IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2017-404-3091
[2022] NZHC 644

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:	9 March 2022 (by telephone)
Appearances:	S J Mills QC and E D Nilsson for the plaintiff S A McKenna and L Hadlow for the defendants
Judgment:	31 March 2022

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 31 March 2022 at 4:00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The plaintiff, Ms Cato, sues the defendants in defamation.

[2] The defendants challenge the admissibility of one of Ms Cato's briefs of evidence, an expert brief by Paul Collins. That brief is in replacement of an earlier brief by Mr Collins that I ruled inadmissible. The defendants say the replacement brief is not materially different from the first brief and is inadmissible for the same reasons that I ruled the first brief inadmissible.

The substantive proceeding

[3] Equestrian Sports New Zealand (**ESNZ**) is the national sports organisation for equestrian sports in New Zealand. In 2017, a senior New Zealand equestrian show jumping team toured Australia. Subsequently, members of the team made complaints to ESNZ against another member of the team, Katie Laurie, and against Ms Laurie's father, Jeff McVean, who was the team's chef d'equipe and coach.

[4] ESNZ convened a Judicial Committee to consider the complaints. The Committee directed the parties to try to settle the complaints at mediation. The parties attended a mediation in late November 2017, at which they settled the complaints. The settlement included agreeing to publish a statement recording the fact of the settlement and the steps agreed to by Mr McVean and Ms Laurie. The agreed statement records that the details of the settlement were otherwise confidential.

[5] Ms Cato is a barrister. She acted for the complainants in the mediation. On 30 November 2017, Ms Cato released the agreed statement to the *iSpyHorses* website and *Show Circuit* magazine, which are two equestrian media outlets. The statement was not sent to *NZ Horse & Pony*, another equestrian media outlet.

[6] Following Ms Cato's release of the statement, for six days from 3–9 December 2017, *NZ Horse & Pony* posted on its website an article entitled *What goes on tour, doesn't stay on tour*. The first defendant (Manaia Media Ltd) is the publisher and the second defendant (Ms Dixon) is the editor of *NZ Horse & Pony*. Ms Dixon and the third defendant (Ms Thompson) are the co-authors of the article.

[7] Ms Cato considered the article defamed her by suggesting she had acted unethically and unprofessionally in releasing the statement, without authority and instructions, "practically exclusively" to the *iSpyHorses* website, which is operated by her mother. Attempts to resolve Ms Cato's concerns were unsuccessful. Ms Cato then commenced, on 22 December 2017, this proceeding against the defendants.

[8] If Ms Cato succeeds in establishing that the article bears one or more of the pleaded meanings, and that those meanings are defamatory of her, an issue will arise as to the gravity of the harm that publication of the article caused to Ms Cato's reputation.

[9] The proceeding is to be tried by a Judge with a jury.

Background to the current challenge

[10] A jury trial had been scheduled to start on 6 September 2021. The parties served briefs in advance of the trial. Each side notified challenges to the admissibility of the other side's briefs. In a judgment dated 2 September 2021, I ruled that the expert brief by Mr Collins, which Ms Cato had served, was inadmissible in its entirety.

[11] Two days before I delivered that judgment, I vacated the jury trial because of the then COVID-19 lockdown. A new jury trial has been scheduled to start on 1 August 2022.

[12] After my judgment, Ms Cato applied for leave to serve another brief of evidence by Mr Collins. She proposed the replacement brief would comply with observations made in my judgment and therefore be admissible. In a judgment dated 8 October 2021, I extended the time for the parties to serve briefs of evidence, so that Ms Cato could serve a replacement brief by Mr Collins and the defendants could serve a brief in response.

[13] Ms Cato served a replacement brief by Mr Collins. The defendants say that the replacement brief is not materially different from Mr Collins' earlier brief and remains inadmissible for the same reasons I excluded that earlier brief.

Mr Collins' earlier brief and my judgment on it

[14] Mr Collins is a barrister with extensive experience and expertise in matters relating to lawyers' ethics and professional conduct. In his earlier brief, he recorded that he was asked to express his opinion about the consequences for Ms Cato, in her capacity as a lawyer, if the pleaded meanings of the article (which Mr Collins abbreviated as "the impugned conduct") "were found by a professional authority to be true". Mr Collins outlined the system of professional discipline of lawyers in New Zealand. He then addressed the professional implications for Ms Cato, the level at which the impugned conduct might be found to be culpable, and likely penalties, all assuming "the impugned conduct is found by a professional authority to be true".

