

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

**CIV-2012-404-006507
[2012] NZHC 2898**

BETWEEN PETER LAWRENCE CLAGUE
 Plaintiff

AND APN NEWS AND MEDIA LTD
 Defendant

Hearing: 2 November 2012

Counsel: M Lloyd for Plaintiff
 G Williams for Defendant

Oral
Judgment: 2 November 2012

Reasons: 5 November 2012

REASONS FOR JUDGMENT OF TOOGOOD J

*This judgment was delivered by me on 5 November 2012 at 4:00 pm
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

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Introduction

[1] At 11:30 am on Friday, 2 November 2012 the plaintiff, the high profile principal of an independent school in Auckland, applied at short notice for an order prohibiting the defendant from publishing any information regarding an allegation of assault made to the Police against him by his former wife.

[2] An urgent hearing was arranged for 2:30 pm that afternoon. After hearing from counsel for both the plaintiff and the defendant (which had been served on a “Pickwick” basis) I took a short adjournment and then delivered an oral judgment at 4:50 pm declining the application.

[3] These are my reasons for judgment.

Background facts

[4] The plaintiff is executive principal of Kristin School, an independent school on Auckland’s North Shore. In June 2010 he married Jeanne Jackman. The couple have been separated since April 2012. On 15 June 2012, Ms Jackman applied for interim and future spousal maintenance orders which, although initially defended, were resolved by the making of consent orders for the payment of interim and final maintenance on 26 July 2012.

[5] Almost immediately, Ms Jackman applied for orders under the Property (Relationships) Act 1976 (“the PRA”) for the division of relationship property including the former matrimonial home (said by the plaintiff to have been owned by him prior to the marriage) and for an order giving Ms Jackman sole occupation of the property. The making of the order sought was opposed by the plaintiff on the grounds that the marriage was one of short duration and that the relationship did not qualify for orders under the PRA. On 12 October 2012, counsel engaged to represent the plaintiff in the relationship property proceedings filed and served affidavits from the plaintiff and a number of other deponents in opposition to Ms Jackman’s application.

[6] Sometime the following week, Ms Jackman made a complaint to the Police that she had been assaulted by the plaintiff almost two years earlier. On 23 October 2012, the plaintiff was interviewed by the Police in connection with the allegation and I was informed from the Bar that the plaintiff anticipates being told by Police sometime this week whether he will be prosecuted.

[7] On 23 October 2012, a publicist engaged by Ms Jackman distributed a media statement which was sent to The Herald on Sunday, a title published by the defendant, and other news media organisations. The statement began with an allegation that Kristin School, which was described as “one of New Zealand’s top schools”, faced potential leadership changes as its executive principal was being investigated for an alleged assault which was said to have occurred on 10 September 2010, “less than two months” after the couple married. The statement described the assault as having happened in the couple’s home while Ms Jackman’s young son from a former marriage was present in the house, and that it resulted in a fracture injury and severe bruising.

[8] The statement described the plaintiff as an active member of the independent schools community and referred to his being elected, in September 2012, as president of the Independent Schools of New Zealand Executive. It then describes Ms Jackman as an academic working at Massey University who was recently nominated as “Lecturer of the Year” by the Massey University Student Association and refers to her being a member of the Board of a local domestic violence agency.

[9] The statement alleged that the Chair of the Kristin School Board of Governors was aware of the allegations against the plaintiff in June 2012, but said that it was not clear if any investigation was done by the school.

[10] Ms Jackman is then quoted as saying:

I am not proud of myself for hiding what has happened. It has taken me years to have the courage to face this, but I take strength from the women who have been in my situation before and stood up for themselves and their children.

The statement concluded by saying that there would be no further comment from Ms Jackman at that stage. Also on 24 October 2012, an item appeared on the Whale Oil blog site on which the blogger, Mr Slater, suggested that the Kristin School Board “may have some answering to do following the Police questioning” of the plaintiff. The blog site self-proclaims that it gets “around 600,000 pageviews per month.”

[11] In response to the allegation, the plaintiff deposed that in September 2012, Ms Jackman and he had an argument in the driveway of their home. He said that Ms Jackman became hysterical and started yelling obscenities and that he was very concerned about the neighbours and her son from a previous relationship, who was inside the house, hearing her.

