IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-483
[2016] NZHC 970

IN THE MATTER	of the Defamation Act 1992
BETWEEN	WARREN DAVID GATLAND First Plaintiff
AND	THE WELSH RUGBY UNION LIMITED Second Plaintiff
AND	PRABHAT MATHEMA Third Plaintiff
AND	GEOFF DAVIES Fourth Plaintiff
AND	FAIRFAX NEW ZEALAND LIMITED First Defendant
AND	MARK REASON Second Defendant

Hearing: 2 March 2016

Appearances: MF McLelland QC and S Cottrell for Plaintiffs
RKP Stewart and H Coull for Defendants

Judgment: 13 May 2016

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 13 May 2016 at 4:00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] In this proceeding, Mr Warren Gatland; the Welsh Rugby Union Ltd; Mr Prabhat Mathema and Dr Geoff Davies sue Fairfax New Zealand Limited and Mr Mark Reason in defamation over comments appearing in an article written by Mr Reason which was published by Fairfax in The Dominion Post and on its Stuff website. The article is about the plaintiffs' handling of potential head injuries to a Welsh player, Mr George North, during the rugby international between Wales and England at Millennium Stadium, Cardiff on 6 February 2015.

[2] The defendants deny that the article is capable of bearing the defamatory imputations alleged by the plaintiffs. In the alternative, they rely on the affirmative defence of honest opinion.

[3] The plaintiffs submit that a number of aspects of the defendants' pleadings are impermissible and they have applied for the Court to either strike out the defence of honest opinion, or to order an amendment of the pleadings and particulars. The defendants oppose the application. They have also raised an issue about whether it is permissible for them to plead their own, alternative imputations and defend those imputations as honest opinion.

Background

The parties

[4] Mr Gatland, the first plaintiff, is the head coach of the Welsh national rugby team. The second plaintiff is the Welsh Rugby Union ("the WRU"), the national governing body for rugby union in Wales. The third plaintiff, Mr Mathema, is the national medical manager for the WRU. He is in charge of educating Welsh rugby unions on concussions, and is also sometimes part of the medical team at games. The fourth plaintiff, Dr Davies, is the national squad consultant sports physician for the WRU.

[5] The first defendant, Fairfax New Zealand Limited ("Fairfax"), publishes The Dominion Post newspaper and the Stuff news website. The second defendant, Mr Mark Reason, is a sports journalist who writes for Fairfax.

The pleaded allegations of events prior to the alleged publication

[6] The following account of the relevant facts is taken from the statement of claim. The defendants do not admit either the plaintiffs' allegations about the on-field events giving rise to the article or the steps taken after the match to assess and treat potential head injuries and concussion suffered by players, but I assume for the purposes of this application that the plaintiffs can prove them.

[7] On 6 February 2015, Wales hosted a rugby match against England at Millennium Stadium. The Wales pitch-side medical team consisted of Mr Mathema and Dr Davies. Their role was to provide an initial assessment and treatment of any injuries suffered by Wales players during the match.

[8] The WRU, at its own initiative, had arranged for an independent match-day doctor and a consultant neurosurgeon to be present at the match. At the request of the WRU, their role was to perform a head-injury assessment ("HIA") on players from either team required to leave the pitch for this purpose.

[9] Mr Gatland sat in the coaching box during the match. Radio contact was maintained with the pitch-side team personnel via one of the other coaches. This radio communication enabled the coaching staff and the pitch-side team to communicate and receive information, for example, in relation to player substitutions.

[10] About 30 minutes into the match, an English player's boot made accidental contact with the head of a Welsh player, Mr North. Dr Davies treated Mr North on the field, and checked him for the signs and symptoms of concussion. There was no evidence of concussion in this on field assessment. Mr North was then taken off the field for an HIA, which was completed and deemed negative. After this, he returned

to the field to play. The only radio communication with the coaching box during this period was to confirm that Mr North would leave the field for the HIA.

[11] At around 60 minutes into the match, Mr Mathema noticed Mr North on all fours and attempting to stand. Mr Mathema, Dr Davies and the independent match-day doctor had not seen what happened to Mr North. Mr Mathema conducted an on-field assessment and found Mr North to be lucid and capable of spontaneous conversation. Because there were no signs or symptoms of concussion, Mr Mathema deemed Mr North fit to play on. The slow motion replay was not available on the field at the time of the assessment.

