken exception to what Mr Vertongen said and did. She told Mrs Paton about it. She also contacted the *Horowhenua Mail* and the *Levin Chronicle* concerning the matter: precisely what she told them at the time of her first contact is in dispute, although it is probable that copies of emails she sent at the time will eventually be uncovered.

[14] What is not in dispute, however, is what was published or broadcast by various media outlets – the two local papers, Radio New Zealand, the *Dominion*

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[1] As required by s 37 of the Defamation Act 1992.

Post, and other newspapers via the New Zealand Press Association - concerning what took place. Mr Vertongen is reported as having repeatedly said strong things about the Patons which are set out in the pleadings (although Mr Vertongen has not advanced a cross-claim against the Patons).

[15] I am not going to set out the detail of what appeared in the newspapers and was broadcast by Radio New Zealand: the gist of it was that the Patons and others had imposed a cost burden of $200,000 on the ratepayers because of their opposition to the seawall proposal; that Mr Vertongen was quite unrepentant about what he had said and about burning the newspaper photograph; that (in trenchant terms) he refused to apologise for his words and actions; and that, ever since the photograph had been published in the *Mail* some years previously he had held the intention of doing precisely what he did on 20 November.

[16] The Patons commenced this proceeding after Mr Vertongen rejected opportunities to apologise. They complained that Mr Vertongen's words and actions on the day, and his subsequent comments as reported in the news media, were defamatory. Specifically, they said that his words and actions had unjustifiably implied that they:

1. Had needlessly imposed a $200,000 expense and delay on the community;

2. Deserved public vilification;

3. Were irresponsible;

4. Selfishly put their own concerns over those of the community;

5. Acted contrary to the public interest.

[17] They went on to say that Mr Vertongen's words and actions had caused them considerable distress and embarrassment, as to which they provided particulars of a number of events and encounters occurring over the two or three months following the opening ceremony.

[18] In respect of each of the publications of Mr Vertongen's comments, including on the day, the Patons seek general and aggravated damages in the sum of $20,000 and exemplary damages in the sum of $10,000. These claims are cumulative, so that the total claim is for $180,000 in respect of the six occasions of publication.

Joinder of Ms Hunt as Third Party

[19] In January 2012, within the time limited under the District Court Rules for taking such a step without leave, Mr Vertongen issued a third party notice and statement of claim against Ms Hunt.

[20] The starting point for that claim is that, so Mr Vertongen alleges, it was the actions of Ms Hunt that caused the Patons to be identified with his words and actions on the day. Thus, he argues, the initial publication of Mr Vertongen's words and actions was by Ms Hunt. Further, such publication – deliberate and purposeful, he asserts – had the consequence that publication of his words and actions on the day, and his further comments made in the course of interview with reporters for various news media, was caused at least in part by Ms Hunt. As a result, she should be required to contribute to any damages which he might be required to pay to the Patons.

Jurisdiction for joinder; pleaded basis for claim

[21] It is important to spell out the precise legal basis for out Mr Vertongen's claims.

[22] As to jurisdiction, r 2.18 of the District Court Rules provides for the issue of third party notices *"on the grounds that the defendant is entitled to a contribution, indemnity, or other relief or remedy"*. The third party notice itself reflects those grounds. But Mr Vertongen has, in his statement of claim, amplified the grounds he relies on for issuing the third party notice by traversing the grounds set out in r 77 of the 1992 rules, now superseded by the 2009 rules. That rule was the same as r 4.4(1) of the High Court Rules.) Thus Mr Vertongen asserts that:

1. He is entitled to contribution and/or indemnity from Ms Hunt.

2. He is entitled to relief and/or remedy from Ms Hunt which is connected with the subject matter of the proceeding and is substantially the same as that claimed by the Patons against him.

3. The issues in the proceedings ought to be determined not only between the Patons and him, but also between the Patons, him and Ms Hunt and (as an alternative) between the Patons and Ms Hunt solely.

4. Issues arising between him and Ms Hunt connected with the subject matter of the proceeding are substantially the same issues as those which arise between the Patons and him.

