IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV-2012-406-000272
[2015] NZHC 3126

BETWEEN	LORETTA ANNE NEWTON Plaintiff
AND	SUSAN DUNN First Defendant
	FAYE COLLEEN LEOV and BERNARD LESLIE LEOV Second Defendants

Hearing: 1 December 2015

Appearances: R J B Fowler QC for Plaintiff
P B Churchman QC for Second Defendants
No appearance for the First Defendant

Judgment: 10 December 2015

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] Mrs Newton initially issued this proceeding against the first defendant, Ms Dunn, alleging defamation in three separate publications, a letter dated 10 September 2012, an email dated 1 October 2012, and a further email dated 8 October 2012. She also alleges harassment under the Harassment Act 1997.

[2] After discovery of documents Mrs Newton learned the involvement of the second defendants, Mr and Mrs Leov, in relation to the alleged actions of the first defendant. This led to her joining Mr and Mrs Leov as second defendants, and to amended pleadings. Mrs Newton says that Mr and Mrs Leov provided to Ms Dunn material which she used in making the publications on which she relies in her claim against Ms Dunn. Until 20 October 2015, the current pleading was the second amended statement of claim. On that day Mrs Newton filed a third amended statement of claim in identical terms to the second amended statement of claim, save

that in the sole cause of action against Mr and Mrs Leov, she added a prayer for relief in the following terms:

> A recommendation by the Court pursuant to Section 26 of the Defamation Act 1992 that the Second Defendants publish or cause to be published a correction of the matter that is the subject of this Proceeding and that in making such a recommendation the Court include recommendations in terms of Section 27 of the Act.

[3] Section 26 of the Defamation Act provides:

> **26. Court may recommend correction** –
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> (1) In any proceedings for defamation, the plaintiff may seek a recommendation from the Court that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings, and the Court may make such a recommendation.
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> (2) Where, in any proceedings for defamation, -
>
> (a) The Court recommends that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings; and
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> (b) The defendant publishes or causes to be published a correction in accordance with the terms of that recommendation, -
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> then –
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> (c) The plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise; and
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> (d) The plaintiff shall be entitled to no other relief or remedy against that defendant in those proceedings; and
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> (e) The proceedings, so far as they relate to that defendant, shall be deemed to be finally determined by virtue of this section.
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> (3) Where, in any proceedings for defamation, -
>
> (a) The Court recommends that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings; and
>
> (b) The defendant fails to publish or cause to be published a correction in accordance with the terms of that recommendation, -
>
> then, if the Court gives final judgment in favour of the plaintiff in those proceedings, -
>
> (c) That failure shall be taken into account in the assessment of any damages awarded against the defendant; and
>
> (d) The plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise.

[4] There is, however, a procedural consequence of the inclusion of a prayer for relief seeking a recommendation under s 26. Section 19A of the Judicature Act 1908 provides that civil proceedings in which the only relief claimed is payment of a debt or pecuniary damages, or the recovery of chattels, may be tried by a jury, at the election of either party. The inclusion in Mrs Newton's prayer for relief of a request for a recommendation under s 26 took the proceeding outside the terms of s 19A. Section 19B(1) therefore applies. It provides that except as provided in s 19A, every civil proceeding shall be tried before a judge alone.[1]

[5] Eight days before the filing of the third amended statement of claim, counsel for Mr and Mrs Leov had advised counsel for Mrs Newton of their intention to elect a trial by jury. Three days after that counsel for Mrs Newton notified counsel for Mr and Mrs Leov that he intended to file an amended statement of claim seeking a remedy under s 26.

[6] Mr and Mrs Leov seek to strike out the prayer for relief seeking a recommendation under s 26 as an abuse of process.

The case for Mr and Mrs Leov

[7] Mr Churchman QC, for Mr and Mrs Leov, says that although the proceedings against his clients were commenced nearly three years ago and have been the subject of earlier amendment, the inclusion of the request for a recommendation was an immediate response to advice that Mr and Mrs Leov elected trial by jury. His principal submission is that the only reason this relief has been sought is to prevent Mr and Mrs Leov from exercising this right.

[8] In *O'Regan v The Radio Network Ltd*, Mr O'Regan's proceeding in defamation had been set down for trial by Judge alone.[2] The defendants then served a notice requiring trial by a Judge and a jury. The plaintiff opposed the notice on the basis that the defendant had no right to a trial by a Judge and a jury because a recommendation of publication of a correction was sought. The defendants,

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1 Section 19B(2) provides that if it appears to the Court at the trial, or to a Judge before the trial, that the proceeding or any issue in it can be more conveniently tried before a Judge with a jury, the Court or a Judge may so order. To date, no application has been made under s 19B(2).

