

**NEW ZEALAND MEDIA LAW UPDATE**  
**RECENT DEVELOPMENTS IN DEFAMATION LAW**

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[223] The last year once again appears to reflect increasing activity in terms of defamation litigation, where matters arose concerning unintentional defamation, the Court of Appeal attempted to grapple with the defence of truth and summary judgment in relation to honest opinion, media defendants were able to obtain a rare summary judgment on the grounds of a proposed statutory qualified privilege defence, levels and mitigation of damages continued to receive attention, correction orders remained elusive, a rare order to strike out a gagging writ for delay was made, and the government attempted unsuccessfully to revive criminal libel. Other developments will be discussed in the next issue of the *Media & Arts Law Review*.

**Unintentional defamation**

In March 2002, Fran Walsh, co-author of *The Lord of the Rings* screenplays (together with her husband, Peter Jackson) was reported to have instructed her lawyers to sue the *Listener* magazine if it did not apologise for publication of an article by an author with a name similar to her, Frances Walsh.<sup>2</sup> The article criticised the local film industry and its lack of financial success. Fran Walsh argued that readers would assume she wrote the article and it therefore damaged her reputation in the local film industry and that of Kiwi filmmakers. Ms Walsh issued a press statement claiming the *Listener* had made a deliberate attempt to mislead its readers, thus breaching the *Fair Trading Act 1989*. She sought an apology, retraction and damages. The magazine strongly rejected the claim, and published a note to its readers the following week, which stated in part:

The co-writer and co-producer of the *Lord of the Rings* is almost exclusively referred to in media coverage, as well as in her film's official publicity and on its website, as Fran Walsh. Frances Walsh, journalist, has been writing for the *Listener* and other publications for many years under her own name ... Readers may well share the view ... that no one is entitled to believe that they have monopoly rights over their name

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<sup>2</sup> *The Press*, 9 March 2002.

and that it must be hoped the threat does not mark a new level of American-style litigiousness in New Zealand society.

[224] Although the mistaken identity cases<sup>3</sup> might support a claim in defamation on these facts, it could be regarded as more like a 'look alike' case where the principle of strict liability may not apply. English law has recently accepted that where a claimant had sought damages for libel in respect of a defamatory message allegedly referring to the claimant as the result of identification from a photograph of another person which was the 'lookalike' or 'spit and image' of the claimant,<sup>4</sup> it would impose an impossible burden on a publisher if required to check if the true picture of someone resembled someone else who because of the context of the picture was defamed. The Court thought that to impose such a burden would be an unjustifiable interference with the vital right of freedom of expression disproportionate to the legitimate aim of protecting the reputations of 'lookalikes' and contrary to art 10 of the *European Convention on Human Rights* and s 12(4) of the *Human Rights Act 1998*. Such reasoning could be advanced in New Zealand based on our *New Zealand Bill of Rights Act 1990*, which, however, is not supreme law. However, the claim in this instance appeared to be focussed on a possible *Fair Trading Act* breach, in which case the resistance of the magazine based on lack of deliberate intent to mislead appears arguable. Fran Walsh has now issued proceedings against the *Listener* and its editor in three causes of action, two seeking unspecified damages (which indicates defamation claims) and another seeking \$50,000.<sup>5</sup>

## Truth

New Zealand courts are still struggling with pleading requirements in relation to the defence of truth, and the issue whether the *Defamation Act 1992* has relaxed the common law requirements. The Full Court of the High Court dealt with matters relevant to the defence in *Manning v TV3 Network Services Ltd*.<sup>6</sup> The case concerned the striking out of particulars which were attempting to justify defamatory meanings

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<sup>3</sup> *Hulton & Co v Jones* [1910] AC 20, *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, *Newstead v. London Express Newspaper Ltd* [1940] 1 KB 377, *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32, *Kendell v The North Queensland Newspaper Co Ltd* (1994) Aust Tort Rep 61,280, *Watts v Times Newspapers* [1996] 1 All ER 152.

<sup>4</sup> *O'Shea v MGN Ltd* [2001] EWHC QB 425 (4th May 2001).

<sup>5</sup> *The Evening Post*, 9 May 2002.

