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

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

**CIV-2021-485-527**
**[2022] NZHC 1403**

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| BETWEEN | IAN ADAMSON<br>Plaintiff/Respondent |
| AND | HUTT VALLEY DISTRICT HEALTH BOARD<br>First Defendant/First Applicant |
| | SHELLEY JAMES<br>Second Defendant/Second Applicant |

Hearing: 10 June 2022

Appearances: Plaintiff in person
S B McCusker for First and Second Defendants

Judgment: 15 June 2022

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**JUDGMENT OF ASSOCIATE JUDGE JOHNSTON**

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[1] Before the Court for determination is an application pursuant to r 15.1 of the High Court Rules 2016 for an order striking out the plaintiffs' defamation proceeding. In the alternative, the defendants seek an order pursuant to r 5.45 for security for costs. The grounds upon which the first of those applications is made is set out as follows in the notice of application:

> 2.1 The plaintiff's statement of claim is not compliant with the requirements of s 37 of the Defamation Act 1992 as it does not provide particulars of any alleged defamatory meaning, and cannot properly be pleaded to;
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> 2.2 The proceedings either disclose no reasonably arguable cause of action and/or are an abuse of process because:

(a) the cost of litigation will be disproportionate to any indication which might be achieved by allowing this claim to proceed; and/or

(b) any alleged defamatory statement, even if proved, would cause less than minor harm to the plaintiffs' reputation; and/or

(c) the defence of qualified privilege is clearly applicable to the facts alleged.

2.3 The plaintiff's claim is vexatious and/or an abuse of process in that it is part of a series of related defamatory proceedings initiated by the plaintiff which has been struck out by the Court as being an abuse of its processes.

[2] The plaintiff's notice of opposition is only remotely responsive to the application, but at least makes it clear that the defendants' applications are opposed.

[3] At the centre of this case is a young child by the name of Alice who has serious health problems.[1] In a judgment dated 24 September 2021 Cooke J set out the factual background in detail, describing the nature of the concerns about Alice's health, and the medical attention that she had had to date.[2] In that judgment, Cooke J dismissed an appeal from the Family Court by the plaintiff in this proceeding and Alice's mother, Ms Kate Jones, who is also the plaintiff's daughter. The plaintiff is therefore Alice's maternal grandfather.

[4] For present purposes, it is unnecessary to traverse that background again. It is enough to say that by early 2020 the first defendant's hospital based in Lower Hutt City was treating Alice for failure to thrive. By that stage, the Family Court had made orders conferring overarching responsibility for Alice on Oranga Tamaki and providing for her paternal grandparents to have day-to-day care of her.

[5] It seems that the DHB and the responsible clinicians had reached the view that appointments for Alice were more productive when the plaintiff, her maternal grandfather, was not present. Whether that determination was correct or not is not in issue in this application.

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1 The names of the plaintiff, and parties associated with the plaintiff have been changed so as to protect Alice's identity, and right to privacy. The anonymisation in this judgment is that adopted in Cooke J's judgment referred to below, pursuant to s 437A of the Oranga Tamariki Act 1989, and ss 11B, 11C and 11D of the Family Court Act 1980.

2 *Adamson v Chief Executive of Oranga Tamariki* [2021] NZHC 2530 at [21].

[6] The DHB arranged an appointment for Alice on 16 August 2021. That appointment was discontinued by the DHB when it became apparent that the plaintiff proposed to attend or was attending with Ms Jones and Alice.

[7] A month later on 14 September 2021, the DHB's Service Manager, Women's and Children's Health, the second defendant, Shelley James, replied to an email from Ms Jones enquiring as to why the appointment had not taken place. As the plaintiff pleads in his statement of claim, Ms James' response included this paragraph:

> In our experience to date the presence of your parents at multiple previous clinical encounters has resulted in conflict arising among the adults present and has also frequently led to protracted discussion during limited clinical time. In our view their presence is likely to impede a safe, productive, and timely clinical review and have a detrimental impact on the wellbeing of [Alice] by exposing her to inappropriate conflict and an extended adult discussion. Oranga Tamariki has also expressed concerns that the presence of your parents may compromise the caregivers' ability to provide pertinent information to Dr Reid.

