

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2021-404-001281  
[2022] NZHC 3243**

UNDER The Defamation Act 1992

BETWEEN NANA YU  
Plaintiff

AND YIQI XIA  
Defendant

Hearing: 5 December 2022

Appearances: D Zhang for Plaintiff  
No appearance for Defendant

Judgment: 6 December 2022

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**JUDGMENT OF VENNING J  
FORMAL PROOF**

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This judgment was delivered by me on 6 December 2022 at 2.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Daniel Zhang, Auckland  
Copy to: Defendant

## **Introduction**

[1] Nana Yu is a Chinese citizen. She came to New Zealand in 2010 and was granted residency in 2013. From about January 2019 until April 2021 Ms Yu and Yiqi Xia (Abby) worked for Yoke Insulation Limited (YIL). Ms Yu and Abby had a falling out about a work related incident in 2020. Abby left YIL in April 2021.

[2] Ms Yu says that on or about 26 May 2021 Abby published defamatory statements about her on WeChat. Ms Yu sues Abby in defamation.

[3] Although Abby was served with the claim, she has taken no steps to defend the proceeding. Given Abby's failure to file any documents in opposition or to appear the matter proceeded by way of formal proof.

## **Formal proof in defamation hearings**

[4] Rule 15.9 of the High Court Rules applies. If a defendant does not file a statement of defence within the specified time and the plaintiff seeks judgment by default the proceeding must be listed for formal proof. Under r 15.9(4) before or at the formal proof hearing, the plaintiff must file affidavit evidence establishing to a Judge's satisfaction, the cause of action relied on and, if damages are sought, provide sufficient information to enable the Judge to calculate and fix damages. The standard to which a Judge is required to satisfy himself or herself regarding the plaintiff's evidence "is much the same as it would be if the proceeding had gone to trial".<sup>1</sup>

[5] In some cases where formal proof is sought in a defamation case an issue may arise as to whether a positive defence may be available. However on the basis of the material before the Court there can be no suggestion of a positive defence in the present case. In any event, I agree with the approach taken by Courtney J in *Kim v Cho* that on a formal proof basis it is not open for the Court to give consideration to possible affirmative defences.<sup>2</sup>

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<sup>1</sup> *Ferreira v Stockinger* [2015] NZHC 2916 at [35].

<sup>2</sup> *Kim v Cho* [2016] NZHC 1771.

## **Procedural issues**

[6] When this matter was previously before the Court for consideration, Jagose J issued a minute noting that, on the face of the fact witness affidavits, all statements relying on the English language appeared to be inadmissible hearsay absent any basis for reasonable assurance of their reliability and (for exhibits of translations) the translator's obvious availability as a witness.<sup>3</sup>

[7] Subsequently, Jagose J issued a further minute noting that if a witness' personal statement, in his or her own words, was not in the English language but was provided in that person's own language, together with an expert witness' translation of it into the English language, some of the inadmissible hearsay issues he had identified would have been addressed.<sup>4</sup>

[8] Following that minute Mr Zhang has arranged for an affidavit of Lingbo Yu, a translator, to be sworn and filed. Mr Yu has translated and verified the English translations for the affidavits of Ms Yu, Duogang Wang, and Minggang Li. He has also translated and verified a number of annexures to the affidavits. On that basis the Court accepts that the evidential issue raised by Jagose J has been addressed.

## **Background**

[9] Ms Yu and Minggang Li married in China in 2008. They emigrated to New Zealand in 2009 and 2010. They were granted residency in 2013. Their daughter was born in New Zealand in 2016.

[10] In January 2019 Ms Yu went to work at YIL as an administrative staff member. YIL's main business was the sale and installation of insulation products. Abby was already working with YIL as a sales representative. Initially at least, Ms Yu and Abby were on reasonable terms. However that apparently changed in about May 2020 when Ms Yu had made a mistake with an order. She had given the wrong type of insulation to the workers to instal at a client's property. Abby rang her about the mistake. Ms Yu recognised her mistake and apologised. However, Abby continued to yell at Ms

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<sup>3</sup> Minute of Jagose J, dated 5 August 2022, at [3].

<sup>4</sup> Minute of Jagose J, dated 8 August 2022, at [2].

Yu over the phone and swore at her. At the time Qingliang Zhang (the manager) was in the office and overheard the heated conversation. He spoke to Abby and reprimanded her for her aggressive attitude. Following that incident Abby did not speak to Ms Yu again unless she had to. Eventually Abby left YIL around April 2021.

[11] Then in May 2021 Qingliang Zhang called Ms Yu. He said that Abby had called him recently and said that Ms Yu's husband, Minggang, had been harassing her. Shortly after, on 26 May 2021, Ms Yu was advised about a post on WeChat Moments (the post). There was a post on Abby's WeChat Moment account which attached a screenshot of the text conversation she had had with a mobile phone number +64 21 148 5163. In the message Abby said:

"Your wife, Nana Yu, has been "Xed" [fucked] like that by Zhang Liang. How can you bear it? You are really a "renzhe shengui", hahaha."