[23] On the face of it, the new rule does not cover some of the second and all of the third and fourth of these grounds. The LexisNexis commentary to the District Court Rules at DCR2.18.3 opines that these words greatly abbreviate the former rules without, apparently, intending any change to practice. The Brookers commentary at DR 2.18.01 says merely that the new rule *"is not dissimilar to"* r 77. I do not agree with either of those observations: the new rule simply does not allow for joinder in the cases of common questions and issues involving all three parties. As a result, there appears to be no room to consider the discretionary issues of convenience to the court and the parties, the avoidance of the prospect of inconsistent outcomes, and other matters relevant to the interests of justice, as discussed in the LexisNexis commentary and *McGechan on Procedure* at HCR 4.4.01-14.

[24] On the other hand, the new rule does not limit a defendant's claim to *"relief or remedy"* to demonstrated connection with the subject matter of the proceeding or similarity of relief with the relief claimed by the plaintiff.

[25] I will consider the implications of this later in this judgment.

[26] As to the causes of action he relies on, Mr Vertongen's statement of claim (as amended) specifies five causes of action against Ms Hunt. I now set these out.

First cause of action – joint and/or concurrent liability - defamation

[27] This cause of action proceeds on the basis that Ms Hunt recounted Mr Vertongen's words and actions at the opening ceremony to the Patons and to various news media organisations, which later published or broadcast items about the matter. Mr Vertongen asserts (I think) that the Patons would not have known about Mr Vertongen's words and actions, and would therefore not have been in a position to make a claim arising out of events at the opening ceremony, without Ms Hunt's intervention. He also asserts that the news media would not have been aware of the alleged events without Ms Hunt's intervention; so that there would have been no defamation of the Patons in the news media without that intervention. The argument before me proceeded on the basis that Ms Hunt's actions amounted to publication to the Patons and the news media of the defamatory matter, although that is not expressly pleaded.

Second cause of action - wrong, negligent and/or reckless disclosure

[28] The matters pleaded concerning this cause of action are identical to those pleaded in respect of the first cause of action. But the allegation is that Ms Hunt's disclosures to the Patons and the news media were wrong, negligent or reckless. No particulars of wrongful, negligent or reckless conduct are furnished.

Third cause of action - joint and/or concurrent liability in respect of publications in news media - defamation

[29] The matters pleaded concerning this cause of action repeated the pleading in respect of the earlier causes of action. The third cause of action appears to differ from the first cause of action only in that it does not invoke Mr Vertongen's words and actions at the ceremony.

Fourth cause of action - negligence

[30] This cause of action differs from the second cause of action only in that it again relies only on the statements to the media and not Mr Vertongen's alleged words and actions at the opening ceremony.

Fifth Cause of Action - Law Reform Act 1936 - contribution/indemnity

[31] The basis of this cause of action appears to be that the circumstances pleaded (which are identical to those pleaded in relation to the earlier causes of action) of themselves give rise to a right of contribution or indemnity in terms of s 17 of the Law Reform Act.

Relief claimed

[32] In the case of each cause of action the relief Mr Vertongen claims is an indemnity or contribution from Ms Hunt for any damages awarded to the Patons. It is therefore clear that Mr Vertongen is not seeking damages in his own right for defamation or negligence. Put another way, he is not claiming that Ms Hunt defamed him or caused him loss or damage through negligence or a breach of a duty owed to him – other than by exposing him to the risk of having to pay damages to the Patons, in which event he wants Ms Hunt only to contribute to what he has to pay them.

Setting aside third party notice

Principles

[33] An application to set aside a third party notice is dealt with on the same basis as applications to strike out pleadings. It follows that a third party notice should not be set aside unless it cannot possibly succeed. As with strike-out applications, pleaded facts are assumed to be true; and the court is reluctant to resolve contentious issues raised in affidavits. But there is no reason why the court should not decide on the legal implications of facts which are not in contention, nor on pleaded allegations which, upon examination, are entirely speculative and without foundation.

[34] As to these principles, see the commentary in *McGechan on Procedure* at HR4.16.01 (third parties) and HR15.1.02 (striking out pleadings).