[8] Whilst Ms James sent that email only to Ms Jones, when Ms Jones replied later the same day, taking issue with what the DHB was saying, she copied her reply to Mr Adamson, the Parliamentary Ombudsman's office and a number of Cabinet Ministers.

[9] In this proceeding, Mr Adamson alleges that Ms James' email was defamatory of him, and seeks damages of $500,000.

[10] Against that background, the DHB and Ms James move to strike out the claim on the grounds already described.

[11] I pause there to make the obvious point that Ms James' email was published only to Ms Jones. To the extent that it was published any further that was done by Ms Jones.

[12] Accordingly, the Court must approach this matter on the basis that publication at the behest of the DHB and Ms James was only to Ms Jones.

[13] The principles governing applications pursuant to r 15.1 of the High Court Rules are well settled.[3] Because, under that rule, the Court is exercising a discretion summarily to dispose of a claim, the courts have consistently said that the jurisdiction is to the exercised sparingly, and only in cases where the position is clear. The courts approach the analysis in any given case on the basis that the party whose pleading is under attack will be able to prove the facts that he or she has pleaded and on which he or she relies.[4] On that basis, the courts ask whether the claim is reasonably arguable (or whether it is frivolous or vexatious).

[14] I turn then to the grounds upon which the DHB and Ms James move for an order striking out the claim.

[15] The first of these is that Mr Adamson's statement of claim is not compliant with s 37 of the Defamation Act 1992 which provides as follows:

> **37 Particulars of defamatory meaning**
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> (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.
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> (2) Where the plaintiff alleges that the matter that is the subject of the proceedings is defamatory in its natural and ordinary meaning, the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself.
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> (3) Where the plaintiff alleges that the matter that is the subject of the proceedings was used in a defamatory sense other than its natural and ordinary meaning, the plaintiff shall give particulars specifying—
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> (a) the persons or class of persons to whom the defamatory meaning is alleged to be known; and
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> (b) the other facts and circumstances on which the plaintiff relies in support of the plaintiff's allegations.

[16] As at the date of the defendants' application the extant statement of claim was the original document dated 21 September 2021. That statement of claim at least had

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3 See *Couch v Attorney General* [2008] NZSC 45; and *Attorney General v Prince* [1998] 1 NZLR 262.

4 *Pharmacy Care Systems Ltd v Attorney-General* CA27/01, 11 October 2001; (2001) 15 PRNZ 465.

the merit of brevity. Excluding the cover sheet it ran to little more than a page. There is no doubt, however, that it was non-compliant with s 37 (1) and (2). It contained no analysis of the impugned email so as to identify what aspects of it are alleged to be defamatory, and no attempt was made to particularise the defamatory meaning that the plaintiff alleges the email, or any particular passage or passages, carry.

[17] This is not a mere technical irregularity. It is fundamental. Unless the plaintiff in defamation proceeding identifies the material about which he or she complains, and pleads the meaning that he or she says this material carries, it is impossible for the defendant to know the case that must be met and plead meaningfully to the allegations made.

[18] With his written submissions in relation to this application, Mr Adamson filed and served an amended statement of claim. This is a lengthier document. However, it takes matters no further in terms of the s 37 requirements. In this regard, it is as unhelpful as its predecessor.

[19] In my view, this, in and of itself, would constitute a proper ground for striking the proceeding out, especially having regard to the fact that the defendants, before making this application, a request made by the defendants for further particularisation of the claim appears to have been ignored. However, at least prior to the expiry of any relevant limitation date, the courts generally acknowledge that a litigant, especially an unrepresented litigant, should have an opportunity to amend inadequate pleadings. Were this the only issue, I would be inclined to give Mr Adamson such an opportunity. In this case, however, that is dependant on the other limb of the application, to which I now turn.

[20] The second and more difficult aspect of the application relates to whether the proceeding — even if it were properly pleaded — should be allowed to go on at all.

[21] In relation to this Mr McCusker drew my attention to two English cases in which defamation proceedings were struck out on interlocutory applications at an early stage.