[12] The plaintiff said that he ran over to Ms Jackman and put his hands on her shoulders, imploring her to stop; he says this was not done violently or with any force but more as a pleading gesture. The plaintiff said that he abhors violence and does not have a violent bone in his body; however, as he put his hands on Ms Jackman’s shoulders, he lost his footing on the garage floor and they both fell. He said Ms Jackman sat down heavily on a small step behind them, bruising her tailbone in the process. The plaintiff deposed that he apologised to her at the time, helped her up and thought that that was the end of it.

[13] The plaintiff said there was no suggestion at the time that what he had done was an assault, or an act of violence, or that Ms Jackman would go to the Police. He said the incident was not mentioned again during the marriage. The plaintiff said that when interviewed by the Police on 23 October 2012, he told the Police what had happened. He said the Police told him that putting his hands on Ms Jackman’s shoulders might technically be an assault and that they would be considering whether or not he would be charged.

[14] The plaintiff complained that the tone of the media release issued by Ms Jackman was deliberately melodramatic and designed to show him as a perpetrator of violence and Ms Jackman as a victim. He deposed that on learning of the media release he contacted a number of media outlets to whom the release had

been sent and was told that they would not be airing or printing the content. He said that he learned, however, on 26 October 2012, that The Herald on Sunday was intending to print a story about Ms Jackman's allegations but that after receiving a request from his counsel not to run the story, the solicitors for The Herald on Sunday and its sister publication, The New Zealand Herald, agreed to advise the plaintiff's counsel if they changed their mind and intended to run the story.

[15] The plaintiff said that he had kept the Board of Trustees of Kristin School fully informed about what was happening and that the Board was naturally concerned about the impact of Ms Jackman's allegations on the reputation of the school and on the morale of the school community, particularly its pupils. As a consequence, the Board Chair sent a letter to members of the school staff and parents of school pupils for their information. The terms of the letters were identical. Because counsel for the plaintiff placed much reliance on the potential implications of publication of Ms Jackman's allegations in The Herald on Sunday, or any other mainstream publication or broadcaster, for the plaintiff's employment and career, it is appropriate to set out the letter in full:

Dear Parent

We write to you about a sensitive matter involving the School's Executive Principal, Peter Clague. Unfortunately this has now been the subject of internet speculation and, given the potential for negative publicity and misinformation, we want to ensure that you are informed.

Peter has been involved for some time in an acrimonious matrimonial property dispute with his ex-wife, Ms Jackman. Last week Ms Jackman laid a complaint of assault with the police in relation to an incident that occurred over two years ago. Peter has given us a full account and we are assured that the incident was minor and accidental.

No complaint has been, or was ever made, by Ms Jackman to the Board.

We have sought professional advice which makes it clear that the proper approach is for the legal process to take its course and we await the outcome of the police investigation.

Peter Clague is a talented, hard-working, and inspirational leader. The School is privileged to have had Peter at the helm for six years as Executive Principal and, before that, for six years as Senior School Principal. Peter continues to enjoy our full and unanimous support.

Several days ago Ms Jackman, sent a press release to the media concerning her allegation. The choice to make this matter public has had little apparent regard for the possible impact on our school and in particular our students, many of whom are studying for exams and need no such distractions. Peter is particularly distressed at the possibility of this happening.

It is important for each of our three schools that it is business as usual. The focus of the entire school community will continue to be, as always, the well-being of our students.

Peter has been overwhelmed by the support he has received from parents, students and colleagues.

We thank you for your understanding and compassion for all involved and for your continued support for the School.

Board of Kristen School Charitable Trust
Board Chairman
Philippa Fee

[16] It is a reasonable inference from the content and tone of the letter that the Kristin School Board at least tended to the view that Ms Jackman's allegations and complaint to the Police "in relation to an incident that occurred over two years ago" were about a minor and accidental event and that they were made in the context of "an acrimonious matrimonial property dispute". Despite the allegations, and on account of its high regard for the plaintiff, it seemed clear to me that the plaintiff continued to enjoy the Board's "full and unanimous support." Significantly, the Board's professional advice had made it clear to the Board that the proper approach for it to take as the plaintiff's employer was for the Board to await the outcome of the Police investigation.

[17] The plaintiff alleged, however, that he was told privately by the Board that they were supportive of him "but that if the allegations got into the public domain they considered that they would have no choice but to stand (him) down as principal until the matter was resolved and then review (his) situation." He said that, in his profession, being stood down is "literally the kiss of death"; that very few principals who are stood down recover from that; and that it is very difficult to get another principalship elsewhere if "you become tainted goods."