[12] At no time during the assessment did Mr Mathema receive any instructions or have any contact with Mr Gatland, or any other member of the Wales coaching team, whereby he was told or it was suggested, either directly or indirectly, that he should clear Mr North to play irrespective of his medical fitness.

[13] After the match, Mr North was assessed again by the independent match-day doctor and the consulting neurosurgeon. He showed no signs or symptoms of concussion, but after viewing the footage of the second injury, the WRU medical team, which included Mr Mathema and Dr Davies, decided to treat him with similar care as they would a concussed patient. Mr North therefore had a graduated return to training following further medical assessments.

[14] In the days that followed, the WRU published on its website press releases and statements that followed up on players' injuries and a subsequent investigation by World Rugby as to whether correct procedures were followed. On 10 February 2015, World Rugby issued a public statement on its website clearing the WRU of any misconduct, and stating that the correct procedures had been followed. The plaintiffs say these statements were not read by the editors of The Dominion Post and the Stuff website before the article at issue in this proceeding was published.

The publication

[15] On 11 February 2015, Fairfax published an article written by Mr Reason in The Dominion Post and on the Stuff website. The online and print versions of the article are worded identically, although they have different headlines, paragraphing arrangements, photographs and captions. The headline for The Dominion Post version reads "Gatland should pay as concussion rears ugly head". The online version leads with "Reason: Concussion in rugby rears its ugly head again in Welsh incident".

[16] In general terms, the article recounts the match events along with a commentary that is very critical of the plaintiffs. The main theme of the commentary is that the plaintiffs wilfully disregarded the safety of Mr North by telling him to play on after he received potentially serious concussions. The article calls for World Rugby to suspend Mr Gatland as the Wales coach for at least one match. The article also says the WRU is bound to cover up any wrongdoing.

The proceedings

[17] Following the publication of the articles, there was some correspondence between the parties' solicitors on 11 and 12 February 2015. On 25 February, the defendants declared that the reference to Mr Gatland telling the players to "play on" was not meant literally, and conceded that World Rugby had accepted the WRU's explanation for what transpired. The "told to play on" reference was then removed from the online version of the article.

[18] On 22 June 2015, the plaintiffs filed a statement of claim alleging that the articles contained untrue and defamatory statements and seeking damages. The statement of claim contains two defamation causes of action: one in respect of the version in The Dominion Post, and another in respect of the online version.

[19] The plaintiffs sue on most of the article, with immaterial exceptions. They plead both causes of action with the same natural and ordinary meanings or false innuendos. Paragraphs 62 to 65 of the statement of claim outline these various

imputations in respect of The Dominion Post article; paragraph 73 adopts these imputations in respect of the online version.

[20] The defendants' current defences are set out in an amended statement of defence filed on 31 August 2015. The defendants deny that the words sued upon are capable of bearing the meanings alleged by the plaintiffs. They also plead, in the alternative, the affirmative defence of honest opinion. Paragraph 75 of the amended statement of defence says:

> 75. If the Article and the Online Article ("the Articles") have any of the meanings alleged by paragraphs 62, 63, 64, or 65 of the statement of claim (which is denied) such meaning or meanings were conveyed by the Articles as expressions of opinion.

[21] The defendants then give particulars for their honest opinion plea. Paragraph 75.1 is entitled "The expressions of opinion", and lists 52 passages from the article which they claim to be statements of opinion. Paragraph 75.2 is entitled "Statements of fact", and lists 23 passages which they claim to be statements of fact. Paragraph 75.3 is headed "The facts and circumstances relied on", and lists 38 extrinsic facts on which the defendants claim to rely for their honest opinion defence.

[22] On 10 September 2015, the plaintiffs filed an interlocutory application asking the Court to either strike out the defendants pleading of honest opinion or to order the defendants to amend their pleadings.

The parties' positions

[23] Mr McClelland QC, for the plaintiffs, submits that there are four major defects with the defendants' amended statement of defence which warrant their pleading of honest opinion being struck out or amended:

(a) The defence of honest opinion does not expressly meet the plaintiffs' pleaded imputations;

(b) The defendants' have misconstrued and failed to follow the requirements of a rolled-up plea;

(c) The defendants' denial that the plaintiffs' pleaded imputations arise from the publications complained of is determinative that the imputations were not genuinely held opinion;

(d) The defendants' provision of "Particulars of honest opinion" is misconceived because, in so far as the particulars are not directed explicitly to meeting the plaintiffs' pleaded imputations, the particulars serve no useful purpose.

