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

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2017-485-443**
**[2019] NZHC 3275**

| | |
|---|---|
| UNDER | the Defamation Act 1992 |
| BETWEEN | DENISE DRIVER<br>Plaintiff |
| AND | RADIO NEW ZEALAND LIMITED<br>First Defendant |
| | STUFF LIMITED<br>Second Defendant |
| | TELEVISION NEW ZEALAND LIMITED<br>Third Defendant |
| | MEDIAWORKS HOLDINGS LIMITED<br>Fourth Defendant |
| | SKY NETWORK TELEVISION LIMITED<br>Fifth Defendant |

| | |
|---|---|
| Hearing: | 22-25 July 2019 |
| Appearances: | P A McKnight and A J Romanos for Plaintiff<br>R K P Stewart and T F Cleary for First, Second and Fourth Defendants<br>D M Salmon for Third Defendant<br>L A O'Gorman for Fifth Defendant |
| Judgment: | 12 December 2019 |

---

**JUDGMENT OF CLARK J**

---

*I direct the delivery time of this judgment is 12:00 pm on 12 December 2019*

**Table of Contents**



## Introduction

[1] The plaintiff sues all five defendants in defamation and for invasion of privacy. The defendants apply to strike out all causes of action in privacy on the basis the claims are clearly untenable. They also seek to strike out the money claims in defamation on the basis those claims are either barred by the Limitation Act 2010 or because the harm suffered was less than minor.

[2] The hearing of those applications proceeded by way of determining, before trial, the question of the late knowledge date for each of the publications relied upon in any claim in defamation against the defendants not otherwise struck out.

## Background

*Factual background in overview*

[3] The plaintiff's claims in defamation are said to arise out of the defendants' reporting of her arrest in India in December 2014. The plaintiff's case is that the reports "repeated and further sensationalised, outrageous allegations made by the Indian Police which were then published by the Indian media".

[4] The issues raised by the present interlocutory applications are similar to issues raised by earlier interlocutory applications heard by Ellis J in September 2017. It is convenient, therefore, to set out the background as summarised by her Honour:[1]

> [3] Ms Driver was born in New Zealand but has spent much of the past 30 years overseas. In late 2014 she was based in Bangalore, India, promoting a multi-level or network marketing scheme called Smart Media. On 3 December 2014, she attended a meeting in a hotel room with potential Smart Media clients, when she and three Indian associates were arrested by local Police on suspicion of "cheating" (which I understand to be an Indian legal term) and being engaged in an illegal money circulation scheme.
>
> [4] The Bangalore Police subsequently issued a statement to the media regarding these events. Between 7 and 9 December 2014 reports of Ms Driver's arrest were published and broadcast by the defendants in New Zealand. On 8 December, it seems that Ms Driver was told by MFAT staff about the media reports. The subsequent chronology of events (as deposed by Ms Driver) is as follows:
>
> (a) on 15 December Ms Driver was transferred from Police to judicial custody. Two days later she was granted bail, but remained in judicial custody;
>
> (b) on 28 December 2014 RNZ broadcast a follow up report on the events surrounding Ms Driver's arrest;
>
> (c) on 24 January 2015 Ms Driver was released from judicial custody, following a modification to her bail terms which included the surrender of her passport;
>
> (d) on 14 February 2015, Ms Driver contacted a New Zealand defamation lawyer, Mr Stephen Price, about the media reports. The following day he advised her of the two year limitation period for defamation claims;

---

1 *Driver v Radio New Zealand Ltd* [2017] NZHC 3188.

(e) Ms Driver remained on bail in India for the rest of 2015. In December, she again contacted Mr Price and advised that she intended to sue five New Zealand media organisations, but took no further steps;

(f) in June 2016 Ms Driver conducted her own research about the operation of ss 45-46 of the Limitation Act 2010 (the LA);

(g) in August 2016, she again contacted Mr Price and another New Zealand lawyer (Mr Nilsson) confirming her intention to sue seven New Zealand media organisations. On 14 October 2016 Mr Nilsson reminded Ms driver of the two year limitation period;

(h) in February 2017 Ms Driver was acquitted on the "cheating" charges and on the 17th of that month she received permission to leave India. She arrived back in New Zealand shortly afterwards.

*Litigation background*

[5] Beyond the factual backdrop, it is necessary also to set out in some detail the litigation history because aspects of it assist in understanding the assertion of abuse of process.

[6] The present claims are in defamation and privacy but when the proceeding was commenced on 25 May 2017 the claims were solely in defamation. The seven defendants named at that stage filed an application to strike out. In an amended statement of claim filed on 20 July 2017, Ms Driver joined two further defendants. Prior to the hearing of the strike-out applications, Ms Driver filed a second amended statement of claim expressly pleading various late knowledge dates for the purpose of s 14 of the Limitation Act and sought orders granting those late knowledge dates and extending the primary limitation period for all claims.

[7] Following the hearing of the interlocutory applications in September 2017, Ellis J:

(a) declined Ms Driver's application under s 45 of the Limitation Act for orders extending the primary limitation period for all claims to 17 February 2019;

(b) except in one respect, dismissed the defendants' application to strike out the statement of claim;

(c) required amendment of the statement of claim within 20 working days; and

(d) ordered Ms Driver to pay staged security for costs, the final sum of $40,000 to be paid 10 working days before the commencement of trial.

[8] A third amended statement of claim was filed on 25 January 2018 followed by statements of defence and replies to statements of defence were filed. A fourth amended claim filed in July 2018 was the catalyst for a further round of pleadings. There followed an application to strike out, a fifth amended statement of claim, statements of defence and notices of discontinuance against some defendants.

[9] The statement of claim has undergone something of a metamorphosis since the defendants filed their application to strike out on 19 September 2018. That application was based on the fourth amended statement of claim. Ms Driver did not respond with a notice of opposition but on 9 October 2018 filed a fifth amended statement of claim adding against each defendant a cause of action for invasion of privacy.

[10] On 23 November 2018, the defendants amended their interlocutory application so as to:

(a) strike out the claim against each defendant; or, in the alternative,

(b) determine before trial the question of the late knowledge date for each publication relied on by the plaintiff that is not struck out; and

(c) strike out the causes of action claiming invasion of privacy against each defendant and certain items allegedly broadcast by the third and fourth defendants on 8 and 9 December 2014.

[11] On 5 December 2018, the matter was set down to be heard in March 2019. On 31 January 2019, Ms Driver filed a notice of opposition to the defendants'

interlocutory application but consented to a pre-trial determination of the question of late knowledge dates in relation to each publication she relies upon. By February 2019, however, the interlocutory issues had expanded. Longer hearing time was needed and the interlocutory matters were set down for hearing in July 2019. On 11 April 2019, Ms Driver filed a sixth amended statement of claim adding further publications and specifying additional late knowledge dates.

**Strike-out application**

[12] The defendants apply to strike out the causes of action in privacy and defamation. In this overview of the strike-out application I deal only with the parties' positions in relation to the defamation causes of action. I discuss the privacy dimension of the application from [85] of this judgment.

[13] The defendants say all publications were reasonably discoverable before 25 May 2015 (for the publications relevant to the first to fourth defendants)[2] and 20 July 2015 (for the publication relevant to the fifth defendant)[3] and it is not reasonably arguable that the plaintiff did not know, or ought not to have reasonably known, of the facts required in order for her to file her claims before these dates. As a result, all money claims in defamation must be struck out. Alternatively, claims added by the sixth amended pleading must be struck out as contrary to r 7.77 of the High Court Rules 2016 because they seek to introduce time-barred causes of action.

[14] The plaintiff denies that all her claims against the first four defendants rely on a late knowledge date for the relevant publication after 25 May 2015. The continuing publication of some of the allegedly defamatory comments by these defendants means those claims are not dependent on her late knowledge dates being accepted by the Court. In this regard, the plaintiff takes issue with aspects of Ellis J's judgment but says her election not to appeal that decision and to amend her pleadings in accordance with Ellis J's orders "does not bind the plaintiff, or another Judge of this Court, to hereinafter apply the law incorrectly".

---

2 The claims against these defendants were filed on 25 May 2017.

3 The claim against Sky Network Television Ltd, the fifth defendant, was filed on 20 July 2017.

[15] The plaintiff accepts her claim against the fifth defendant is dependent on the acceptance of her claimed late knowledge dates. Where the plaintiff does rely on late knowledge dates, her case is that is it reasonably arguable she did not know, nor ought to have reasonably known, all the facts specified in s 14(1)(a) to (e) of the Limitation Act.

[16] As the plaintiff's claims for damages are largely reliant upon her assertion of the late knowledge dates pleaded in her statement of claim, the central issue for determination is whether, in terms of s 14 of the Limitation Act, the plaintiff can establish she had late knowledge of the publications on which her claims are based. If she is unable to establish late knowledge, those claims will be vulnerable to strike-out.

**Principles relating to strike-out**

[17] A pleading may be struck out, in whole or in part, if it:[4]

(a) discloses no reasonably arguable cause of action; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

[18] The criteria for striking out are settled:[5]

(a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations that are entirely speculative and without foundation.

(b) The cause of action must be clearly untenable.

(c) The jurisdiction is to be exercised sparingly and only in clear cases.

---

4 High Court Rules 2016, r 15.1.

5 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

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

[19] Where a defendant seeks to have a cause of action struck out as statute-barred, the Court must be satisfied the plaintiff's cause of action is "so clearly statute-barred" that the claim "can properly be regarded as frivolous, vexatious or an abuse of process".[6] In this case, if the defendants demonstrate the proceeding was commenced after the period allowed by the Limitation Act, they will be entitled to an order striking out the causes of action against them unless Ms Driver shows she has "an arguable case for an extension or postponement which would bring the claim back within time."[7]

[20] Importantly for the purposes of this strike-out, the plaintiff bears the onus of establishing an arguable case that there is a late knowledge date and that date was within two years from when the claim was made.[8]

**What is the limitation period for defamation claims?**

[21] The express purpose of the Limitation Act is to encourage claimants to make claims for monetary or other relief without undue delay by providing defendants with defences to stale claims.[9]

[22] A plaintiff must file any money claim within six years of the act or omission giving rise to the claim, but a plaintiff suing in defamation has only two years within which to file a claim. A defendant will have a defence to a claim in defamation if the defendant can prove the date on which the claim is filed is at least two years from:[10]

---

6 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [33]; and *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379 at [39].