[22] Here is how Mr La Hood described those cases:

> 18. Two mechanisms have been developed by the Court to deal with trivial defamation claims, reflecting similar advancements in United Kingdom defamation law:
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> 18.1 **The *Jameel* principle.** Based on the decision of the England and Wales Court of Appeal in *Jameel v Dow Jones & Co Ltd*, and as applied by this Court, the Court may strike-out defamation proceedings as an abuse of process even where there is a reasonably arguable cause of action because the costs of litigation are disproportionate to whatever benefit or vindication might be achieved.
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> 18.2 **The minimum threshold**. Based on the decision of the England and Wales High Court in *Thornton v Telegraph Media Group Ltd*, a claimant must satisfy a minimum threshold of seriousness for any defamation claim to be actionable. In *Sellman v Slater*, Palmer J acknowledged that in "extreme circumstances" an otherwise actionable claim could be struck out as disproportionate on the basis of the *Jameel* principle, but preferred the approach taken in *Thornton*. On this formulation, a defendant can defeat a defamation claim by showing that their statement caused "less than minor harm" to the plaintiff's reputation.

(Footnotes omitted)

[23] Both of *Jameel*[5] and *Thornton*[6] have been applied in this Court, although neither has been as yet considered in any detail at appellate level as far as I am aware.[7]

[24] In a helpful article relating to the application of these two lines of authority in this country, Emma Croskery identifies the distinction between them.[8] As she argues, the *Thornton* case proceeded on the basis that the Court should strike out cases in which the allegedly defamatory material could not be said to have a tendency to cause reputational harm. The *Jameel* case on the other hand is an authority for the proposition that the Court will strike out cases where it is clear that it would result in a disproportionate drain on resources because no real substantial tort has been committed.

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

6 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, [2011] 1 WLR 1985 (QB).

7 See *Lau v ACP Media Ltd* [2013] NZHC 1165; *Opai v Culpan* [2017] NZHC 1036; *X v Attorney-General* [2017] NZHC 1136; *Sellman v Slater* [2017] NZHC 2392; *Craig v Stiekama* [2018] NZHC 838; *Driver v Radio New Zealand* [2019] NZHC 3275; *Craig v Slater* [2020] NZCA 305; and *Craig v Stringer* [2020] NZCA 260.

8 Emma Croskery "A Principled Approach to Defamation Claims in New Zealand: Untangling the Harm Threshold" (2019) 50 VUWLR 33.

[25] Ms Croskery continues:[9]

> Track one only looks at the meaning of the words published, and deals with claims which are not actionable because the meaning of the publication does not meet the required standard of seriousness to be defamatory. Conversely, track two refers to prima facie actionable claims, the pursuit of which would be a disproportionate drain on court resources due to external evidence which proves the lack of a real and substantial tort.

[26] Whilst acknowledging the different starting points of the two cases, for myself I am inclined to agree with the view expressed by Fitzgerald J in *Craig v Stiekema* that the *Thornton* and *Jameel* approaches, whilst clearly distinguishable, are part of a larger picture.[10]

[27] As already said, both of these English cases have been applied in this Court, and whilst previous High Court cases are not binding, they are persuasive. I accept the submission made on behalf of the DHB and Mr James by Mr McCusker that *Thornton* and *Jameel* should be regarded as applying in this country.

[28] Here is how I would be inclined to view their application:

(a) as a starting point, it is helpful to acknowledge the context in which the Court is likely to be considering their application. Generally, the analysis will arise in the context of an application inviting the Court summarily to dispose of a claim — in an application for an order striking out a claim pursuant to r 15.1 of the High Court Rules, an application for summary judgement pursuant to pt 12, or possibly a defendant's application to dismiss a plaintiff's claim after the close of the plaintiff's evidence at trial (though, nowadays, such applications are very rarely encountered);

(b) in any such application there will be at least two broad clashes of principle. At the procedural level there will be a clash between the right of any party to come to the Court whatever the merits of the claim or defence as the case may be, and the Court's entitlement to insist on

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9 At 34.

