IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2015-485-467
[2017] NZHC 1136

BETWEEN	X Plaintiff
AND	THE ATTORNEY GENERAL OF NEW ZEALAND Defendant

Hearing:	6-7 December 2016
Counsel:	J Bates for Plaintiff P McKnight for Defendant
Judgment:	29 May 2017

JUDGMENT (NO 2) OF SIMON FRANCE J
(Application to strike out reputational claims)

Introduction

[1] X was in the Royal New Zealand Navy (RNZN). For a period she was seconded to the Royal Navy. While there she says she was the victim of two sexual assaults, and numerous acts of sexual harassment. In a previous judgment I set out the facts more fully, and dealt with forum and jurisdiction issues.[1] This judgment addresses applications by the defendant to strike out claims in defamation, misappropriation of personality, false light invasion of privacy (false light) and for a breach of the Fair Trading Act 1986. The causes of action in misappropriation and false light are causes of action not previously recognised as part of New Zealand law.

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1 *X v Attorney-General* [2017] NZHC 768.

Facts

[2] At the time X completed her training in the Royal Navy and returned to service in the RNZN, she had not disclosed the incidents that had occurred overseas. When back in New Zealand, X was stationed on two RNZN ships for a total period of 26 months.

[3] X pleads various matters that happened to her during this period. They range from further incidents of sexual harassment through to unsupportive and inappropriate responses by senior officers to any complaints she made.

[4] In November 2012 X spoke to a different senior officer about her experiences. The officer expressed concern and suggested that X record her experiences. She did this in a document entitled "My Story". It recounts:

> ... her experience of sexual assault and other sexual harassment and unsafe work conditions throughout her service, including unsafe and stressful events and behaviour at Official Functions off-shore which caused extreme stress and distress to the Plaintiff.

[5] The senior officer expressed shock at "My Story" and suggested it be made anonymous and then forwarded to the Deputy Chief of Navy. It is claimed, however, that the senior officer, without X's permission, circulated My Story to a number of other RNZN personnel.

[6] The foregoing narrative provides background to the reputational claims that X has made. Further facts are needed. In 2011, after she returned to New Zealand, the RNZN asked X to be interviewed and photographed for promotional material for external recruitment. She agreed.

[7] The photographs were seemingly not used immediately, and in the meantime, as already described, things moved on in X's relationship with the Navy, culminating in her writing My Story. X ultimately left the RNZN at the end of 2012. However, despite this history of events, in May 2014 the RNZN used X's photograph in a promotional poster, and in other promotional materials:

(a) The poster portrays images of the key moments in a navy officer's career looking back from 2037. The imagined officer was originally in the Royal Navy but in 2014 had joined RNZN. Events along the way are then depicted – citizenship, several promotions and various navy activities. The officer is called Kate Millar, who has had a thriving happy career in the Navy. The photograph of Kate Millar is that of X.

(b) The other materials. X's photograph was used in brochures for a specific unit in the RNZN, a generic defence force brochure, and on a Facebook promotion.

[8] Concerning publication, it is said the poster was displayed in RNZN headquarters in Wellington, and was distributed to a series of individuals concerned with its making such as the designer, the printer, distributor, and whoever it was in the RNZN who approved it. Of the other promotional materials, it is alleged some of them were published to members of the public, including those who saw them online on Facebook.

[9] Out of these facts, X pleads three causes of action in tort: defamation, misappropriation of personality and false light. She also pleads breach of the Fair Trading Act 1986.

Defamation

[10] Turning first to defamation, the plaintiff pleads defamation by innuendo.[2] These are situations where on its face the publication does not appear to defame or cause harm to reputation. However, to those with specific knowledge, the publication will take on a different context that is damaging to the plaintiff. That is what X pleads here, namely that those who knew of her dissatisfaction with the Navy and who saw her in the poster apparently encouraging women to join the RNZN, would think of her as:

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2 Defamation Act 1992, s 37(3).