7 *Murray v Morel & Co Ltd*, above n 6, at [33]. See also Limitation Act 2010, s 14(2).

8 At [33].

9 Limitation Act 2010, s 3.

10 Sections 11(1) and 15.

(a) the date of the act or omission on which the claim is based (the claim's **primary period**); or

(b) the date when the claimant has late knowledge of the claim (the **late knowledge date**).[11]

[23] In defamation cases the relevant act is the publication upon which the plaintiff claims. The late knowledge date is defined in s 14 as the earlier of the date on which the claimant gained knowledge, or ought reasonably to have gained knowledge, of all of the facts specified in s 14(1)(a) to (e). Mr Romanos submitted Ms Driver's case engages paras (a) and (b). That is, when did Ms Driver know or when could she reasonably have gained knowledge of:

(a) the fact that the publication being sued upon had occurred;[12] and

(b) the fact that the publication being sued upon was attributable (wholly or in part) to, or involved, the defendant?

*What constitutes constructive knowledge?*

[24] The plaintiff and defendants advocated different pathways by which to establish a claimant has "knowledge" within the meaning of s 14(1). What constitutes constructive knowledge for determining a late knowledge date has been considered in numerous cases. The defendants cited no defamation cases on point but relied on analogous cases in proposing the following test:

> When would a reasonable person, in Ms Driver's situation, ought to have reasonably known, in the sense that she could have with reasonable diligence found out, that the particular defendant had published a statement about her?

[25] The plaintiff criticised the so-called analogous cases relied on by the defendants as inapt because the concept of constructive knowledge depends upon the

---

11 Sections 11(2) and (3) and 15.

12 *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] QB 594 at [63], citing Lord Denning's statement in *Grappelli v Derek Block (Holdings) Ltd* [1981] 1 WLR 822 (CA) at 825 that, in defamation, the cause of action is the publication of defamatory words of and concerning the plaintiff. "The cause of action arises when those words are *published.*" Followed in *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [22].

claim at issue. Mr Romanos argued the underlying similarity across the cases cited by the defendants was that the knowledge required "was assessable by a matter of degree or extent" whereas in a defamation claim "a plaintiff either knows or does not know of the facts giving rise to a particular claim — the words of a defamatory publication and that it was published by a particular defendant".

[26] The difficulty for the plaintiff is that s 14(1) stands firmly in the way of this argument. Section 14(1), and its clear distinction between the date on which a claimant gains knowledge (of relevant facts) and the date on which the claimant "ought reasonably to have gained knowledge" (of the same relevant facts), applies to all claims made in a court or tribunal (other than criminal and disciplinary proceedings).[13] In relation to the knowledge required in order to commence a claim, the distinction the plaintiff draws between defamation and other claims is not a distinction the Limitation Act makes or recognises. The only statutory distinction drawn between defamation and other claims is in the duration of the period within which a claim must be made.

[27] The reform of the rules determining limitation periods for civil claims achieved one of its purposes in the relative simplicity of the 2010 Limitation Act. It is no longer necessary to engage in the contentious and, at times, tortuous analyses in which parties once had to engage in order to pinpoint the time when it could be said a plaintiff had requisite knowledge for the purpose of commencing a claim within a statutory limitation period. As Stephen Todd observes: "Happily perhaps, much learning about a cause of action in negligence accruing on the date of damage has been cast aside".[14] While that was an observation about the rules of discoverability in relation to negligence actions, the fact is that the essential features of the discoverability principles developed in relation to tort cases were enacted in the date of knowledge provisions in the Limitation Act 2010.[15]

[28] Following the Law Commission's recommendations in 1988, 2000 and 2007 to replace the 1950 Act with an Act that balanced fairly the interests of claimants to

---

13 Limitation Act 2010, s 4 definition of "claim".
14 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1405.
15 At 1405.

access justice with the interests of defendants in being protected from stale claims, the new Act aimed to be clearer and more comprehensive. One of the main reform proposals was to replace "reasonable discoverability" with a statutory late knowledge period.[16] It is apparent that at the Select Committee stage, "reasonable discoverability" was regarded as synonymous with constructive knowledge of the key facts.[17]

[29] The approach mandated by the Limitation Act requires a single inquiry into a claimant's knowledge, which is (effectively) extended by s 11(3) from actual knowledge to constructive knowledge of the facts upon which the claim is based. I approach s 14(1), guided by the New Zealand and United Kingdom appellate authorities on the elements of constructive knowledge for the purpose of a statutory limitation argument, notwithstanding they were decisions in contexts other than defamation. From these decisions I extract and apply the following principles in determining the requisite knowledge requirement under s 14.

[30] Thus, for the purpose of s 14 a claimant will have knowledge when he or she:[18]

> … knows enough to make it reasonable for him to *begin* to investigate whether or not he has a case against the defendant. He then has [two] years in which to conduct his inquiries and, if advised that he has a cause of action, prepare and issue his writ.

[31] A plaintiff cannot postpone the start of the limitation period by shutting her or his eyes to the obvious.[19] I immediately acknowledge that this observation was made in the course of the Judicial Committee's analysis of a limitation point in the context of a negligence claim for latent building defects. Their Lordships emphasised that their advice was confined to the problem created by latent defects in buildings and they abstained from considering whether the reasonable discoverability test should be of more general application in the law of tort.[20] However, that a plaintiff cannot postpone the limitation period by turning a blind eye to the obvious, is a statement of principle of broad application. And, in the context of defamation suits, it is consistent

---

16 Limitation Bill 2009 (33–1) (explanatory note) at 20.
17 Limitation Bill 2010 (33–2) (select committee report) at 5 and 10–11.
18 *Broadley v Guy Clapham & Co* [1994] 4 All ER 439 (CA) at 448.
19 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526.
20 At 526–527.

with the principle underlying the truncated limitation period for defamation, that a plaintiff should protect her or his reputation with vigour.

[32] As to the degree of certainty and detail required before it can be said a plaintiff has knowledge, in *Haward v Fawcetts*, Lord Nicholls observed, by reference to the earlier guidance of Lord Donaldson in *Halford v Brookes*:[21]

> … knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: "Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice." In other words, the claimant must know enough for it to be reasonable to begin to investigate further.

[33] Where a plaintiff is, or could have been, legally represented s 14 may require the plaintiff to undertake inquiry. In *Perrott-Hunt v Johnston*, Associate Judge Bell held that a lawyer acting on the plaintiff's behalf ought to have found out about the matters required under s 14(1).[22]

**Late knowledge: plaintiff's case**

[34] Ms Driver's claims for damages for defamation are largely reliant on the Court accepting the late knowledge dates identified in her statement of claim. Ms Driver has the onus of establishing late knowledge. Specifically, Ms Driver must show why it was not reasonable for her to have gained knowledge of relevant facts prior to the late knowledge dates she has pleaded.

[35] Ms Driver has sworn some five affidavits. Her affidavit sworn in August 2017 in support of her application for late knowledge dates, and in opposition to the defendants' interlocutory applications, runs to some 327 paragraphs. As well, Ms Driver was cross-examined for almost one day. Ms Driver's evidence was detailed, careful and particular. She has clearly suffered greatly as a result of her arrest and detention in India.

---

21 *Haward v Fawcetts* [2006] UKHL 9, [2006] 1 WLR 682 at [9], quoting *Halford v Brookes* [1991] 3 All ER 559 (CA) at 573–574.

22 *Perrott-Hunt v Johnston* [2018] NZHC 2568 at [35].

[36] In overview, Ms Driver says she was detained between 3 December 2014 and 24 January 2015 and, upon release, faced the momentous task of extricating herself from criminal proceedings. That took over two years and, by the time she had been exonerated and was able to return to New Zealand, the primary limitation period for the bulk of the publications had expired. It was only when she returned to New Zealand and was no longer encumbered by the intense difficulties of her situation in India that she was able to discover the greater extent of defamatory publications about her by the defendants.

[37] Ms Driver's evidence is that from 3 December 2014, when she was first held by the Indian authorities, until 17 February 2017 when she was permitted to leave India she was "deprived of one or more fundamental liberties that precluded [her] from being in a position to issue this proceeding". During this "detention period" Ms Driver says she was deprived of her economic freedom, her freedom to communicate and her freedom of movement. Ms Driver explained the deprivations in this way:

(a) During the detention period Ms Driver's cash, credit card and debit cards had been seized and were not released until 28 January 2017. Ms Driver's New Zealand bank account was frozen some time after her arrest until late February 2017.

(b) Ms Driver's mobile phone and computer were confiscated and not released until 28 January 2017, although there were periods following Ms Driver's release from custody when she had access to computers and the internet and was able to make telephone calls.[23] However, these limited opportunities were constrained by other factors including economic means.

(c) Ms Driver's freedom of movement was constrained by the confiscation of her passport on 3 December 2014 until it was released to her on

[23] On 6 December 2014, Ms Driver was remanded from judicial custody to police custody at the Central Crime Branch Police Station in Bengaluru, then returned to judicial custody at the Bengaluru Central Prison on 15 December 2014 until her release on bail on 24 January 2015.

25 January 2017, coupled with a travel ban and a warning that if she tried to leave the country she would be arrested.

[38] Ms Driver contends that these factors individually and collectively made it impracticable for her to issue proceedings any sooner. Without meaningful dialogue with, and advice from, an experienced defamation lawyer Ms Driver says she could not apprehend how a complex proceeding could be issued given the widespread defamation across multiples modes of publication, by multiple media companies and involving multiple instances of publication. As well, Ms Driver said her ability to give informed instructions was rendered impracticable by the deprivations she described.

[39] In submissions, Mr Romanos made the point a plaintiff is obliged by the Defamation Act to set out all the defamatory words on which a claim is made. In Ms Driver's unusual situation, she was searching for the very things she wanted to sue upon. Ms Driver was in the uncommon position of having "to find" within a wide net of publications each discrete publication. As at January 2016, Ms Driver thought there were only six publications. Ms Driver did not know until she returned to New Zealand in February 2017 and embarked on a process of searching that she discovered all the additional publications upon which she now sues.