Grounds

[35] Ms Hunt's application to set aside the third party notice makes the general point that none of the five causes of action pleaded by Mr Vertongen are *"reasonably arguable"*, either generally or in terms of Rule 4.4(1) of the High Court Rules. She also asserts that the claims against her are not sufficiently connected to the Patons' claims so as to justify the additional complexity inherent in continuing the proceeding with her as a party.

[36] As to the first cause of action pleaded (joint and/or concurrent liability in relation to all publications, including at the opening ceremony), Ms Hunt makes a number of points:

1. Her communications as to what occurred at the opening ceremony were, taken as a whole, not defamatory of the Patons, because they were made in the context of detailed criticism of Mr Vertongen's words and actions, so that it is a case of *"bane and antidote"*.

2. Even accepting that she alerted the news media to Mr Vertongen's words and actions, he then made his own choice to repeat his defamatory words and to describe his actions at the opening ceremony in the course of interviews with the news media. As a result, there is no causal connection between her alert to the news media and the defamatory statements subsequently made by Mr Vertongen and reported by the news media.

3. Any alert from her to the news media is irrelevant to Mr Vertongen's words and actions at the opening ceremony, when there was a first *"publication"* of the alleged defamatory words and action.

4. As to the facts, Ms Hunt asserts that other people at the opening ceremony could very likely have alerted the news media as to what had happened; and for her part she denied that she had in fact repeated the defamatory words and actions of Mr Vertongen to the news media.

[37] As to the second cause of action based in negligence, Ms Hunt asserts that there is no duty of care recognised by the law in the circumstances pleaded by Mr Vertongen. She also argues that there is no pleading of the matters normally regarded as essential to support a claim based in negligence – the existence of a duty of care, loss to Mr Vertongen arising from the alleged negligence, and the causal link between the alleged negligence and any loss. In addition she relies on arguments advanced in respect of the first cause of action,

[38] Ms Hunt's response to the third cause of action (joint/concurrent liability in defamation for media publications) essentially repeats matters raised earlier – see [36] above.

[39] Coming to the fourth cause of action (negligence in relation to publication by news media), Ms Hunt asserts that there is no valid distinction between this cause of action and the second cause of action; so that the arguments she has advanced in relation to that cause of action are equally applicable.

[40] Finally, in relation to the fifth cause of action, based on the Law Reform Act, Ms Hunt argues that the Act does not establish a distinct cause of action; and in any event it adds nothing to the matters pleaded in support of the first and third causes of action, which also relate to joint as well as concurrent liability. She therefore relies on arguments already advanced in relation to those causes of action.

[41] In the course of their submissions, Mr Geiringer, counsel for Ms Hunt, and Mr Price, counsel for the Patons, also addressed legal issues which might arise if it were to be held that the circumstances did not amount to bane and antidote. In those circumstances, they argued, Ms Hunt would be able to rely on the defence of qualified privilege, there being no evidence or pleading that she acted out of malice.

(There is no pleading as to this in Ms Hunt's statement of defence.) Mr Vertongen has himself pleaded qualified privilege as a defence to the Patons' claim; and the Patons have given particulars of malice by way of response. I was not asked to consider the merits of that defence.

Summary

[42] Out of this mass of detailed pleadings, it seems to me that the application requires consideration of the following issues:

1. Whether, assuming that Ms Hunt gave a detailed description to the news media of Mr Vertongen's words and actions at the ceremony, such words and actions were defamatory of the Patons in the circumstances, and in particular whether Ms Hunt would be entitled to rely on bane and antidote.

2. Whether there is any legal basis for those elements of Mr Vertongen's claims which appear to be based on the tort of negligence.

3. The implications of the Law Reform Act 1936.

[43] I add that, in my opinion, the procedural rules governing the joinder of third parties do not create any legal liability where none existed before: they do nothing more than provide tools whereby legally sustainable claims involving parties other than the plaintiff and defendant may be dealt with in the same proceeding. As for the Law Reform Act, its purpose was to reform the law so as to permit claims for indemnity and contribution between joint tortfeasors. This was already the case in respect of concurrent tortfeasors. But a defendant seeking to rely on the Act must still establish that the party from whom contribution or indemnity is sought would, if sued, have had a liability in tort to the plaintiff.