(a) hypocritical for endorsing the RNZN;

(b) callous to the plight of other women because she was apparently, contrary to her own experiences and views, encouraging them to join the Navy;

(c) willing to trade her principles for commercial benefit; and

(d) likely to have been fabricating or exaggerating her experiences and complaints because here she was promoting the Navy as a good work opportunity.

[11] The significance of this pleading is that it limits the alleged reputational damage to only those with the particular knowledge about X. The particular knowledge required about X is described in the pleading as an awareness of her treatment during her service in the Navy, and knowledge that she left the RNZN as a consequence. The relevant publishees would include those who were involved in these matters during X's time in the Navy, together with anyone other than those who read the My Story document.

[12] The defendant seeks to strike out the defamation claim on the basis of what is called the *Jameel* principle.[3] In that case, the English Court of Appeal held that there are occasions where an otherwise tenable claim that potentially meets the requirements for a defamation cause of action may be struck out or stayed because the litigation is just not justified. The harm allegedly involved, the damages likely to be awarded and the vindication likely to be achieved will be minimal, even if the claim is successful. On these occasions it can be assessed that the proceeding would pose a disproportionate burden on the defendant and absorb a disproportionate share of limited public resources. If that is the Court's assessment the proceeding should be stopped. The underlying jurisprudential principle is that such a proceeding is an abuse of process.[4]

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3 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

4 At [40].

[13] Mr McKnight cites a passage from *Duncan and Neill on Defamation* which captures the focus:[5]

> Subsequently, the decision in *Jameel* was relied upon to strike out a number of defamation actions which, though they involved a claim with a reasonable prospect of success, could be described as trivial having regard to the nature of the defamatory allegation, its likely impact on the claimant's reputation, or the identity or number of the publishees.

[14] The availability in New Zealand of a stay of proceedings or strike out for such reasons was recognised by Ronald Young J in *Moodie v Strachan*.[6] Several other cases have done likewise.[7] A common feature, however, is that in almost all these cases, the actual proceedings have not themselves been stayed or struck out.

[15] The principle enunciated in *Jameel*, that defamation proceedings must meet a threshold of seriousness, was enacted in s 1 of the Defamation Act 2013 (UK). The following passage provides a useful summary of the types of situation in which it has been applied:[8]

> Useful guidance in relation to the likely application of section 1 in such cases can be derived by considering the circumstances in which courts have applied the principle derived from *Jameel v Dow Jones & Co Inc.* In that case, the Court of Appeal stayed defamation proceedings in respect of a seriously defamatory statement that had been accessed by only five persons in England and Wales, three of whom were 'members of the claimant's camps, on the ground that the cost involved in achieving vindication of the claimant's reputation would be out of all proportion to what would be achieved.
>
> Other cases in which the *Jameel* principle has been applied to end proceedings include cases based on an e-mail and a letter that had been published only to the claimant's accountant and daughter; publications to only one or two recipients; a comment posted by the defendant on the claimant's own website which had been relevantly accessible for only four hours and nineteen minutes, with no evidence that any person had accessed the comment during that time; an oral statement made by the defendant that could have been overheard by no more than seven people and an article

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5 Brian Neill and others (eds) *Duncan and Neill on Defamation* (4th ed, LexisNexis, London, 2015) at [32.29].

6 *Moodie v Strachan* [2013] NZHC 1394 at [60].

7 *Bradbury v Judicial Conduct Commissioner* [2015] NZAR 1 (CA); *Karam v Parker* HC Auckland CIV 2010-404-3038, 29 July 2011, Sargisson AJ; *Deliu v Hong* [2013] NZHC 735, Bell AJ; and *Opai v Culpan* [2016] NZHC 3004, Bell AJ. Reference should also be made to *CPA Australia Ltd v NZICA* [2015] NZHC 1854, (2015) 14 TCLR 149 at [104]–[121] where Dobson J recognised the need for a minimum threshold of seriousness.