[40] Ms Driver was remanded in custody when the publications about which she complains were first published on 8, 9 and 28 December 2014. Mr Romanos submitted that, being remanded in custody from 4 December 2014 until 24 January 2015, Ms Driver was therefore in custody "on the close of the start date for each claim's primary period". Ms Driver did not know of the fact of each publication of the defamatory words about her at this time, nor that the publications were attributable to the respective defendants and it cannot be suggested she ought reasonably to have known about the facts giving rise to her claims at this time. It could not be reasonably expected that she should have known about the facts giving rise to her claims at this time. Therefore, s 14(2) is surmounted.

[41] The next step, and the central issue for determination, is to establish the late knowledge date for each of Ms Driver's claims. The late knowledge date will be either the date Ms Driver actually gained knowledge of the particular publication and to

whom is was attributable or, if earlier, the date on which she ought reasonably to have gained knowledge of those two facts.

[42] Ms Driver's affidavit sworn on 9 April 2019 sets out in the detail typical of Ms Driver's thoroughness when and how she discovered the publications on which her claims in defamation are based. Ms Driver makes the point that in respect of several publications her claims are not reliant on a late knowledge date, on the basis those publications were continually published on the defendants' websites beyond 25 May 2015.

[43] The late knowledge dates for which Ms Driver contends in respect of each publication are set out in the following table, which is a slightly modified version of the table prepared by Ms Driver's counsel.

**Plaintiff's pleaded causes of action and late knowledge dates**

| Publication | Defendant | First published | Pleading reference | Claimed late knowledge date |
|---|---|---|---|---|
| Bulletin 1 | First Def | 8/12/14 | 8.1 | 8/11/18 or 27/05/17 |
| Bulletin 2 | First Def | 8/12/14 | 8.2 | 8/11/18 or 27/05/17 |
| Bulletin 3 | First Def | 8/12/14 | 8.3 | 8/11/18 or 27/05/17 |
| Bulletin 4 | First Def | 8/12/14 | 8.4 | 8/11/18 or 27/05/17 |
| Bulletin 5 | First Def | 8/12/14 | 8.5 | 8/11/18 or 27/05/17 |
| Checkpoint Item | First Def | 8/12/14 | 8.6 | 27/06/17 |
| Bulletin 6 | First Def | 8/12/14 | 8.7 | 8/11/18 or 27/05/17 |
| Bulletin 7 | First Def | 8/12/14 | 8.8 | 8/11/18 or 27/05/17 |
| Bulletin 8 | First Def | 28/12/14 | 15.1 | 8/11/18 or 27/05/17 |
| Bulletin 9 | First Def | 28/12/14 | 15.2 | 8/11/18 or 27/05/17 |
| Bulletin 10 | First Def | 28/12/14 | 15.3 | 8/11/18 |
| Bulletin 11 | First Def | 28/12/14 | 15.4 | 8/11/18 |
| Bulletin 12 | First Def | 28/12/14 | 15.5 | 8/11/18 |
| RNZ Article 2 | First Def | 28/12/14 | 15.6 | 16/06/15 |
| RNZ Article 1 | First Def | 28/12/14 | 22.1 | Sued only in privacy |
| | | | | |
| Nelson Mail Article | Second Def | 8/12/14 | 29.1 | 27/05/17 |
| Sunday Star Times Article | Second Def | 8/12/14 | 29.2 | 8/06/17 |
| Stuff Article | Second Def | 8/12/14 | 36 | Sued only in privacy |
| | | | | |
| One news at 6 pm | Third Def | 8/12/14 | 44.2 | 31/03/17 |

| | | | | |
|---|---|---|---|---|
| *Breakfast* item | Third Def | 9/12/14 | 49.1 | 31/03/17 |
| Article with embedded video of 6 pm news item | Third Def | 8/12/14 | 55.1 | Sued only in privacy |
| | | | | |
| Newshub Website Article Post and Facebook Comments | Fourth Def | 8/12/14 | 65.1 | 29/05/17 |
| Newshub Website Article | Fourth Def | 8/12/14 | 72.1 | Sued only in privacy |
| | | | | |
| Prime News Item | Fifth Def | 9/12/14 | 79.1 | 29/05/17 |
| Prime News Item (on Prime News website) | Fifth Def | 9/12/14 | 79.2 | 20/11/18 |

[44] In respect of some of her claims Ms Driver contends she is aware of a television item, or radio item but is unable to plead until the relevant defendant has complied with its discovery obligations. Accordingly, Ms Driver seeks a late knowledge date, on provision of the publication pleaded against the third and fourth defendants in the following paragraphs of the sixth amended statement of claim: 44.1, 44.3, 44.4, 44.5, 49.2, 49.4, 49.5, 49.6, 65.2, 65.3, 65.4, 65.5, 65.6 and 65.7.

**Late knowledge: defendants' case**

[45] The defendants maintain the plaintiff cannot reasonably argue she did not know, or ought not to have reasonably known, of the facts specified in s 14(1)(a) to (e) of the Limitation Act in relation to:

(a) the causes of action against the first to fourth defendants on or before 25 May 2015; or

(b) the cause of action against the fifth defendant on or before 20 July 2015.

[46] The defendants say the plaintiff's evidence supports their position because it shows she ought reasonably to have gained knowledge of each relevant publication and the involvement of the relevant defendant during the primary limitation period for that publication.

[47] The defendants rely on the strike-out by Ellis J of six publications Ms Driver discovered as a result of a Google search conducted between 26 January 2015 and

14 February 2015.[24] Ms Driver sought a late knowledge date of 1 February 2015, which would have required her claim to have been filed by 2 February 2017. It was not filed until 25 May 2017, almost four months after the expiry of the asserted late knowledge date. The defendants say the publications in respect of which Ms Driver now claims are identical or substantially similar to the articles that were struck out. Ms Driver discovered the struck-out articles in early 2015 through her Google searches and the publications in respect of which she now claims were reasonably discoverable at the same time and by the same means.

[48] In short, the defendants say Ms Driver ought reasonably to have had knowledge in January or February 2015 for the following reasons:

(a) The publications are similar to those already struck out.

(b) Ms Driver ought reasonably to have discovered the publications now sued on because the struck-out articles were discovered in early 2015 through Google searches and the contested publications were also internet articles and reasonably discoverable at exactly the same time by exactly the same means.

(c) Ms Driver had enough information at that time to make inquiries and find out what publications there were and who published them.

(d) Once Ms Driver had become aware her arrest had "hit" New Zealand media it was reasonable to assume that all news outlets or at least all mainstream outlets would be publishing on their different platforms.

[49] In relation to the radio and television broadcasts sued upon, the broadcasts were referred to or included in internet publications and broadcast by media organisations that had also published internet reporting on the events. As well, the broadcasts were known to members of Ms Driver's family. Ms Driver's knowledge of the struck-out articles and her knowledge that her arrest had been widely reported

---

[24] *Driver v Radio New Zealand Ltd*, above n 1, at [28]–[29].

in New Zealand put her on inquiry. Inquiry would have led to the discovery of the publications she now sues upon.

[50] Finally, the defendants argue that to the extent any publications sued upon continued to be published on the internet after 25 May 2015, the harm to Ms Driver's reputation resulting from those publications is less than minor.[25] The continued prosecution of those claims is an abuse of process and they should be struck out.

**Late knowledge: discussion**

[51] The defendants make a distinction between publications made before 25 May 2015 and those that remained online after 25 May 2015.

*Non-continuing publications*

[52] I discuss first the publications made before 25 May 2015 and the fifth defendant's (Sky Network Television's) publication, which was not republished.

[53] I accept the submissions of Ms O'Gorman for Sky Network Television and Mr Stewart for the remaining defendants that Ms Driver had constructive knowledge of her potential claim well before (respectively) 20 July 2015 and 25 May (that is, more than two years before the claims against the defendants were commenced). The following facts are established on the evidence:

(a) Ms Driver's sister, Megan Way, saw news bulletins concerning Ms Driver's arrest on TV3 and on TV One early in the morning on 8 December 2014 and later that evening, again on TV3 and TV One. Both Radio New Zealand and The Radio Network contacted Ms Way to inquire about her sister's situation. Ms Driver's other sister, Susan Matthews, first saw a bulletin of Ms Driver's arrest on TV3 shortly after 6.30 am on 8 December 2014. After speaking to her sister Megan at around 7 am, Ms Matthews also saw a bulletin at around 7 am on TV One.

---

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

(b) Ms Driver's brother-in-law recorded the Prime News Show at 5.30 pm on 9 December 2014 and kept a copy.

(c) By 15 December 2015, Ms Driver had actual knowledge that her case had "made it to the New Zealand media". She was given this information by both Indian police and the New Zealand High Commission.

(d) In February 2015, Ms Driver had actual knowledge of the most significant media coverage in New Zealand. Ms Driver had already searched for that coverage and seen a number of articles, namely those struck out by Ellis J.

(e) On 14 February 2015, Ms Driver researched New Zealand defamation law online and emailed Mr Steven Price who Ms Driver understood to be a media law specialist. She advised Mr Price she was "seriously considering taking action against the New Zealand media because of the way they reported what happened". She asked Mr Price if he would be interested in representing her. In his reply the following day Mr Price advised there was a two-year time limit for bringing defamation claims.

(f) Ms Driver next contacted Mr Price 10 months later on 15 December 2015.

[54] There are further indications from the evidence that Ms Driver ought reasonably to have gained the knowledge required to commence a proceeding. On Ms Driver's own evidence she had access to the internet:

(a) for up to two weeks in February 2015 when she had the use of a laptop;

(b) at internet cafes (notwithstanding the frustrations that arose from unreliable technology and unreliable hours);

(c) on Sundays at her lawyer's home office where Ms Driver prepared the necessary documents in relation to the criminal charges.

[55] By 14 February 2015, even if Ms Driver could not herself have accessed the full content of the defendants' publications, it was objectively reasonable to expect that she might have enlisted support to that end, including from her family members but in particular, through Mr Price who had confirmed his willingness to legally assist Ms Driver. When Ms Driver contacted Mr Price because she considered she had been defamed and she was contemplating legal proceedings, this was the moment when Ms Driver knew enough to make it reasonable for her to begin to investigate.[26] By this stage, Ms Driver had already seen several of the publications first-hand.

