

MAHENDRA PRASAD

v.

THE UNIVERSITY OF THE SOUTH PACIFIC & ROBIN SOUTH

[HIGH COURT, 1998 (Pathik J) 9 November]

Civil Jurisdiction

Defamation- duty of Plaintiff to disclose actual words and circumstances of their utterance.

A Statement of Claim in defamation failed to disclose whether the words complained of were verbal or written, by whom and to whom they were uttered and on what occasion. The defendants applied for the statement of claim to be struck out for want of particularity. The High Court stressed the importance of providing full particulars to enable a fair trial to be held and ordered the Plaintiff to provide the particulars sought.

Cases cited:

Aqua Vital Australia Ltd v. Swan Television (1995) Aust.

Torts Reports 62.709

Astrovlanis Compania Naviera Sa v. Linard [1972] 2 All E.R. 647

Bishop v Bishop [1901] P 325

Bradbury v. Cooper (1883) 12 Q.B.D. 94

Collins v. Jones [1955] 1 Q.B. 564

Humphries v Taylor (1889) 39 Ch.D. 693;

Lewis v Daily Telegraph Ltd. [1964] A.C. 234

Marriott v Chamberlain (1886) 17 Q.B.D.

Wootton v Sierver (1913) 3 K.B. 499

Zierenberg v Labouchere (1893) 2 Q.B. 183

Interlocutory application in the High Court.

J.K.L. Maharaj for the Plaintiff

A.H.C.T. Gates for the Defendants

Pathik J:

This is the defendants' Summons for an Order that the Statement of Claim be struck out and the action dismissed for the following reasons:

- a) The actual words used in the alleged defamation, and the circumstances thereof were not pleaded in the Statement of Claim.
- b) Further and better particulars of the words or publication causing the alleged defamation were not supplied by the

Plaintiff upon the request of the Defendants in writing.

- A
- c) The Defendants are as a result unable to plead in answer to the Statement of Claim, and
 - d) The claim discloses no reasonable cause of action, it is scandalous, frivolous and vexatious, and it is otherwise an abuse of the process of the Court.
- B In support of the Summons affidavits of Sarojini D. Pillay, the Registrar of the University of the South Pacific and that of Mr. Robin South (the second defendant) has been filed. The Plaintiff filed an affidavit in reply.

Both counsel were heard on the Summons. In addition to oral arguments I have a written submission from Mr. Gates.

C Background facts

The Plaintiff is an assistant marine engineer with the first defendant (the USP). His statement of claim sets out details of his employment.

- D In the Writ of Summons he is seeking a declaration that the "Plaintiff was entitled to be paid the difference of rates between the higher rate and his continuous existing rates at all times when he performed higher duties"; and "an order against the first defendant that it pay the Plaintiff an amount of \$170,077.00 being unpaid rates of pay as claimed in paragraph 13(i) to (ii) and paragraph 14" of the Statement of Claim.

- E In items 3, 4 & 5 of the prayer the Plaintiff alleges that he has been defamed by the defendants and that he is entitled to damages.

As can be seen the action is in two parts. One deals with his rate of pay and the second with an action for defamation.

- F The application before me relates to the defamation aspect of the action. I shall therefore now deal with the order sought in the Summons before me.

Defendants'/Applicants' submission

- G The defendants claim that the Statement of Claim does not disclose: (i) whether the alleged defamation was verbal or in writing (ii) by whom made (iii) to whom (iv) when and on what occasion and (v) what were the actual words used.

They are therefore submitting that they are entitled to particulars of the persons to whom the words were uttered and all the other details stated above. [*Bradbury v. Cooper* (1883) 12 Q.B.D. 94].

Through their counsel Mr. Gates they submit that if the plaintiff is unaware of the contents of communications and pleads on speculation he cannot bring an action for libel unless the actual words complained of could be set out with

reasonable certainty in the pleadings'. (Collins v. Jones (1955) 1 Q.B. 564 at 571-572).

Plaintiff's/Respondent's submission

According to Mr. Maharaj for the Plaintiff, there are sufficient particulars when the word sabotage has been used which he says emanated from the second defendant. He relies in this regard on item 22 of the Statement of Claim which states:-

"22. That on or about the 15th August, 1997, the plaintiff was interviewed by a police officer named detective Waqa that the Marine Studies Programme an arm of the first defendant which was headed by the second defendant, had made an allegation that the plaintiff had sabotaged the said engine which resulted in the breakdown".

This allegation the Plaintiff denied in answer to detective Waqa's question. He said that the mechanical troubles with the engine arose as a result of negligence and incompetence on the part of the previous four chief engineers who were temporarily engaged by the first defendant, upon the recommendation of the second defendant, from outside.