8 Matthew Collins QC *Collins on Defamation* (Oxford University Press, Oxford, 2014) at [7.60]-[7.61], footnotes omitted.

> appearing in the online edition of a South African magazine in relation to which there was no satisfactory evidence of publication in England or Wales; a letter that had been published to an associate of the defendant and four members of the claimant's camp, where the recipients were unlikely to have altered their evaluation of the reputation of the claimant as a result of its contents; a blog posting published to five persons at most, none of whom knew the claimant; blog postings that, although still accessible, had been commented upon and had 'receded into history' by the time the defendant was put on notice of their existence; and a statement made by a former employee of the defendant to a single person in the course of an 'over-enthusiastic, misguided and ill-intentional piece of salesmanship' that had caused no apparent damage, and where there was no likelihood of repetition.

[16] In New Zealand there appears to be two cases where the principle has been applied, as well as numerous others where the ability to strike out for these reasons has been acknowledged.[9] The first is *Russell v Matthews* where the allegedly defamatory statement was made to a relevant professional standards body, and to the plaintiff's father.[10] Noting the small number of publishees, the proceeding was struck out as being an abuse of process.

[17] The other case is *Opai v Culpan* where the applicability of *Jameel* was considered in some depth by Katz J.[11] The context was an employment situation. The plaintiff's supervisor had a practice of making diary notes. When the supervisor moved on, he passed the notes onto his successor. This was seemingly the extent of the publication. At first instance, Associate Judge Bell considered that the alleged defamation was itself unclear, doubtful and lacking seriousness.[12] Given it was published only to the one person, the claim was struck out.

[18] On an application for review of the Associate Judge's decision, Katz J addressed arguments focussed on the different procedural rules applicable in New Zealand, and what was said to be a different human rights framework in New Zealand from that applying in the United Kingdom. Neither proposition persuaded Katz J that *Jameel* should not be applied here and I respectfully adopt her reasons. More generally, I agree with the analysis that the doctrine is consistent with the way the rules of procedure have evolved in New Zealand. In particular, r 15.1(1)(d) of

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9 See above n 7.
10 *Russell v Matthews* [2016] NZDC 17743.
11 *Opai v Culpan* [2017] NZHC 1036, per Katz J.
12 *Opai v Culpan* [2016] NZHC 3004, per Bell AJ.

the High Court Rules 2016 expressly provides for the interlocutory stay or strike-out of proceedings on abuse of process grounds.[13]

[19] As was observed in *Jameel*, the resources of the Courts are not limitless and so time must be allocated where best suited.[14] Where appropriate, albeit exercised with restraint, *Jameel* offers another tool to ensure those resources are used as best they can be.

[20] Turning to the present case, the pleading is deficient in its articulation of the alleged publications, and it is difficult to assess accurately the exact publications X complains of and therefore the potential pool of relevant publishees. However, it seems that the poster was on display only within RNZN settings, rather than externally. The Facebook publication and the distribution of other recruitment material obviously increases the pool of publishees. However, these publications are irrelevant unless a reader also possessed the necessary knowledge about X. It is very unlikely that those with the particular knowledge about X, inevitably being Navy personnel, would be looking at Navy recruitment brochures or on Facebook.

[21] I consider the defamation proceeding should be struck out pursuant to r 15.1(1)(d) of the High Court Rules and the *Jameel* principle. The group of potential publishees is already very small, and will then be reduced further to those who actually saw these materials. If any did, in my view it is quite unlikely they would view the material from the alleged innuendo viewpoint. They are far more likely to have considered the RNZN made a mistake. The pleaded damage to X's reputation, if established, will not be significant. There is no prospect of any further publication. Although X may be insulted and annoyed by what she says is unauthorised use, I do not consider the matter merits defamation proceedings.

Misappropriation of personality and false light

[22] Turning next to the remaining two torts, as noted neither has ever been recognised to be part of New Zealand law. Indeed, it does not appear the proposition that they are part of New Zealand law has previously been raised.