2 *O'Regan v The Radio Network Ltd* [2001] 1 NZLR 568 (HC).

therefore, sought a requirement that the plaintiff elect in advance of the trial whether he wished to continue with the claim for a correction. The plaintiff opposed being required to make this election.

[9] Wild J ordered the plaintiff to elect by a stipulated date whether or not he would pursue his prayer for a s 26 recommendation. He directed that if the plaintiff did not wish to pursue that prayer, the proceeding would be tried by a jury. He also invited the plaintiff to apply for a conference under s 35 of the Defamation Act if he did wish to pursue his request, and indicated that at that conference he would consider recommending a correction which might be published by the defendant.

[10] Before stating these conclusions, his Honour said:

> [32] I indicate that, once it has become clear that this proceeding is going to trial before me sitting alone, then I will not subsequently allow [the plaintiff] to amend his statement of claim by deleting his prayer for a s 26 recommendation. This is because any such request would be consistent only with inclusion of the prayer as a device to deprive the defendants of their s 19A right to trial before a Judge and jury, and would thus constitute an abuse of the process of the Court. In *TV3 Network Ltd v Eveready New Zealand Ltd* at p 438, Cooke P rejected TV3's submission that Eveready had inserted a prayer for a s 26 recommendation in its statement of claim to preempt TV3's right to seek a trial by jury. Whilst I respectfully agree with His Honour, preemption would become blatantly apparent if a plaintiff sought to drop the prayer shortly before or at the commencement of trial.

[11] This judgment makes it clear that this Court is alive to the prospect that a request for a recommendation under s 26 may be used by a party to a defamation suit for tactical advantage, and that in some circumstances that may be an abuse of process. This will depend, of course, on the circumstances of the case.

[12] In developing his argument Mr Churchman submits that s 26 was inserted into the Defamation Act to provide fast and accessible relief in claims for defamation. He supports this submission by reference to four statements during debate in Parliament, recorded in Hansard, all of which support this view. Indeed, the Hon Douglas Graham, during the third reading of the Bill, said that if a correction order is to have any benefit to the plaintiff, it has to be made within a matter of days of publication of the defamatory statement, otherwise a correction

order would become a waste of time.[3] At an earlier point in the transition of the Bill through the House, Mr Graham had made reference to this occurring, by way of example, at a judicial conference, which of course would occur in advance of any trial.[4]

[13] Mr Churchman notes that in *O'Regan* Wild J describes a s 26 correction as a "quick fix", a view he found to be supported by Burrows and Cheer *Media Law in New Zealand*,[5] and Gillooly *The Law of Defamation in Australia and New Zealand*.[6]

[14] In this case, Mr Churchman submits, the request has been made at a point close to the trial when it cannot provide, as the learned authors of Gillooly put it, "an attractive alternative to the fully blown damages action for a plaintiff who seeks merely a speedy vindication and costs".[7] This delay, combined with the prompt filing of the third amended statement of claim after the communication of the election by Mr and Mrs Leov, leads to an inference that the request is not included in order to obtain a recommendation that a correction be published, but rather to avoid the prospect of a trial by jury.

[15] Mr Churchman submits that in any event, a retraction could not be ordered under s 26 because at no point in the cause of action against Mr and Mrs Leov is it alleged that they published any of the defamatory statements relied on in their causes of action against the first defendant, Ms Dunn. Rather, the cause of action against Mr and Mrs Leov is based on their having entered an agreement with Ms Dunn, the purpose of which is stated to be:

> To create a book [*The Faye Leov Story*] which is to show the true nature of bullying in the workplace, and demonstrate the devastating emotional and physical cost to Faye and the others involved. Integral to the story will be the profiling and exposure of a bully, Loretta Newton, former principle (sic) of the Rai Valley Area School.

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3 (17 November 1992) 531 NZPD 12331.
4 (10 November 1992) 531 NZPD 12146.
5 J Burrows and U Cheer *Media Law in New Zealand* (4th ed, Oxford University Press, Auckland, 1999).
6 M Gillooly *The Law of Defamation in Australia and New Zealand* (The Federation Press, Sydney, 1998.
7 At 332.

[16] Based on this agreement Mrs Newton pleads that the publications by Ms Dunn were part of the enterprise described in the commercial agreement, and were carried out:

(a) at the direction and with the knowledge of Mr and Mrs Leov; or

(b) as the agent of Mr and Mrs Leov; or

(c) following the suggestions of Mr and Mrs Leov; or

(d) following the provision of material by Mr and Mrs Leov to Ms Dunn with the knowledge that she was likely to republish it in some manner or form.

[17] Mr Churchman says that as it is not alleged that Mr and Mrs Leov themselves published any defamatory material, the Court could not in any event direct that a correction be published under s 26. Further, nothing would be gained by it, because Ms Dunn has an open offer on the court record to publish such a correction herself, and as she was the original publisher, any publication of any further correction would be of no effect.