[15] The defendants objected to Mr Collins' brief. They said the evidence was irrelevant, because Ms Cato would not be before a professional authority. They said the evidence wrongly inflated the seriousness of the pleaded meanings by giving hypothetical outcomes that were of no assistance to the jury in determining quantum.

[16] Ms Cato's position was that Mr Collins' evidence was relevant to the gravity of damage caused by the pleaded meanings among a subset of the audience, namely members of the legal profession. She relied on a decision of a High Court of Australia, *Reader's Digest Services Pty Ltd v Lamb*,[1] to support the proposition that evidence of that sort is relevant to the gravity of the damage caused by the pleaded meanings.

[17] In *Lamb*, the statement in issue was found at trial to mean that the plaintiff journalist had, in order to secure a sensational newspaper story, exploited a tragedy that had befallen an old friend. The plaintiff called evidence from two other journalists that betrayal of a friend's trust was a breach of journalists' ethical standards. The defendants challenged the admissibility of that evidence. The High Court said the evidence was inadmissible to prove what the statement meant or to prove whether the statement was defamatory. But it was admissible to prove the gravity of the damage. In the words of Brennan J:[2]

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1 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500.
2 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 507.

> A jury is entitled to take into account in assessing general damages the effect of the libel on those who read it … . In making its assessment, a jury is properly assisted by evidence that the making of the defamatory imputation found by them had an especially adverse impact upon the plaintiff's reputation in the eyes of some group or class in the community.

[18] In my earlier judgment, I said that a key point in that passage was that the evidence in question addressed the impact of the defamatory imputation. I found that Mr Collins' evidence did not do that. His evidence addressed not the impact of the pleaded meanings, but the impact of the pleaded meanings being found by a professional authority to be true. I said that was a distinction with a significant difference. Mr Collins' evidence would have been relevant if the pleaded meanings were that a professional authority had found that Ms Cato had engaged in the impugned conduct. But that was not what was pleaded.

[19] For that reason, I found that Mr Collins' earlier brief was not admissible.

Mr Collins' replacement brief

[20] Mr Collins' replacement brief takes a different approach from that taken in his earlier brief. In his earlier brief, he expressed his opinion about the consequences for Ms Cato on the assumption that the pleaded meanings of the article "were found by a professional authority to be true". In his replacement brief, he makes no such assumption. He looks at how a professional disciplinary body would deal with a lawyer charged with conduct of the kind alleged in the pleaded meanings of the article, but he does so only because he considers that is a proxy for considering the harm to Ms Cato from those pleaded meanings.

[21] For example, in the introductory part of his brief, after noting that Ms Cato has not faced any disciplinary proceedings and is not expected to do so, Mr Collins says:

> [10] … However, in considering the harm to the plaintiff from the professional misconduct allegations that are set out in the Claim, I have considered it relevant to look at the way in which a disciplinary body would deal with a lawyer charged with professional misconduct of the kind that is involved here. This is because professional standards, and the disciplinary consequences of a breach of those standards, reflect the collective view of the legal profession, including judges, on how lawyers must behave in their professional lives.

[22] And later in his brief, when he considers the gravity with which each of the pleaded meanings would be considered in the legal community, Mr Collins prefaces his evidence by explaining:

> [29] I will do this by reference to how I would expect a Standards Committee or Disciplinary Tribunal to treat each allegation. As I have said earlier in my brief, this is because in my opinion the way in which conduct of the kind alleged in the Claim would be treated in a formal complaints process is a good proxy for how the legal profession, judges and sophisticated clients would be expected to react to the allegations of professional misconduct that are set out in the Claim.

[23] In order to give this evidence, Mr Collins outlines the system of professional discipline of lawyers in New Zealand (as he did in his earlier brief). He also expresses his opinion as to whether the pleaded meanings would constitute breaches of the Conduct and Client Care Rules (which is similar to what he did in his earlier brief).[3] Thus, although Mr Collins takes a different approach from that in his earlier brief, his replacement brief has many similarities to his earlier brief.