<sup>6</sup> Unreported, High Court, Christchurch, CP 143/99, 31 August 2001.

not relied upon by the plaintiff. This involved the issue whether s 8 of the *Defamation Act 1992* has altered the extent of the 'pick and choose' rule in New Zealand, where under the common law the plaintiff could define the issues to be determined at trial, and the defendant had the onus of proving the truth of such issues.<sup>7</sup> In *Manning*, the plaintiff had pleaded very specific meanings that the defendant was not able to prove the truth of. TV3 broadcast a program alleging Manning had stolen rimu trees in a manner that amounted to 'tree rustling'. Manning sought to have the particulars struck out on the basis that TV3 could not plead a defence of truth based instead on an allegation of theft by destruction. Although it considered the law in relation to truth had been relaxed, the Court thought that the statute only allowed the defendant to prove theft by destruction if theft by destruction was alleged in the program. The pleading as currently drafted could not support that, but repleading was possible. *Manning* was repleaded in the High Court by the defendant,<sup>8</sup> to assert the meaning suggested by the Full Court of [225] the High Court previously.<sup>9</sup> The repleaded defence survived attack by the plaintiff, subject to some minor amendments.

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<sup>7</sup> The *Defamation Act 1992* provides:

S 8(2) In proceedings for defamation based only on some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.

(3) In proceedings for defamation, a defence of truth shall succeed if—

- (a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
- (b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

New Zealand courts did not allow the defendant to justify a wider or lesser meaning: In *Templeton v Jones* [1984] 1 NZLR 448, the plaintiff, who, it was alleged, 'despised bureaucrats, politicians, women, Jews and professionals', was able to sue only on the allegation that he 'despised Jews' and therefore to strike out particulars of justification relating to the other allegations which supported a wider meaning. In *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 the plaintiff, a solicitor, sued the corporation in respect of statements it had made about the sale of some land to the Crown. The plaintiff alleged the corporation's statements meant that the plaintiff had got an excessive price because of his political connections. The defendant pleaded that its statements did not mean that, but rather just that the plaintiff had, as part of a speculative venture, 'astutely caused the Crown to overspend'; it tried to justify the statement in that meaning. The Court of Appeal held that the trial judge was right to strike out the plea of justification, and also the defendant's 'meanings'. *Crush* prevented a defendant from alleging that a statement bore a lesser defamatory meaning than that claimed by the plaintiff and attempting to justify it in that meaning. In *Manning*, the Court was of the view that s 8(2) and 8(3) mean both *Jones* and *Crush* would now be decided differently: [40]–[41].

<sup>8</sup> *Manning v TV3 Network Services Ltd* (unreported, High Court, Christchurch, CP 143/99, 25 February 2002).

<sup>9</sup> *Manning v TV3 Network Services Ltd* (unreported, High Court, Christchurch, CP 143/99, 31 August 2001).

In between the *Manning* decisions, the Court of Appeal was asked to review its decision in *Broadcasting Corporation of New Zealand v Crush*<sup>10</sup> that alternative and lesser meanings asserted by a defendant in a case that was not a 'pick and choose' case cannot be the subject of a plea of truth. In *Television New Zealand v Ah Koy*<sup>11</sup> the appellant had broadcast words suggesting the respondent had bankrolled the attempted Fijian coup and may therefore have committed the crimes of treason and kidnapping. TVNZ argued it had a right to assert lesser meanings and prove the truth of them. However, the Court found it did not have to decide that the law had changed because the lesser meanings asserted by TVNZ were not materially different from the meanings asserted by Mr Ah Koy. On the assumption that a lesser defamatory meaning can be pleaded and proved, but not expressing a view either way, the Court held this should only be permitted if the alternative meaning asserted by the defendant is one which is reasonably capable of material distinction from that asserted by the plaintiff.

### **Summary judgment, honest opinion and statutory qualified privilege**

A number of decisions were outlined previously that indicated the availability of summary judgment in defamation proceedings since 1998 in New Zealand is seen as attractive, though not easy to achieve.<sup>12</sup> Rule 136(2) of the *High Court Rules* permits summary judgment only where a defendant satisfies the court that the plaintiff cannot succeed on any of its causes of action. In *Mitchell v Sprott*<sup>13</sup> the Court of Appeal accepted that the rule permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. This is in comparison to the United Kingdom [226] which has a new summary procedure for disposal of defamation claims in ss 8–10 of its *Defamation Act 1996*, under which a court may dismiss a claim if it has 'no realistic prospect of success' and there is no other reason why it should be tried.

