IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-003091
[2019] NZHC 440

BETWEEN	KRISTIN PIA CATO Plaintiff
AND	MANAIA MEDIA LIMITED First Defendant
	ROWAN DIXON Second Defendant
	JANE THOMPSON Third Defendant

Hearing:	17 December 2018 and 13 February 2019
Appearances:	S Mills QC (17 December only) and E Nilsson for the Plaintiff T Goatley and E Bello for the Defendants
Judgment:	13 March 2019

JUDGMENT OF HINTON J
[Capability of meaning]

This judgment was delivered by me on 13 March 2019 at 4.30 pm
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
Lee Salmon Long, Auckland
Stephen Mills QC, Auckland
Bell Gully, Auckland

[1] The innocuously named *Horse & Pony* magazine has become, somewhat surprisingly, embroiled in defamation proceedings.

[2] The point at immediate issue is whether an article published in the magazine on 3 December 2017, on its website and Facebook page, is capable of bearing the defamatory meanings pleaded by the plaintiff.

[3] The article is titled, "What goes on tour, doesn't stay on tour". The article has proven to be very aptly named.

Background – 'What goes on tour, doesn't stay on tour'

[4] The plaintiff is a barrister, and a member of the equestrian community.

[5] The three defendants are the publisher and editor of *Horse & Pony* and the author of the article.

[6] The article dealt with complaints made to the judicial committee of Equestrian Sports New Zealand (ESNZ), which concluded with a private mediated settlement.

[7] The complaints had been made by members of a senior New Zealand show jumping team which toured Australia in March and April 2017, against the team's chef d'equipe, Mr McVean, and his daughter, Ms Laurie, a member of the team.

[8] The plaintiff acted as counsel for the complainant members of the team.

[9] The mediated settlement terms required Mr McVean to not hold any role with Jumping NZ, and Ms Laurie acknowledged unacceptable conduct and apologised.

[10] The plaintiff says that the settlement statement was released by her on her clients' instructions for publication on the websites of iSpyHorses and Show Circuit magazine, two well-known equestrian media outlets. It was not released to *Horse & Pony*.

[11] Mr McVean and Ms Laurie have a high profile within the equestrian community and so the complaints and subsequent settlement have attracted significant comment.

[12] The primary thrust of the *Horse & Pony* article is about the way the complaints were dealt with by the sport's governing body. The author is critical of the lack of control by ESNZ over what was seen to be a regulatory matter, and in particular over the matter having been resolved in a private mediation. The author is obviously concerned about the outcome of the mediation and the potential consequential loss to the New Zealand equestrian community of Ms Laurie.

[13] The sole focus of the first half of the article, and the last page or so, is the background to the complaints and the role of ESNZ. In the few pages in between, are a dozen or more paragraphs that focus on the settlement statement issued by the plaintiff, and the plaintiff herself. These are the paragraphs highlighted by the plaintiff as defamatory of her.

The High Court proceedings

[14] The plaintiff issued this defamation proceeding on 22 December 2017.

[15] On 16 May 2018, the plaintiff filed an amended statement of claim. The plaintiff sought (as primary relief) a recommendation under ss 26 and 27 of the Defamation Act 1992, for publication of a correction of the article.

[16] The plaintiff at the same time sought a conference for purposes of the Court making the recommendation under ss 26 and 27, and also an early determination as to whether the article is capable of bearing the pleaded defamatory meanings. It was said that publication of a recommended correction would dispose of the proceeding in its entirety. Mr Mills QC, for the plaintiff, argued that the meanings issue needed to be resolved, along with the conference, as it was likely to be crucial to achieving any early resolution.

[17] The plaintiff prevailed in this argument and the recommendations conference and meanings hearing took place together, at the plaintiff's request, on 17 December

2018. The hearing ran over time and a further hour was allocated on 13 February 2019. However, immediately prior to 13 February 2019, the plaintiff withdrew the application for recommendations under ss 26 and 27 of the Act, leading to a costs judgment against her on 18 February 2019. The meanings hearing then concluded and this judgment follows.