[24] In opposition to the strike-out application, Mr Stewart submits that the defence of honest opinion has been correctly pleaded, and that the plaintiffs' grounds given in support of their strike-out application are misguided. In relation to the plaintiffs' fourth ground, Mr Stewart also argued that it should be permissible for the defendants to raise their own imputations in their particulars, and then claim the defence of honest opinion in respect of those.

Strike-out principles

[25] The Court may strike out all or part of a pleading if it discloses no reasonably arguable defence.[1] The principles to be applied this are well established, and can be summarised as follows:

(a) The defence must be so clearly untenable that it cannot possibly succeed.[2]

(b) The jurisdiction to strike out should be exercised sparingly, and only in clear cases. In all other cases, the respondent to a strike-out application should not be deprived of having the case dealt with in the ordinary way.[3]

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1 High Court Rules, r 15.1(1)(a).
2 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.
3 *Miller v Commissioner of Inland Revenue* [1995] 3 NZLR 664 (CA) at 668.

(c) Where pleadings are defective but the challenged party is willing to make remedial amendments, the Court will prefer to order amendments rather than a strike-out.[4]

(d) The facts pleaded in the statement of claim are assumed to be true, but the Court is not required to accept entirely speculative or untenable allegations.[5]

(e) The Court should be particularly slow to strike out a claim in any developing area of the law.[6]

Issues to be addressed

[26] Because the plaintiffs' strike-out application relates only to the form of the amended statement of defence, counsel did not submit arguments addressing other aspects of the defendants' pleadings, such as the distinction between facts and opinion, or the sufficiency of any factual claims supporting any opinions.

[27] The questions to be determined are:

(a) Does the defendants' plea of honest opinion meet or respond to the plaintiffs' alleged imputations?

(b) Do the defendants use a "rolled-up plea"? If so, do they use the plea correctly?

(c) Are the defendants permitted to deny the plaintiffs' imputations, in conjunction with an alternative defence that that the plaintiffs' imputations were genuinely held honest opinions?

(d) Are the defendants' particulars of honest opinion misconceived?

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4 *Cooper v van Heeran* [2007] NZCA 207, [2007] 3 NZLR 783 at [51], citing *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC) at 323 - 324.

5 *Attorney-General v Prince and Gardner*, above n 2, at 267.

6 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786 at [16].

(e) Should the defendants be permitted to plead alternative imputations for their honest opinion defence?

Question one: Does the defendants' honest opinion plea meet or respond to the plaintiffs' imputations?

[28] Mr McClelland QC submits that the defendants' plea of honest opinion, at paragraph 75 of the amended statement of defence, is defective. He says that the plea does not explicitly address the plaintiffs' imputations, and that it avoids them. He points to a number of cases which indicate the importance of honest opinion defences meeting the plaintiffs' pleaded imputations, rather than the raw words of the publication.[7]

[29] Mr Stewart, for the defendants, contends that the defendants' pleading of honest opinion does indeed meet the plaintiffs' imputations. He also submits that the plea cannot be in error because it mirrors the form of honest opinion pleading that was suggested by the Court of Appeal in *Television New Zealand Limited v Haines*.[8]

[30] In *Haines,* the Court of Appeal held that the honest opinion defence must be directed primarily at the plaintiff's imputations.[9] In light of this determination, the Court noted that the pleading of the defence suggested by the judge in the High Court was ambiguous. Although it considered it unnecessary to direct a repleading, as long as appropriate directions were given to the jury, the Court of Appeal suggested the following as a better pleading of the honest opinion defence:[10]

> If the broadcasts have any of the meanings alleged by para 13 of the second amended statement of claim (which is denied) such meaning or meanings were conveyed by the publication as expressions of opinion.

