**IN THE HIGH COURT OF NEW ZEALAND**
**HAMILTON REGISTRY**

**CIV 2009-419-000479**

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| BETWEEN | RENE (AKA LISA-RENE) MOSES (AKA WHAREPAPA)<br>Plaintiff |
| AND | THE MINISTER OF POLICE<br>First Defendant |
| AND | THE NEW ZEALAND POLICE<br>Second Defendant |
| AND | SERGEANT HEPWORTH<br>Third Defendant |

Hearing: 19 November 2009

Counsel: No appearance by plaintiff
AM Powell for defendants

Judgment: 20 November 2009 at 3:30pm

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**JUDGMENT OF ASSOCIATE JUDGE FAIRE**
**[on application to strike out part of pleading]**

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Solicitors: Crown Law Office, PO Box 2858, Wellington for defendant

And To: Ngai Tupango Hapu, c/- Kingi Whanau, Wainui Road, Te Ngaere Bay, Kaeo

[1] The defendants apply for orders striking out those parts of the plaintiff's statement of claim which assert causes of action against the defendants in defamation and negligence.

[2] Paragraph 3 of the plaintiff's statement of claim advises that she is:

> making claim against the Minister of the New Zealand Police Department, Wellington and the Ministry of the New Zealand Police Department, Wellington and Sergeant Hepworth MHF727 of the Hamilton Police Department, 6 Bridge Street, Hamilton for the wrongful arrest, defamation of character and negligence of the original infringement notice PN7296529.

[3] The plaintiff alleges that she was driving her car in Hamilton when she was stopped by Sergeant Hepworth for driving through a controlled intersection against the lights. The plaintiff's case is that the light was amber and that she drove through the intersection safely.

[4] The incident was complicated when the plaintiff would not provide Sergeant Hepworth with her details. That is, of course, a requirement of s 114 of the Transport Act 1998. The plaintiff's position was that she did not believe that she had any such obligation. Sergeant Hepworth did not agree. The plaintiff was arrested.

[5] Her statement of claim is not clearly articulated. I have referred to the passage which signals the three specific bases relied upon for the claim.

[6] The plaintiff seeks damages in the amount of $5,000,000.00.

[7] In accordance with the High Court Rules this proceeding was given a case management conference with the parties attending by telephone on 18 May 2009. The defendant's application to strike out parts of the statement of claim had already been filed. Following a discussion with counsel for the defendant and Mr Kingi, who I permitted to assist the plaintiff, Ms Moses, I issued a minute in the following form:

> The defendant has filed an application to strike out, which is Court document 6.

> The plaintiff is anxious to have the issue of whether she breached the law by travelling against either a yellow or red light determined and also to ascertain what the consequences of that action might be.
>
> Mr Powell needs time to research whether it is possible still to contest the infringement notice and possibly whether it is possible to get an extension of time to do that. He will set out the options that are available in a memorandum which must be filed and served by Friday, 29 May 2009.
>
> This proceeding is adjourned for a telephone conference with the plaintiff and counsel for the defendants at 12.20pm on 9 June 2009. The conference will discuss whether Mr Powell's memorandum provides a possible better solution than the High Court proceedings for addressing the concerns of the plaintiff and to which I have made reference in this minute. If in fact the High Court proceedings are to proceed, the Court will allocate a time for a defended hearing for the strike out application and make appropriate directions for the exchange of submissions before that hearing.

[8] At a subsequent case management conference on 9 June 2009 a further adjournment was granted for reasons which are set out in the minute issued at that time. The content of that minute is as follows:

> I adjourn this proceeding for a further telephone conference at 9:00 am on 23 July 2009. The purpose of the adjournment is to allow the plaintiff to consider an application to the District Court in reliance on s 78B of the Summary Proceedings Act 1957.
>
> Mr Powell will re-email his memorandum on this topic to the plaintiff forthwith.
>
> If the plaintiff advises me on 23 July that she does not wish to pursue an application to the District Court under s 78B of the Summary Proceedings Act 1957, I will set a time for the hearing of the defendant's strike out application. If, however, the plaintiff does wish to pursue the application pursuant to s 78B of the Summary Proceedings Act 1957, I would, in all probability, adjourn this proceeding to a date that awaits the outcome of that application.

