IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-3091
[2022] NZHC 1727

UNDER	the Defamation Act 1992
BETWEEN	KRISTIN PIA CATO Plaintiff
AND	MANAIA MEDIA LIMITED First Defendant
	ROWAN DIXON Second Defendant
	JANE THOMPSON Third Defendant

Hearing:	14 July 2022
Appearances:	R Butler and D Nilsson for Plaintiff F King and R Che Ismail for Defendants
Judgment:	19 July 2022

JUDGMENT OF WOOLFORD J
[Re: Admissibility of part of Hood brief]

This judgment was delivered by me on Tuesday, 19 July 2022 at 4:00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:	Lee Salmon Long, Auckland McKenna King Dempster, Hamilton
Counsel:	S Mills QC, Auckland R Butler, Auckland

[1] The plaintiff is a barrister. She alleges the defendants defamed her in a magazine article, by suggesting she had breached her professional ethical obligations. A jury trial is set to begin on 1 August 2022.

[2] The plaintiff will lead expert evidence from barrister Paul Collins. Mr Collins will say that, in the eyes of the legal profession, such allegations are serious.

[3] On 31 March 2022, Campbell J dismissed a challenge to the admissibility of this evidence, but granted the defendants leave to serve a response. The defendants then served a brief of evidence from Samuel Hood dated 24 May 2022.

[4] The plaintiff now claims certain passages from Mr Hood's evidence are inadmissible.

Background

[5] The plaintiff acted in a mediation. The parties to the mediation reached a settlement, which included the release of an agreed statement. The plaintiff released the agreed statement to two equestrian media outlets, but not to NZ Horse & Pony, a magazine published by the first defendant and edited by the second defendant. The second and third defendants then co-authored an article on the dispute, titled *What goes on tour, doesn't stay on tour*. The plaintiff alleges the article suggested she had released the agreed statement without instructions and authority, and "practically exclusively" to a website operated by her mother.

[6] The plaintiff sought to bring expert evidence from a barrister, Mr Collins, on the likely effect on the plaintiff if a professional authority found the allegations against her to be true. Campbell J found this evidence to be irrelevant, as the plaintiff had not been found guilty of misconduct by a professional body, nor was this a pleaded meaning of the article.[1] He granted the plaintiff leave to file a replacement brief of evidence from Mr Collins. In the replacement brief, Mr Collins explained how a professional disciplinary body would deal with the allegations, because professional standards, and the consequences of breaching them, reflect the collective views of the

1 *Cato v Manaia Media Ltd* [2021] NZHC 2299 at [92].

legal profession, and so serve as a proxy for the harm to the plaintiff from the pleaded meanings.[2]

[7] Campbell J found the replacement evidence admissible, as it focussed on the effect of the pleaded meanings rather than a hypothetical finding of misconduct.[3] He also extended the time for the defendants to serve a brief of evidence in reply.[4]

[8] The defendants then served the brief of evidence of Mr Hood. The essence of Mr Hood's evidence is that, although the allegations of misconduct are serious, lawyers would treat them with "great scepticism".

[9] Mr Hood set out his expertise on this subject:

> I feel qualified to give this evidence because of my experience in the legal profession. I have interviewed, supervised, trained and mentored hundreds of lawyers, ranging from law graduates through to lawyers with more than 35 years of professional experience. In the past four years alone, I have invested thousands of hours on career development and progression for lawyers of all levels of experience and understand the importance of 'reputation' to a lawyer's career trajectory and their sense of identity and self-esteem.

[10] The plaintiff objects to two passages from Mr Hood's evidence, one in paragraph [11], and all of paragraphs [28]–[47].

Paragraph [11]

[11] At [11] of his brief, Mr Hood says:

> **While I hold a view on this**, **I do not consider I can comment on whether the meanings in the Article do hold a defamatory meaning**, because that is outside of my role as an expert witness. Instead, I will confine my evidence to the question of the potential impact of the defamatory statements on the plaintiff's reputation on specific classes of people if it is found they do hold that meaning.

