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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 301/92

**MEDIUM
PRIORITY**

BETWEEN BRIAN EDWARDS of
Manukau City, City Councillor

Plaintiff

1363

AND GORDON EADE of
21 Glasgow Terrace,
Papatoetoe, Dealer

First Defendant

AND PETER TIFFANY C/- 2 Ryan
Place, Manukau, Editor

Second Defendant

AND SUBURBAN NEWSPAPERS
LIMITED t/a Manukau Courier,
2 Ryan Place, Manukau

Third Defendant

Hearing: 2 - 4 August 1993

Judgment: 3 August 1993

Counsel: Clifton Lyon for plaintiff
William Akel and Helen Wild for first defendant
John Stevenson for second and third defendant

ORAL JUDGMENT (NO.1) OF THOMAS J

Mr Edwards is a longstanding member of the Manukau City Council. Over the years he has established an impressive record of public service. He describes

himself as a person dedicated to the service of others, and he is obviously proud of his contribution to the good of the community and the reputation which he enjoys as a result.

On 11 February 1992, the third defendant, the publishers of the Manukau Courier, published a report of a meeting of the Manukau City Council. At the meeting the Council decided to make a \$5,000 grant to Western Samoa following the damage caused by Cyclone Val. The headline to the report is, "Aid to Samoa Disappoints" and indicates the disappointment which Mr Edwards expressed to his fellow Council members at the inadequacy of the amount contributed by the Council. He is reported describing it as "infinitesimal". In the course of the report the following account then appears:

"Mr Edwards says he has been to the islands and has spoken to many people recently returned from there. The extent of damage has not been over-exaggerated, he says. 'It is a national disaster'."

Subsequently, on 25 February, a letter appeared in the Manukau Courier over the name of the first defendant, Mr G Eade. The letter begins by indicating that Mr Eade would like to "take Mr Edwards to task when he slates Manukau City Council for donating only \$5,000 to the Samoan Cyclone Relief Fund". The letter then adverts to the duty of the Council to look after the business of Manukau City rather than "playing high wide and handsome on the international stage" and refers to the well-informed, competent administrators who, it is said, are able to solve their country's problems. The paragraph which is complained of as being defamatory then appears. It reads:

"It would be interesting to know why and how Mr Edwards' trip was funded and why he took up valuable space that could have taken relief supplies or workers to Samoa."

Mr Edwards sued Mr Eade as first defendant, Mr Tiffany, the Editor, as the second defendant, and Suburban Newspapers Ltd, the owner of the Manukau Courier, as the third defendant. The "sting" of the alleged defamation emerged clearly from Mr Edwards' evidence. Put shortly, it is that the paragraph in the letter which I have quoted, read in the context of the letter as a whole and the article relating to the meeting, means that Mr Edwards is a "freeloader" and a hypocrite. The imputation that he is a "freeloader" is inherent in the statement, "It would be interesting to know why and how Mr Edwards' trip was funded ...". The necessary implication is that Mr Edwards did not fund his own trip but went to Samoa at the public's or someone else's expense.

The imputation that Mr Edwards is a hypocrite derives from the letter read as a whole having regard to the circumstances and the context in which it appears. Mr Edwards had vigorously condemned the Council's grant of \$5,000 as infinitesimal. The letter then purports to take Mr Edwards to task for "slating" the Council for donating no more than that sum. Then, in the offending paragraph, Mr Edwards is portrayed as a person who went to Samoa at another's expense and took up "valuable" space which could have been used to take relief supplies or workers to Samoa. On the one hand Mr Edwards is taken to task for slating the Council for being niggardly in its contribution for the relief required in Samoa; on the other hand he is depicted as a person who is nevertheless prepared to deprive the relief effort of funds, supplies and worker assistance. In anybody's language that would make him a hypocrite. The imputation is attenuated if the context is enlarged to take into account the terms of the article of 11 February to which Mr Eade was clearly referring.

At the close of the plaintiff's case, Mr Akel and Ms Wild submitted that the natural and ordinary meaning of the letter as pleaded in the amended statement of claim was not capable of bearing a defamatory meaning, and that the alleged meanings

should not be put to the jury. The relevant pleading in the amended statement of claim is para 6. It reads as follows:

- "6. THE said words in their natural and ordinary meaning meant and were intended to mean:
- a The Plaintiff had taken a trip to Samoa since Cyclone Val.
 - b That the Plaintiff may have had the trip funded by other than his own funds.
 - c That the Plaintiff took up space on the plane to the detriment of the relief operation.
 - d That the Plaintiff was a "free-loader" or a person who would take advantage of the situation to obtain a free trip at the expense of helping others with relief supplies or workers.
 - e That the Plaintiff is not charitable."