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13 *Opai* (Katz J), above n 11, at [67].
14 *Jameel*, above n 3, at [54].

[23] It is convenient to begin the discussion with a summary of the torts taken from the American Law Institute's *Restatement (Second) of Torts*.[15] The text identifies what are said to be the four limbs of the tort of privacy:

> §652A. General Principle
>
> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another, as stated in §652B; or
>
> (b) appropriation of the other's name or likeness, as stated in §652C; or
>
> (c) unreasonable publicity given to the other's private life, as stated in §652D; or
>
> (d) publicity that unreasonably places the other in a false light before the public as stated in §652E.

These four limbs are themselves sourced in a 1960 analysis undertaken by Prosser.[16]

[24] Both of the two novel causes of action pleaded here are recognised in the *Restatement* – misappropriation of personality is 2(b) and false light is 2(d). The other two limbs identified in the *Restatement* have already been recognised in New Zealand, albeit relatively recently. The conduct described in 2(a), the unreasonable intrusion upon the seclusion of another, received its first full analysis in 2012 in *C v Holland*.[17] In that case, the intrusion tort was recognised as part of New Zealand law. The conduct in 2(c), which involves the publication of private facts and which is often described as the tort of privacy, was confirmed as being part of our law in 2005 in the case of *Hosking v Runting*.[18]

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15 American Law Institute *Restatement (second) of Torts* (St Paul, Minnesota, 1977).

16 William L Prosser "Privacy" (1960) 48 Cal L Rev 383 at 389. The article is referred to in *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672. More generally see the discussion by Ursula Cheer "Invasion of Privacy" in Stephen Todd and others (eds) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [17.6]–[17.8], and specifically [17.7.01].

17 *C v Holland*, above n 9.

18 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

[25] The *Restatement* provides a fuller description of misappropriation of personality:[19]

> One who appropriates to his own or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.
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> Comment:
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> a. The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. *Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right,* for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.
>
> b. *How invaded.* The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statues in some states have, however, limited the liability to commercial uses of the name or likeness.

[26] The defendant submits that the tort plainly has a commercial overlay which is not present here. The tort's purpose is to protect a plaintiff's commercial rights in their image. The poster in the present case was not used in a commercial context, and X does not claim any financial loss arising from the allegedly unauthorised use of her image. Accordingly, the claim is untenable and should be struck out.

[27] The other tort cause of action, false light, is explained in the *Restatement* in these terms:[20]

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:
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> (a) the false light in which the other was placed would be highly offensive to a reasonable person; and

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19 *Restatement*, above n 7, §652C, emphasis added.

20 *Restatement*, above n7, §652E.

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

[28] Mr McKnight referred the Court to *Jews for Jesus Inc v Rapp*, a decision of the Supreme Court of Florida.[21] There the Court decided it would not recognise the false light tort as part of the common law of Florida. The Court noted that acceptance of the tort was not universal across the United States of America, and summarised the concerns as being:[22]

> In short, courts rejecting false light have expressed the following two primary concerns: (1) it is largely duplicative of defamation, both in the conduct alleged and the interests protected, and creates the potential for confusion because many of its parameters, in contrast to defamation, have yet to be defined; and (2) without many of the First Amendment protections attendant to defamation, it has the potential to chill speech without any appreciable benefit to society.

[29] The Court also identified what the elements of the tort would be, if adopted:[23]

> (1) publicity; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity; (4) actual damages; (5) publicity must be highly offensive to a reasonable person; and (6) publicity must be about the plaintiff.

[30] The respondent submits that for similar reasons the tort of false light would be rejected in New Zealand. Further, the principles underlying *Jameel* are equally applicable. One would only see X in a false light if one had the particular knowledge and so the same very small pool of publishees applies.

[31] The plaintiff responded to the challenge to these causes of action by emphasising the established principle that novel claims are usually better reserved for full argument following the establishment of facts. There was accordingly little attempt in the hearing before me to establish the likely elements of these torts and whether the claims are tenable.