[12] The plaintiff submits the statement in bold (the statement) is inadmissible. Firstly, the mere fact that Mr Hood has an opinion on whether the article is defamatory is irrelevant, and unfairly prejudicial as it invites the jury to speculate on what

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2 *Cato v Manaia Media Ltd* [2022] NZHC 644 at [20] and [21].
3 At [34].
4 At [47].

Mr Hood's opinion might be. This prejudicial effect clearly outweighs the statement's probative value, which is non-existent.

[13] If the statement indicates to the jury what Mr Hood's opinion is, the plaintiff submits evidence of the meaning of a defamatory statement is inadmissible. The plaintiff cites *Hough v London Express Newspaper*, in which Goddard LJ said:[5]

> In the case of words defamatory in their ordinary sense the plaintiff has to prove no more than that they were published: he cannot call witnesses to prove what they understood by the words; nor will it avail the defendant to call any number of witnesses to say that they did not believe the imputation. The only question is, might reasonable people understand them in a defamatory sense?

[14] This approach was adopted in New Zealand in *New Zealand Magazines Ltd v Hadlee (No 2)*:[6]

> If the matter proceeded to trial it might be that the plaintiff would give evidence asserting that Ms McNaught's denial of their ever having met was untrue. As well, the Court had no evidence that at a trial Ms McNaught would maintain her denial of meeting Lady Hadlee.
>
> With respect to the Judge, such speculations on the future course of evidence, and they can be no more that that, are inappropriate. Any such evidence could not be relevant since whether particular words are capable, as a matter of law, of bearing a defamatory meaning is to be determined exclusively by an examination of the words themselves and where an ordinary meaning goes to a jury it will be without further evidence of whether the words would reasonably be understood in a defamatory meaning: *Gatley on Libel and Slander* (8th ed, 1981) para 1316. In deciding whether words are capable of bearing a defamatory meaning the Court examines what meaning is expressly stated therein or can reasonably be inferred without looking at any surrounding material and without knowledge of further facts.
>
> …
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> Where, as here, a plaintiff claims a false innuendo, no further evidence is permitted on the meaning of the statement. Once the publication of the words is proved or admitted, the only relevant evidence at trial can be that directed to the question of damages. Accordingly, on the way in which this case is pleaded, the Judge was wrong to say that evidence as to whether Ms McNaught had or had not met the respondent would be admissible.

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5 *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 (CA) at 515; adopted in New Zealand in *Salmon v McKinnon* [2007] NZCA 516 in which the Court of Appeal held that such evidence was admissible in cases of "true innuendo" rather than plain defamatory meaning.

6 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 624, per Blanchard J; and 631, per Barker J.

[15] Finally, Mr Hood admits in the above passage that the statement is outside the scope of his role as an expert witness. The plaintiff therefore submits the statement is ordinary opinion evidence, which is prima facie inadmissible.[7]

[16] The defendants submit the words simply qualify Mr Hood's role and refine the scope of his evidence to the jury. Mr Hood makes clear to the jury that they should not consider his personal views.

Paragraphs [28]–[47]

[17] At paragraphs [28]–[47] of his brief of evidence, Mr Hood counters Mr Collins' conclusions that other lawyers and clients would consider the allegations serious, believe the plaintiff is not to be trusted, and avoid dealing with her as a result. Mr Hood begins by saying:

> [30] … I respectfully disagree. Lawyers are trained to critically assess information and examine both sides of any issue. This critical mindset is ingrained in how lawyers assess any information. Lawyers tend to not just simply accept a statement to be true or comprise all the relevant facts. Lawyers will naturally first consider various factors, including what I describe as the source, setting and seriousness.

[18] Mr Hood also explains the possible effect on Judges and clients.[8] He says:

> [41] Based on my experience, it is impossible to generalise the impact of the defamatory statements on the plaintiff's reputation in the minds of clients, given their diversity.
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> [42] At paragraph 29 of his brief, Mr Collins appears to place "sophisticated clients" in the same basket as judges and lawyers, in terms of how they would react to the defamatory statements.
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> …
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> [46] My opinion is that a sophisticated client would be more guided by general principles than a rigorous analysis that a lawyer would instinctively undertake.