I acknowledge at once that this key paragraph has been poorly pleaded. (This is not necessarily uncommon; see *Fletcher Bernard-Smith Ltd and Anor v Shell BP and Todd Oil Services Ltd and Anor* (Unreported, CA.9/78, 14 December 1978, at p 29 et seq)). Subparagraph (a), as it reads, is not capable of a defamatory meaning. I suspect that Mr Edwards is seeking to say that, in alleging that he had gone to Samoa after Cyclone Val when he had told the Council something different, he is a liar. But that is not what para (a) states or even infers. I therefore consider that it is incapable of a defamatory meaning and it will not be put to the jury.

I refer next to para (e) to the effect that the plaintiff is not charitable. This imputation is in a different category. It is at least *prima facie* defamatory to say of a person that he or she is not charitable. But there has been no evidence to support this plea and I doubt that it can sensibly be the basis of an issue to go to the jury. That question, however, should not be finally determined until the completion of the evidence when counsel and I will meet to determine the issues. But I will need to be persuaded that an issue based on para (e) should be permitted to go to the jury.

Mr Akel and Ms Wild also submitted that the allegations in paras (b), (c) and (d) are incapable of a defamatory meaning. With respect to counsel, the submission is, in my view, quite misconceived. The defamatory meaning in each of these paragraphs read in context and, indeed, at times without regard to the context, is clear. I considered at one point that counsels' submissions in respect of these paragraphs were so ill-founded that their application could well attract an award of costs against the solicitors personally. No Judge likes having the Court's time wasted, especially when a jury has been empanelled and is waiting for the trial to resume. I have been deterred from adopting that course simply because a serious issue did arise in the course of argument, and it is an issue which requires serious consideration.

The issue is whether the meanings as pleaded by the plaintiff embraced the second part of what I have described as the "sting" of the alleged defamation, namely, that Mr Edwards is a hypocrite. In resisting this implication Mr Akel and Mr Stevenson relied heavily upon the pleading. Both claim to have come to Court unprepared to meet the allegation that the letter, even when read in context, means that Mr Edwards is a hypocrite. Mr Stevenson said that he came to Court believing in all innocence that no element or question of hypocrisy was in issue. Of course, I accept what counsel tells the Court, but I find it difficult to envisage that they could have prepared their respective cases without confronting that question. I would have thought that they would have asked themselves what the "sting" of the defamation was and, in asking that question, have perceived that it was essentially the charge of being a "freeloader" and a hypocrite. Certainly, counsel may then have questioned whether the meanings pleaded in para 6 of the amended statement of claim put the latter imputation in issue and may have decided, perhaps, that there was a possibility that the Court could be persuaded to hold that a strict or literal interpretation should be adopted which would exclude that meaning.

Be that as it may, I accept that in a defamation case the pleading is of critical importance and that the defendants are entitled to prepare their defence in accordance with that pleading. I also accept that the Court is not able to look beyond the ambit of the pleading in determining what is in issue. In this respect, however, I consider that the meaning that Mr Edwards is a hypocrite has in fact been sufficiently pleaded for that matter to go to the jury as an issue. It is a necessary implication in subparas (b) and (c) and, to my mind, is virtually spelt out in para (d). A hypocrite is one who falsely professes to be virtuous or one who pretends to be other than or better than he or she really is. The meaning in para (b), to the effect that the plaintiff had the trip funded by other than his own funds, is an allegation of hypocrisy having regard to the fact that Mr Edwards "slated" the council for not contributing a far greater sum to the Samoan Cyclone Relief Fund. To so condemn the Council and then take a funded trip to Samoa is surely hypocritical. The same reasoning applies to the meaning given in subpara (c), that is, that the plaintiff took up space on the plane to the detriment of the relief operation. The letter refers to the space as being "valuable space". Again, it is an unavoidable implication that a person who denounces the Council for its niggardly contribution and then takes up valuable space which would otherwise have been available to assist the Samoan people is a hypocrite.

Subparagraph (c) is more explicit. The second part of this subparagraph is an alternative to the word "freeloader". A person who has strongly criticised the Council for not doing enough to help the Samoan people and who then takes advantage of the situation to obtain a free trip at the expense of helping others with relief, supplies or workers, is undoubtedly a hypocrite. I therefore conclude that this meaning has been adequately pleaded.