[18] Mr Churchman also notes that s 27(2) of the Defamation Act provides that in deciding whether to make a recommendation, the Court is required to have regard to the context and circumstances in which the matter which is the subject of the proceedings was published, including the manner and extent of publication. He says that this would necessarily include the fact that Mr and Mrs Leov did not publish any of the material which Mrs Newton says is defamatory. Therefore, the Court would not in any event order a publication of a correction.

The case for Mrs Newton

[19] Mr Fowler QC for Mrs Newton says that a plaintiff is entitled to refine or amend a prayer for relief at any stage before a close of pleadings date has been fixed, as in this case. He refutes the suggestion that inserting the request for a recommendation is an abuse of process.

[20] First, he says that in *O'Regan* the request was allowed to stand, though the plaintiff was put to an election and forbidden from resiling from that election, because that would be seen as tactical and an abuse of process. In this case the same might be said if Mrs Newton were to withdraw the request at a point when a Judge alone trial had been directed. That is not, however, the position here.

[21] Secondly, the decision to include the request can properly be seen as a decision by Mrs Newton to accept a correction, from Mr and Mrs Leov, in addition to that which has been offered by Ms Dunn, and to recover her solicitor and client costs, rather than proceeding to trial and seeking damages. This is not a case in which, he says, any award of damages is likely to be substantial.

[22] Thirdly, even if the Court does see a link between the filing of the third amended statement of claim and the communication of the election of Mr and Mrs Leov, that is not of itself an abuse of process. There is no reference to timing in s 26, and the passages from Hansard do no more than indicate the type of situation where a recommendation might be of optimal utility.

[23] Fourthly, Mr Fowler refutes the suggestion that it is not alleged that Mr and Mrs Leov published the allegedly defamatory statements. He notes that publication is an essential element of any defamation cause of action. If there has not been any publication by Mr and Mrs Leov there can be no claim at all against them. He says that in fact publication is pleaded in paragraph 28. The publication is said to be at the direction and with the knowledge of Mr and Mrs Leov, or as their agent, or following their suggestions, or following the provision of material and with the knowledge that Ms Dunn was likely to republish it, after it was first published by Mr and Mrs Leov to her. In short, the publication is, as Mr Fowler put it, a fusion of the actions of the first and second defendants.

Discussion

Abuse of process

[24] In my opinion, it is certainly possible that Mrs Newton filed her third amended statement of claim with the intention of depriving Mr and Mrs Leov of

their right to elect a jury trial under s 19A of the Judicature Act. This is strongly suggesting by the timing of its filing.

[25] However, even if that is so, in my opinion that does not make this an abuse of process in this case. First, an amended pleading may be filed at any time prior to a close of pleadings date, and no date has been set in this case. Secondly, s 26 of the Defamation Act does not expressly limit the time at which a request can be made. Whilst the views expressed during the passage of the Bill through Parliament all support the view that early pleading of a request will have the most efficacious outcome in terms of clearing a slur on a reputation, avoiding long and possibly costly litigation whilst covering the actual legal expenses incurred by a plaintiff to date, this does not mean that the publication of a correction could not be accepted by a plaintiff at a later stage, if a plaintiff forms the view that it is an acceptable outcome.

[26] Thirdly, I note that Wild J in *O'Regan* did not confine the making of a request for a correction to an early point in the life of a case. He said:[8]

> [24] I consider Parliament intended that the possibility of resolving the proceeding by publication of a correction recommended by the Court under s 26 be addressed wherever possible in the early stages of a defamation proceeding, and certainly well before trial.

[27] Although this places optimal use of s 26 in the early stages of a proceeding, his Honour left open the prospect that it could be used at any time provided it was well before trial. In the present case, a close of pleadings date has not been set, let alone a trial arranged.

[28] Fourthly, it may not be possible to dispose of a proceeding promptly by the Court making a s 26 recommendation where essential facts are disputed. As Wild J noted in *O'Regan*:

> [27] Burrows and Cheer quite properly make the point that swift disposal of a proceeding by a s 26 recommendation is unlikely to be possible where essential facts are disputed eg where the plaintiff disputes that it published the defamatory remarks, or disputes that it published them about the plaintiff.

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8 *O'Regan v The Radio Network Ltd*, above n 2.

[29] This may well be one reason why s 26 was enacted without a limitation of time within which it might be invoked. It is for the Court to determine whether it will accede to a request. It may well be appropriate to do so once disputes on factual matters have been resolved. This is an issue for consideration of a Judge at trial or subsequently, before entry of judgment for damages.