[19] Overall, Mr Hood concludes:

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7 Evidence Act 2006, s 23.

8 The defendants note the plaintiff is a barrister, and her clients will largely contact her via an instructing solicitor.

> [47] In conclusion, my opinion is that the defamatory statements would not have the serious impact on the plaintiffs' reputation in the minds of lawyers that Mr Collins suggests. Any impact would be minimal because lawyers would likely to take the defamatory statements with a large grain of salt.

[20] The plaintiff submits that, despite Mr Hood's cautionary words on generalising clients at [41], Mr Hood proceeds to generalise lawyers in the passage. Though Mr Hood is a partner in a law firm, he is not an expert on how all lawyers think.

[21] Expert evidence must also be substantially helpful to the jury.[9] The plaintiff submits Mr Hood's evidence is not substantially helpful as it is unreliable.[10] This is because Mr Hood's opinions are based exclusively on his own experience. He cites no objective or independent basis for his opinions. The plaintiff analogises with evidence based on novel scientific techniques, which must have been tested, peer-reviewed and generally accepted. Mr Hood's evidence would fail all three criteria.

[22] Alternatively, the plaintiff submits Mr Hood's evidence is not substantially helpful as the jury is capable of coming to its own conclusions about how people, including lawyers, think. The plaintiff cites the following passage from the *Taula v R*:[11]

> [19] The jury did not need an expert to understand it was possible for a young person to be affected by marijuana and to have such sexualised dreams, and on occasions to have difficulty distinguishing between dreams and reality…
>
> [20] In our view, it is not substantially helpful for expert scientific evidence to be used to put forward a proposition about how people may think and act that a jury could itself already comprehend and weigh. This Court has held for example that to the extent memory is a matter of ordinary human experience, expert evidence about memory is not substantially helpful to a jury and so is inadmissible. A jury will know that cannabis can affect sleep, that young people can have sexualised dreams, and that on occasions dreams can be confused with reality. This sort of evidence can be distinguished from counterintuitive evidence where a jury might naturally assume the opposite inference to the proposition put forward by the expert.

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9 Section 25.

10 To be substantially helpful, expert evidence must cross a "minimum threshold of reliability"; *R v Calder* HC Christchurch T154/94, 12 April 1995; approved *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [42].

11 *Taula v R* [2016] NZCA 194 at [20].

[23] The defendants submit the plaintiff mischaracterises Mr Hood's evidence, which is primarily that, because of their training, lawyers would consider all available evidence before coming to conclusions about serious allegations.

[24] The defendants submit it is open to the Court to rely on *Myers v R*, a 2015 Privy Council case on appeal from Bermuda.[12] In that case, a police officer who had done extensive work with gangs was to give evidence on, among other things a "gang culture of reprisal". The Privy Council noted each case will turn on its facts:[13]

> The particular issues which may arise when a new scientific theory is advanced do not arise here. But the officer must have made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact… But care must be taken that simple, and not necessarily balanced, anecdotal experience is not permitted to assume the robe of expertise.

[25] Applying this, the Privy Council allowed the evidence, saying:

> [61] In the present cases a good deal of Sergeant Rollin's evidence was plainly based on his own personal observation. His status as an expert was not necessary to the admissibility of that evidence. But his interpretation of the signs shown in photographs or of Cox's tattoo was clearly a matter of expertise based on a study of the gangs generally. Similarly, his evidence of the gang culture of reprisal taken against any member of the rival organisation was grounded in expertise, whilst the evidence of territories, the history of violent gang conflict and the associations between individuals was a mixture of expertise and personal experience. The Board is satisfied that he sufficiently demonstrated expertise in these areas to give evidence about them.