[31] Here, the defendants' pleading of honest opinion mirrors the Court of Appeal's suggested repleading of the defence in *Haines*; that is supportive of the defendants' position. In any event, I am satisfied that the defendants' plea in this

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7 *Jones v Lee* HC Wellington CIV-2007-485-1510, 10 May 2010; *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60, 241 ALR 468 at 501 - 502; *Chakravarti v Advertiser Newspapers Ltd* [1998] HCA 37, 193 CLR 519 at 299.

8 *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA).

9 At [90] – [91].

10 At [96] – [97].

case does meet the plaintiffs' alleged imputations. The plea refers to "the meanings alleged by … the amended statement of claim", and then claims those meanings as expressions of opinion. It applies the defence of honest opinion to any of the plaintiffs' defamatory imputations which are accepted by the jury.

[32] On the authority of the Court of Appeal's direction in *Haines*, I am satisfied that this plea is permissible in its current form.

Question two: Do the defendants use a "rolled-up plea"? If so, do they use the plea correctly?

[33] The plaintiffs claim the defendants have used a "rolled-up plea", and that they have done so impermissibly.

[34] A rolled-up plea is one in which the defendant pleads that all the allegations of fact in the publication, concerning the plaintiffs, are true; and that the remainder of the comments about the plaintiffs are honest opinions, which are justified by facts.[11] The rolled-up plea is usually made in the following terms:[12]

> In so far as the words complained of consist of statements of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment.

[35] The plea, therefore, has the appearance of being both a defence of truth and honest opinion, although, the common law has held that it is technically a defence of honest opinion.[13]

[36] Although the original statement of defence did use a rolled-up plea, I accept Mr Stewart's submission that the amended statement of defence does not. The amended statement of defence uses a regular pleading of honest opinion, in the form cited above at [20] which does not purport to justify the truth of any factual allegations in the article or in the imputations. Mr McClelland's ground of challenge on this point fails also.

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11 *Augustine Automatic Rotary Engine Co v Saturday Night Ltd* (1917) 34 DLR 439 at 447.
12 *Lord v Sunday Telegraph Ltd* [1971] 1 QB 235 (CA) at 239.
13 *Sutherland et al v Stopes* [1925] AC 47 (HL); *Gooch v NZ Financial Times (No 2)* [1933] NZLR 257 (SC).

Question three: Are the defendants permitted to deny the plaintiffs' imputations, in conjunction with an alternative defence that that the plaintiffs' imputations were genuinely held honest opinions?

[37] The plaintiffs argue that the defendants' plea of honest opinion conflicts with their denial of the plaintiffs' imputations. Section 10(1) of the Defamation Act requires the defendant to prove that their opinion was genuine:

> **10 Opinion must be genuine**
>
> (1) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.

[38] The plaintiffs say that, as a matter of logic, the defendants cannot deny that the articles bear the defamatory imputations and then, if that argument fails, fall back onto an honest opinion defence which requires that they genuinely believed the plaintiffs' imputations to be true. The plaintiffs submit that the defence of honest opinion is untenable, therefore, and should be struck out.

[39] I noted above that the defendants' alternative pleading mirrors the form suggested by the Court of Appeal in *Haines* and I held that the reasoning is supportive of the defendants' position.[14] This issue was also recently discussed by Clifford J in *Arnold v Fairfax New Zealand Limited*.[15] The plaintiff in that case had also applied to have the honest opinion defence struck out on the grounds that the honest opinion defence could not, logically, be sustained in light of the defendants' denial of the imputations. In refusing to strike out the defence, Clifford J noted that:[16]

> Pleadings in the alternative that are inconsistent, from a lay perspective, are nevertheless acceptable in law. As [counsel for the second defendant] correctly submitted, although a defendant may not have intended particular meanings at the time, he can nevertheless plead that those meanings were, in fact, his opinion at the time. That is not to say that such an alternative pleading will not give rise to difficulties of proof, by reference to those commonsense considerations. As *Gatley* puts it:

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14 Above at [30].
15 *Arnold v Fairfax New Zealand Ltd* [2016] NZHC 207.
16 At [17].

> The defendant should consider with some care his response to the meanings pleaded by the claimant. While it is open to a defendant both to deny that the words bear a defamatory meaning and to advance a plea of justification, such an approach may be difficult to sustain forensically.

[40] The High Court's judgment in *Arnold v Fairfax* is the subject of an appeal to the Court of Appeal which is due to be heard in mid-June. Counsel have indicated, nevertheless, that they do not wish delivery of this judgment to be deferred so that the views of the Court of Appeal may be taken into account.