Analysis

Statements defamatory?

What was said

[44] The starting point is what it was that Ms Hunt alleged to have said, not of Mr Vertongen, but of the Patons. As summarised in paragraph 28.11 of Gatley on Libel and Slander (11th ed), the position is that –

> The words used are material facts and they must therefore be set out verbatim in the particulars of claim, preferably in the form of a quotation.

[45] The learned authors cite as authority for this proposition the words of Denning LJ in *Collins v Jones* (1955) 1 QB 564 at 571:

> A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of whose contents he is unaware.

[46] In this case, the pleading in the amended statement of claim against Ms Hunt is that she repeated Mr Vertongen's alleged defamatory words and actions to the Patons and the news media. This can only be a reference to what the Patons themselves have alleged as to Mr Vertongen's words and actions at the opening ceremony, which he has admitted (whilst denying that his words and actions were directed at the Patons.) I have set the words and actions out in [11] above.

[47] There is doubt about what exactly it was that Ms Hunt might have told the media about what took place. Ms Hunt has acknowledged that she sent emails to the *Horowhenua Mail* and *Levin Chronicle* concerning events at the opening ceremony. Mr Vertongen asserts that those emails would have described his words and actions in some degree which may well have carried a defamatory meaning. Ms Hunt denies that. The emails have not come to light. Ms Hunt has also pleaded that others present at the ceremony might have been responsible for the initial alert to the media. But for the purposes of this application, I must assume that Ms Hunt did in fact, either orally or in emails, relay Mr Vertongen's words and describe his actions to those papers in the terms alleged and admitted, and say that those words and actions related to the Patons.

[48] There is no pleading as to anything else that Ms Hunt may have said of Mr Vertongen's words and actions in respect of the Patons. Particulars given in the amended statement of claim refer generally to discussions Ms Hunt must have had (because her comments were reported) with other news media beyond the local papers; but what is expressly pleaded are Ms Hunt's *"extremely critical"* comments about Mr Vertongen and his behaviour. In the absence of a claim that Ms Hunt defamed Mr Vertongen, or otherwise wronged him, and that he thereby suffered loss and damage, these comments are irrelevant.

[49] So I proceed on the basis that Mr Vertongen's claim stands or falls on Ms Hunt's alert to the media as to his words and actions on the day, in the terms he has admitted, and Ms Hunt's linkage of those words and actions to the Patons. I add that Mr Vertongen's denial of reference to the Patons is not capable of belief. He has admitted burning a newspaper clipping concerning the seawall dispute and bearing their photographs whilst uttering the words he has admitted to. The inference as to them as the primary targets for his wrath is inescapable. His subsequent reported and pleaded comments emphasise this, granted that others might also have been in his sights.

Words defamatory?

[50] In determining whether words are capable of bearing an alleged defamatory meaning, the general principle is that they must be read in context. Put another way, they must be construed as a whole with appropriate regard to the surrounding circumstances, including everything written or said by the defendant at the time.

1. Bane and Antidote

[51] The words *"bane and antidote"* refer to a particular aspect of this principle. The words go back to what Barker J in *NZ Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 631 called the *"evocative formula"* coined by Alderson B in *Chalmers v Payne* (1835) 15 ER 67:

> In one part of this publication something disreputable to the plaintiff is stated but that is removed with the conclusion that the bane and antidote must be taken together.

[52] Recent cases from England and Australia, as well as New Zealand, are discussed in *NZ Magazines* and I am not going to go through them here. What is clear for present purposes is that, if a defendant publishes words which are capable of bearing a defamatory meaning, then the material also published which is relied on as providing an *"antidote"* must be sufficient to make it clear that each and every imputation of the defamatory words are refuted by the publisher.

[53] In *NZ Magazines Ltd* the *NZ Women's Weekly* had published an interview with a well known female media figure in which there was a discussion of rumours that she had engaged in a lesbian affair with the plaintiff, Lady Hadlee. The idea of such an affair was roundly rejected by the interviewee, whose comments the magazine clearly reported. But (as the Court concluded) the published article left open the implication that Lady Hadlee was a person who might well engage in relationships of that type. Put another way, the antidote refuted the particular imputation of a relationship with the interviewee, but left open the imputation that Lady Hadlee might on other occasions have been involved in a relationship of that kind[2].