I do not, for that reason, need to allow an amendment. If it were necessary to do so, however, I would be prepared to make an amendment at this stage. It would be

a simple enough. All that is necessary would be to add the words "or is a hypocrite" to subpara (d). Counsel for the defendants should, however, proceed on the basis that the only reason the amendment is not made is my conclusion that such a meaning is already fairly pleaded. They should also proceed on the basis of having an issue put to the jury along those lines, namely, "Did the words ... in their natural and ordinary meaning mean that Mr Edwards was a hypocrite?"

Mr Stevenson raised a second matter. He referred to the fact that Mr Edwards in evidence on three or so different occasions volunteered, not only that the allegations contained in the letter were untrue, but that the Manukau Courier knew that they were untrue. Mr Stevenson submitted that this could be grounds for a new trial but, in the circumstances, he was not inclined to press for that course. He indicated that the matter could be resolved by my giving the jury a suitably worded direction. Mr Lyon did not object to this course and I will, in fact, direct the jury in the terms of the draft direction which Mr Stevenson has helpfully submitted to me.

The final matter raised by Mr Stevenson relates to an integral part of his client's defence. It is alleged that a full and final settlement was arrived at between Mr Edwards and Mr Tiffany, the Editor of the Manukau Courier. The question, therefore, arises whether this is a matter which should properly go to the jury. Mr Stevenson submitted that it was not. Mr Lyon took the opposite view. I acknowledge that this is a question which will have to be resolved prior to the counsels' addresses and, indeed, prior to the Court and counsel settling the issues which are to be put to the jury. I propose, however, to consider the question further and will rule on it at that time. I will do so in such a manner that counsel will not be prejudiced in preparing their final addresses.

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a horizontal line extending to the right.

Solicitors:

Lyon Lucas, Manukau City, for plaintiff

Simpson Grierson Butler White, Auckland, for first defendant

Izard Weston, Wellington, for second and third defendants

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ORAL JUDGMENT OF THOMAS J

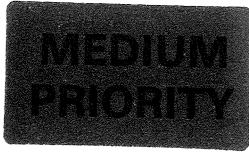
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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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1367

BETWEEN BRIAN EDWARDS of
Manukau City, City Councillor

Plaintiff

AND GORDON EADE of
21 Glasgow Terrace,
Papatoetoe, Dealer

First Defendant

AND PETER TIFFANY C/- 2 Ryan
Place, Manukau, Editor

Second Defendant

AND SUBURBAN NEWSPAPERS
LIMITED t/a Manukau Courier,
2 Ryan Place, Manukau

Third Defendant

Hearing: 2 - 4 August 1993

Judgment: 4 August 1993

Counsel: Clifton Lyon for plaintiff
William Akel and Helen Wild for first defendant
John Stevenson for second and third defendant

ORAL JUDGMENT (NO.2) OF THOMAS J

At the close of the second day of the trial Mr Stevenson renewed his application to restrict the imputations arising out of the letter so as to exclude any reference to a

meaning imputing hypocrisy to Mr Edwards. He asked me to revisit and reconsider my ruling contained in my oral judgment of 3 August.

Mr Stevenson submitted that, if the meanings ascribed to the letter in para (6) of the amended statement of claim embrace the allegation of hypocrisy, the article relating to the meeting could have been expected to have been pleaded as well as the letter in issue. Mr Stevenson referred to Mr Edwards' discussion with Mr Tiffany following the publication of the letter when Mr Edwards showed Mr Tiffany a Bank draft for \$2,000. It was produced in evidence as Exhibit 1. Mr Edwards referred to it as part of the monies sent to the Samoan people for the relief of a particular village. The monies had been borrowed from the Bank by Mr Edwards' partner, a Samoan herself, and the advance had been guaranteed by him. But Mr Stevenson contended that Mr Edwards' story had varied. Mr Edwards, it was claimed, had initially indicated to Mr Tiffany that it was his own money. He had, it was said, then changed this claim when the draft correction and apology had been produced containing a reference to Mr Edwards having made a personal donation of \$2,000. Mr Stevenson said that Mr Edwards had then acknowledged in cross-examination that the money had been borrowed by his partner and that he had guaranteed it. I must say, however, that Mr Edwards made it clear that he considered his guarantee was the effective donation. He clearly regards himself as being responsible for repayment. But, Mr Stevenson's point was that, if hypocrisy had been put in issue, it would have been open to the defendants to plead justification to that meaning, and to be given particulars of it.