The defendants' challenge and the plaintiff's response

[24] The defendants say the replacement brief is not materially different from the earlier brief and is an attempt to circumvent my earlier judgment by re-framing the same evidence that has already been found inadmissible. They say Mr Collins' opinion is based on a scenario in which a disciplinary body found Ms Cato guilty of the alleged professional misconduct. That is an irrelevant hypothetical scenario, as no complaint to a professional body has been made. The defendants say that Mr Collins' replacement brief is therefore inadmissible on the same basis his earlier brief was excluded.

[25] The defendants also challenge some specific passages of the replacement brief in which they say Mr Collins gives inadmissible evidence of meaning.

[26] Ms Cato rejects these challenges. She says that Mr Collins' different approach (namely, using the disciplinary treatment of the allegations as a proxy for how the profession would react) means that the replacement brief does not suffer from the

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3 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008.

defect identified in my earlier judgment. She relies again on the decision of the High Court of Australia in *Lamb*. She disputes that Mr Collins gives any inadmissible evidence of meaning in his brief.

[27] By way of reply, Mr McKenna, for the defendants, submitted that I was not bound by *Lamb*. He invited me to not follow it.

Is the replacement brief, or any part of it, inadmissible?

[28] The admissibility of evidence is governed by the Evidence Act 2006. Under s 7, all relevant evidence is admissible except evidence that is inadmissible or excluded under the Evidence Act or any other Act. Evidence is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[29] Under s 8 of the Evidence Act, evidence must be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or will needlessly prolong the proceeding. Unfair prejudice generally arises when the evidence carries a risk the jury will use the evidence for an improper purpose or in support of an impermissible chain of reasoning.[4]

[30] In *Lamb*, Brennan J (who delivered the leading judgment) summarised the challenged evidence as being that "the conduct attributed to the [plaintiff] amounted to a breach of the journalists' ethical code or of the required standard of journalists' ethical behaviour".[5] His Honour said the evidence was not admissible to show what the published statement meant or to prove the statement was defamatory.[6] If, however, those matters were established, there was no reason why evidence should not be admitted to show the gravity of the damage done to the plaintiff's reputation by the making of the defamatory statement. This was because the fact-finder, in assessing general damages, was properly assisted by evidence that the making of the defamatory statement had "an especially adverse impact upon the plaintiff's reputation in the eyes

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4 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [7].
5 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 504.
6 At 506.

of some group or class in the community".[7] It followed that the challenged evidence "was admissible to prove the impact of the defamatory imputation upon the [plaintiff's] reputation among journalists".[8]

[31] In reaching that conclusion, Brennan J referred to the possibility of the fact-finder (in that case, a jury) using the challenged evidence for the impermissible purpose of determining the meaning of the publication or whether it was defamatory. His Honour referred to the trial judge's directions and said there was no reason to think the jury erroneously took the challenged evidence into account in determining those issues.[9]

[32] In my view, *Lamb* involved the application of orthodox principles relating to the assessment and proof of the damage done to the plaintiff's reputation by the making of a defamatory publication. I respectfully agree with Brennan J's reasoning and adopt it.

[33] In his replacement brief, Mr Collins expresses his opinion as to whether the pleaded meanings in the impugned article would constitute breaches of the Conduct and Client Care Rules. He also gives his opinion as to how a professional disciplinary body would deal with a lawyer charged with conduct of the kind alleged by the pleaded meanings. In my view, and for the reasons set out in *Lamb*, this evidence is relevant to the issue of the gravity of the harm that publication of the article caused to Ms Cato's reputation. It passes the relevance test in s 7.

[34] Mr Collins' replacement brief does not suffer from the defect that made his earlier brief inadmissible. His earlier brief addressed not the impact of the pleaded meanings, but the impact of the pleaded meanings being found by a professional authority to be true. His replacement brief does not do that. Mr Collins makes that clear.

[35] At the hearing of the defendants' challenge to the replacement brief, I asked whether Mr Collins' evidence, insofar as he referred to how a disciplinary body would

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7 At 507.
8 At 508.
9 At 505, 506–507 and 508.

deal with conduct of the kind alleged by the pleaded meanings, might be unfairly prejudicial in terms of s 8. The response of Mr Mills QC, for Ms Cato, was that Mr Collins had to be able to explain to the jury the basis of his opinion. This included that his opinion was influenced by how he has seen disciplinary bodies treat such allegations. The jury would be appropriately directed as to the use it could make of such evidence. Mr McKenna said that jury directions would not cure the risk of unfair prejudice. He contrasted the challenged evidence in *Lamb* (just a few lines in oral examination in chief) with Mr Collins' detailed evidence.