10 *Craig v Stiekema* [2018] NZHC 838 at [51].

managing its own processes and ensuring that resources are not wasted for no good reason. At the substantive level the clash is between the plaintiff's right to protect his or her reputation and the defendants' corresponding right of free speech. Bearing in mind the importance of the principles involved in both of these areas, the Court will unquestionably exercise the right summarily to deal with a proceeding sparingly;

(c) against that background, it can readily be seen that the principles behind *Thornton* and *Jameel* fit within a broader framework. The overarching question is whether the plaintiff's case is one which the Court, exercising its jurisdiction to control its own processes, should permit to go to trial. In examining that question — in any of the three contexts referred to above — the Court will need to ask — amongst other questions — whether the publication about which the plaintiff complains is one that goes to reputational damage, and if so whether the apparent damage in the case under consideration is sufficiently material to justify the resources that will be involved in a defamation trial or whether on the other hand the damage is so vanishingly small as to justify the Court moving summarily to dismiss the claim. In *Stiekema*, Fitzgerald J referred to either approach, and considered that the result in that case would be the same regardless of which principle was applied.[11]

[29] In my judgment, the same can be said here The view I take is that Mr Adamson's claim is not reasonably arguable and must be dismissed. In reaching that view I have had regard to the following matters discussed below.

[30] As already said, the claim in its current iteration is not pleaded in accordance with the requirements of the Defamation Act 1992.

[31] Assuming as I must that Mr Adamson's complaint concerns the entirety of the paragraph quoted in his statement of claim, it seems to me that at the very most the

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11 At [52].

meaning that can be drawn from that paragraph is that Mr Adamson's involvement in a clinical examination of his granddaughter has in the past and is likely to be in the future unhelpful from the perspectives of the hospital, the clinicians and Alice as it has and may give rise to conflict.

[32] I accept that, viewed in isolation, that is something that is capable of having an adverse impact on Mr Adamson's reputation, though I would add that any such impact is likely to be minimal.

[33] However, as already emphasised, the evidence is that the DHB and Ms James only published the email to Mr Adamson's daughter, Ms Jones, who was already well aware of the views held by the DHB as to Mr Adamson. As such, the letter itself was not capable of having any serious impact. There is no evidence that would suggest that it was reasonably foreseeable that the email would be further published by Ms Jones. Her further publication of it is in my view not something for which the DHB or Ms James can be held responsible. On that basis, in my assessment, if any reputational damage was caused by the DHB and Ms James publishing the email, it was vanishingly small. Any further damage was caused by Ms Jones' further publication of it.

[34] In any event, it seems to me that the defence relied on by the DHB and Ms James that the latter's email to Ms Jones was published in a situation attracting qualified privilege is unanswerable. Lord Atkinson described this defence in these terms:[12]

> A privileged occasion is…an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

[35] Ms James' email clearly a response to a request for an explanation by Ms Jones (though her request is not before the Court). There would seem to me to be no doubt that the DHB and Ms James had a duty to respond, and Ms Jones had a corresponding interest in receiving a response. In my view, the response was an attempt, honestly

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[12] *Adam v Ward* [1917] AC 309 (HL) at 334; cited in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [16.11.01].

and in temporate terms, to explain the position. Despite Mr Adamson's accusations to the contrary, there is no evidence before the Court which would suggest that there was any malice that would undermine a plea of qualified privilege.[13] As I say, in my view, the communication was clearly covered by qualified privilege and thus not actionable.

[36] Even putting those matters to one side, the amount of harm that the email appears to me to be capable of doing to Mr Adamson's reputation is modest. It is quite plain that Mr Adamson is a committed grandparent and genuinely concerned about Alice's health, and throughout has been doing what he regards as discharging his responsibility to her. For it to be said that his presence at an appointment is not conducive to the most successful outcome is a criticism that appears to me to fall into the category of criticisms that all of us must endure from time to time — accordingly, if Mr Adamson were to be successful in his claim, it seems to me to be inconceivable that he would recover anything other than nominal damages. Plainly that renders allowing the matter to proceed a disproportionate drain on resources in terms of the *Jameel* principle.

[37] For those reasons, I make an order striking out this proceeding pursuant to r 15.1 on the ground that the claim cannot succeed.

[38] It is unnecessary, therefore, to address the defendants' alternative application for an order for security for costs.

[39] As to costs, my preliminary view is that, the defendants having been successful in their application, they are entitled to a costs award on a 2B basis. However, not having heard from counsel or Mr Adamson as to costs, I reserve them. If the parties are unable to agree on costs, they may come back by memorandum in the usual way.

Associate Judge Johnston

Solicitors:
Luke Cunningham Clere, Wellington for first and second defendants/applicants

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13 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [16.11.03].