[41] I agree respectfully with Clifford J's view that the genuineness element of an honest opinion defence is not automatically defeated by a defendants' denial of the plaintiff's imputations. Whether a defendant has proved that a pleaded opinion was honestly held at the time of publication is a matter for determination by the jury; there is no reason in law to limit the defence of honest opinion to cases where a defendant admits the plaintiff's defamatory imputations. While it is not for the Court to second guess a defendant's strategic approach to pleading there may be cases in which there would be good reason to doubt that a defendant's claim of genuineness is arguable – for example, where a defendant both denies making the publication complained of and also pleads the defence of honest opinion. In this case, however, I am satisfied that the defence of honest opinion is arguable as an alternative to the denial of the plaintiff's imputations.

Question four: Are the defendants' particulars of honest opinion misconceived?

[42] After the general pleading of honest opinion in their amended statement of defence, cited above at [20], the defendants then provide particulars for their defence. At paragraph 75.1 of the amended statement of defence, the defendants list 52 passages from the article which they consider to be expressions of opinion. At paragraph 75.2, they list other passages which they consider to be statements of fact. At paragraph 75.3, the pleadings give an extensive list of the "facts and circumstances relied on" for the defence of honest opinion.

[43] Mr McClelland submits that the defendants' particulars of honest opinion at paragraph 75.1 are misconceived because they do not address the plaintiffs'

imputations and are directed to a line of enquiry that is irrelevant to them. He supports his submissions by noting:

(a) The Court of Appeal in *Haines* held that it is inappropriate for a defendant's particulars to isolate particular phrases from a publication and classify them as statements of opinion.

(b) The particulars embarrass, prejudice and unduly delay the plaintiffs' claim because the current particulars prevent them from filing a notice under s 39 of the Defamation Act, which requires a plaintiff to serve notice on the defendant if they wish to allege that a defendant's opinion was not genuinely held.

[44] In response, Mr Stewart submits for the defendants that the style of their particulars, which isolates particular phrases from the article which are said to express opinions, was expressly approved by the Court of Appeal in *Simunovich Fisheries Limited v Television New Zealand Limited,* which was decided two years after *Haines*.[17]

Are the defendants' particulars of honest opinion permitted?

[45] Mr McClelland QC referred me to the reasoning of the Court of Appeal in *Haines,* which held that, in pleadings for honest opinion, it is inappropriate for the defendant's particulars to isolate particular from the publication and classify them as statements of opinion. The Court said:[18]

> We have set out our view as to the correct approach to a defence of honest opinion in the preceding section of this judgment. As necessarily follows from our conclusions on that point, the approach adopted of isolating particular phrases or clauses and considering whether those taken in isolation are expressions of opinion is flawed. It is not necessary for the jury – still less the Judge, who is not the trier of fact – to isolate which passages in the broadcast are expressions of opinion and which are statements of fact. The jury is entitled to look at the entire broadcast in determining whether imputations which it has found to exist were conveyed by the publication as expressions of opinion.

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17 *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350.
18 At [104].

[46] The Court's concern in *Haines* was that if the particulars isolate individual opinion phrases from the publication, then it could suggest to the jury that they should only concentrate on those isolated phrases, rather than on the entirety of the publication. The Court accordingly directed that the particulars which isolated the specific statements of opinion should be deleted entirely.

[47] Mr McClelland also noted the statements in *Television New Zealand Limited v Ah Koy* about the purpose of particulars. Speaking about the purpose of particulars in relation to the defence of truth, Tipping J observed:[19]

> [17] One of the purposes of particulars is to enable the plaintiff to check the veracity of what is alleged; another is to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth; yet another is to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on … It should be mentioned that a further purpose of particulars is that a defendant at trial is not usually permitted to lead evidence of facts and circumstances beyond those referred to in the particulars.…

This statement has been affirmed by the Supreme Court, which also said that its principles could apply with equal force to the particulars given in support of a defence of honest opinion.[20]

[48] The defendants, however, say that their particulars comply with the specific directions given by the Court of Appeal in *Simunovich.*[21] In that case, the Court recommended that the defendants amend their particulars so they "identify those parts of the defamatory publications that are said to be honest opinion".[22] That principle was not disturbed by the Supreme Court on appeal.[23]