[56] Ms Driver gave evidence of the impediments to her accessing the internet in India. In that regard I adopt Ellis J's conclusions. Although made in the context of an argument that Ms Driver was detained, they are relevant to what might have been reasonably expected of a reasonable person in Ms Driver's position:

> [24] As Ms Driver's own account makes clear, however, she was in fact able to contact (two) counsel in New Zealand during the time she was on bail, and to discuss the possible issuing of defamation proceedings with them. She sought and obtained legal advice. While it may be that issuing civil proceedings was not the most pressing thing on her mind, she was plainly entertaining the prospect and, indeed, conducting her own research. There is no suggestion in her evidence that she did not have access to the necessary means of communication, should she choose to use them. …

[57] There can be no doubt that Ms Driver's experiences in India were deeply traumatic for her, as she states. But it is incorrect to describe the legal standard that the defendants rely upon as a counsel of perfection reached with the benefit of hindsight. As I have mentioned, the express purpose of the Limitation Act is to encourage claimants to make claims for relief without delay and Parliament's particular interest in protecting defendants from stale money claims in defamation is reflected in a limitation period of only two years.

---

[26] See *Haward v Fawcetts*, above n 21, at [112] per Lord Mance; and *AB v Ministry of Defence* [2012] UKSC 9, [2013] 1 AC 78 at [57] per Lord Walker.

[58] Well before 20 July 2015, Ms Driver was on notice that her circumstances had been publicised in the New Zealand media. She had used Google searches to effect and located the following items which the parties have termed the "Google 6":

- a *Radio New Zealand* article published by the first defendant;
- a *Stuff* article published by the second defendant;
- a *Television New Zealand* website video and article published by the third defendant;
- two *New Zealand Herald* website articles published by NZME Publishing Ltd (no longer a party); and
- a *Newshub* article published by the fourth defendant.

[59] The obvious question is whether all that was known to Ms Driver made it reasonable for her to look into whether there had been publications by another major broadcaster. The evidence of Christine Major, Director of External Affairs of Sky Network Television, was that the Prime News bulletin is one of New Zealand's best known free-to-air television news programmes. In fact, all the defendants provide well-known news media services to the public.

[60] Ms Driver resists the suggestion she ought to have known. Ms Driver was cross-examined about the nature and extent of the Google searches she had undertaken. In evidence were the two pages of search results revealing the Google 6 items. Her search returned 359,000 results. Ms Driver said the magnitude of the results meant nothing to her because not all would have been relevant. But Ms Driver was unable to say she had used any search terms beyond "Denise Driver scam" and unable to say that she had indeed looked beyond the first of the two pages of search results, although she believed she would have done. Her evidence was that she thought the Google 6 publications about her in New Zealand were "it". Ms Driver insisted she had no reason to believe there would be other publications but when pressed about the

reality of that belief, Ms Driver accepted she could have, for example, asked her sister in one of the many emails between them to look for other publications.[27]

[61] For these reasons, I set Ms Driver's late knowledge date at 14 February 2015, the day she communicated with Mr Price. Accordingly, Ms Driver's claim against the fifth defendant is barred by the Limitation Act as are her claims against the first to fourth defendants insofar as they relate to publications made before 25 May 2015.

[62] I have carefully weighed in the balance Ms Driver's submission that it would be unjust to find she should have known of all the publications when she did not know what she was looking for. And that it would also be unjust to find that she ought to have been familiar with the intricate ways by which content is disseminated by the defendants to readers, listeners or viewers. Ms Driver says that even after expending a great deal of time and effort she did not know, and still does not know, whether she has found all the offending publications published by the defendants. That is why she submits that in a defamation claim the facts that are reasonably discoverable to support a cause of action will be different from other types of claims.

[63] Ms Driver insists she could not issue proceedings until she knew the precise defamatory words on which to sue and that in seeking to discover what defamatory words had been published about her, she was "flying blind". However, all that Ms Driver was required to do to ensure any claim did not become time-barred was to stop the clock. The particularity with which a claim in defamation must be pleaded could have been perfected at a later time. Revealingly, Ms Driver has amended her statement of claim six times. Ms Driver knew of the publicity and she believed she had been defamed. The fact she may have been inhibited by a lack of particulars did not mean time had not begun to run for the purpose of the Limitation Act. Ms Driver's position confuses the requirement for particulars with the reasonable knowledge necessary to found a cause of action and commence a claim in defamation.

[64] Ms Driver's contention that it would not have been feasible for her to file a claim while she was in India misses the point. The bright line (for limitation purposes) was when Ms Driver approached Mr Price for advice. From that date, the late

---

[27] Ms Driver estimated she had emailed her sister on approximately 60 occasions.

knowledge date of 14 February 2015, Ms Driver had two years within which to undertake her further inquiries and obtain the requisite information to enable her to formulate and file a claim. She was industrious during this period. Ms Driver deposed to undertaking her own research into the Limitation Act and saw for herself that "Mr Price was correct" about the two-year limitation period but saw that the Act provided exceptions. Believing the statutory exceptions applied to her, she delayed instituting her claim. Ultimately, Ellis J determined the exceptions did not apply to Ms Driver. The point for present purposes, however, is that Ms Driver was fully cognisant of her potential claims in defamation before the expiry of the limitation period and chose to sit on her hands.

*Continuing publications*

[65] With respect to the continuing publications, the defendants rely on the line of jurisprudence arising from the English Court of Appeal's decision in *Jameel (Yousef) v Dow Jones & Co Inc*.[28] In *Jameel* the Court struck out a defamation claim that was otherwise arguable on the basis that publication of the defamatory material within the jurisdiction was minimal and any damage to the claimant's reputation was insignificant. The Court reasoned that bringing a defamation claim in such circumstances amounted to an abuse of process.

[66] The *Jameel* principle, as it is sometimes called, has been discussed in several New Zealand authorities and has been met with mixed reception, although all agree the principle, or a variation of it, has application in one form or another.[29] It is not necessary for present purposes to delve into the detailed debate found within those decisions as to the appropriate threshold and jurisprudential basis for the *Jameel* principle. Because it is most favourable to the plaintiff I adopt Palmer J's formulation of the principle in *Sellman v Slater*, commended by the defendants:[30]

> If a defendant can show their statement has caused less than minor harm to the plaintiff's reputation, that will defeat a defamation claim. It may therefore

---

28 *Jameel (Yousef) v Dow Jones & Co Inc*, above n 25.

29 See *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142; *X v Attorney-General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365; *Sellman v Slater*, above n 12; and *Craig v Stiekema (No 2)* [2018] NZHC 838, [2018] NZAR 1003.

30 *Sellman v Slater*, above n 12, at [69].

> be a basis for showing a cause of action is clearly not tenable in a strike-out application.

[67] The defendants say Ms Driver could not have suffered more than minor harm to her reputation as a result of any publications after 25 May 2015. They say any damage to her reputation was done by the initial publications in December 2014. They rely on the evidence of Dr Gavin Ellis, the defendants' expert witness on the New Zealand media, that interest in online news articles wanes over time and the evidence of Ms Kerrie-Lee Magill, General Counsel for the second defendant, that interest in online news stories "quickly dies away to almost nothing once the story is no longer current news".

[68] Ms Magill gave evidence as to the number of views received by the *Stuff* article first published by the second defendant on 8 December 2014. She said the article had received approximately 45,000 views but only 86 of those (less than 0.2 per cent) occurred after May 2015. It is likely a number of those 86 views were by Ms Driver herself or her supporters and solicitors.

[69] Mr John Keet, director of The Knowledge Basket, a search engine that contracted with the second defendant, gave evidence about the views of the *Stuff* article and the *Nelson Mail* article through its search engine. The *Stuff* article was viewed four times by the same person, identified as a customer at Auckland Library. The *Nelson Mail* article was viewed by the same person, along with two employees of The Knowledge Basket in the course of their employment. In her affidavit sworn on 9 April 2019, Ms Driver confirmed she was the Auckland Library customer.

[70] Ms Fahim Dhalla, an employee of PressReader Inc, a digital distributor, gave evidence about the number of views of the *Nelson Mail* and *Sunday Star Times* articles. The *Nelson Mail* article was viewed three times by one employee of Fairfax Media. The *Sunday Star Times* article was viewed eight times by two users, one of whom was the same Fairfax employee.

[71] Mr Paul Smith, the executive producer of online news at Television New Zealand, gave evidence as to the number of views of the *Television New Zealand* website article. The article was viewed 58 times and the embedded video footage was

viewed only 20 times after 24 May 2015. The video footage was viewed a total of 822 times, with about 93 per cent of those occurring on 9 December 2014, the day it was published. Mr Smith expects the later views to include the parties and their lawyers.

[72] Mr Thomas Turton, Senior Legal Counsel for MediaWorks, gave evidence as to the number of views of the *Newshub* website article and associated *Facebook* post. The article was viewed a total of 2,762 times but only 68 of those occurred after 24 May 2015. Nearly all the comments on the *Facebook* post were made on 8 and 9 December 2014. Mr Turton observed that a significant number of unrelated posts were made on the *Newshub Facebook* page between December 2014 and May 2015, making it highly unlikely any regular user would have scrolled back to the post concerning the article about Ms Driver after May 2015.

[73] The evidence demonstrates that very few people saw a number of the publications after 25 May 2015. It is likely this also holds true for the other publications about which no statistics were produced. It is reasonable to infer that many of the views since May 2015 were in consequence of this litigation. Where statistical information was available, it supported the evidence of Dr Ellis and Ms Magill that the overwhelming interest in the online publications was within a few days of initial publication when it was current news.

[74] In those circumstances, it is not seriously arguable that Ms Driver suffered more than minor reputational harm from the publications remaining online after 25 May 2015. The evidence is simply that too few people would have seen the continuing publications for them to have had any impact on her reputation. That is without taking into account the fact any harm had in all likelihood already been done in December 2014. Accordingly, the remaining defamation claims must also be struck out as disclosing no tenable cause of action.