[18] The plaintiff also alleged that a barrister briefed by Ms Jackman in respect of the relationship property proceedings had placed him under considerable pressure to agree to go to mediation on Friday 1 November 2012, with a view to settling Ms Jackman's property claims. From that the plaintiff inferred that Ms Jackman would withdraw her complaint to the Police and cease her media campaign if he paid her money to settle the proceedings. It is said by the plaintiff that the proposed

mediator, after first accepting the assignment, indicated she did not consider it appropriate to proceed with the mediation at that time and that within “a couple of hours” of receiving that indication, The Herald on Sunday contacted his counsel to say that they intended once more to run a story about Ms Jackman’s allegations.

[19] Exchanges of correspondence between the Herald, its lawyers and counsel for the plaintiff did not result in any undertaking by the newspaper not to publish the allegation. The plaintiff said in his affidavit:

If [The New Zealand Herald on Sunday does] that I will be stood down and my career, which has already been harmed badly by these allegations as it is, will quite likely be ruined. The reputation of the school will also obviously suffer and the pupils, who are just about to embark on end of year exams, will also be distracted and suffer.

Plaintiff’s grounds for interim relief

[20] The grounds for the plaintiff’s claim for interim injunctive relief against the newspaper publisher may be summarised as follows:

- (a) publication of the allegations might prejudice the impartial administration of justice in that they may influence the Police to charge him with a criminal offence when otherwise they would not have done so;
- (b) publication of the allegations may jeopardise his right to a fair trial, if a prosecution ensues;
- (c) Ms Jackman’s allegations are largely untrue or, as described in the media release, give an impression that is untrue and that publication of them by the newspaper would be defamatory and amount to the commission of an injurious falsehood;
- (d) that the allegations were made to the Police and the media for an improper purpose, namely to gain leverage in the relationship property proceedings and might unfairly influence the outcome of those proceedings;

- (e) that the allegations are tantamount to blackmail so that publishing them would be to assist in the commission of a crime;
- (f) the allegations concern the private affairs of Ms Jackman and the plaintiff so that, if no criminal charges arise from them, publication would be a gross infringement of the plaintiff's right to privacy from which he would suffer irreparable harm;
- (g) there is minimal legitimate public interest in the allegations;
- (h) the potential harm to the plaintiff and Kristin School from publication of the allegations far outweighed any legitimate public interest in them; and
- (i) it would be unjust and unfair to allow publication of the allegations in circumstances in which the defendant would suffer no damage by the making of an order restraining any publication until the further order of the Court.

Submissions for the plaintiff

[21] In argument, Mr Lloyd for the plaintiff suggested that the appropriate course would be for the Court to issue an interim injunction to remain in force until the Police decided whether they would prosecute the plaintiff. This suggestion recognised that there may be genuine public interest in a decision by the Police to prosecute and, therefore, the nature of the allegations whereas, at the time of the hearing, the matter was a strictly private one between husband and wife.

[22] In support of the application for interim relief, Mr Lloyd handed up a draft statement of claim which, I accept, had been prepared in some haste. It contained three causes of action alleging that publication would amount to a breach of the plaintiff's legal right to private; defamation and injurious falsehood. Notably, Ms Jackman; her publicist; and the blogger, Mr Slater, are not named as intended

defendants on the basis that what had already occurred gave rise to existing causes of action justifying damages or other relief.

[23] The allegation of blackmail was not pursued by Mr Lloyd after he properly conceded that, whatever ulterior motive Ms Jackman may have had for her actions, she had not made any threat capable of giving rise to a criminal prosecution.

[24] Mr Lloyd argued, when he opened his submissions, that the threshold test for the granting of the relief sought by the plaintiff was the tripartite *Klissers* test requiring the Court to consider:

- (a) whether there is a serious question to be tried;
- (b) the balance of convenience; and
- (c) the overall justice of the case.

[25] He acknowledged in the course of argument, however, as the other authorities referred to in support of the application make clear, that a different and higher threshold applies in cases where a plaintiff seeks to restrain a news media organisation from publishing, televising or broadcasting a statement which is arguably defamatory or publication of which might result in an unreasonable breach of the plaintiff's right to privacy. I shall return to those issues shortly.