[49] At a glance, the Court of Appeal's statements in *Haines* and *Simunovich* are not easy to reconcile. However, the honest opinion issues considered by the Court in *Simunovich* were very different to the issues in both *Haines* and in this case.[24] None

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19 *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA).
20 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [18].
21 *Simunovich(CA)*, above n 17.
22 At [126].
23 *Simunovich (SC)*, above n 17.
24 There were two issues relating to honest opinion. The first was whether a defendant may plead

of these issues required the Court to discuss, or overrule, what it had earlier decided in *Haines*, and the Court did not purport to do so. The statement that the defendant should "identify those parts of the defamatory publications that are said to be honest opinion" appeared in a list of general principles which the Court gave to guide the defendant's amendment of their pleadings. In that sense, the Court's statement was strictly unnecessary for the purposes of the Court's decision.

[50] In contrast, the Court's conclusions in *Haines* were made after substantial discussion about the nature and effect of particulars for honest opinion. The Court was essentially considering the same issue as the one in this case, namely, whether it is appropriate for particulars to list phrases of opinion from the publication. The Court held that isolated quotations of opinion have the potential to mislead and confuse a jury.[25] I consider, therefore, that I am bound to follow *Haines* in this case.

[51] When a jury considers whether the plaintiff's imputations were made as a statement of fact or as an opinion, they are to consider the entire article, not just isolated phrases.[26] The defendants' particulars in this case would be of no assistance. Moreover, the identification of discrete phrases as expressions of honest opinion would not assist counsel in trial preparation, and would do not influence the direction of the trial in any relevant way.

[52] For these reasons, I accept that the defendants' particulars at paragraph 75.1 are inconsistent with the view of the Court of Appeal in *Haines*, which was carefully reasoned and which went directly to the issues that were argued in that case. I do not believe that the Court in *Suminovich* intended to overrule or qualify it.

[53] I am satisfied, therefore, that paragraph 75.1 of the second amended statement of defence is misleading and unhelpful and that it should be struck out in its entirety. This amendment addresses Mr McClelland's submission that the current particulars prevent the plaintiffs from filing notice under s 39 of the Defamation Act;

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the opinions or assertions of others as supporting facts and circumstances. The second issue was whether a defendant may plead facts and circumstances that are neither referred to in the publication nor which are publically known, which may post-date the publication.

25 At [105] – [107].

26 *Haines,* above n 8, at [91] and [106]; *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 (CA) at 467 - 468.

it should now be sufficiently clear that the honest opinion defence is claimed in relation to all the plaintiffs' imputations.

[54] I do not accept, however, Mr McClelland's submission that the remainder of the defendants' particulars of honest opinion, at paragraphs 75.2 and 75.3, are also misconceived or redundant. Those particulars state the assertions of fact in the article which are relied on in support of the plea of honest opinion, and then provide factual details which support those statements. Such details are necessary for the running of an honest opinion defence, and I am not persuaded they should be struck out or that amendment is necessary.[27]

Question five: Should the defendants be permitted to plead alternative imputations for their honest opinion defence?

[55] The defendants have not yet pleaded any alternative imputations to those relied upon by the plaintiffs. But, in advancing his responses to the plaintiffs' challenges to his clients' pleadings, Mr Stewart raised the question of whether it is permissible for the defendants to plead their own, alternative imputations and then claim that those imputations were their genuinely held honest opinions. He submits that this issue has not been considered in New Zealand, and he offers a number of legal and policy based principles to support his case that alternative imputations may be pleaded and relied upon in honest opinion defences.

[56] In case it should be thought that the issue is academic in the context of the cases as currently pleaded, I record that Mr Stewart responded to my invitation to submit a memorandum articulating the alternative imputations the defendants would plead if permitted to do so, and that both Mr McClelland QC and Mr Stewart provided helpful arguments concerning them. I proceed to address the arguments so as to avoid the need for the defendants to amend their pleadings as signalled and then require the plaintiffs to mount a further challenge in respect of which another interlocutory hearing and judgment would be required.

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[27] *Haines*, above n 8, at [101]; Ursula Cheer *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [16.8.02(2)].