*Are the claims for declaratory relief different?*

[75] Mr McKnight submitted that in the event I reached the conclusion Ms Driver's defamation claims must be struck out, I should do so only with respect to her monetary claims and not her claims for declaratory relief pursuant to s 24 of the Defamation Act.

In his submission, ss 11 and 15 of the Limitation Act apply only to money claims and not to claims for declaratory relief. He referred in this regard to Fogarty J's decision in *Maltese Cat Ltd v Doe*, in which his Honour declined to strike out a claim for declaratory relief under the Defamation Act.[31]

[76] On behalf of the defendants, Mr Stewart observed that *Maltese Cat Ltd v Doe* is under appeal and the Court of Appeal has accepted the appeal has merit, dispensing with security for costs in relation to the ground of appeal concerning the limitation period.[32] Mr Stewart submitted the outcome in *Maltese Cat Ltd v Doe* was reached without a careful analysis of the Limitation Act. He referred to the Law Commission's 2007 update report and the explanatory note to the Limitation Bill to support the submission Parliament did not intend to alter the position under the 1950 Act pursuant to which one limitation period applied to all defamation actions regardless of whether the remedy sought was damages or a declaration.[33]

[77] A "money claim", to which s 11 of the Limitation Act applies, is defined in s 12 as "a claim for monetary relief at common law, in equity, or under an enactment." On its face, the definition excludes a claim for declaratory relief. When understood in their context, the Law Commission's commentary and the explanatory note to the Limitation Bill confirm the 2010 Act would continue the 2-year limitation period for defamation claims that was enacted in the 1950 Act. The Limitation Act does not expressly provide a limitation period for declaratory relief, arising in the context of the Defamation Act or otherwise.

[78] This does not, however, entitle the bringing of stale claims for declaratory relief. Section 9 of the Limitation Act re-enacts s 4(9) of the 1950 Act. Section 4(9) permitted the courts to apply limitation periods by analogy to claims for "equitable relief". Section 9 provides:

---

31 *Maltese Cat Ltd v Doe* [2017] NZHC 1728.
32 *Nottingham v Maltese Cat Ltd* [2019] NZCA 246.
33 Law Commission *Limitation Defences in Civil Cases: Update Report for Law Commission* (NZLC MP16, 2007) at [91]; and Limitation Bill 2009 (33–1) (explanatory note) at 7.

> **9 Act may be applied by analogy to equitable claims**
>
> Nothing in this Act prevents it from being applied by analogy to a claim in equity to which no defence prescribed by this Act applies.

[79] The power to apply the Limitation Act by analogy to claims for declaratory relief, which is equitable in origin, was recently considered by Associate Judge Johnston in *Taylor v Attorney-General* in the context of a claim under the New Zealand Bill of Rights Act 1990:[34]

> [18] The discretion to time-bar equitable claims by analogy is an old one deriving from the courts of equity. In 1872, Lord Westbury said:[35]
>
> > … where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point in time by the Statute of Limitations, the Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation.
>
> [19] As the Court of Appeal explained in *Johns v Johns*, the doctrine of limitation by analogy is far from automatic and involves a relatively rigorous exercise:[36]
>
> > There will be a bar by analogy only when the [equitable] claim parallels the statute-barred claim so closely that it would be inequitable to allow the statutory bar to be outflanked by the [equitable] claim. In order to determine how close the parallel is the Court must examine not only the underlying facts but also the nature of the relationship between the parties and the policy and purpose of the different causes of action. If there is a sufficient difference in any material respect, the suggested parallel is unlikely to be close enough to make it appropriate in equity to apply an analogous bar.

[80] The Associate Judge declined to exercise his discretion to apply the Limitation Act by analogy in that case in light of considerations unique to the human rights context, including the distinct compensatory and vindicatory focuses of declaratory relief and *Baigent* damages, as well as New Zealand's obligation under the International Covenant on Civil and Political Rights to ensure an effective remedy where a person's rights have been violated.[37]

[81] Quite different considerations apply in the defamation context. The limitation period for defamation claims is the shortest in the Limitation Act. In recommending

---

34 *Taylor v Attorney-General* [2019] NZHC 2767.
35 *Knox v Gye* (1872) LR 5 HL 656 at 674.
36 *Johns v Johns* [2004] 3 NZLR 202 (CA) at [80].
37 *Taylor v Attorney-General*, above n 34, at [20]–[22].

the retention of the two-year limitation period, the Law Commission said there are "special reasons why defamation claims should be brought more promptly than other claims in tort".[38] As the authors of *Gatley on Libel and Slander* put it:[39]

> The rationale of these reductions in the basic limitation period is that a person whose reputation has been traduced should pursue legal redress with vigour: 'Memories fade. Journalists and their sources scatter and become, not infrequently, untraceable. Notes and other records are retained only for short periods.'

[82] And, as the Law Commission observed, "[i]t is particularly undesirable to have a defamation claim hanging over a defendant (perhaps by way of threat) for longer than is necessary".[40] This remains true whether the claim is for monetary relief or declaratory relief. The same degree of preparation for trial would be necessary and the attention received by the trial would equally be the same. In her leading text on media law in New Zealand, Professor Ursula Cheer suggests it would be appropriate to apply the Limitation Act by analogy to an "unusual claim seeking only a statutory remedy such as declaration, correction, or retraction and reply under the Defamation Act".[41]

[83] I am satisfied the plaintiff's claims for declaratory relief under s 24 of the Defamation Act so closely resemble her claims for monetary relief that it would be inequitable to allow her to proceed against the defendants with her declaratory claims after the expiry of the limitation period for her money claims. Accordingly, the claims for a declaration in terms of s 24 of the Defamation Act shall be struck out.

*Summary*

[84] The plaintiff's first, second, fourth, sixth, seventh, ninth and eleventh causes of action in defamation are struck out.

---

38 *Limitation Defences in Civil Cases: Update Report for Law Commission*, above n 33, at [91].

39 Alastair Mullis and Richard Parkes *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at 790 (footnote omitted).

40 *Limitation Defences in Civil Cases: Update Report for Law Commission*, above n 33, at [91].

41 Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 209.

**Invasion of privacy claims**

[85] The *Radio New Zealand* article struck out by Ellis J, is now the basis for Ms Driver's third cause of action for breach of privacy against the first defendant. Similarly, the fifth, eighth, tenth and twelfth causes of action against the second, third, fourth and fifth defendants are based on the publications in respect of which Ellis J determined the defamation causes of action were statute-barred.

[86] The cause of action for invasion of privacy, insofar as it relates to the publication of private information, requires the plaintiff to demonstrate two elements:[42]

(a) the existence of facts in respect of which there is a reasonable expectation of privacy; and

(b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[87] If these elements are established, the defendant may raise a defence that publication was in the public interest.[43]

[88] The plaintiff pleads invasion of privacy in relation to four matters in which she says she has an expectation of privacy:

(a) the fact of her arrest and the details of the allegations of fraud against her (pleaded against all defendants);

(b) Ms Driver's passport details and residential address (pleaded against the second defendant only);

(c) the reactions of Ms Driver's family members to the news she had been arrested (pleaded against the third defendant only); and

---

42 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117] per Gault P and Blanchard J.
43 At [129].

(d) video footage of her reaction to being confronted with the allegations in her hotel room (pleaded against the third and fifth defendants only).

[89] The defendants say Ms Driver did not have a reasonable expectation of privacy in relation to any of these facts and, even if she did, the publication of those facts would not be considered highly offensive to an objective reasonable person. In particular, the defendants rely on *Clague v APN News and Media Ltd*, where, in the context of an application for an interim injunction, Toogood J held the "high-profile" principal of a second school could have no reasonable expectation of privacy in the fact police were investigating an allegation he assaulted his former wife, even though no charge had been laid against the principal at the time of the hearing.[44] The defendants argue if there is no reasonable expectation of privacy in a police investigation, there is certainly no reasonable expectation in an arrest.

[90] The plaintiff relies upon the recent decision of *Richard v British Broadcasting Corporation*, where, in the context of a claim for breach of art 8 of the European Convention on Human Rights, the High Court of England and Wales held that Sir Cliff Richard had a reasonable expectation of privacy in the fact police were investigating him in relation to allegations of historic child sex offending.[45] The plaintiff emphasises the importance of a formal charge being laid as the point at which allegations of criminal offending become a matter of public information.

[91] The plaintiff says the publications by the defendants were highly offensive because they were defamatory, unnecessarily sensational and factual incorrect. She argues the defendants ought to have known the allegations publicised by the Bengaluru City Police were likely to be unreliable because of the suggestion of her guilt prior to any investigation or formal charge. The defendants say this demonstrates a conflation of privacy and defamation principles by Ms Driver and suggests she is bringing her privacy claims in an attempt to side-step Ellis J's decision to strike out her defamation causes of action in relation to these publications.

---

44 *Clague v APN News and Media Ltd* [2012] NZHC 2898, [2013] NZAR 99.
45 *Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch), [2018] 3 WLR 1715.

[92] In a strike-out context, the burden lies on the defendants to demonstrate these claims are untenable.[46] Before addressing Ms Driver's claims of invasion of privacy, I briefly address the two elements of the privacy tort.

*Reasonable expectation of privacy*

[93] The High Court of Australia has described the nature of private facts in the following way:[47]

> Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviours, would understand to be meant to be unobserved.

[94] The focus on contemporary standards of morals and behaviour entails a risk that "a retrograde development in society may be incorporated into that standard".[48] Professor Moreham and Winkelmann CJ both support a normative element to the reasonable expectations test.[49] In other words, the courts should look not just to how society usually treats privacy interests in a particular situation but how those privacy interests ought to be treated.

[95] In *Murray v Express Newspapers plc*, the Court of Appeal of England and Wales outlined the following circumstances that are relevant to the broad inquiry of whether there is a reasonable expectation of privacy:[50]

(a) the attributes of the claimant;

(b) the nature of the activity in which the claimant was engaged;

(c) the place at which it was happening;

---

46 See [17]–[20] above.

47 *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199 at [42] per Gleeson CJ.

48 Helen Winkelmann, Judge of the Court of Appeal of New Zealand *Sir Bruce Slane Memorial Lecture* (Victoria University of Wellington, 30 October 2018) at 17.