[36] I consider that the risk of unfair prejudice is very low. The risk comes merely from the jury using Mr Collins' evidence for an impermissible purpose, such as using it to determine the meaning of the impugned article. This risk is very low because Mr Collins himself makes it clear that his evidence is not being put forward for that purpose, and that can be reinforced by jury directions. This risk does not outweigh the clear probative value of the evidence.[10]

[37] I therefore reject the defendants' challenge to the admissibility of the replacement brief as a whole.

[38] As noted, the defendants also challenge some specific passages of the replacement brief. These challenges adopt concerns that I provisionally expressed, in advance of the hearing, that Mr Collins' brief contained some inadmissible evidence.[11]

[39] At [9] of his brief, Mr Collins says he specialises in disciplinary proceedings against lawyers "who have been accused of breaching the standards the legal profession requires of them, which is the effect of the professional misconduct allegations the jury is considering here". In the underlined passage Mr Collins is expressing his view of the effect – in this context, the impression or meaning – of the "professional misconduct allegations", which is the shorthand he uses for the

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10 After the hearing, Ms Cato filed a memorandum dated 14 March 2022. I read the introductory paragraphs. It appeared that, by the memorandum, Ms Cato wished to make further submissions on the s 8 point. I declined to read the memorandum further. The point was a straightforward one that had been fairly addressed at the hearing. There was no call for further submissions.

11 Minute dated 15 February 2022.

collective pleaded meanings of the impugned article. The underlined passage is inadmissible and cannot be read.

[40] At [30], Mr Collins refers to the first pleaded meaning, which is:

> That the plaintiff acted unethically in her capacity as the lawyer acting for the complainants in the matter which was the subject of the article, because she released a statement to the media about Mr McVean and Ms Laurie that was damaging to their reputations, without their consent.

[41] Mr Collins then says, at [31]: "I understand this to mean that the media statement breached a confidence the plaintiff was either directly or indirectly bound to observe". By giving evidence of his understanding of the meaning of a pleaded meaning, Mr Collins is giving evidence of the meaning of the article. Mr Mills submitted that, read in context, Mr Collins was not in this passage purporting to express an opinion on what the article means. I disagree. The passage speaks for itself. I note that, by contrast, Mr Collins does not say what he understands any of the other pleaded meanings "to mean".

[42] It follows that [31] contains inadmissible evidence of meaning. Mr Collins relies on that meaning throughout [31] and [32]. Those paragraphs are inadmissible and cannot be read.

[43] At [43], Mr Collins addresses the impact of the fourth primary meaning of the article, which is that Ms Cato acted unethically as a lawyer by breaching confidentiality provisions in a mediation or settlement agreement. Mr Collins says that a lawyer found by a disciplinary body to have deliberately breached confidentiality in these circumstances could be subject to sanctions including suspension. He then says (underlining added):

> In terms of reputation, such a finding would be very damaging to a lawyer who would be regarded by colleagues as untrustworthy and therefore potentially marginalised in professional life. The reputational effect of an allegation of this kind would reflect the seriousness of those potential penalties.

[44] The underlined sentence, as with the earlier brief, strays into evidence that I found to be inadmissible in my earlier judgment. It would be admissible if the article had said that Ms Cato had been found by a disciplinary body to have breached

confidentiality. That is not a pleaded meaning of the article. The underlined sentence is inadmissible and cannot be read.

Result

[45] The passages of Mr Collins' replacement brief identified in [39], [42] and [44] of this judgment are inadmissible and cannot be read.

[46] I otherwise reject the defendants' challenge to the brief.

[47] In the circumstances, I extend the time for the defendants to serve any brief in response to Mr Collins' brief to 6 May 2022.

[48] Ms Cato has been substantially successful in rejecting the defendants' challenge. She is entitled to costs. If costs cannot be agreed, brief memoranda (no more than two pages each) may be filed and served: Ms Cato by 20 April 2022, the defendants by 5 May 2022.

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Campbell J