

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 13/97

BETWEEN: **RICHARD GARY GATES** of Apia,
Airline Executive

First Plaintiff

A N D: **IAN HARDING GEMMELL** of Apia,
Airline Executive

Second Plaintiff

A N D: **SAMOA OBSERVER COMPANY**
LIMITED a duly incorporated
company having its registered office
at Apia, Western Samoa

First Defendant

A N D: **SAVEA SANO MALIFA**, publisher of
Apia

Second Defendant

A N D: **PAPALIITELE STEVE PERCIVAL**
of Apia, Businessman

Third Defendant

Counsel: T K Enari for first and second plaintiffs
T Malifa for first and second defendants
P A Fepuleai for third defendant

Hearing: 16 & 20 May 1997

Judgment: 11 June 1997

JUDGMENT OF SAPOLU, CJ

In this case the Court is concerned with two notices for further particulars filed pursuant to Rule 16 of the Supreme Court (Civil Procedure) Rules 1980. The first of these notices was filed on behalf of both the first and second defendants, and the second notice on behalf of the third defendant. In the case of *Tofilau Eti Alesana v Samoa Observer Ltd and Savea Sano Malifa* (C.P.42/97; judgment delivered on 5 June 1997), this Court dealt with much the same legal issues raised in the present case. Therefore much of what was said in that case regarding the relevant legal principles which are applicable, is also relevant to the present case.

I will deal first with the notice for further particulars which was filed for the first and second defendant. At the outset, it must be noted that the power of the Court to order further particulars is discretionary. The principle underlying further particulars is to make plain to the opposite party the case which is being raised against him so that he may take steps to deal with it. Therefore if a matter is already plainly pleaded, then it is not necessary to order further particulars.

It is pleaded in paragraph 1 of the statement of claim that :

“the first defendant is the chief executive officer of Polynesian Airlines which fact is widely known among his family, friends and acquaintances, persons involved or interested in business generally in Western Samoa, New Zealand and elsewhere both within and outside the airline industry”.

In paragraph 2 of the statement of claim it is pleaded that :

“the second plaintiff is the manager of flight operations at Polynesian Airlines which fact is widely known among his family, friends, and acquaintances, persons involved or interested in business generally in Western Samoa and New Zealand and elsewhere both within and outside the airline industry”.

Counsel for the first and second defendants has applied to the Court for an order that the first plaintiff furnish full details of his position as chief executive officer of Polynesian Airlines and of his management role within Polynesian Airlines Ltd and Polynesian Holdings Ltd. Similarly, counsel for the first and second defendants has asked for an order for the second plaintiff to furnish full details of his position as manager of flight operations of Polynesian Airlines and whether he or the first plaintiff is responsible for scheduling pilot rosters or flight changes.

Counsel for the first and second plaintiffs submitted that given that counsel for the first and second defendants has not shown any ground for requesting the particulars sought, and has also not shown in what way the defendants have been embarrassed by the present pleadings, the Court should, in the exercise of its discretion, dismiss this part of the application for further particulars. It is clear to me that the reference in paragraph 1 of the statement of claim to the position of the first plaintiff as chief executive officer of Polynesian Airlines, is to pinpoint the relevant position held by the first plaintiff, but the thrust of paragraph 1 is to show the extent of those persons who know the first defendant to be the holder of that position.

I am also of the view, that if the purpose of particulars is to make sufficiently clear to the other party the case that is being raised against him so that he may be able to take steps to deal with it, then it was not shown how and in what way the particulars which have been sought would assist in making sufficiently clear to the first and second defendants the case that is being raised against them so that they may be able to take steps to deal with it.

In a defamation action, the plaintiff is normally required to establish for the purpose of liability that a defamatory statement has been published, that the defamatory statement is about the

plaintiff, and the defamatory statement was published by the defendant : See *The Law of Torts in New Zealand (1997) 2nd ed at p.854*. With respect, I cannot see how the particulars sought in respect of paragraph 1 of the statement of claim would be relevant to any of those elements of the tort of defamation so that if the particulars sought are ordered, they would assist to make any more plain or sufficiently clear to the first and second defendants the case that is being raised against them. Even on the question of damages, I cannot see the relevance of the particulars sought for the purpose of the present application. That application is denied as far as it relates to paragraph 1 of the statement of claim.