[54] In this case, Ms Hunt is quoted in the *Horowhenua Mail* of 26 November 2009 as saying that the photo-burning was *"symbolic of the culture of intimidation"* in the council; that *"it was an appalling way for a politician to treat people who had made a genuine submission on a matter they were concerned about"* (the reference to *"people"* is obviously a reference to the Patons, who were referred to and quoted earlier in the article); and that Mr Vertongen's behaviour as a civic leader *"reflected very badly on the council"*. She told a Code of Conduct subcommittee meeting of the Foxton Community Board (convened at least in part at her insistence) that she was *"sickened"* by Mr Vertongen's conduct at the opening ceremony. Mr Vertongen

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[2] The defamatory aspect of the article, as identified by the Court, appears to be the adulterous nature of the alleged relationship, Lady Hadlee being married, not that it was a same sex one: Barker and Blanchard JJ both refer to it as an affair.

alleges in paragraph 6.6 of his amended statement of claim against Ms Hunt that she made other highly critical comments about his behaviour.

[55] I therefore consider that it is abundantly clear that whatever Ms Hunt may have *"published"* to the Patons and the media by repeating what she asserted Mr Vertongen had said and describing what she asserted he had done at the opening ceremony, she not only did not agree with it but considered that Mr Vertongen's words and actions were completely unacceptable in her eyes. And further that all of Ms Hunt's reported or alleged remarks either expressly or by clear implication make it clear that the Patons' actions in respect of the seawall did not justify Mr Vertongen's response.

[56] I accept that, so far as the evidence goes, Ms Hunt did not in terms refute or dissociate herself from the implications of Mr Vertongen's words and actions as set out in [16] above. Most of her alleged remarks included in the pleadings were directed at Mr Vertongen. (She did describe the Patons' opposition to the seawall as *"genuine"*, as mentioned in [48] above.) But that is not the point. I accept, as I must, that she said or communicated what is pleaded, and that what is pleaded was discreditable and capable of being defamatory of the Patons. But it is clear from the context that she uttered those words only by way of quoting or paraphrasing what Mr Vertongen had said about the Patons, and further did not accept their truth or validity and disassociated herself from them. That context is essentially undisputed: it includes all that is pleaded or included in unchallenged affidavits as to what Ms Hunt said and did.

[57] I do not believe that the ordinary reader would think, in considering the entirety of what Ms Hunt had said and done, that she attached any credibility at all to Mr Vertongen's criticisms of the Patons. Or that she had left it open for readers to infer that, in some respect, she might agree with what Mr Vertongen had said of the Patons. The case is different from *NZ Magazines* in that respect.

[58] I therefore consider that Mr Vertongen cannot possibly succeed in his claim against Ms Hunt because any bane inherent in what she must be assumed to have said was accompanied by a comprehensive antidote in which she expressed positive

views about the propriety and legitimacy of the Patons' conduct and decidedly negative views about Mr Vertongen's.

2. Defamation more generally

[59] If I am wrong in my specific reliance on bane and antidote, then I consider that the same result can be reached by a straightforward consideration of the words assumed to be used in the context of all that Ms Hunt said and did as evident from the undisputed material before me. The bane and antidote approach is, I think, just a particular application of the general principle I referred to in [50] above.

Decision for me to make

[60] Mr McKnight addressed these arguments on their merits but submitted that the claim should go to trial. But, in my opinion, this is something that I can decide decide. That is because this is one of *"the clearest of cases"* (to use the words of Samuels JA in *Morosi v Broadcasting Station 2GB Pty Ltd* [1980] 2 NSWLR 418n) in which the judge may rule on the issue. To the same effect is the statement in *Gatley*, paragraph 6.34, that where it is clear that, taken as a whole, the bane in an article is taken away by the antidote, and a defamatory imputation could not be understood by a reasonable person, the issue may be left to the judge. (As the claim has been commenced in this court, any trial would be before a judge alone in any event.)

Outcome on defamation

[61] For the reasons given, I am satisfied that insofar as Mr Vertongen's claim depends on whatever Ms Hunt might have said to the news media, it cannot succeed.