[30] Fifthly, the Court retains control over whether a case will be tried by a Judge or by a jury, in any event. Section 19B(2) of the Judicature Act provides that the Court at trial, or a Judge before the trial, may direct that the case be tried by a Judge with a jury. In the present case, therefore, Mr and Mrs Leov retain the option, notwithstanding the filing of the third amended statement of claim, to apply to the Court for an order under s 19B. Although they have lost their right to a jury trial, they have not lost the prospect that it can occur. In my opinion, it would be unfair to Mrs Newton to find that she could not request a remedy specifically reserved to her, without time limitation, by s 26 merely because she had been notified that the defendants wish to have her case tried by a Judge and jury. If that wish continues, the Court may order that mode of trial on the application of the defendants without Mrs Newton being deprived of her request for a correction.

[31] For these reasons I find that the inclusion of the request in the third amended statement of claim was not an abuse of process and I decline to strike it out on that ground.

Are Mr and Mrs Leov alleged to have published?

[32] The distinction Mr Churchman draws is between it being alleged that Mr and Mrs Leov published the defamatory material, and it being alleged that although they did not publish it, they are jointly and severally liable with Ms Dunn for damages. Neither Mr Churchman nor Mr Fowler was able to point me to any authority determining whether this is a valid distinction. Guidance is obtained however in my opinion from the judgment of Gendall J in *Woodgate v Harris*.[9] His Honour said:

> [16] Generally speaking, where a person to whom publication of defamatory matter is made, and republishes that on a different occasion, the original

[9] *Woodgate v Harris* [2011] NZAR 787 (HC).

> publisher would not be liable to a plaintiff for repetition of that to another person. But the original publisher will be liable if he/she authorised the repetition by another person or intended that that would occur. An original publisher is also responsible for republication if the repetition was foreseeable as a natural and probable consequence of the original publication. Individual cases will, however, depend on their own facts and repetition of a defamatory statement by someone else can sometimes be treated as an intervening act for which the original maker of the statement is not responsible.

[33] His Honour went on to note that if a person orally communicates defamatory words to a reporter for the purpose of having those words published in a newspaper that person would be liable for such a publication.[10]

[34] It follows from this that if it can be proved at trial that Mr and Mrs Leov provided defamatory material to Ms Dunn, which she then recommunicated by means of the three publications on which Mrs Newton relies, Mr and Mrs Leov are liable for the publication. It does not matter whether they personally published the material to any other party. I agree with the proposition advanced by Mr Fowler that liability exists without Mr and Mrs Leov having actually published the material beyond publication to Ms Dunn. Their liability would stem from her then publishing that material to others, if the facts pleaded can be established.

[35] It is plain from this principle that liability of a party (A) can stem from publication by a different party (B) in defined circumstances. For the purposes of liability of party A in defamation, publication by the recipient party B provides the relevant element of wrongful publication which founds liability in tort of party A for defamation.

[36] In this circumstance I do not think that s 26 is to be construed in such a way that a recommendation cannot be made by a court for publication of a correction by a person who provides defamatory material to another party, who then publishes it, resulting in the first party becoming liable under the principle I have set out. First, s 26 does not clearly exclude the availability of a recommendation in that circumstance. A plaintiff may seek a recommendation from the Court that the

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[10] His Honour cited *Adams v Kelly* (1824) Ry. & M. 157, 171 ER 977 (Assizes) and *R v Cooper* (1846) 8 QB 533 (KB).

defendant published or caused to be published "a correction of the matter that is the subject of the proceedings". It does not provide, as it might have, that the Court can only recommend that a defendant publish or cause to be published a correction of the material which the defendant had first published personally.

[37] Secondly, I can see no reason in principle why s 26 should be construed in the restrictive manner sought by Mr Churchman. Whilst there is some force in the view that it may sometimes appear odd to the original recipients of defamatory material to receive a correction from a person who did not supply the material in the first place, I think it is for the trial Judge considering a s 26 request to decide whether that is a sufficiently compelling reason to decline the request, in any particular case. In the present case, for instance, that might not present a particular difficulty. The publication alleged by Ms Dunn was to a comparatively small number of people within the confined community of the Rai Valley settlement, and it might be open to the Court at trial to find that the recipients of the letters were well aware of the participation of Mr and Mrs Leov in the communications, at the time they were made. As I have said, though, this is an assessment which is for the trial Judge.

[38] For these reasons I find that relief under s 26 of the Defamation Act is available to Mrs Newton in relation to her claim against Mr and Mrs Leov.

Outcome

(a) The application to strike out paragraph C of the prayer for relief in the first cause of action against Mr and Mrs Leov, in the third amended statement of claim, is dismissed.

(b) As discussed with counsel, costs will follow the event. As a result Mr and Mrs Leov will pay to Mrs Newton costs on a 2B basis with disbursements fixed by the Registrar.

(c) In accordance with the submission of Mr Fowler, Mrs Newton is not permitted to delete paragraph C from her prayer for relief.

J G Matthews
Associate Judge

Solicitors:
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