Availability of pleaded meanings – the law

[18] The law applicable to the consideration of whether pleaded defamatory meanings are available is well-established. Whether or not a statement is capable of bearing its pleaded meanings is a matter of law for the Judge and is capable of determination at an interlocutory stage. Early determination of this issue has been encouraged by the Courts. Whether a statement in fact bears those meanings is an issue of fact for the finder of fact at trial, be it Judge or jury.

[19] The test is objective and straightforward: could (not would) a reasonable person regard the words as bearing the pleaded meanings? The threshold for dismissing pleaded meanings is high.

[20] The relevant principles were summarised by the Court of Appeal in *New Zealand Magazines Ltd v Hadlee (No 2)*.[1] The following principles (additional to the test above) are particularly relevant here:

(a) Where, as here, no "true" or "legal" innuendo is pleaded, the issue of a publication's capacity to bear pleaded meanings is to be answered exclusively by an examination of the words used in the context of their publication. Extrinsic evidence as to its meanings is inadmissible.

(b) The ordinary reasonable reader is not a lawyer and does not approach interpretation as any lawyer would. The reader is not inhibited by strict rules of interpretation and construction, and the capacity for implication is accordingly much greater than that of a lawyer. Blanchard J observed:[2]

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1 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.
2 At 625.

> The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.

(c) The impression carried away in the head of the ordinary and reasonable reader may depend on the tone of the publication as a whole. Where suspicion is invited, inferences may more readily arise.

[21] Once it is established that a statement is capable of bearing the pleaded meaning, the next question is whether that meaning is capable of being defamatory. What amounts to defamation has been expressed in different ways, some of which suggest more of a hurdle than others. These include:

(a) A statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally.[3]

(b) A publication without justification which is calculated to injure the reputation of another by exposing him or her to hatred, contempt or ridicule.[4]

The pleaded meanings

[22] The meanings pleaded by the plaintiff are set out at paragraph 11 of the first amended statement of claim:

> 11. In its natural and ordinary meaning the Article as a whole, and including the passages highlighted in Schedule 1, meant, and was understood to mean:
>
> (a) The plaintiff had acted unethically in acting as counsel for the complainants in the dispute that is the subject of the Article by:
>
> (i) Being responsible for releasing a statement that is damaging to the reputations of Mr McVean and Ms Laurie;
>
> (ii) Misusing her position as a lawyer for the complainants to benefit her family by releasing the statement to iSpyHorses, a media outlet controlled by her mother, when the statement

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3 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin.
4 *Parmiter v Coupland* (1840) 6 M & W 105 at 109 per Parke B.

would have received wider and more effective publicity for the vindication of her clients if it had been released by *Horse & Pony*;

(iii) Hiding that misuse of position by not identifying herself in the statement or disclosing her relationship with the founder and director of iSpyHorses.

(b) The plaintiff had acted unprofessionally or otherwise improperly in her capacity as a lawyer for the reasons set out in (a)(i)-(iii) above.

(c) There are grounds to suspect that the plaintiff has acted unethically in her capacity as a lawyer for the reasons set out in (a)(i)-(iii) above.

(d) There are grounds to suspect that the plaintiff has acted unprofessionally or otherwise improperly in her capacity as lawyer for the reasons set out in (a)(i)-(iii) above.

(e) There are grounds to suspect that the plaintiff has acted unethically in her capacity as a lawyer by breaching confidentiality provisions in a mediation or settlement agreement by releasing the statement without the consent of her clients and/or other parties to the dispute.

(f) There are grounds to suspect that the plaintiff has acted unprofessionally or otherwise improperly in her capacity as a lawyer by breaching confidentiality provisions in a mediation or settlement agreement by releasing the statement without the consent of her clients and/or other parties to the dispute.

The need for amendment of the statement of claim

[23] The defendants, in my view, correctly submit that the statement of claim requires amendment. The article itself is too long to be relied on as a whole with passages highlighted. The pleading should be in reverse, with specific passages identified in respect of each meaning and then other passages relied on for context.