With due respect to counsel, I believe that this is playing legal games. The claim that the defendants would have pleaded justification if it had been pleaded that the letter meant that Mr Edwards was a hypocrite is, I believe, so far-fetched as to beggar belief. A moment's reflection is sufficient to reveal the weakness of the claim.

First, Mr Stevenson has advanced an unduly favourable version of the facts relating to the donation of \$2,000. His censure of Mr Edwards is not justified on the evidence. The defendants would, I believe, be hard put to establish those facts. It is difficult to accept that experienced counsel would risk aggravating the damages with such a tenuous claim.

Secondly, pleading justification on the basis of these facts is barely relevant, if at all, to the alleged libel. The defamatory statement arises out of the one paragraph relating to the funding of Mr Edwards' trip and his occupation of valuable space which otherwise would have been taken up providing assistance to the Samoan community. It would be stretching the patience of the Court to suggest that some initial hyperbole on Mr Edwards' part - although I do not accept that it was that - justified these mistaken statements of fact in the letter. A defendant must justify the libel, not something of its own making. It is difficult to see how the defendants in this case could have sensibly pleaded that, although they were mistaken in what they said, they were justified in inferring that the plaintiff was a hypocrite.

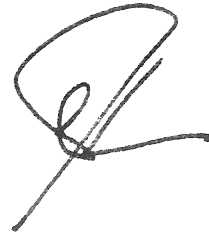
Thirdly, I repeat what I said before. I do not accept that experienced counsel could have approached this case, including counsel with a predisposition to adhere closely to the plaintiff's pleading, without appreciating that the words complained of imputed hypocrisy to the plaintiff. Mr Stevenson undoubtedly accepts that the meanings of the words complained of are to be determined having regard to the circumstances and context in which they appear. In this respect, counsel were aware of the newspaper article and the letter, would have perceived the relevance of the opening words in the letter taking Mr Edwards to task for slating the Council, which lays the foundation for the inference of hypocrisy, and would have been aware that the allegation that Mr Edwards had travelled to Samoa after Cyclone Val was factually incorrect. Moreover, if the defendants had wished to plead

justification they had every opportunity to do so. For the reasons which I have given, I suspect that this was not done simply because it would have been suicide, to use a figure of speech, to have done so.

I do not consider, therefore, that there has been any prejudice to the defendants. The issues, as drafted, will stand. I should, perhaps, record that this point was initially dealt with at the close of the plaintiff's case and my earlier judgment was given at that time. When Mr Stevenson opened to the jury, however, he adhered to the literal wording of para (6) of the plaintiff's amended Statement of Claim. At the close of his opening I reminded him, before he called evidence and while he still had the opportunity to address the jury in his opening, of my earlier ruling. Mr Stevenson declined to touch upon the issue and proceeded to call evidence.

The other matter which remains outstanding is the question raised by Mr Stevenson whether the defence of settlement should go to the jury or be resolved by me as the Judge. There is much to be said of Mr Stevenson's argument that the question whether there was an agreement between Mr Tiffany and Mr Edwards to the effect that the latter would accept the proposed apology and retraction in full and final settlement is not a suitable issue for the jury. But it does involve questions of fact. Whether or not Mr Tiffany and Mr Edwards intended to enter into an agreement to that effect is a question of fact. For this reason Mr Lyon was adamant that the issue should be put to the jury. The plaintiff, he argued, had elected trial by jury, and it was his right to have all issues of fact tried by that jury. I am inclined to agree. If Mr Lyon had faced an application to stay the proceeding prior to trial the position might have been different. It would also be different if Mr Lyon had agreed to the issue being resolved by me as I could then deal with the matter by consent. That is not, however, the case, and Mr Edwards is entitled to the full exercise of his right to trial by jury. Although, subject to hearing counsels'

submissions on the issue, I would have been inclined on the evidence I have heard to find against the defendants, the plaintiff must now take his chances with the jury.

A handwritten signature in black ink, consisting of a large, stylized capital letter 'R' with a loop at the top and a long, sweeping tail that extends to the right and then curves downwards.

Solicitors:

Lyon Lucas, Manukau City, for plaintiff
Simpson Grierson Butler White, Auckland, for first defendant
Izard Weston, Wellington, for second and third defendants

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ORAL JUDGMENT (NO.2) OF THOMAS J