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<sup>10</sup> [1988] 2 NZLR 234.

<sup>11</sup> Unreported, Court of Appeal, CA 64/01, 26 November 2001.

<sup>12</sup> See (2001) 6(3) *Media & Arts Law Review* 249.

<sup>13</sup> Unreported, Court of Appeal, CA 21/01, 15 November 2001 [25].

However, it appears unlikely that a defendant will be able to persuade a court he or she held an opinion honestly to an extent necessary to satisfy a court it can safely conclude that an honest opinion defence would be successful at trial.<sup>14</sup> Trial would allow cross-examination and comment on failure to give evidence, which would determine the issue. Also in *Mitchell*, the meaning of the words still remained to be determined at trial, and it was therefore impossible for the defendant to establish that he held an honest opinion in relation to them. Further, it may be difficult to establish facts sufficiently to support the defence. In *Communications Trumps Ltd v Fitzsimmons*,<sup>15</sup> the defendants sought to strike out two defamation suits on the basis that a defence of honest opinion must succeed. The High Court was not satisfied given conflicts in affidavits that the facts relied on by the defendant to support honest opinion were so patently clear that there was no room for dispute. There were clearly disputed issues of fact which required full trial.

However, in *Tipple v Buchanan*<sup>16</sup> media defendants were able to obtain summary judgment on the basis that a statutory qualified privilege defence would be successful at trial. Three media defendants had broadcast television items based on a media release issued by the police, which could attract qualified privilege under the *Defamation Act 1992* if the broadcast was a fair and accurate summary of the release and was at the time of publication a matter of public interest in any place in which publication occurred.<sup>17</sup> This decision confirmed that the locational requirement is satisfied if the report or matter is a matter of public interest in any (meaning some) place or places where the report is published.<sup>18</sup> The matter was found to be of public interest in the city of Christchurch at the relevant time. The Court went on to assess each news item individually using the media release, and tapes and transcripts of the broadcasts, on the basis that the reports need not be verbatim, but must accurately express what took place, and there must be no substantial misrepresentation of a material fact prejudicial to the plaintiff's reputation.<sup>19</sup> All three broadcasts satisfied these tests.

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<sup>14</sup> *Ibid* [48].

<sup>15</sup> Unreported, High Court, Wellington, CP 111/99, 1 October 2001.

<sup>16</sup> Unreported, High Court, Christchurch, CP 51/01, 30 January 2002.

<sup>17</sup> *Defamation Act 1992* ss 16(2), and 18(1), cl 15 of Pt II of the First Schedule.

<sup>18</sup> *Ferrymead Tavern v Christchurch Press Ltd* (1999) 13 PRNZ 616. See (2001) 6(3) *Media & Arts Law Review* 249.

<sup>19</sup> *Thom v Associated Newspapers Ltd* [1964–5] NSW 396, 398.

## **Damages**

A claim by a District Health Board and three of its executives against a part-time psychiatric nurse for nearly \$1.8 million for publishing a newsletter on notice boards around a hospital which made fun of senior managers at the hospital was noted previously.<sup>20</sup> The defendant applied for dismissal of the proceedings on the grounds, amongst others, that the plaintiffs had no intention of proceeding to trial when proceedings commenced, and that the amount of damages claimed was unrealistic and implied the claim was a 'gagging writ'.<sup>21</sup> Applying the principle that a matter should be struck out sparingly, the Court found that all the evidence before it indicated an intention to proceed to trial. Further, the Court was not prepared to strike out the amount of damages sought as being unrealistically high because no statement of defence had yet been filed and there was insufficient factual background with which it [227] could determine the issue. However, the Court noted that some of the amounts claimed seemed high in comparison with the level of damages commonly awarded in defamation claims in New Zealand, and that if the claim was found to be grossly excessive at trial, there was a risk the plaintiffs might be fixed with the defendant's costs on a solicitor and client basis.

A claim in the same case that aggravated damages cannot be separately claimed in a defamation case was also rejected on the basis that there is no appellate authority to that effect. The Court considered that it would be open for a plaintiff to re-plead claims for general damages to take account of aggravating elements in any event.