I turn to the particulars sought in respect of paragraph 2 of the statement of claim. What I have already said regarding paragraph 1 of the statement of claim also applies here. This part of the application for further particulars is also denied.

It is pleaded in paragraph 3 of the statement of claim that :

“the first defendant is publisher of the Samoa Observer and Sunday Samoan newspapers in “Western Samoa and New Zealand”.

The particulars sought in respect of that paragraph of the statement of claim are particulars of full details of the publication of the Samoan Observer and Sunday Samoan newspaper in New Zealand and particulars of where the newspaper is published, printed and circulated in New Zealand. Particulars are also requested about the office of the first defendant in New Zealand, who is responsible for it in New Zealand, the circulation of the newspaper in New Zealand, and how often it comes out there.

It is not clear from the statement of claim or from the submissions by counsel for the plaintiffs whether the plaintiffs, or one of them, rely in these proceedings on publication of the newspaper in New Zealand as a cause of action. This is a matter counsel for the plaintiffs would have to clarify. I am not at present in a position to deal conclusively with this part of the application for further particulars until counsel for the plaintiffs has clarified his position. But it must be pointed out that publication of a defamatory does not mean its actual printing; it means the making known of a defamatory statement to some person other than the person who is being defamed. In the case of *Pullman v Hill & Co* [1891] 1 QB 524, Lord Esher MR said at p.327 :

“What is the meaning of ‘publication’? The making known the defamatory matter after it “has been written to some person other than the person of whom it is written. If the “statement is sent straight to the person of whom it is written, there is no publication of it; “for you cannot publish a libel of a man to himself”.

It is publication of the libel that completes the tort. The place where the libel is published is usually the place where the tort is committed and where the cause of action arises : *Bata v Bata* [1948] WN 366, 92 Sol Jo 574; *Church of Scientology v Metropolitan Police Commissioner* (1976) 120 Sol Jo 690. That means if the plaintiffs are to rely in these proceedings on publication of the alleged libel in New Zealand, then the place where the alleged libel was committed and where the cause of action must have arisen is New Zealand. Certain principles of conflict of laws and pleadings would therefore have to be considered : see *Cheshire and North Private International Law* (1992) 12th edn 542; *Dicey and Morris The Conflict of Laws* (1993) 12th edn, vol 2, pp 1487-1488; *Chaplin v Boys* (1971) AC 356, 388; *Phillips v Eyre* (1870) LR 6 QB 1, pp 28-29; *Bullen & Leake & Jacobs Precedents of Pleadings* (1990) 13th edn 625.

I turn now to the next set of particulars sought for the first and second defendants. This relates to the use in paragraphs 6, 12, 19, 25, 32 and 39 of the statement of claim of the phrase "falsely and maliciously published or caused to be published" the alleged libel and, in respect of paragraph 39, the alleged slander. The Court has been requested to order further particulars of falsity and malice pleaded in that phrase. I would also deny this part of the application. The phrase "falsely and maliciously" has become a customary pleading in a defamation action even though it is not necessary to plead that phrase in order to establish a cause of action in defamation. The plaintiff does not have to prove falsity because if the words complained of are defamatory, the law will presume they are false. The onus is then placed on the defendant to plead and prove that the words are true if he is to succeed on the defence of justification. Similarly malice in this context need not be proved by the plaintiff for the law presumes malice from the fact of publication of the alleged defamatory words. However, if the defendant raises the defence of qualified privilege or fair comment, then the plaintiff would have to plead and prove express malice in order to rebut those defences.

The legal position is explained in a number of authorities. In *28 Halsbury's Laws of England 4th edn para 16* it is there stated :

"In an action for libel or slander it is the practice to allege in the statement of claim that the words were published falsely and maliciously. However, the plaintiff does not have to prove falsity and malice to establish his cause of action. If the words are defamatory, the law presumes that they are false, and it is for the defendant to plead and prove that the words are true. In other words, the onus of proving justification is on the defendant.