[9] Unfortunately, Mr Powell's memorandum had not been considered by the plaintiff at the time of the conference of 23 July 2009. Out of an abundance of caution I adjourned the conference to 19 August 2009 to give the plaintiff one further opportunity to explore an alternative approach.

[10] On 19 August 2009 a further conference was held. Mr Kingi was permitted to attend on behalf of the applicant. Mr Powell, as counsel, attended for the defendants. I issued the following minute as a result of that conference:

> The defendant's application to strike out this proceeding is adjourned for a half day fixture at 10:30 am on 19 November 2009. A telephone conference with counsel and, if appropriate, the parties shall be held at 9:00 am on 20 October 2009. Its purpose is to give directions for the exchange of written submissions to be advanced at the defended fixture.
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> As yet there is no formal notice of opposition to the application to strike out. Rule 7.24 of the High Court Rules requires such a document to be filed. I order that a notice of opposition be filed and served no later than 16 September 2009. I emphasise that the notice of opposition must comply with rule 7.24 and must be in form G33 of the High Court Rules. A failure to provide an appropriate notice of opposition may result in the application being determined on an unopposed basis. I emphasise this for the plaintiff's benefit so that she appreciates the need to follow the Court's requirements carefully.
>
> A matter that will be considered at the telephone conference on 20 October is the issue of the representation of the plaintiff. She, of course, is entitled to represent herself if she so wishes. If in fact she wishes someone other than a person on the roll of barristers and solicitors to represent her, she must be able to advise me at that time of the authority, whether by statute or otherwise, that she relies on for some other person to represent her.

[11] Of particular note was the advice given to the parties of a fixture for the strike out application for 10:30 am on 19 November 2009.

[12] The 19 August 2009 minute made provision for a telephone conference on 20 October 2009. That conference, in fact, was held. As a result a minute was issued in the following form:

> **Directions relating to the fixture for the strike out application scheduled to be heard at 10.30am on 19 November 2009**
>
> The defendants shall file and serve submissions in support of the strike out application plus copies of all authorities referred to, plus a casebook of the relevant pleadings, application, notice of opposition, and affidavits, which is indexed and paginated by 30 October 2009.
>
> The plaintiff shall file and serve submissions in answer by 13 November 2009.

[13] Again, I recorded in the minute that Mr Powell attended as counsel for the defendants and the plaintiff, assisted by Mr Kingi, also attended. As with the other conferences, it was held by telephone.

[14] On 19 November 2009 the application was called in the Hamilton High Court. Mr Powell, counsel for the defendants, entered an appearance on their behalf.

No appearance was entered by the plaintiff or anyone on her behalf. I requested the acting Registrar of the Chambers Court in which I was sitting to make inquiries as to whether the plaintiff was in the precincts of the Court. Time was allowed for the inquiries to be made, which included not only inquiries in the precincts of the High Court building in Hamilton, but also in the neighbouring District Court. The acting Registrar reported back to me that the plaintiff could not be identified in either place. I was also informed that a telephone call had been made to the telephone number which the Court held for the plaintiff. No person responded at that telephone number.

[15] Faced with the situation where;

a) two minutes that I had issued notifying the plaintiff of the date of hearing had been sent to her;

b) either she or Mr Kingi, who was given permission to speak on her behalf was present when the fixture dates were announced;

c) I had received no reason why the plaintiff was not present; and

d) The Court could not get a response from the telephone number provided for the plaintiff, I invited Mr Powell to present his case.

[16] Mr Powell, in his carefully prepared submission, drew attention first to the general principles applicable to a strike out application as set out in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267, where the Court said:

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed. (*R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at pp 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult

> questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

Mr Powell drew attention to the fact that those principles had been endorsed by the Supreme Court in *Couch v Attorney-General* [2008] 3 NZLR 725.

[17] Mr Powell noted that the components of a cause of action in negligence adjusted to fit the facts of this case required:

a) A legal duty to take care owed to the plaintiff by Sergeant Hepworth;

b) A breach of the duty through the conduct of Sergeant Hepworth falling below the standard to be expected of a reasonable constable; and

c) Loss caused to the plaintiff that was a foreseeable consequence of the failure to take care.