[62] This conclusion directly disposes of the first cause of action pleaded in the amended statement of claim against Ms Hunt, and does serious damage to other causes of action as I shall describe.

[63] My conclusion as to whether what Ms Hunt said to the news media was defamatory, and as to bane and antidote in particular, also means that I do not have to

consider the issues of qualified privilege and malice. I add that not only are those matters not pleaded, but they raise issues about the parties' roles and responsibilities in public life that call for factual enquiry beyond the material before me.

Negligence

[64] I need spend little time on this. There are two reasons why a claim in negligence against Ms Hunt cannot possibly succeed.

[65] First, none of the accepted elements of the tort of negligence has been pleaded or asserted in argument. There is no pleading that Ms Hunt owed a duty to Mr Vertongen not to disseminate to the news media information as to his conduct as the opening ceremony, public and apparently official as it was (or to notify the news media that it might care to inquire into such conduct) – no pleading of a special relationship, or proximity of some other kind. I cannot imagine how such a duty could arise. All that Mr Vertongen has said is that it was reasonably foreseeable that if Ms Hunt notified the media about events at the opening ceremony, then the media might investigate and report on such events. But, in the absence of any accompanying duty, it is trite law that just because some consequence is a reasonably foreseeable outcome of action by a party, that does not render that party liable in negligence.

[66] Secondly, in this case Mr Vertongen has accepted (in paragraph 21 of his statement of defence to the Patons' amended statement of claim) the truth of their allegations that he spoke and acted as pleaded at the opening ceremony. Further (as noted earlier) his formal denial that those words and actions were directed at the Patons is implausible. In those circumstances, it is not easy to see the basis on which the existence of such a duty could possibly be argued. It would mean that anyone who gave to the news media a truthful or (perhaps) good-faith account of something occurring in public would be liable in negligence to a person involved in that occurrence and aggrieved by subsequent media interest in it. *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA) is authority for the proposition that there can be no liability in negligence for making a true statement.

[67] I have no doubt but that such parts of Mr Vertongen's amended statement of claim as involve a claim in negligence against Ms Hunt should be struck out.

Section 17 Law Reform Act

[68] In the light of my conclusions that there is no evidence that anything said or done by Ms Hunt could be taken as defamatory of the Patons, and that there is no basis for a claim in negligence against her, then the Law Reform Act cannot assist Mr Vertongen. Ms Hunt cannot be treated as *"any other tortfeasor"* within the meaning of s 17(1)(c) of the Act.

Other matters

[69] However, there are two further matters raised by the parties which I need to deal with – *"in recognition of the constant of first instance fallibility and in deference to the careful arguments advanced by counsel"*, to borrow the words of Harrison J in *Osmose New Zealand Limited v Wakeling*[3]. These matters are whether any liability of Ms Hunt to the Patons would be *"in respect of the same damage"*, as required by s 17(1)(c) of the Law Reform Act; and secondly whether Mr Vertongen is a *"plaintiff"* within the meaning of s 19 of the Defamation Act.

Same Damage

[70] As Harrison J pointed out in *Osmose*, the basis for a contribution claim under the Act depends on the *"damage"* not the *"damages"* being the same. In *Osmose*, the claim was necessarily for special damages, but in this case it is for general damages. Thus the difficulties of proof discussed in *Osmose* do not arise in the same way in this case. In the *Osmose* case, the claim was for the overall loss of profits the plaintiffs alleged they had suffered over a four year period, reflecting the alleged destruction of the plaintiff's market in the product the subject of the defendants' allegedly defamatory allegations. In this case, the claim is for general, aggravated and/or exemplary damages for injury to the reputations of the Patons and for the considerable distress and embarrassment which they have allegedly suffered. But

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[3] [2007] 1 NZLR 841 at 859

the way the Patons have put their case is that they have specifically identified a succession of different publications of allegedly defamatory matter *"published"* by Mr Vertongen in the course of interviews with the various media, and in respect of each separate publication have claimed general and aggravated and/or exemplary damages as noted in [18] above.