[57] Mr Stewart concedes that the Court of Appeal in *Broadcasting Corporation of New Zealand v Crush* held that defendants cannot set up alternative imputations and then prove the truth of those imputations.[28] That decision was also affirmed in *Haines*. He notes, however, that those cases were concerned solely with the defence of truth, and the Court did not address whether the same principle applies to the defence of honest opinion.

[58] Principally, he notes that s 10 of the Act, which mandates that a defence of honest opinion must fail unless it is genuine, shows that the defence goes to a defendant's subjective state of mind. He says that a person expressing a genuine, subjective opinion should not be liable for making a wrong decision on a question of the meaning of words on which people could take reasonably different views. He submits that an approach to honest opinion which strictly adheres to a plaintiff's imputations would require an author to very carefully consider each and every possible imputation which could be drawn from their words, and then decide whether each imputation is their genuine opinion. Equally, publishers would have to interrogate their authors to ascertain whether all possible defamatory imputations were held by them.

[59] Mr Stewart also raised an argument based on the New Zealand Bill of Rights Act 1990. Section 14 of NZBORA gives everyone the right to freedom of expression, including the freedom to "impart information and opinions of any kind." Mr Stewart submits that it would be inconsistent with the right to freedom of expression if s 10 of the Defamation Act were interpreted in a manner which requires an author to have genuinely held the plaintiff's own interpretation of an opinion, even if the author did not intend to convey the plaintiff's interpretation. He says this inconsistency is unjustifiable in a free and democratic society.

[60] Mr Stewart argues that allowing the defendants to plead honest opinion in respect of their own alternative imputations, which the second defendant actually intended from the publication, would prevent the above difficulties from arising. He pointed to two decisions from the English Court of Appeal and the Privy Council

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[28] *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA).

which indicate that a more flexible approach to alternative imputations may be available.[29]

[61] Mr McClelland QC, however, submits that it is clear from *Haines* and *Crush* that a defendant must plead to the defamatory imputations pleaded by the plaintiff. He says it would be consistent for the principles given in those cases for disallowing alternative meanings for the defence of truth to apply to the defence of honest opinion. Counsel argues that once a plaintiff pleads their imputations, they have nailed their colours to the mast, and the rest of the trial should be focused on those imputations.

[62] I accept Mr McClelland's propositions. The reasons given by the Court of Appeal in *Haines* and *Crush* for disallowing alternative imputations in respect of the defence of truth apply with equal force to the defence of honest opinion. There does not appear to be any principled reason to distinguish between the two defences in respect of the alternative imputation rule.

[63] To illustrate, I describe the reasoning in *Haines* which supports this conclusion. The Court begins by outlining the theoretical steps in an action for defamation where the defence is truth:

> [56] An action for defamation conceptually proceeds as follows. The plaintiff must first establish the publication. Next, it must satisfy the Judge that the publication is capable of having the imputations contended for. It must then prove to the satisfaction of the trier of fact that the words used have one or more of the various imputations identified. If a plaintiff fails to do that, it will lose at that point. It is at this point that the defendant may argue that the words used do not bear the meaning contended for by the plaintiff.

[64] This same sequence also applies to defamation proceedings where the defence is honest opinion: it is only after a plaintiff's imputations are found to exist that a defence of honest opinion can become available.

[65] After the jury has found the plaintiff's imputations in the publication, a defendant's alternative imputations would no longer be relevant to the jury, even if

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[29] *Cammish v Hughes* [2012] EWCA Civ 1655, [2013] EMLR 13 at [48]; *Bonnick v Morris* [2002] UKPC 31; [2003] 1 AC 300 at [20] – [25].

those alternative imputations share a common sting with those asserted by the plaintiff. The Court of Appeal in *Haines* gives two reasons for this:

> [58] First, proving the truth of a lesser meaning would not have an effect on the defamatory meaning pleaded by the plaintiff, and the defamatory meaning would remain undefended. As a matter of logic, a defence must always be a defence to something. In cases of defamation that something is the defamatory imputations pleaded by the plaintiff.
>
> [59] Secondly, a parallel inquiry into something about which the plaintiff is not complaining is unhelpful and potentially confusing for the jury.