49 At 18–19; and Nicole Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 LQR 651.

50 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [36], endorsed by the United Kingdom Supreme Court in *Re JR38* [2015] UKSC 42, [2016] AC 1131 at [98].

(d) the nature and purpose of the intrusion;

(e) the absence of consent and whether it was known or could be inferred;

(f) the effect on the claimant; and

(g) the circumstances in which, and the purposes for which, the information came into the hands of the publisher.

[96] Assessing whether there is a reasonable expectation of privacy will always be a contextual exercise requiring consideration of the particular circumstances of the parties, the nature of the information and the circumstances of the alleged invasion of privacy. These factors must be considered in light of contemporary standards of behaviour but cross-checked against a minimum standard of privacy.

*Highly offensive threshold*

[97] The law in relation to the highly offensive limb was recently summarised by Thomas J in *Henderson v Walker*:[51]

> [206] What is highly offensive is assessed from the perspective of a reasonable person in the position of the plaintiff as opposed to a reasonable bystander. It should also be emphasised that it is the *publicity* and not the *information* that must be highly offensive. In other words, the Court is concerned with whether the breach is sufficiently serious — offensive — such that the law should intervene to protect the privacy interests of the plaintiff. No doubt, the nature of the information is a relevant consideration in determining whether publication would be considered highly offensive, but other considerations are also important, including the circumstances and extent of the publication and the nature of the relationship between the parties.

[98] I turn to Ms Driver's four claims.

**Fact of arrest and details of the allegations**

[99] This is the most complicated category and the one given the most attention in counsel's submissions. There are several complex issues involved. Beginning first

---

[51] *Henderson v Walker* [2019] NZHC 2184 (footnote omitted).

with whether it is reasonably arguable Ms Driver had a reasonable expectation of privacy. I consider it useful to consider this question in three conceptual stages:

(a) First, can there ever be a reasonable expectation of privacy in the fact of arrest?

(b) Second, do the distinct procedural aspects of the Indian criminal justice system preclude a reasonable expectation of privacy for Ms Driver?

(c) Third, was any reasonable expectation of privacy lost following widespread publicity in the Indian media?

*Can there ever be a reasonable expectation of privacy in the fact of arrest?*

[100] Whether there is a reasonable expectation of privacy is an intensely factual inquiry. In that respect, I am not greatly assisted by either *Clague v APN News and Media Ltd* or *Richard v British Broadcasting Corporation*. Both cases involved criminal investigations into high profile figures in their respective communities. Ms Driver, by comparison, was unknown to the world prior to being thrust into the limelight by the publicity given to the allegations against her. She is what McGechan J described as a "reluctant debutante".[52]

[101] It is conceivable some individuals have an expectation of privacy in the fact of their arrest. Many New Zealanders are likely to be perturbed by having their arrest for a low-level offence publicised on the evening news. Obviously, the seriousness of the allegations would be a relevant factor. This does not necessarily assist Ms Driver who was facing quite serious allegations, but it demonstrates a consideration of her circumstances is required. In *Richard v British Broadcasting Corporation*, Mann J acknowledged that whether or not there is a reasonable expectation of privacy in a police investigation is a fact-sensitive question, not capable of a universal answer.[53]

[102] *Richard v British Broadcasting Corporation* involved a claim for breach of "the right to respect for … private and family life" under the European Convention for

---

52 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC) at 735.
53 *Richard v British Broadcasting Corporation*, above n 45, at [237].

the Protection of Human Rights and Fundamental Freedoms, which the defendants submitted encompasses a wide variety of interests. The New Zealand privacy tort is based squarely on the interests of autonomy and dignity.[54] In *Hosking v Runting*, Gault P and Blanchard J distinguished the privacy tort from defamation: "the true focus [of the privacy tort] is on hurt and distress rather than standing in the eyes of others".[55] Despite the arguably different focus, some of the general principles discussed in *Richard v British Broadcasting Corporation* are informative, even if a different outcome may have been reached had those particular circumstances arisen in New Zealand.[56]

[103] One example is that legitimate operational concerns may tell against a reasonable expectation of privacy.[57] For instance, if police were trying to locate a suspected criminal or wished others to come forward with corroborating evidence or similar supporting allegations, there may be no reasonable expectation of privacy. The defendants suggested operational concerns were at play in Ms Driver's case. This was based on the evidence of Mr Goel that Indian police "often release information, including the names of those accused, to the public regarding high profile or large public interest cases" as "an investigative tool, to seek information from the public". Mr Goel described this "common practice" by Indian police as "in part to show the local community that the Police are active and action is being taken to stop criminals". Despite this broad practice, there was no evidence of any legitimate operational concern specific to Ms Driver's case. Mr Goel accepted in cross-examination the Indian police did not seek information regarding Ms Driver when it publicised the allegations against her on its Facebook page.

[104] Another relevant consideration is freedom of expression. The public has a legitimate interest in knowing about serious criminal activity, even at the stage of an arrest or investigation. That does not necessarily preclude an individual from enjoying a reasonable expectation of privacy. The media can report on an anonymised basis without violating the privacy interests of the suspect. United States authorities are unanimous in holding there is no actionable invasion of privacy where the plaintiff

---

54 *Hosking v Runting*, above n 42, at [239] per Tipping J.
55 *Hosking v Runting*, above n 42, at [138] per Gault P and Blanchard J.
56 I discuss the significance of Gault P and Blanchard J's remark at [110] below.
57 *Richard v British Broadcasting Corporation*, above n 45, at [252].

cannot be identified by the general public from the publication itself.[58] This position was adopted by Allan J in *Andrews v Television New Zealand Ltd*.[59] That said, there are circumstances where the public would also have a legitimate interest in publication of a suspect's identity. In such a case, there is unlikely to be a reasonable expectation of privacy.

[105] The defendants also advanced the proposition that recognising a reasonable expectation of privacy would be contrary to public policy because it would override the carefully calibrated requirements for obtaining name suppression in s 200 of the Criminal Procedure Act 2011. But s 200 applies only to someone who is charged or convicted. Prior to a charge being laid, an individual has no opportunity to seek interim name suppression meaning publication of her or his name at that stage could pre-empt the potential right to name suppression that a court might recognise at a later stage.

[106] The point was recently discussed by Cooke J in *Teacher v Stuff Ltd*, in which an interim injunction was granted to prevent Stuff from identifying a teacher who had been the subject of a number of anonymised media reports concerning allegations of inappropriate sexual conduct with students.[60] It appears from that decision most New Zealand media outlets tend to refrain from identifying alleged offenders prior to a charge being laid, although there are no established principles or guidelines governing the appropriateness of identifying alleged offenders prior to charges being laid.[61] The evidence of Dr Ellis, who gave expert testimony bearing on media practices in New Zealand, was that the New Zealand media "may show restraint in naming a person before a first court appearance". Dr Ellis also confirmed the New Zealand media "would be unlikely to name a suspect in the midst of a police investigation". The practice may support the existence of a reasonable expectation of privacy for individuals prior to being charged.

[107] No useful purpose would be served by considering whether a person with Ms Driver's characteristics would have a reasonable expectation of privacy if arrested

---

58 *Todd on Torts*, above n 14, at [17.5.03].
59 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC) at [52].
60 *Teacher v Stuff Ltd* [2019] NZHC 1170, [2019] NZAR 902 at [19].
61 At [12] and [21].

on comparable charges in New Zealand. That is because New Zealand Police would be unlikely to arrest a person at the stage Ms Driver was arrested. Everyone who is arrested in this country has the right to charged promptly or to be released.[62] To charge a person with an offence, the New Zealand Police must have "good cause to suspect that the defendant has committed the offence specified in the charge".[63] At the time Ms Driver was arrested, the Indian police had not yet conducted a formal investigation and nearly two weeks after the arrest the magistrate who ordered Ms Driver's bail said there was "no hint of evidence which can say that accused had deceived the public". The circumstances of Ms Driver's arrest are arguably more comparable to those of a police investigation, such as in *Clague v APN News and Media Ltd* and *Richard v British Broadcasting Corporation*.

[108] The plaintiff and the defendants advanced submissions on the importance of the presumption of innocence in determining whether there can be a reasonable expectation of privacy during a police investigation. The plaintiff says publicising the allegations against her undermines her presumption of innocence, while the defendants say the presumption of innocence means no distress could be caused by publicising the allegations. In this regard, the defendants rely on United Kingdom authorities suggesting the law proceeds on the basis most members of the public understand an accused person is innocent until proven guilty.[64]

[109] To begin with, it is important to understand the presumption of innocence is not engaged in these circumstances. The presumption of innocence is a principle upon which criminal trials proceed. It requires a defendant to be presumed innocent until proven guilty in a court of law. The principle governs how trials are to be run. It does not imply an accused is factually innocent or must be treated as such by the public.[65] The United Kingdom authorities relied upon by the defendants do not suggest otherwise. In *Khuja v Times Newspapers Ltd*, the majority of the Supreme Court accepted there is no "legal presumption" that members of the public will treat an

---

62 New Zealand Bill of Rights Act 1990, s 23(2).

63 Criminal Procedure Act 2011, s 16(2)(c).

64 *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697 at [66]; and *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC 161 at [8] and [33] per Lords Sumption, Neuberger, Clarke, Reed and Baroness Hale.

65 The Law Commission discussed the context in which the presumption is important in Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at ch 3.

accused person as innocent until proven guilty.[66] What the public will assume about an accused person is a factual question and there is a strong argument a significant section of the public might assume guilt, or a likelihood of guilt, from the fact of a police investigation. As Mann J said in *Richard v British Broadcasting Corporation*:[67]

> If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not.

[110] Arguably, Mann J's observations support the existence of a reasonable expectation of privacy for a person under police investigation, in certain circumstances. I am not persuaded by the defendants' argument that reputational considerations are thereby unjustifiably imported into the privacy sphere. In *Hosking v Runting*, Gault P and Blanchard J said:

> [138] To the extent that a remedy in damages is awarded arising from publicity given to private information it may be seen as constituting a remedy for damage to reputation which hitherto has been the almost exclusive realm of defamation. But the true focus is on hurt and distress rather than standing in the eyes of others. The objectionable disclosure may be entirely factually accurate.