Submissions for the defendant

[26] Mr Williams, for the defendant, had not had an opportunity to file affidavits in support of the defendant's opposition to the orders sought. He informed me from the Bar, however, that the defendant's position was that it considered the investigation by Police into an allegation of assault against the principal of a well-known private school to be a matter of legitimate public interest and not merely of prurient or salacious interest to readers of the defendant's publications. He said further that the defendant had not, at the time of the hearing, made a decision on whether to publish any information related to the allegations and the Police investigation, or what any such publication might contain. A decision would be

made by the publication's editors on the evening of Saturday 3 November, depending on what information they had available and what other news items would be given priority.

[27] Mr Williams also argued that the Court should take account of the ability of any other news media organisation to publicise the matters at issue, the defendant being the only organisation against whom the interim order was sought.

[28] Mr Williams submitted that the Court should take notice that the defendant was a major and responsible news media organisation, well-informed and well-advised of its rights and obligations, and the potential legal issues arising, in respect of any publication of the material at issue. He submitted, in particular, that although the plaintiff had declined to be interviewed about the allegations, the defendant had the benefit of a letter from counsel for the plaintiff and, now, the affidavits filed by the plaintiff in the proceeding, to enable it to provide a balanced account of the background to the Police investigation and to fairly represent the plaintiff's position.

[29] Mr Williams placed particular emphasis on the submission that the Court's jurisdiction to restrain the publication of defamatory matter is exercisable only for clear and compelling reasons. Maintenance of the right of freedom of expression, which is reinforced by s 14 of the New Zealand Bill of Rights Act 1990, requires that where justification or the defence of truth is advanced an injunction will not be granted except in cases where the statement complained of is obviously untruthful and libellous.¹

[30] Further, Mr Williams submitted that a similarly high threshold applied where an application was made for an order restraining publication by a news media organisation on the grounds of invasion of privacy.²

¹ *TV3Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA) at 132, citing *NZ Mortgage Guarantee Co v Wellington Newspapers* [1989] 1 NZLR 4 (CA). Those case provide affirmation of the rule in *Bonnard v Perryman* [1891] 2 Ch 269.

² *Hosking v Runting* [2005] 1 NZLR 1 at 40 per Gault P and Blanchard J, See the discussion in Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers Ltd, Wellington, 2009) at 870 et seq.

[31] Mr Williams also submitted that an allegation of assault, even of a husband allegedly assaulting a wife in their home, was not such as to give rise to an assumption of privacy. More persuasively, he argued that the nature of the assault allegation was incidental to the principal fact in which the public had a legitimate interest; namely, that the principal of a major private school was under some form of investigation by the Police.

[32] Mr Williams submitted also that the assault allegation was no longer a private fact because of the prior publication on the Whale Oil blog and in the Board Chair's letter sent to parents and staff. Further, both the plaintiff's counsel and the Board Chair had written directly to the defendant or its solicitors setting out the plaintiff's response to the allegation and in doing so must have intended, or at least anticipated, that those matters would subsequently become public as a result.

Plaintiff's submissions in reply

[33] In his submissions in reply Mr Lloyd quite properly conceded that there was considerable force in the proposition that there was a legitimate public interest in the fact of a Police investigation, but submitted that the harm done by publicity at this stage would be irreparable, even if the Police decided not to prosecute. In such circumstances, he submitted, the better course would be to restrain publication until after the Police had made a decision on the potential prosecution. He conceded that if charges were laid it would be very difficult for the plaintiff to argue that the news media did not have a right to report such a fact.

Discussion of applicable principles

Invasion of privacy

[34] Dealing first with the ground based on a claim of invasion of privacy, I accept on the basis of *Hosking v Runting* and the other authorities discussed by the learned authors of *The Law of Torts*,³ that the tort requires proof of three things:

³ At 855.

- (a) public disclosure;
- (b) the facts alleged must be private facts, i.e. facts in respect of which there was a reasonable expectation of privacy;
- (c) the facts must be of a kind the publicity of which would be offensive or objectionable to a reasonable person of ordinary sensibilities.

[35] I observe that publication in a weekend newspaper having a circulation said to be of the order of 100,000 with a readership of 380,000 more than qualifies as public disclosure.

[36] I accept also that even in a case where the three stated criteria are met, a defence may be available based on the nature and extent of legitimate public interest in the disclosure.