[18] Mr Powell submitted that no legal duty to take care existed in the circumstances of this case. He noted that the Courts have considered whether the law can impose a private law duty of care on a constable acting in the execution of duty and, in general, had rejected it on policy grounds. He cited a number of authorities for that proposition which I now set out:

> In *Hill v Chief Constable West Yorkshire* [1988] 2 All ER 238 it was alleged that a duty was owed to the subsequent victims of a serial criminal the police had failed to earlier apprehend;
>
> In *Calveley v Chief Constable of the Merseyside Police* [1989] 1 All ER 1025 the intending plaintiffs were police officers alleging that investigations against them had been negligently carried out.
>
> In *Brooks v Metropolitan Police Commissioner* [2005] 2 All ER 489 the plaintiff was both eyewitness to a crime and a victim himself. He alleged that the Police owed a duty of care to afford reasonable weight to the account of events he gave Police and to provide him with protection.
>
> In *Baigent v Attorney-General* HC WN CP 850/91 17 December 1992 Master Williams QC, the facts of which are well known the plaintiff sought to cast an action in negligence in respect of the search of her property. That part of her case was struck out in the High Court.

> In *Evers v Attorney-General* [2000] NZAR 372 the plaintiffs were victims of anti-social behaviour in their neighbourhood and sought to establish a duty of care on the Police to investigate their complaints.
>
> In *Fyfe v Attorney-General* HC WN CP 230/95 7 March 2003 Durie J, the plaintiff was an innocent member of the public mistaken for a notorious criminal and subjected to a dramatic and harrowing arrest. He argued that the Police owed him a duty of care.

[19] Mr Powell noted that in each of the cases the duty of care was found not to be owed as a matter of law. He submitted that, at the heart of the law's objection to imposing a private law duty of care is an important public policy principle. He noted that the public policy objection is not always engaged. A duty of care has been established in a case where the conduct in question was a positive act of negligence causing damage to property. In this respect he referred to *Rigby v Chief Constable Northamptonshire* [1985] 1 WLR 1242. He also mentioned two other cases, which I need not review. They are all distinguishable because they do not concern the operational activities of the police that are at the heart of the policy objection.

[20] Mr Powell observed that the plaintiff clearly believes that Sergeant Hepworth overstepped the mark on the occasion when she was requested to stop. He submitted it was not in the interest of the community that the police approach the enforcement of the Land Transport Act 1998 with trepidation or indecision. He submitted there is a strong public policy argument against the imposition of a duty that would lead to defensive policing particularly in the area of road safety. He noted that the Courts have routinely rejected such a duty where those important values have been affected. He further submitted that where there are existing bases of liability with which a new duty of care might overlap, the Court of Appeal has said that Court should look first to the adequacy of those existing principles. He cited *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 in support in support of that principle. As a result, he submitted, that the cause of action in negligence simply cannot succeed. I find the argument he presented compelling and for the specific reasons which he gave and which I have recorded in this judgment.

[21] He next dealt with the defamation aspect of this claim. He referred to the Laws of New Zealand, *Torts* Part II para 82 which records what a plaintiff must prove in a claim in defamation:

> In proceedings for defamation a plaintiff must prove the following three elements: first, that the words complained of were defamatory; second, that they referred to the plaintiff; and third, that the words were published by the defendant in circumstances in which the defendant is responsible for the publication.

[22] Mr Powell then drew attention to the fact that the statement of claim does not attempt to assert any facts that would go to the proof of the essential elements. He went further and submitted that the elements of a claim in defamation simply do not exist in the circumstances where a constable directs a driver to stop and then arrests the driver for failing to provide particulars. That is because there is no publication of words on such an occasion. The constable is required to talk to the driver in order to communicate with them. That does not involve a publication about the driver. It is noted that this case is centred on an allegation made in the course of carrying out the arrest. It is not a case involving some subsequent statement to the effect that an arrest has been made.

[23] He drew attention to the fact that the plaintiff must establish the fact of publication. He noted that whether the facts are capable of amounting to a publication is a matter of law. He cited *O'Brien v NZ Social Credit Political League* [1984] 1 NZLR 63. He submitted that there is no foundation for a cause of action in defamation in this case. I accept that submission and the specific reasons which I have outlined which he gave for the conclusion so reached.