[26] The defendants submit these observations apply to Mr Hood. Contrary to the plaintiff's submissions, the defendants submit there is no need for expert evidence to have a scientific or empirical basis. The Evidence Act 2006 defines "expert" as a person having "specialised knowledge or skill based on training, study, or experience".[14]

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12 *Myers v R* [2015] UKPC 40, [2015] 3 WLR 1145. The case has not been cited in New Zealand, but relied primarily on English cases such as *R v Hodges* [2003] EWCA Crim 290, [2003] 2 Cr App R 247, which was in turn adopted in New Zealand in *Shepherd v R* [2011] NZCA 666, [2012] 2 NZLR 609. The case has also been cited in Australian state courts, for example in *Western Australia v Martin* [2018] WASC 151 at [106]–[108].

13 At [58].

14 Evidence Act, s 4(1).

[27] The defendants submit Mr Hood's evidence is based on his extensive professional experience working with lawyers. It is substantially helpful for him to address how lawyers, as a class, would tend to confront the allegations in the article.

[28] The defendants distinguish *Taula*. That case concerned scientific evidence of the effect of cannabis on the mind, not professional experience. And Mr Hood's evidence does not directly address how lawyers think, but rather, how they would react if confronted with serious allegations of misconduct.

Discussion

[29] The statement in paragraph [11] is admissible. It is relevant, and acceptable, for Mr Hood to define the scope of his role to the jury, and to explain the kinds of evidence he can and cannot give. That he has an opinion on the case is not surprising and does little to invite speculation.

[30] The plaintiff does not explain how the statement could inform the jurors of Mr Hood's opinion, and I consider it cannot. *Hough* and *Hadlee* are therefore not applicable.

[31] As the plaintiff submits, in paragraphs [28]–[47] Mr Hood makes generalisations on how lawyers think. However, Mr Hood's observations are no more general than those of Mr Collins, which have already been ruled admissible.

[32] Mr Collins' evidence arguably has more empirical backing, in the form of his use of the professional disciplinary process as a proxy for the views of the legal community. However, the defendant correctly submits that expert evidence need not have an empirical or scientific basis. It can derive from extensive experience, provided it is not anecdotal.

[33] Mr Hood sets out his experience working with lawyers, and his time as a member of a Standards Committee of the New Zealand Law Society. His expertise on the subject goes beyond mere anecdote. In any event, Mr Hood's evidence also draws on the professional disciplinary process, but emphasises the in-built requirement of

natural justice.[15] According to Mr Hood, this too reflects the standards of the legal community:

> [24] Whether a member of a standards committee or not, I would expect all lawyers to understand that the fact a complaint is made does not mean the complaint has substance. Given the fundamental obligations referred to above, all lawyers should understand the differences between an allegation and a finding. This distinction lies at the heart of the administration of justice.

[34] The evidence is also substantially helpful. The defendants' analogy with *Myers* is apt. In *Myers*, the witness's expertise was derived from his extensive professional contact with gangs. The evidence of how a specific class of people, in that case gang members, would be likely to react in certain circumstances was substantially helpful to a jury not comprised of gang members.

[35] In the present case, Mr Hood's extensive experience with lawyers will allow him to comment on how lawyers would be likely to react to allegations of misconduct. The jury, which will be comprised of non-lawyers, will be helped by evidence of how lawyers would react to allegations of misconduct. This is particularly so given the plaintiff has put the reactions of the legal community firmly in issue, in the form of Mr Collins' evidence.

[36] *Myers* has not been cited in New Zealand, but the Privy Council relied primarily on English cases such as *R v Hodges*,[16] which was in turn adopted in New Zealand in *Shepherd v R*.[17] The case has also been cited in Australian state supreme courts.[18] In any event, the Privy Council's treatment of expert evidence is consistent with the New Zealand definition, which includes opinions based on specialised knowledge derived from experience. It follows that it is possible for such opinions to be substantially helpful.

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15 Lawyers and Conveyancers Act 2006, s 142(1).
16 *R v Hodges* [2003] EWCA Crim 290, [2003] 2 Cr App R 247.
17 *Shepherd v R* [2011] NZCA 666, [2012] 2 NZLR 609.
18 For example, in *Western Australia v Martin* [2018] WASC 151 at [106]–[108].

Result

[37] The statements in Mr Hood's brief of evidence at [11] and [28]–[47] are admissible.

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Woolford J