[37] The essential fact to which the defendant said it might give some publicity in The Herald on Sunday is that the Police are currently investigating the allegation of a single assault said to have occurred some two years ago. It argued that the nature of the charge being considered (domestic assault) should be disclosed in order to give context to the fact of the investigation and that disclosure removes the possibility of speculation by readers as to the nature of the Police inquiry. I was inclined to agree that the principal of a high profile private school could have no reasonable expectation of privacy with regard to an allegation that his past conduct was being investigated by the Police.

[38] If I was wrong about that, I was not persuaded in any event that publicity given to the Police investigation would be highly offensive or objectionable to a reasonable person of ordinary sensibilities. I concluded that public disclosure of the investigation would undoubtedly be embarrassing to the plaintiff, and distressing to him and members of his family, but I did not think it reasonable to describe such disclosure as offensive or objectionable.

Defamation

[39] In respect of the defamation cause of action, I was not persuaded that the plaintiff had proved that The Herald on Sunday intended to allege that he had assaulted Ms Jackman in September 2010, or that he was the perpetrator of prolonged domestic violence. Rather, the evidence before the Court, such as it was, suggested only that the newspaper would publish the fact that Ms Jackman had made an allegation of assault to the Police which was under investigation; that the plaintiff's version of events indicated that any injury was accidentally caused while he was endeavouring to calm Ms Jackman down; and that his employer maintained a high degree of confidence in and support for him despite the allegations. Viewed that way there could be no suggestion that what was likely to be published would be "obviously untruthful and libellous."⁴

Malicious falsehood

[40] The granting of an interim injunction in anticipation that the possible publication of the story by The Herald on Sunday would amount to malicious publication of a false statement required proof, or at least an arguable case, that publication would be undertaken in the knowledge that the statement was false and likely to cause irreparable damage to the plaintiff. I concluded that the evidence fell well short of establishing anything of that kind.

Consideration of effect of publication on plaintiff's employment

[41] While I had little hesitation in coming to the view that the plaintiff did not have an arguable case that one or more of the three causes of action might be made out against the defendant, I went on to consider whether there was merit in the submission of Mr Lloyd that an interim injunction should be granted to remain in force at least until after the Police had announced whether they intended to prosecute the plaintiff for assault. This submission rested on the plaintiff's evidence that he had been told by his employer that any publicity of the allegations and the Police

⁴ See n 1 above.

investigation would require him to be stood down as principal while the investigation continued.

[42] I was not persuaded that a potential threat to the plaintiff's employment was sufficiently probable to justify taking that matter into account. The letter to staff and parents from the Board Chair emphasised the proposition that the complaint by Ms Jackman was made in the context of an acrimonious matrimonial property dispute, in respect of an incident which occurred over two years ago, and that the Board had been assured that the incident was "minor and accidental." Further, after praising the plaintiff's qualities and employment performance, the letter declared that the plaintiff continued to enjoy the Board's "full and unanimous support." Significantly, the letter stressed that the focus of the entire school community (which, I infer, included the Board) would continue to be the well-being of the School's students.

[43] Given that the letter itself publicised the allegations and the Police involvement, I was not satisfied that the mere fact of publicity about the Police investigation in The Herald on Sunday would so detrimentally affect the Board's employment relationship with the plaintiff that there was a risk the Board would conclude it would be necessary to stand him down. In any event, if such an action occurred and the plaintiff was aggrieved, the Board would be susceptible to an application for remedies for a personal grievance under the Employment Relations Act 2000, including interim reinstatement to his role.

[44] In those circumstances, I was not persuaded that the plaintiff would suffer irreparable harm in his employment by publication in the newspaper.

Result

[45] While having considerable sympathy for the plaintiff's position, I came to the firm view that the Court's intervention, whether on a short-term basis or otherwise, could not be justified in circumstances where a responsible news media organisation had yet to determine whether to publish a report on the allegations and the Police investigation and where, if it elected to do so, there was a reasonable expectation that

a balanced report on the matter would be given. Whether founded on anticipation of the publication of defamatory material, or on an arguable invasion of the plaintiff's privacy, the threshold for injunctive relief is set at a high level which was not reached in the present case.

[46] For the reasons given, I dismissed the application and reserved the question of costs for the exchange of memoranda.

Costs

[47] Counsel are invited to confer as to costs. In the event that costs cannot be agreed, and the defendant wishes to apply, the defendant shall file and serve a costs memorandum on or before **Friday, 30 November 2012**. Any memorandum in opposition shall be filed and served by the plaintiff on or before **Wednesday, 19 December 2012**. Costs will then be determined on the papers.

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Toogood J