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21 *Jews for Jesus Inc v Rapp* 997 So 2d 1098 (Fla 2008).
22 At 1105.
23 At 1105–1106.

[32] In relation to misappropriation of personality, there is in my view very limited prospect that this tort will be recognised in New Zealand at this time. The development in the privacy area has been slow and incremental, and there seems no case for further expansion. Given its probable commercial focus, I have not heard argument as to what gap it might fill. Nor, for reasons already discussed, do the present facts cry out for some remedy that might encourage a court to recognise this new cause of action. Finally, for the reasons advanced by Mr McKnight, I am not satisfied that the present claim is tenable even if the tort were recognised to be part of New Zealand law. There is no commercial focus and the message is not being sold by means of being linked to X. Her image is incidental to the message.

[33] Likewise with false light. Its boundaries are very uncertain and the endeavour involved in arguing it in relation to this set of facts is not justified. I agree with the first defendant that the *Jameel* principle applies. The boundaries of the tort are unclear but it is likely the same limit concerning relevant publishees will apply. Further, as with misappropriation of personality, I am not satisfied there is any realistic possibility this tort would be recognised at this point. I do consider both of these claims are an example of working too hard to find some cause of action for an event that simply does not merit damages. It is not every incident that needs legal redress.

[34] The final two tort causes of action – misappropriation of personality and false light – are also struck out.

Fair Trading Act 1986

[35] The plaintiff claims that the representations by the RNZN concerning X's endorsement of the Navy as a career were misleading or deceptive, or likely to mislead or deceive, contrary to s 9 of the Fair Trading Act 1986.

[36] Section 9 provides:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[37] The first defendant applies to strike out on the basis that the actions of the RNZN in seeking to recruit cannot amount to acting in trade. "Trade" is defined as:[24]

> trade means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land

[38] Mr Bates contends that recruiting is captured by that part of the definition relating to "acquisition … of services". I do not agree. "Services" is itself defined:[25]

> services includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:
>
> (a) a contract for, or in relation to,—
>
> (i) the performance of work (including work of a professional nature), whether with or without the supply of goods; or
>
> (ii) the provision of, or the use or enjoyment of facilities for, accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking, or recreation; or
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> (iii) the conferring of rights, benefits, or privileges for which remuneration is payable in the form of a royalty, tribute, levy, or similar exaction:
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> (iv) to avoid doubt, the supply of electricity, gas, telecommunications, or water, or the removal of waste water:
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> (b) a contract of insurance, including life assurance, and life reassurance:
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> (c) a contract between a bank and a customer of the bank:
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> (d) any contract for, or in relation to, the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits;—
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> *but does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service.*

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24 Fair Trading Act 1986, s 2.

25 Section 2.

[39] I do not consider that encouraging someone to join the Navy as effectively an employee is caught by this definition. The last part of the definition of services expressly excludes the performance of work under a contract of service. Even more so then, an advertisement encouraging someone to apply to enter into a contract of service must be excluded.

[40] Although not relied on in the application for strike out, there are other insurmountable obstacles to this claim. Whether or not the poster is potentially misleading or deceptive, this particular plaintiff cannot have been misled or deceived, nor can she prove damage resulting from the deception. The need for a causative link was made clear in *Red Eagle Corp Ltd v Ellis*.[26] Further, in my view, while there have been awards under s 43 of the Fair Trading Act for stress and emotional harm, they are an adjunct to the suffering of direct loss caused by misleading or deceptive conduct. I consider it goes too far in this case to suggest that damages can be claimed in the absence of actual reliance.

[41] The Fair Trading Act cause of action is not tenable and is accordingly struck out.

[42] The defendant has succeeded in its application as regards all causes of action. Costs memoranda may be filed if agreement cannot be reached.

Simon France J

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26 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20; [2010] 2 NZLR 492 at [29].