[24] However, the defendants did not raise this point in objecting to the preliminary hearing, or at least not clearly, and so I proceed, as the defendants ultimately do in their submissions, on the assumption that the plaintiff relies on some or all of the highlighted words for each of the alleged defamatory meanings.[5] The highlighted words of any significance in the article comprise about 12 out of the total 65 paragraphs. The paragraphs in the article itself are not numbered, but they have

[5] To be fair to the defendants though, Ms Goatley in objecting to an early hearing of the meanings issue did say the pleadings were "highly unlikely to be in their final form". Also prior to this hearing, the defendants gave a formal notice under Rule 5.21, to which the plaintiff had not responded.

been helpfully numbered and highlighted in Schedule 1 to the first amended statement of claim. I refer to the paragraphs by those numbers.

Are the pleaded meanings available?

[25] I now turn to consider the relevant pleadings, which condense to three headings. I examine whether at least some of the words identified, read in their context, are capable of bearing the pleaded meanings and whether these meanings are capable of being defamatory. I do so by applying the principles identified above. In particular, I do my best to don the hat of a reasonable, but not lawyerly, reader, and to consider the impression left in my head after reading the article.

Responsible for release of defamatory settlement statement – 11(a)(i)

[26] Could a reasonable reader take the view from the article that the plaintiff was responsible for releasing a statement that was damaging to the reputations of Mr McVean and Ms Laurie?

[27] The article says at paragraph 55 that the author understands the settlement statement was released by the plaintiff, and it says at paragraph 35 that:

> We are not going to reproduce the full story from the iSpyHorses website, as we believe it has the possibility to be considered defamatory, but the gist of it is that the complainants will withdraw their complaints as long as Jeff McVean never again holds any role with Jumping NZ, and that Katie "unreservedly apologises" for her conduct. It then goes on to say that for the next 12 months, if Katie breaches any of ESNZ's Code of Conduct, she will be suspended from ESNZ for three months.

[28] The "story from the iSpy Horses website" is synonymous with the settlement statement. While not crystal clear, this can be drawn from paragraphs 33-35 and 55, and from the article generally.

[29] The revelation at 55 that the plaintiff is the complainants' lawyer and is the person understood to have released the settlement statement does come well after the comment that the statement may be defamatory, but there were earlier references at 33 to a statement issued by "the lawyer for the complainants" and some focus on the release of that statement. The claim at 35 that the statement may be defamatory came

as part of those earlier references. I therefore do not consider the order of the paragraphs significant, or that the relevant paragraphs are so separated that I could say a reasonable reader would not be left with the pleaded impression or view.

[30] The comments made in paragraphs 55 and 33-35 could be capable of meaning that the plaintiff was responsible for the release of a statement that might be defamatory, and by implication, damaging to the reputations of Mr McVean and Ms Laurie. If that were true, it could amount to unprofessional and/or improper behaviour on the part of a lawyer and/or to a breach of the plaintiff's ethical obligations and could be seen as such by the ordinary reader. Such a meaning would be defamatory.

[31] I therefore find that the article is capable of bearing the defamatory meaning pleaded at 11(a)(i), and to the extent applicable, 11(b)-(d).

Conflict of interest with mother's iSpyHorses publication – 11(a)(ii), and (a)(iii)

[32] Based on the plaintiff's submissions, I take this pleading to rely primarily on paragraphs 33, 34 and 55 of the article.

[33] I agree that these paragraphs are capable of being read as suggesting that the plaintiff has used her position as a lawyer for the complainants to release the statement to iSpyHorses, a media outlet controlled by her mother. The article also clearly suggests that the statement would have received wider and more effective publicity for the plaintiff's clients if it had been released to *Horse & Pony*.

[34] However, I do not consider that the ordinary reasonable person would carry away in their head that the plaintiff was "misusing" her position as a lawyer for the complainants, or acting unethically, unprofessionally, or improperly in releasing the statement to iSpyHorses and not releasing the statement to *Horse & Pony*. The pleadings made in this regard seem to me to be stretching a point. It would be clear to the reader that the parties involved in the mediation were key players in the New Zealand equestrian scene and knew of the available publications. There is no suggestion that the plaintiff was acting without her clients' instructions, and nor would that have been possible because the means of publication used (and not used) would

have been clear to her clients. Members of the public would not see a lawyer or their clients as having to be impartial between different media outlets.