[111] The defendants suggest their Honours intended to preclude reputational interests from the privacy tort. I do not read the above passage in that way. In fact, their Honours accepted the privacy tort "may be seen" as a remedy for damage to reputation, although that is not the focus of the tort. It seems their Honours were cognisant of the indistinct boundary between the two concepts.

[112] There are likely many situations in which the privacy tort will protect reputational interests in an indirect way. Take the example of a sex tape. One could legitimately claim to be hurt and distressed by the publication of such a thing, but an inseparable component of that distress would be concern for the effect the publicity would have on one's reputation. Because everything contained in the tape would be true, there could be no claim in defamation. The harm to reputation would not arise

---

66 *Khuja v Times Newspapers Ltd*, above n 64, at [8] and [33].
67 *Richard v British Broadcasting Corporation*, above n 45, at [248].

from the falsity of the tape but from its truth. The situation is exactly the kind of situation the privacy tort embraces and it would be artificial to insist no reputational interest is being protected. Of course, the focus is still on the hurt and distress. Any effect on reputation is secondary and relevant only insofar as the effect causes hurt or distress to the claimant.

[113] The stigma associated with a criminal investigation could both have an effect on one's reputation and cause hurt and distress, irrespective of how others react. Just as with a sex tape, the hurt and distress caused by the stigma of a criminal investigation is not the concern of defamation. The fact of investigation is true and the prospect of reputational harm (and resultant distress) occurs because of its truth. This factor could arguably be considered alongside those identified above at [100]–[106] when considering whether there is a reasonable expectation of privacy in the fact of a police investigation.

[114] When assessed holistically, it is reasonably arguable a person in Ms Driver's situation would have a reasonable expectation of privacy while subject to a police investigation in New Zealand prior to a charge being laid. Although the allegations against her were relatively serious, she was otherwise not a person of public interest, except perhaps for the fact she was a foreign national in the country where she was arrested. Publication of her identity would arguably be unnecessary to service the public interest in the allegations against her. Dr Ellis accepted it was the nature of the allegations against Ms Driver, and not her identity, that made her arrest newsworthy. Nor was there convincing evidence before me that the Indian police had operational reasons for identifying her to the public. Arguably, Ms Driver could reasonably expect her privacy to be maintained while police investigated the allegations against her.

*Do the distinct procedural aspects of the Indian criminal justice system preclude a reasonable expectation of privacy for Ms Driver?*

[115] But Ms Driver was not under investigation in New Zealand. To understand this dimension of the analysis, it is necessary to consider the procedural aspects of the Indian criminal justice system.

[116] Mr Naveen Goel, a lawyer based in New Delhi, India, gave evidence on behalf of the defendants. He provided three affidavits and was cross-examined. Mr Goel has practiced law in India for 27 years and has substantial experience in civil and criminal litigation at all levels of the Indian courts. He has handled a number of matters involving economic offences of the kind Ms Driver was charged with.

[117] Mr Goel explained that, in India, the criminal procedure can be set in motion by the recording of what is called a "first information report" (FIR). Essentially, an FIR is a report describing the allegation against the accused. It can be registered by police either on receipt of a complaint or on their own motion. Mr Goel did not explain whether there are any prerequisites to the recording of an FIR, such as a requirement to have good cause to suspect the accused committed an offence.

[118] Mr Goel explained FIRs are considered public documents accessible under India's freedom of information legislation and a recent decision of the Supreme Court of India requires all FIRs to be published on police websites unless they concern allegations of a sexual nature.[68]

[119] If the allegation in the FIR corresponds to a certain category of criminal offences, known as cognisable offences, then Indian police will have the power to arrest the accused without a warrant. Mr Goel explained there are some judicial decisions in India suggesting police have a duty to arrest the accused once an FIR has been registered. Although there is now some ambiguity around the point, his evidence was that in most cases police will arrest the accused once the FIR is registered.

[120] If the offence falls within another category of offences, known as non-bailable offences, the Indian police are required to produce the accused before the competent court within 24 hours. A magistrate then determines bail. It is only after this appearance the India police commence an investigation into the allegation. If upon investigation it appears there is sufficient evidence or reasonable grounds to justify prosecuting the accused, the Indian police forward another report, known as a charge

---

[68] I note, however, Mr Navkiran Singh, the plaintiff's expert on Indian law, gave evidence the social media posts by the Bengaluru City Police were made before the FIR was recorded and contained substantially more detailed and serious allegations against Ms Driver than were outlined in the FIR.

sheet, to a magistrate. It is the magistrate who decides, after examining the charge sheet and hearing from the accused, whether to charge the accused with an offence. If the magistrate considers the charges to be "groundless", the magistrate will discharge the accused.

[121] Mr Goel also explained the Indian criminal justice system follows a more open process than New Zealand's. There is no ability to grant name suppression in the general run of cases and the media can report freely on criminal proceedings from their inception, including pre-trial matters and the registering of an FIR. The ability to report on any stage of a criminal trial is considered an important part of the right to freedom of speech, guaranteed under art 19(1)(a) of the Constitution of India.

[122] The primary offence for which Ms Driver was arrested was "cheating and dishonestly inducing delivery of property", a cognisable, non-bailable offence.[69] She was formally arrested in the early hours of 4 December 2014, after the recording of an FIR by the lead officer who entered her hotel room the previous evening. Ms Driver was brought before a magistrates court later that day and remanded in judicial custody. On 6 December 2014, Ms Driver was transferred to police custody for interrogation. By 15 December 2014, police had not recovered any incriminating evidence, so Ms Driver was transferred back to judicial custody. She was released on bail on 24 January 2015.[70] A charge sheet was not filed by the Indian police until April 2016. When Ms Driver appeared before the magistrate court on 16 April 2016, she sought to be discharged. After numerous delays, although I am informed not more than would be expected,[71] Ms Driver was eventually discharged on 13 December 2016.

[123] As will be evident, the criminal procedure followed in India is very different from that in New Zealand. The courts become involved at a much earlier stage and the process is more public than in New Zealand. These factors point away from a person arrested in India enjoying a reasonable expectation of privacy until they are

---

69 Indian Penal Code, s 420. The offence broadly corresponds to the offence of obtaining by deception under s 240 of the Crimes Act 1961.

70 Although I note Ms Driver says she was granted bail much earlier, on 17 December 2014, but never informed of this fact by the lawyer assigned to her.

71 In fact, Mr Goel's evidence was that Ms Driver's case was dealt with more expeditiously than would be expected for an Indian national in her situation.

charged with an offence. Put another way, the formulation of a charge appears to assume a lesser significance in the Indian criminal justice system.

[124] There may, however, be some force in the argument that the privacy tort exists to protect values and interests recognised in the context of New Zealand's social and cultural norms and that a New Zealand citizen, even when travelling or living abroad, is entitled to expect the New Zealand media and other people or institutions in this country to respect those interests irrespective of differing norms or procedures in the country where the events take place. The proposition is reasonably arguable. In other words, it is reasonably arguable that an expectation of privacy should be determined in the context of its publication (which occurred in New Zealand) rather than in the context of the events that were publicised (which occurred in India). In the circumstances of this case, that might mean placing greater emphasis on the fact the plaintiff had not been charged than the fact she had been arrested when considering whether she had a reasonable expectation of privacy. This is a novel point and was not the subject of submissions before me. It would be necessary to address this at trial.

*Was any reasonable expectation of privacy lost following widespread publicity in the Indian media?*

[125] The defendants argue any reasonable expectation of privacy was lost by the stage they published their respective stories about the plaintiff on 8 and 9 December 2014. The Bengaluru City Police publicised details of the allegation against Ms Driver on its Facebook and Twitter accounts and her arrest was widely reported on by Indian media, including on television and in *The Times of India*, a national newspaper with a readership of around 2.8 million.

[126] The defendants refer to McGrath J's remark in *Television New Zealand Ltd v Rogers* that "[f]or there to be a reasonable expectation of privacy in relation to a fact it cannot be known to the world at large at the time of publication".[72] However, the learned authors of *Todd on Torts* recognise that sometimes a question of degree may be involved.[73] In *TV 3 Network Broadcasting Ltd v Broadcasting Standards Authority*, Eichelbaum CJ held that information known to a small group of people present in a

---

72 *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [100].
73 *Todd on Torts*, above 14, at 994.

courtroom may retain a degree of privacy.[74] Similarly, in *OGB Ltd v Allan*, Lord Nicholls said "[p]rivacy can be invaded by further publication of information or photographs already disclosed to the public".[75]

[127] The mischief the privacy tort aims to address is the denigration and embarrassment caused to an individual whose private life is intruded upon, including by unwarranted publicity. Conceivably, therefore, the privacy tort can accommodate varying levels of publicity, such that a person may enjoy a reasonable expectation that private facts known to some individuals will not be shared with everyone else. Many private facts about an individual will usually always been known by close friends and family, while other private facts might be known by the community in which the person lives and works but will not be known to the world at large. An invasion of privacy (of the *Hosking v Runting* variety) is characterised by the spreading of the private information outside the circle of people already aware of it.

[128] In my view, it is reasonably arguable an invasion of privacy could occur when publicity given to private information is increased by an order of magnitude. Local news reporting on an internal workplace matter or national media attention given to an article in a student magazine could be examples. Another example might be international media attention given to the domestic news of another country, as happened here. In each case, vast numbers of people who otherwise might never had known about the private facts in question have the facts drawn to their attention, creating fresh humiliation for the claimant. Arguably, if Ms Driver can establish she otherwise had a reasonable expectation of privacy, she might also reasonably have expected she would not be identified to the New Zealand public even though different rules might apply in India. In other words, it is not untenable for Ms Driver to argue the New Zealand media ought not be able to "coat-tail" on publicity in a foreign jurisdiction when that same publicity would constitute an invasion of privacy had it occurred in New Zealand.

---

74 *TV 3 Network Broadcasting Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 (HC).
75 *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [255].

[129] Although there was evidence before me of the vast readership enjoyed by the Indian newspapers in which Ms Driver's arrest was publicised, there was no evidence of the extent to which the New Zealand public would have been aware of articles appearing in those newspapers. That may be a matter the defendants could explore at trial.

*Highly offensive threshold*

[130] The application of the second limb of the privacy tort to the plaintiff's claim also raises a novel question: to what extent is the way in which private facts are presented relevant to the question whether a reasonable person would find their publication highly offensive?