"The malice signified by the phrase 'falsely and maliciously' is malice in law, that is to say a wrongful act done intentionally, without just cause or excuse. Malice in that sense is presumed from the fact of publication of defamatory words, so that the plaintiff need not prove it. This is to be distinguished from express malice, which is actual malice or malice in fact. Express malice will rebut a defence of qualified privilege or of fair comment, and may be relevant on the issue of damages. It is for the plaintiff to plead and prove the "existence of express malice".

And in para 171 of the same volume of *Halsbury's Laws of England 4th edn* it is there stated :

“It is usual, but not essential, to state that the words were published ‘falsely and ‘maliciously’”.

In *Gatley on Libel and Slander 16th edn*, which is the only edition of that book available to the Court, it is stated in para 1192 at p.484 :

“The plaintiff need adduce no evidence in support of the allegation that the words were ‘published ‘falsely and maliciously’ for the law presumes these facts in his favour”.

See also *Bullen & Leake & Jacobs Precedents of Pleading (1990) 13th edn*.

The next lot of particulars sought is in respect of paragraphs 7, 14, 20, 27 and 34 of the statement of claim. As I understand this part of the application for the first and second defendants, it is asking for further particulars to show that the alleged publications are defamatory and for further particulars to show that the natural and ordinary meanings pleaded by the plaintiffs are in fact the natural and ordinary meanings of the words complained of.

I must repeat that the purpose of particulars is to make plain or sufficiently clear to the opposite party the case that is being raised against him, so that he may take steps to deal with that case. The Court will not just order any particulars unless they are relevant to the purpose that particulars are designed to serve.

Here it is a general application for particulars to show that the alleged publications are defamatory. No specific particulars are being sought. So how would the Court know what specific particulars are needed by the first and second defendants. It was also not made clear in what way the allegations that the publications are defamatory is not plain or sufficiently clear to the first and second defendants, so that further particulars should be ordered to make the plaintiffs' case plain to the first and second defendants. In any event, I am of the view that the pleadings as they presently stand do bring out the elements of the tort of defamation and clearly demonstrate the grounds on which the plaintiffs are saying that the alleged publications are defamatory. Whether those publications are in fact defamatory is to be decided at the trial.

The second part of the application which seeks further particulars to show that the natural and ordinary meanings pleaded are in fact borne by the words complained of does not explain why such particulars are required and whether they come within the principle underlying particulars and the purpose particulars are designed to serve. It seems to me that the Court is being asked to order the plaintiffs to prove that the natural and ordinary meanings they have pleaded are actually borne out by the words complained of as defamatory. But particulars go to pleadings and not proof. It is also stated in *Bullen & Leake & Jacobs Precedents of Pleadings (1990) 13th edn* at p.624 :

“No particulars will be ordered of natural and ordinary meanings”.

The plaintiffs are also not relying on an innuendo. In any event, it is for the Court to decide at the trial whether the alleged publications actually bear the natural and ordinary meanings pleaded in the statement of claim.

The particulars sought under this part of the application including particulars of Polynesian Airlines profits and safety record since the plaintiffs became involved in its management are also denied.

Next the first and second defendants are seeking particulars of the plaintiffs' respective reputations. In paragraphs 8, 21, 28, 35 and 42 of the statement of claim, it is pleaded that by reason of the publications, the first or second plaintiff's professional and personal reputation has been seriously injured and he has been brought to ridicule and contempt.

In my view the particulars sought here should also be denied. If the alleged publications against the plaintiffs are proved to be defamatory, then general damages to the plaintiffs reputations are presumed to flow from the ordinary course of events. The plaintiffs also do not have to prove their reputations : *28 Halsbury's Laws of England 4th edn para 18*. But they may give evidence of their good character at trial if necessary.

Furthermore, particulars are being sought under this part of the application regarding jobs the plaintiffs previously held, and various alleged incidents regarding certain landings of Polynesian aeroplanes and related matters. It was not shown whether such particulars fall within the purpose particulars are designed to serve. This part of the application is also denied.

The next part of the application seeks further particulars on the paragraphs in the statement of claim which plead the conduct of the first and second defendants relied on in support of the claim for exemplary damages. The conduct alleged in support of the claim for exemplary damages is clearly particularised that no further particulars are necessary. I must also say that some of the

particulars sought under this part of the application are based on a reading of the pleadings with which I do not agree.