[24] It is unfortunate that the plaintiff did not take up the opportunities which the Court presented to her. Her principal concern appears to be her desire to challenge the allegation that she drove through an amber traffic light when she could and ought to have stopped. She has been given the opportunity to challenge the position but she elected not to pursue it.

[25] Mr Powell observed that Sergeant Hepworth action in arresting the plaintiff was able to be scrutinised in a proceeding for false imprisonment. The focus in such a case will be whether the Sergeant had grounds for belief that he was entitled to arrest the plaintiff.

[26] Rule 5.26(b) sets out the particulars which a statement of claim must give. For the purposes of this case that requires that the statement of claim:

> give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action.

[27] Mr Powell properly conceded that since the proceeding was filed the Police file has become available. That apparently discloses the circumstances surrounding the plaintiff's detention. He therefore acknowledged that the defendants suffered no particular prejudice by the lack of a clear pleading in this case.

[28] That, of course, is not the end of the matter. Mr Powell correctly recorded that the purpose of a pleading was not only to enable the defendants to answer the claim but is also to fix the plaintiff's allegations to a particular set of facts so that the defendants know which evidence has to be supplied to answer at the time of trial. That, of course, is required and is the only way that an efficient and satisfactory examination of the specific matters which are the subject of the complaint in the proceeding can be analysed by the Court.

[29] Mr Powell, helpfully set out in his submissions, which had been served on the plaintiff, how particulars which might justify a false imprisonment claim could be given. His suggestion is as follows:

> On [specify date and time] the plaintiff was taken into custody by Sergeant Hepworth, and was transported via Police patrol car to the [specify police station] where she was held against her will until [delivered into the custody of the District Court at Hamilton/released on Police bail] on [specify date and time of release from police detention]

That, of course, is a guide only but does give an indication of the matters that should be provided by a plaintiff who wishes to pursue a claim of false imprisonment arising in the way the claim is alleged by the plaintiff has come about in this case. Without that material the Court and the defendants will be prejudiced and there will not be a proper opportunity for the matter to be challenged at trial. It is for that reason that I am ordering the filing of a further statement of claim in this proceeding.

**Orders**

[30] I order:

a) Those parts of the plaintiff's statement of claim which assert a cause of action against the defendants in defamation and in negligence are struck out;

b) The plaintiff shall file and serve an amended statement of claim no later than 18 December 2009 which provides the particulars required by the High Court Rules to support the claim which she apparently wishes to advance based on false imprisonment. The statement of claim must comply with r 5.26 and may be set out along the lines which I have referred to in this judgment. Unless an amended statement of claim is filed by 18 December 2009, this proceeding shall be struck out;

c) In the event that an amended statement of claim is so filed, this proceeding is adjourned for a telephone conference, which must be attended by counsel for the defendants and the plaintiff and her counsel, if she is represented by counsel, at 12:20 pm on 16 March 2010. The conference will discuss the following matters:

i) The adequacy of the amended statement of claim and, if appropriate, directions for the filing of a statement of defence to it;

ii) Discovery and whether affidavits of documents should be ordered to be filed and served and inspection undertaken;

iii) settlement and whether a mediation or a Judicial settlement conference should be ordered;

iv) trial duration, the fixing of a trial date and the making of any special trial directions that are required; and

v) costs in relation to the strike out application.

[31] In the event that the amended statement of claim is filed by 18 December 2009 counsel for the defendants may file and serve a memorandum which sets out the costs which are sought by the defendants in respect of this proceeding and which are calculated based on Category 2 Band B together with any disbursements which are claimed. Proof of service of the memorandum on the plaintiff shall be provided. The plaintiffs may file and serve any memorandum in answer within 15 working days after receipt of the defendants' memorandum. Should the defendants wish to file a memorandum in reply it shall be filed and served within a further 5 working days. The Registrar shall then refer the file to me for the purpose of fixing costs.

[32] In the event that no amended statement of claim is filed, with the result that the proceeding is struck out, costs will be determined after considering memoranda from the parties. In that event, memoranda on costs shall be filed at 14-day intervals in support, opposition and reply.

JA Faire
Associate Judge