It is the Plaintiff's allegation in item 25 of the Statement of Claim that "the allegation of sabotage against him was false and malicious, and instigated by the second defendant, which was widely publicised amongst the plaintiff's colleagues in his workplace that caused the plaintiff much shame, distress and humiliation".

As a result he says that "such a false and malicious allegation has defamed his good character and reputation, giving the impression that he was an irresponsible, lawless person who was capable of committing the criminal act of sabotage, which allegations hurt his trade and profession as an engineer".

Consideration of the issue

The issue for Court's determination is whether the Plaintiff's application should be granted or not.

There was correspondence between counsel in the matter of particulars which the defendants were after. The letter of 22 January 1998 from Gates sets out the particulars required to which Mr. Maharaj replied by his letter of 7 February 1998. Despite the reply Mr. Gates complains as in item (a) and (b) of the summons, namely, that it has not been divulged as to what the actual words used were. Mr. Maharaj is adamant that the "actual words used is not relevant as a topic of further and better particulars, and in any event an answer to such a question involves divulging of evidence that has to be adduced in Court".

A However, I notice from the affidavit in reply to the defendants' affidavits the circumstances which had given rise to this action with particulars of his allegation implicating both the defendants. There is reference to someone in the statement made by the second defendant to the Staff in the Marine Studies Programme and this reference to someone as the Plaintiff knows is to him alleging "sabotage" against him. He says that the second defendant has written to the first defendant in this regard. The Plaintiff says that the second defendant "is at liberty to explain the course he adopted in Court, or he could even deny it if he has not communicated such slanderous material to the first defendant for transmission to the police".

C In these circumstances the question in law is whether there is actually any need for an order for any particulars. On the authorities I hold that there is, as the Plaintiff has not clearly pleaded in his Statement of Claim what the actual words used were and by whom and also if the Plaintiff is pleading a true legal innuendo he has not set out in his Statement of claim the extrinsic facts on which he relies (*Gatley on Libel and Slander* 9th Ed. - 1998 p.678-26.43). On these grounds the defendants can apply to have the Statement of Claim struck out and that is what the Defendants are now applying to Court for; it is open to the Plaintiff to generally obtain leave to amend. In *Aqua Vital Australia Ltd v. Swan Television* (1995) Aust. Torts Reports 62.709 it was held that it would be a rare case in which a court would strike out a plea of true innuendo on the ground that there were no extrinsic facts to support the innuendo, without giving the plaintiff every reasonable opportunity properly to particularise the plea.

E How essential it is to know what the actual words are is illustrated by the following passage from the judgment of Denning L.J in *Collins* (supra) at p.571-572 and it is very pertinent to this case and therefore I quote it at length:

F "In a libel action it is essential to know the very words on which the plaintiff founds his claim. As Lord Coleridge C.J. said in *Harris v. Warre*: In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them... In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends.

G Assuming that these letters did contain some statements defamatory of the plaintiff, that is not sufficient to ground a libel action. She must show what the actual words were. A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of the contents of which he is unaware. He

must in his pleading set out the words with reasonable certainty; and to do this he must have the letter before him, or at least have sufficient material from which to state the actual words in it. A suspicion that it is defamatory is not sufficient. He cannot overcome this objection by guessing at the words and putting them in his pleading. The court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one. If he cannot give the particulars, he will not be allowed to go on with the charge. That is what was done in the recent case in this court of Guest v. Iraq Petroleum Co. Ltd., and I think that we should make a similar order here.

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If the plaintiff can give proper particulars, she can, of course, go on with the action: and she can prove her case by subpoenaing the holder of the letter to produce it, as was done in Saunders v. Bate, and the case referred to in Harris v. Warre: but before she can do this, she must first be able to launch a case with sufficient certainty. She must give the required particulars."

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As already stated, the law allows the defendants to make the present application as in the Summons and it is for the Court to decide whether to dismiss the claim or not or make such other order or give judgment as may be just; and where "the defendant seeks to strike out a legal innuendo meaning, the test is whether the facts relied upon in support of the innuendo would reasonably induce the persons to whom the words were published to understand them in a second and defamatory sense. Where the judge holds that the words are incapable of bearing the meaning or meanings attributed to them, he may in appropriate cases give the plaintiff the opportunity to re-plead his case": (Gatley supra).

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In this case I agree with Mr. Gates that the particulars are insufficient to enable the defendants to properly plead to the Statement of Claim.