It is also requested that details should be given to show that the publications were published recklessly. I think such details are found in the other parts of the pleadings relating to exemplary damages. The request for further particulars to show that the alleged publications are untruthful and false does not have to be answered by the plaintiffs. The falsity of the publications is presumed by law, and it is for the defendants to prove that the words complained of as defamatory are true. In other words the onus of proving justification is placed on the defendants. This part of the application is also denied.

The rest of this application is also denied except that the plaintiffs are required to plead separately the amounts claimed for exemplary damages under the various causes of action which have been pleaded. As the claims for damages under the various prayers for relief presently stand, a global amount is claimed for damages including exemplary damages. The amounts claimed for exemplary damages must be shown separately. The amounts claimed for general damages, after they are separately pleaded, require no further particulars as such damages are presumed by law.

With regard to the application for further particulars made on behalf of the third defendant, think I have answered all the parts of this application when dealing with the application for further particulars made on behalf of the first and second defendants, except one matter. Paragraph 28 of the statement of claim pleads that :

“by reason of the publication the first plaintiff’s professional and personal reputation has “been seriously injured and he has been exposed to ridicule and contempt”.

Counsel for the third defendant has asked for particulars of the names, addresses and professions of those persons who in fact ridiculed and were contemptuous of the first plaintiff.

After due consideration of this part of the application for the third defendant, I have also decided to deny it. It will be an impossible task for a plaintiff in a libel action against a newspaper to find out all those persons who have regarded him with ridicule and contempt because of publication of an alleged libel. That will be particularly so where a newspaper has a wide circulation. It will also be most difficult to tell, in some cases, whether a person has in fact regarded a plaintiff with ridicule or contempt because of the publication of an alleged libel. To make an order for further particulars which is clearly not possible for a plaintiff to comply with may lead to a stay of further proceedings by the plaintiff so that he would not be able to proceed with his action. That in my view would not be appropriate. But that would be the result reached if the first plaintiff in this case is required to furnish particulars of those persons who have regarded him with ridicule and contempt because of the publication of the alleged libel in the Samoa Observer, which is not a newspaper with a limited circulation.

It also does not appear that it is material for the purpose of liability in libel whether a person who reads the libellous statement believes the libel or not, and therefore regards or does not regard the plaintiff with ridicule or contempt. In the case of *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 Goddard LJ said a p.515 :

“If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue”.

That passage was approved by Lord Morris of Borth-y-Gest in the case of *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at p.1169. The same passage has also been cited with approval in *Salmond and Houston The Law of Torts* (1992) 12th edn where it is stated at p.145 :

“A tendency to injure or lower the reputation of the plaintiff suffices, for ‘If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know it is untrue’. Hence it is settled that a statement may be defamatory although no one to whom it is published believes it to be true”.

The same point is also made in *The Law of Torts* (1992) 8th edn by J G Fleming where it is said at pp 536-537 :

“If the allegation is ex facie defamatory and refers by name to the person defamed or, without mentioning him by name, describes him in such a way that the man in the street would know to whom it referred, it is unnecessary to prove that the person to whom it was published had any knowledge of the plaintiff or that the allegation led him to think the less of him”.

It follows from this passage in *Fleming* that the alleged newspaper publication in this case being ex facie defamatory and refers by name to the first plaintiff, it is therefore unnecessary to prove that the persons to whom the alleged libel was published had any knowledge of the first plaintiff or that the publication led them to think the less of him. In other words, proof that publication of an alleged libel has actually given rise to ridicule and contempt of the plaintiff by those persons who read the libel is not necessary : see also *Winfield & Jolowicz on Tort* (1994) 14th edn p.313 footnote 14.

Subject therefore to what is said in the next paragraph, both applications for further particulars are dismissed.

The first and second plaintiffs are required to file within 7 days an amendment to their statement of claim showing separately the amounts claimed for general damages and the amounts claimed for exemplary damages in the respective prayers for relief. The plaintiffs are also required to indicate within 7 days whether they propose to rely on the publications of the alleged libel in New Zealand as a cause of action.

This matter is adjourned to 9.00am on 17 June 1997 for re-mention.

TFM Sapsalu
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CHIEF JUSTICE