[35] Materially, the sense I gain from the article as a whole, and that I consider the reasonable reader would gain, is that *Horse & Pony*, or at least the author, are not on-side with the plaintiff's clients. The reader would think it understandable that the plaintiff/her clients did not release the settlement statement to *Horse & Pony*, and released it to other media.

[36] The comments made by the author of the article with regard to non-publication in *Horse & Pony* seem more like sour grapes on the part of the defendants, and while casting petty aspersions on the plaintiff, are not defamatory in the sense pleaded.

[37] I therefore do not consider that the article is capable of bearing the defamatory meaning pleaded at 11(a)(ii), and consequently also as pleaded at 11(a)(iii).

[38] To the extent 11(b)-(d) rely on a(ii) and a(iii), the pleaded meanings are not available.

Breach of confidentiality – 11(e) and (f)

[39] In terms of the pleading at 11(e) and (f), I agree the article could be read as suggesting that the plaintiff has breached confidentiality provisions in the mediation agreement by releasing the settlement statement without the consent of other parties to the dispute. I do not read the article as saying or suggesting that the plaintiff has released the statement without her clients' consent.

[40] In this regard, I treat the plaintiff as relying on paragraph 42 of the article, in particular. Paragraph 42 recites a question the author has put to ESNZ and the answer:

> Is the statement itself a breach of the confidentiality clause of the mediation?
> *That is a matter for the parties involved.*

[41] The defendants say that it is clear from the article that the settlement statement had only been released with the consent of both parties to the mediation and that therefore there was no breach of the confidentiality clause.

[42] However, while the article cites from the settlement statement itself, at paragraph 33, that what is published is "exactly what was agreed to be published by the parties to the mediation", and also quotes a question and answer from ESNZ: ("Did ESNZ sanction this statement? This statement was provided in its entirety by the parties involved in the complaint"), both of those are followed by the question at 42. This could leave a suggestion that the plaintiff's claim that the settlement statement was published in an agreed form is not accepted by the author.

[43] There is then a subsequent paragraph in the article (paragraph 54) which says:

> While you have clarified that the parties' legal counsel did advise ESNZ it would be released, can you confirm that this included Katie and Jeff's legal counsel rather than just the legal counsel for the complainants?
> *Yes.*

[44] But that paragraph does not make it clear that the settlement statement as released was released with the consent of both parties to the mediation. Also, paragraph 54 is detracted from by the immediately-following revelation that the statement was understood to be released by "the complainants' lawyer, Kristin Cato (aka Kristin Manson)", and that she is the daughter of the iSpyHorses founder, which puts the focus back on the plaintiff.

[45] I consider it arguable, looking at paragraph 42 and the article as a whole, that the reader could be left with the impression that the plaintiff, who I have already said was named as likely responsible for releasing the statement, may have breached a confidentiality provision or requirement in doing so.

[46] Had she done that, it could amount to a breach of the plaintiff's ethical obligations and/or be unprofessional and improper and the ordinary reader could consider that to be the case.

[47] I therefore find that the article is capable of bearing the defamatory meaning pleaded at 11(e) and (f), except that I do not consider the article suggests the settlement statement has been released by the plaintiff without the consent of her clients.

Conclusion

[48] I find that the meaning pleaded at 11(a)(ii) and (a)(iii) is not available.

[49] I also find that the meaning pleaded at 11(e) and (f) is not available insofar as it refers to release without the consent of the plaintiff's clients.

[50] To the extent (b), (c) and (d) rely on the above pleadings, they are not available.

[51] The article is otherwise capable of bearing the defamatory meanings pleaded in paragraph 11.

[52] The plaintiff will need to re-plead to take account of my findings and also to properly particularise the remaining pleading.

[53] I consider the article casts what seem to be unfair aspersions on the plaintiff. Whether it is defamatory will be a matter for trial. It is not a clear-cut case. Certainly the main thrust of the article is about the processes of ESNZ. This is a case which both parties should now try harder to resolve. I consider it regrettable that the plaintiff withdrew her s 26 application.

Hinton J