[71] If it is the case that each of those publications caused injury to the Patons' reputations, and caused them distress and embarrassment then, on the footing that Ms Hunt's communications were defamatory, it seems to me that the general damages arising from each of the individual publications must be for *"the same damage"*- the damage arising from that individual publication. As a result, it seems to that the third party claim could not be struck out on that basis.

[72] But the court would, of course, be required to apportion the damages on the basis of what is *"just and equitable having regard to the extent of [Ms Hunt's] responsibility for the damage"* – s 17(2) of the Law Reform Act.

[73] I agree with Mr Price's observation that on the face of it Ms Hunt's involvement in the publications the Patons complain of is peripheral and her contribution to any damage suffered by them is tiny. Indeed, it seems clear that Mr Vertongen needed little persuasion to ventilate in public his views about the Patons and other objectors, continuing to use florid and extravagant language in doing so. Even accepting that Ms Hunt put the ball of publicity in play, Mr Vertongen seized it and ran the length of the field with it.

[74] It is at this point that the difference between the District Courts rules and the High Court rules comes in to play. For reasons just given, I consider it implausible that a court would, in the exercise of its just and equitable jurisdiction under the Law Reform Act, order Ms Hunt to contribute anything more than a nominal amount to the damages payable to the Patons. That being the case, whether liability and ultimately damages *"ought to be determined"* in a proceeding involving Ms Hunt is doubtful in my view. (The quoted words are from r 4.4(1)(c) of the High Court rule.) I refer also what the Court of Appeal said about proportionality in *Vero Liability Insurance Ltd v Symphony Group Ltd* [2008] NZCA 419:

> [A party should not be] joined into litigation between others where its interest is relatively inconsequential, whether in terms of the underlying issues as to liability, or the amount of the claim.

[75] But to read such elements of discretion and proportionality into the wording of r 2.18 of the District Courts rules is too much of a stretch, in my view. On the other hand, if I considered that the claim against Ms Hunt should not be struck out, there might be scope for making an order under r 2.24.3(a) Mr Vertongen to pursue a claim against Ms Hunt in independent proceedings. But, with the failure of the 2009 rules to repeat even the substance of r 77 of the 1992 rules, it is not easy to see how the court would approach the exercise of its discretion under r 2.24.3(a).

Whether defendant may plead malice when third party pleads qualified privilege

[76] This issue arises only in respect of s 19 of the Defamation Act, which deals with the rebuttal of qualified privilege. In summary, the section provides for the rebuttal of a defence of qualified privilege by proof of ill will. Mr Price and Mr Geiringer assert that s 19 applies only as between a plaintiff and a defendant, as strictly so named in the proceeding; so that a defendant joining a third party cannot invoke malice as a rejoinder to a defence of qualified privilege raised by the third party.

[77] Strictly speaking, I do not need to rule on this submission because I have not found it necessary to deal with the issue of qualified privilege. I accept that the wording of the section supports the argument. However, it is common for defamation cases to involve third and subsequent parties; and it is therefore implausible that Parliament could have intended to confine the issues of qualified privilege and malice to situations involving plaintiffs and defendants strictly so called. Extracts from the preparatory legislative material tendered by Mr McKnight support that view, suggesting legislative oversight in failing to deal explicitly with third and subsequent parties.

[78] Without going into detail, I consider that sufficient jurisdiction exists to ensure that the court can treat a defendant making a claim against a third party as if he or she was a plaintiff in terms of s 19. For authority I refer to *Northland Milk*

Vendors Association Inc v Northern Milk Ltd [1988] 1 NZLR 530 (CA), the headnote to which states in part as follows:

> Where in new legislation a very real problem has certainly not been expressly provided for and possibly not even foreseen, the responsibility falling on the Courts is to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended

[79] I do not intend to address this aspect further.

Outcome

[80] The application to set aside the third party notice is granted. The defendant is to pay the costs of the plaintiff and third party, calculated on a 2B basis, together with fees and disbursements as fixed by the Registrar if not agreed. As to the next step in the litigation between the Patons and Mr Vertongen, I direct the Registrar to convene a telephone conference at a time and on a date fixed in consultation with the parties.

T J Broadmore
District Court Judge