[66] The Court continued its explanation in these terms:

> [62] … The plaintiff sets a threshold which it must meet before the defendant is required to react. This is perfectly normal in civil litigation. It is not anything to do with form or substance. It is about a party making a specific complaint about a meaning which it says arises from a publication. If the meaning which is alleged, or something not materially dissimilar, is not established, then the plaintiff loses its case. It is only when that meaning is established that the defendant needs to respond to it, but not to some other issue which might have been complained about but has not been the subject of complaint.

[67] This reasoning applies equally to the defence of honest opinion. Once a plaintiff has successfully proved that the publication is capable of bearing the defamatory meaning complained of, the next step, if an honest opinion defence is being pleaded, is for the defendant to prove that plaintiff's imputation is an expression of opinion and not a statement of fact.[30] The jury will be able to conduct their assessment in light of the entire publication, although the relevant question always will go back to the plaintiff's imputations. The fact that alternative, less damaging imputations can be adduced from the publication is simply not relevant to this inquiry. The logic that the honest opinion defence must attach to a plaintiff's imputations, and not other matters, has also been endorsed by the High Court of Australia[31] and the Privy Council.[32]

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30 See *Haines,* above n 8, at [89] – [90].

31 *Channel Seven Adelaide Pty Ltd v Manock,* above n 7, at [83] – [86]; *Chakravarti v Advertiser Newspapers Ltd*, above n 7, at 299.

32 In *Lloyd v David Syme & Co Ltd* [1986] AC 350 (PC) at 365, the Board noted that "Comment must have a meaning, and ex hypothesi the jury are proceeding on the footing that its meaning is defamatory in the sense of the pleaded imputations which have been found established."

[68] The Court of Appeal's second point, that a jury may be confused if they are directed to perform a separate inquiry into a matter not complained of, is also applicable to the defence of honest opinion. Mr McClelland noted that, in this case, if the defendants' alternative imputations were to be presented alongside the plaintiffs', a jury would end up being presented with a total of 59 different defamatory imputations. I accept this would lead to a lengthy and complex inquiry, which would require the jury to undertake the additional, complex task of assessing whether the defendants' imputations have a sufficiently similar sting to those of the plaintiffs. And for the reasons explained, the task is irrelevant to a determination upon the plaintiffs' complaints.

[69] New Zealand's unique requirement that an author must prove that their opinion was genuine could be seen as strict. That strictness is particularly evident in cases such as this one, where the defendants might be prevented from successfully claiming a defence of honest opinion on imputations which they may have never turned their mind to. The law holds, however, that people should be responsible for their words if those words can be interpreted in ways which harm the reputations of others, regardless of the author's intention.[33] The inherent ambiguity in language is constrained in defamation proceedings by the well-established principle that a plaintiff's imputations must be available to an "ordinary, reasonable person".[34] This principle mitigates Mr Stewart's concern that an author would have to anxiously consider every possible interpretation of their publication lest they unwittingly be liable for defamation.

[70] Counsel did not advance substantial arguments in their written submissions or at the hearing on the application of the New Zealand Bill of Rights to this particular issue. Sitting at first instance, I am not persuaded that a broad statement of the right to freedom of expression alters the authoritative force of the considered views of the appellate courts on a matter as arcane as pleadings in defamation cases.

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33 See Cheer, above n 27, at [16.3.07], citing *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (CA) at 172 per Diplock LJ.

34 *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [18], *New Zealand Magazines Ltd v Haldee (No 2)* [2005] NZAR 621 (CA) at 625.

Determinations

[71] For the reasons given:

(a) I direct the defendants to amend their amended statement of defence by deleting paragraph 75.1.

(b) I dismiss the plaintiffs' other grounds for strike-out.

(c) I rule that the defendants shall not be permitted to plead alternative imputations to those pleaded by the plaintiffs, and then seek to defend the plaintiffs' claims on the basis that the alternative imputations were opinions honestly and genuinely held.

Costs

[72] Both the plaintiffs and the defendants have been partly successful in this matter. Without deciding the issue of costs, I am inclined to think that costs should lie where they fall.

[73] Any party wishing to apply for costs, however, shall do so by memorandum filed and served **by Friday, 3 June 2016**. Any opposition to such application shall be by memorandum filed and served **by Friday, 24 June 2016**. Costs shall then be determined on the papers unless the Court directs otherwise.

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Toogood J