The claims for exemplary damages were also argued by the defendant as grossly excessive. Although the Court noted that New Zealand takes a conservative approach to such claims, and reiterated that the amounts in this case appeared high in comparison to most New Zealand awards, without full knowledge of the factual background, it was not prepared to conclude that the exemplary claims were incapable of success.

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<sup>20</sup> See (2001) 6(3) *Media & Arts Law Review* 252. The figure was made up of general damages for four plaintiffs of \$500,000, \$150,000, \$200,000, and \$50,000 respectively, exemplary damages of \$250,000, \$100,000, \$150,000 and \$50,000 respectively, and aggravated damages of \$100,000, \$200,000 and \$25,000 for the three individual plaintiffs.

### **Pecuniary loss of a corporation and the Derbyshire principle**

When the *Perks* case came back to the High Court,<sup>22</sup> the plaintiffs no longer sought damages, but a declaration of liability. This was upheld for the individuals concerned but not for the Hospital Board, which was a statutory successor to a registered company. Under s 6 of the *Defamation Act 1992*, a body corporate must show it has or is likely to, suffer pecuniary loss in order to succeed. The only pecuniary loss put forward by the Board was \$150,000 in dealing with the published defamatory statements. The Court rejected this as being the cost of initiating the defamation proceedings. The Court also noted that although it did not have to decide the issue, the *Derbyshire* decision<sup>23</sup> might also apply to a district health board.

### **Mitigation of damages**

In *Manning v TV3 Network Services Ltd*<sup>24</sup> the High Court dealt with the meaning of s 30 of the *Defamation Act 1992*, which permits a defendant to prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate, contrary to the common law. It surveyed the case law dealing with the provision,<sup>25</sup> and noted that it required that the [228] ‘aspect to which the proceedings relate’ must be an aspect of the plaintiff’s character. The aspect put in issue in this case was the honesty of the plaintiff. The Court found that the allegations all needed repleading in this regard, and affirmed the discussion of the provision in *Television New Zealand v Ah Koy*<sup>26</sup> where the Court of Appeal noted it allowed specific instances of misconduct to be proved in order to prove a generally bad

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<sup>21</sup> *Tairāwhiti District Health Board v Perks* (unreported, High Court, Gisborne, CP 2/01, 26 September 2001).

<sup>22</sup> *Tairāwhiti District Health Board v Perks* (unreported, High Court, Gisborne, CP 2/01, 11 March 2002).

<sup>23</sup> *Derbyshire County Council v Times Newspaper Ltd* [1993] AC 534, where the House of Lords held that elected councils cannot sue for defamation because they must be open to free public criticism. *Derbyshire* with its reasoning based on freedom of expression, could be advanced in New Zealand based on s 14 of the *Bill of Rights*. However, since the development of a form of political discussion qualified privilege defence in the *Lange v Atkinson* decisions (see (2001) 6(3) *Media & Arts Law Review* 247) it has not featured in any reported case.

<sup>24</sup> Unreported, High Court, Christchurch, CP 143/99, 25 February 2002.

<sup>25</sup> *Ansley v Penn* (unreported, High Court, Christchurch, A 36/98, 28 August 1998), *Brown v TV3 Network Holdings Ltd* (unreported, High Court, Christchurch, CP, 22 May 1995), *Shadbolt v Independent News Media (Auckland) Ltd* (unreported, High Court, Auckland, CP 207/95, 7 February 1997), *TVNZ v Prebble* [1993] 3 NZLR 513, *Television New Zealand v Ah Koy* (unreported, Court of Appeal, CA 64/01, 26 November 2001).

<sup>26</sup> Unreported, Court of Appeal, CA 64/01, 26 November 2001.

reputation in the relevant aspect, not a generally bad reputation in a wider sense. Therefore the specific instances, if found to be generally known, will support an available inference that the plaintiff has a generally bad reputation in the relevant aspect.<sup>27</sup>