[131] In support of her position, the plaintiff emphasises the fact the defendants' publications were, she says, defamatory, unnecessarily sensational and factually incorrect. In particular, she takes issue with the reports that she had been charged with an offence and had confessed. Ms Driver also objects to the description of the allegations against her, which included references to her involvement in a "Ponzi scheme", the claim she was the "Asia-Pacific head" of an international organisation and suggestions she had fraudulently obtained more than $10 million. These details were not contained in the FIR, although the social media posts by the Bengaluru City Police did refer to Ms Driver as the Asia-Pacific head and that she personally collected more than 500 million rupees. The reference to Ms Driver's supposed confession appears to have originated in the Indian media.

[132] Privacy actions are generally in respect of true facts. In *A v Hunt*, Wild J said:[76]

> … a necessary aspect of the privacy tort is that the impugned, highly offensive fact is just that: a fact. That is what distinguishes the privacy tort from defamation.

[133] But it might not always be so simple. A single publication, or even a single statement, may contain any number of true and false facts in combination. This case serves to illustrate the point. While it was true Ms Driver had been arrested, it was not true she had confessed.

---

[76] *A v Hunt* [2006] NZAR 577 (HC) at [58].

[134] I have already referred to the distinction drawn by Gault P and Blanchard J between privacy and defamation.[77] The nature of the plaintiff's evidence and the progression of her claims reflect her desire to bring her reputation into play vis-à-vis the false aspects of the media reports.[78] The defendants have some cause to be concerned the plaintiff's privacy claim blurs the line with defamation. As the learned authors of *Todd on Torts* explain:[79]

> The rules of defamation have been worked out over centuries of judicial decision to achieve the right balance between reputation and freedom of speech, and one would not want plaintiffs electing to sue in privacy to avoid the application of those rules.

[135] That said, I do not consider the plaintiff's claim to be an abuse of process. The interests protected by privacy law are distinct from those protected by the law of defamation. Regardless of her motivation in bringing this action, the plaintiff is entitled to pursue her claim that she suffered an invasion of privacy. Accordingly, it is necessary to consider the extent to which defamation-related principles may be utilised when assessing whether a publication is highly offensive.

[136] In this regard, *Todd on Torts* concludes:[80]

> So a possible position is that if a false statement is made which injures reputation the proper action is defamation, whereas if a false statement results in distress or humiliation rather than injury to reputation invasion of privacy is the appropriate cause of action. Examples might be false statements about a person's state of health, sexuality, or domestic relationship. Even then, however, exceptions may have to be made where false allegations are not clearly severable from true ones. One wonders whether such reasoning may not eventually lead to something like the United States "false light" tort.

[137] The United States false light tort is one of four manifestations of the privacy action described by William Prosser.[81] Only two of those manifestations have thus far been adopted in New Zealand law: publicity given to private facts (*Hosking v Runting*) and intrusion upon seclusion (*C v Holland*).[82] It may be cases under the false light tort in the United States could inform the development of the privacy tort in this country

---

77 See [110] above.

78 This is a distinct reputational interest from that discussed at [110]–[113] above, which concerned the true aspects of the reporting.

79 *Todd on Torts*, above n 14, at 1013.

80 At 1013.

81 See *Hosking v Runting*, above n 42, at [66].

82 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

in relation to publications containing a mixture of true and false private facts. An example from the United Kingdom that bears some analogy to the present case is *Mosley v News Group Newspapers Ltd*, where the *News of the World* published an article concerning a sadomasochistic orgy, falsely suggesting it was Nazi-themed.[83]

[138] I am satisfied it is reasonably arguable the defendants' publications were highly offensive. As Thomas J said in *Henderson v Walker*, it is not just the nature of the private information but also the "circumstances and extent of the publication" that are relevant to determining whether the reasonable person would consider publication highly offensive.[84] Whether consideration of the circumstances of publication extends to inaccurate or embellished reporting is an open (and novel) question not to be summarily dismissed. Quite apart from the possible relevance of the false and sensational aspects of the media reports, an argument that the publicity given to the true aspects of the reports was highly offensive in any event, is not untenable. The scale of publication was large — to a national audience over at least a two-day news cycle, and the allegations were serious and likely to cause significant distress if publicised in connection with the plaintiff's identity.

**Footage of Ms Driver's reaction to being confronted with the allegations in her hotel room**

[139] The initial entrance of Indian police into Ms Driver's hotel room on the evening of 3 December 2014 was recorded on camera and later played by the Indian media. The plaintiff claims the third and fifth defendants (Television New Zealand and Sky Network Television) invaded her privacy by broadcasting this video footage. The footage shows an Indian police officer saying, "We got information that you are doing some illegal business here", to which Ms Driver replies, "No". The video continues as an officer explains the allegations to Ms Driver in Hindi. Ms Driver appears in a shocked and distressed state.

[140] Given my conclusions in relation to the claim based on the publicity given to the allegations against Ms Driver, I am satisfied it is reasonably arguable she had a reasonable expectation of privacy in relation to this video footage. The arguments in

---

83 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).
84 *Henderson v Walker*, above n 51, at [206].

favour of the plaintiff are even stronger in relation to this footage because it not only involved the allegations against Ms Driver but displayed her reaction to those allegations in real time. In *Television New Zealand Ltd v Rogers*, McGrath J said:[85]

> [101] It is well recognised that, in general, photographic images may contain significantly more information than textual description. This is especially so with sequential images on a videotape which will often portray graphically intimate and personal details of someone's personality and demeanour. …

[141] McGrath J cited in support the remark of Lord Phillips MR in *Douglas v Hello! Ltd (No 3)* that an image "intrudes on privacy by enabling the viewer to focus on intimate personal detail".[86]

[142] Ms Driver may arguably have enjoyed a reasonable expectation of privacy in the moment of this confrontation even if she had no such reasonable expectation in relation to the fact of her arrest. Her arrest may have been one of the most significant, or at least consequential, moments of Ms Driver's life. How she reacted in that moment was likely to be intensely personal. The fact this footage was taken in her private hotel room bolsters the plaintiff's case.

[143] I am also satisfied the plaintiff has a reasonably arguable case a reasonable person in her situation would find publication of this footage to be highly offensive. The defendants submitted there was nothing offensive in the footage as Ms Driver conducted herself respectably and denied the allegations. But, as Thomas J explained in *Henderson v Walker*, it is the publicity, not the private facts, that must be highly offensive.[87] It is possible the combination of the intensely personal nature of the moment, the intimate detail provided by video footage and the widespread nature of the publicity (to a national audience in news media) could meet the highly offensive threshold.

---

85 *Television New Zealand Ltd v Rogers*, above 72 (footnote omitted).
86 *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125 at [105].
87 *Henderson v Walker*, above 51, at [206].

**Passport details and residential address**

[144] When the Bengaluru City Police issued its public statement on social media, it included a photograph of Ms Driver's passport and her residential address in New Zealand. In its article initially breaking the story in New Zealand, the second defendant (Stuff) included a hyperlink to the Bengaluru City Police Facebook post containing the passport and address. The plaintiff claims this was an invasion of her privacy.

[145] I am satisfied this claim should be struck out. While it is possible Ms Driver had a reasonable expectation of privacy in the personal details contained in her passport and her address, I am satisfied no reasonable person would find the publication of those details by Stuff to be highly offensive. While those details might be personal, there is nothing embarrassing about them. A reasonable person might fairly be perturbed by the release of such details, and may legitimately be fearful of identity theft, but would unlikely be distressed by the nature of the publicity given to them by Stuff. The details did not feature in the body of the article and were only visible if the reader followed the hyperlink provided to the Facebook post. Ms Driver could take comfort in the fact a far smaller group of New Zealanders would have seen this information, reducing the scale of the publicity. Importantly, this was not a claim against the Bengaluru City Police.

**Reaction of Ms Driver's family to her arrest**

[146] Finally, the plaintiff claims the third defendant, Television New Zealand, invaded her privacy by publishing her family's reactions to her arrest. The plaintiff could have no reasonable expectation of privacy in the reactions of her father and Ms Way. Any privacy they had in their reactions was not hers to protect. Privacy has been described as a dignitary tort, much like the various forms of trespass to the person.[88] A quintessential feature of such actions is that they are intensely personal. A person can bring an action only for conduct towards her or him, as the wrong is

---

[88] Nicole Moreham "Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort" in Jeremy Finn and Stephen Todd *Law, Liberty, Legislation*: *Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008) at 234 and 243–244.

directed to her or his autonomy and dignity. Ms Driver had no legal interest in the privacy of her family members.

[147] In any event, both Mr Driver and Ms Way consented to being interviewed on the record by Television New Zealand, although both requested not to be filmed. That request was honoured by Television New Zealand. Moreover, on her own behalf and on behalf of Mr Driver, Ms Way wrote to the reporter after the broadcast to thank him for the way the story was presented. In those circumstances, Mr Driver and Ms Way could have no reasonable expectation of privacy and the publications could not be considered highly offensive. Accordingly, this claim shall be struck out.

**Result**

[148] In relation to the claims in defamation:

(a) all publications attributed to the first to fourth defendants were reasonably discoverable before 25 May 2015, and the publications attributed to the fifth defendant were reasonably discoverable before 20 July 2015;

(b) less than minor harm to the plaintiff's reputation arose from the publications remaining online after 25 May 2015;

(c) the limitation period for money claims applies by analogy to the plaintiff's claims for a declaration under the Defamation Act;

and therefore, all claims in defamation are struck out.

[149] The plaintiff's claims for invasion of privacy based on publication of passport details and residential address, and the reactions of members of her family to her arrest, are struck out.

[150] In relation to the claims for invasion of privacy based on publication of the fact of Ms Driver's arrest and the video footage of her being confronted in her hotel room, the application to strike out is dismissed.

Karen Clark J

Solicitors:
Langford Law, Wellington for Plaintiff
Oakley Moran, Wellington for First Defendant
Izard Weston, Wellington for Second Defendant
LeeSalmonLong, Auckland for Third Defendant
Chapman Tripp, Wellington for Fourth Defendant
Buddle Findlay, Auckland for Fifth Defendant