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It is said in Gatley (supra) at 26.45 p.681 that:

"Particulars will not be ordered before defence, unless they are necessary or desirable to enable the defendant to plead, or ought for any other special reason to be served at that time. An application for particulars should be made promptly. The proper course is to apply in the first instance by letter before making a formal application to the court. Such a letter is usually served on the plaintiff with the defence. On every such application the summons should ask that, in default of service of particulars, the relevant allegations be struck out of the statement of claim. *If the defendant is entitled to the particulars, the order will be made, even though the plaintiff will thereby disclose the names of the*

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A *persons whom he intends to call as witnesses at the trial.*"
 [Marriott v Chamberlain (1886) 17 Q.B.D. 154, 164.
 Humphries v Taylor (1889) 39 Ch.D. 693; Zierenberg v
 Labouchere (1893) 2 Q.B. 183 at 187, 188; Bishop v Bishop
 (1901) P 325; Wootton v Sierver (1913) 3 K.B. 499, C.A.].
 (emphasis added).

B The Plaintiff's Statement of Claim, although it perhaps discloses a reasonable cause of action, it appears to be hidden in a wealth of prolixity and therefore difficult to understand and get at the issues which makes it difficult for the defendants to plead and hence counsel's complaint. Be that as it may, this would not be a reason for striking it out in its entirety.

C At this stage I would like to refer to an extract from Lord Reid's classic judgment in Lewis v Daily Telegraph Ltd. [1964] A.C. 234 emphasising to my mind the absolute necessity for the defendants to know what the words were and what those words would convey to an ordinary man. It is important to bear this in mind because the defendants are asking the Court to strike out the Statement of Claim as disclosing no reasonable cause of action. His Lordship stated at pp.258-260:

D "There is no doubt that in actions for libel the question is what
 the words would convey to the ordinary man: it is not one of
 construction in the legal sense. The ordinary man does not live
 in an ivory tower and he is not inhibited by a knowledge of the
 rules of construction. So he can and does read between the lines
 in the light of his general knowledge and experience of wordly
 E affairs... What the ordinary man would infer without special
 knowledge has generally been called the natural and ordinary
 meaning of the words. But that expression is rather misleading
 in that it conceals the fact that there are two elements in it.
 Sometimes it is not necessary to go beyond the words themselves,
 as where the plaintiff has been called a thief or a murderer. But
 F more often the sting is not so much in the words themselves as in
 what the ordinary man will infer from them, and that is also
 regarded as part of their natural and ordinary meaning...
 Generally the controversy is whether the words are capable of
 having a libellous meaning at all, and undoubtedly it is the judge's
 duty to rule on that."

G In this case the Plaintiff ought to give all such particulars as will enable the defendants properly to conduct their defence. As stated in Bishop v. Bishop (1901) P 325 at p.328:

"everything material to the case intended to be set up must be stated. That is the principle applied in cases of slander, because in those cases it may be essential for the purpose of making out special damage that the slander should be known to, or uttered

to, particular persons, and the publication to particular persons constitutes, in that case, the gist of the charge. Slander uttered to one person might not be actionable if uttered to another person; in that sense, therefore, it becomes essential to see to whom it is uttered, and that is part of the case which has to be stated, and which the other side is entitled to know for the purpose of meeting the charge.”

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It is the function of the particulars to ensure that the trial is conducted fairly and openly by requiring a party who has made a general allegation to give such particulars as are necessary to enable the party against whom the allegation is made to be informed of the case he has to meet and not the particulars of the evidence from which the Plaintiff proposes to ask the court to infer that defamation has been established. [Astrovlanis Compania Naviera Sa v. Linard [1972] 2 All E.R. 647].

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It is the defendants' contention that the allegations are in general terms and insufficient and ought to be supplemented by further particulars giving more specific information as prayed for in the Summons before this Court. With this I agree.

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The defendants ought to be told any and every particular which will enable them to properly prepare their case for the trial, so that they may not be taken by surprise, or may, if they see they have been wrong, give way at once (Kekewich J in Humphries & Co v. The Taylor Drug Company 34 Ch.D 693 at 695).

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In the outcome for the reasons given above, I am of the view that in this case, the particulars requested are relevant to the defendants' case and must therefore be given.

For these reasons it is ordered that the Plaintiff give further and better particulars within 14 days from the date hereof as prayed for in the Summons, namely:

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- (a) the actual words used in the alleged defamation and the circumstances thereof;
- (b) whether the alleged defamation was verbal or in writing;
- (c) by whom those words were uttered; and
- (d) to whom they were uttered.

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To enable the Plaintiff to comply with this order, I order that an amended Statement of Claim be filed within 14 days from the date hereof so that the defendants can plead to the claim as amended within 21 days thereafter. I

award costs against the Plaintiff in the sum of \$150.00 which is to be paid within 14 days.

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(Application granted.)