In *Television New Zealand v Ah Koy*<sup>28</sup> the Court of Appeal also dealt with the issue of mitigation by similar imputations in other publications. Mr Ah Koy claimed he was defamed by an allegation that he bankrolled the attempted Fijian coup, and the defendants wished to prove a number of other similar publications made the same or similar allegations of the plaintiff, on the basis that a jury should have all the facts and circumstances impacting on the plaintiff's reputation before it, in order to determine the full extent of damage for which the defendant is responsible. The matter is governed by the common law,<sup>29</sup> to which New Zealand statute has made no specific change.<sup>30</sup> The defendants argued that since s 30 of the Act had had changed the common law to allow proof of specific instances of misconduct in aid of proving a generally bad reputation (in contrast to English law), a change to the common law was supportable which would allow publications to the same effect as that in suit to be admissible to prove a generally bad reputation. However, the Court of Appeal would not depart from the principle that where indivisible harm is caused by concurrent tortfeasors, each is liable for all the harm, and did not accept that the changes made in the statute supported alteration to the common law.<sup>31</sup> Further, although under s 31 of the Act, a defendant can make mitigating use of other publications damaging to the plaintiff against whom the plaintiff is also pursuing an action, this does not apply to parties who have similarly published but whom the plaintiff is not pursuing. This means that by choosing which publications to sue, the plaintiff can determine the ambit of the evidence in mitigation open to the defendant.

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<sup>27</sup> Ibid [44].

<sup>28</sup> Ibid.

<sup>29</sup> *Associated Newspapers v Dingle* [1964] AC 371.

<sup>30</sup> See *Defamation Act 1992* ss 29–31.

### **Retraction or correction orders**

The difficulties of obtaining a correction order at an early stage in proceedings, when they would be of most effect, has been noted.<sup>32</sup> In the *Perks* case<sup>33</sup> the plaintiffs also sought an order for retraction or apology at an interlocutory stage, but were unsuccessful. No statement of defence had been filed but the Court accepted that Mr Perks' intended defence appeared to be that the contents of the allegedly defamatory newsletters were ironic or published in jest. It held that to publish a correction would deprive him of that defence and pre-empt a proper consideration of the circumstances.

### **Gagging writ**

In an oral judgment,<sup>34</sup> the High Court made a rare order striking out defamation proceedings for want of prosecution, referring to the claim as a 'gagging writ' with no prospect of going anywhere. Although [229] the power to strike out under s 50 of the *Defamation Act 1992* if no date has been fixed for trial, or no other step has been taken within 12 months of the date of the application, is discretionary, the onus is on the plaintiff to present adequate reasons why the matter should not be struck out.<sup>35</sup> No active steps had been taken by the plaintiff for which he could produce evidence, and the Court found the submission of the defendant asking it to give full recognition to freedom of speech contained in s 14 of the *New Zealand Bill of Rights Act 1990* to be compelling.

### **The short-lived revival of criminal defamation**

The Government attempted unsuccessfully to revive a form of criminal libel in 2001 in a manner that many regarded as an inappropriate use of the parliamentary process. A clause making it an offence to expose between writ day and polling day any untrue statement that defames a candidate and is calculated to influence votes, was inserted into an Electoral Amendment Bill as part of a 39 page Supplementary Order Paper, after submissions had been heard, and after the Select Committee examining the Bill

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<sup>31</sup> It also cast doubt on some aspects of its decision in *TVNZ v Quinn* [1996] 3 NZLR 24, which could be said to support the defendant's argument, as contrary to the tenor and trend of the authorities: [40].

<sup>32</sup> See (2000) 5 (3) *Media & Arts Law Review* 195.

<sup>33</sup> *Tairāwhiti District Health Board v Perks* (unreported, High Court, Gisborne, CP 2/01, 26 September 2001). See above n 21.

<sup>34</sup> *Travers v Television New Zealand Ltd* (unreported, High Court, Auckland, CP 92-SD00, 4 September 2001).

<sup>35</sup> *Mountain Rock Productions Ltd v Wellington Newspapers Ltd* [1997] 3 NZLR 31.

had reported back on it, rejecting a similar provision in the process.<sup>36</sup> This last minute amendment caused an uproar, as it was seen to have a chilling effect on free speech, to be unnecessary and to have been included in the Bill in a surreptitious manner. Members of the Green Party which usually supported the Government refused to support the amendment and the matter received very extensive coverage in the media. One of the criticisms of the provision was that it was inconsistent because as drafted it could only apply to newspaper and Internet journalists. The Government's first response was to announce its intention to extend the ambit of the offence to cover television and radio reporters as well. However, following a meeting with media representatives, the provision was dropped from the Bill.<sup>37</sup>

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<sup>36</sup> *The Press*, November 21, 28, 2001.

<sup>37</sup> Reportedly after it was pointed out that the media would find itself chilled from providing live coverage during elections.