The post also came with a caption, which said:

"Sends his wife to be a "ji" [prostitute], himself goes gambling every day, X insulation company is really great".

[12] The number did not belong to Minggang. Neither Ms Yu nor Minggang know who the phone number belongs to. Ms Yu understands the reference to Zhang Liang to be a reference to Qingliang because he was sometimes called Zhang Liang for short. A "renzhe shengui" is apparently a reference to a Mutant Ninja Turtle and is also slang for a man whose wife "hooks up" with other men.

[13] Ms Yu was extremely upset by the post. She felt very embarrassed and humiliated. Her husband Minggang and she have a close relationship.

[14] Ms Yu says she felt even more humiliated when various people started asking her about the posts.

[15] Abby took down the posts several days after putting them up but remained defiant. When Ms Yu's solicitors sent a legal letter asking her to retract the statement and seeking payment of legal costs her response was: "I like court" and "hahah".

[16] In addition to Ms Yu's evidence there is the evidence of Mr Duogang Wang who is a mechanic employed by YIL from time to time. On 26 May 2021 he saw Abby's post on WeChat. He understood it suggested that Ms Yu had had sex with Qingliang for material gain while her husband was aware.

[17] Ms Yu's husband, Mr Minggang Li, has also given evidence confirming the effect the posts had on Ms Yu.

### **The defamation claim**

[18] To succeed in her defamation action Ms Yu must establish that:

- (a) the statement(s) was defamatory; and
- (b) the statement was about Ms Yu; and
- (c) the statement was published by Abby.

[19] A defamatory statement is a statement which:

- may tend to lower the plaintiff in the estimation of right-thinking members of society generally
- a false statement about a person to his or her discredit
- a publication without justification calculated to injure the reputation of another by exposing her to hatred, contempt or ridicule;
- a statement which tends to make others shun and avoid her.

[20] The pleaded defamatory meanings in the present case are:

- (a) Ms Yu has frequent extramarital sex or relations with Liang Zhang and is therefore sexually promiscuous;

- (b) Ms Yu married a cowardly husband who lets his wife have frequent sexual relationships with others;
- (c) Ms Yu is a prostitute;
- (d) Ms Yu married a husband who profits from his wife's prostitution and uses the money to fund his gambling; and
- (e) Ms Yu married a husband who has a gambling problem and/or only gambles every day.

[21] To the extent that the defamatory meanings are suggested to be, by inference, defamatory of Ms Yu's husband, Minggang Li, I do not consider that Ms Yu can rely on them as defamatory of her. However, I accept that the statements are readily construed as suggesting that Ms Yu had an extramarital sexual relationship with Liang Zhang and is therefore a sexually promiscuous woman, that she was doing so for material gain and is a prostitute. In Ms Yu's situation such statements may tend to lower her in the estimation of right-thinking members of society, particularly the members of the local Chinese society. The statements were calculated to injure her reputation by exposing her to contempt or ridicule, and they may tend to make others shun her.

[22] The statements are clearly directed at Ms Yu. She is expressly identified by name.

[23] I accept the evidence establishes that the statements were published on Abby's WeChat Moments post. It is difficult to know exactly how broadly the statements were published but Mr Zhang noted that Ms Yu has 1,598 contacts on her WeChat friends' list, a number of whom were work contacts. Statistics show the average WeChat user has nearly 200 contacts. It seems likely that the material would have been published and available to at least several hundred people before it was taken down.

### **Damages**

[24] The issue then is the appropriate figure for damages.

[25] Mr Zhang seeks general damages in the sum of \$50,000. Although the statement of claim referred to special damages Mr Zhang accepted that special damages could not be established and were not pursued further.

[26] In response to an earlier minute from Downs J,<sup>5</sup> on the file Mr Zhang filed further submissions in relation to damages.

[27] Mr Zhang's research disclosed the following cases. In *Clark v Vare*,<sup>6</sup> a shopkeeper placed a placard in his shop window which said, "One man, one trade, one wife". The plaintiff claimed the words imputed an improper relationship between himself and his housekeeper, as it was common knowledge in Upper Hutt at the time they were living together but separated from their respective spouses. Myers CJ found the statement defamatory, but remitted the case to the lower court to assess damages. Unfortunately there is no clear evidence as to what the damages award ultimately was.

[28] In *Truth (NZ) Ltd v Bowles*,<sup>7</sup> the respondent plaintiff had been a prosecution witness in a murder trial. The Truth magazine ran an article entitled "Prostitution, Drugs and Grog Feature in Murder Trial" which incorrectly said the respondent had stayed the night at the accused's flat and had denied in cross-examination she was a drug addict, prostitute, or that she had left Hamilton after an affair with a married man. The Truth accepted its article was erroneous. The Truth sought to explain the publication on the basis of a mistake. There were other witnesses who had made such denials. The Truth had mistakenly attributed their evidence to the plaintiff. It published an apology a week after the initial article.

[29] Woodhouse J found the article to be defamatory and awarded £2,000 in damages. On appeal, the award was reduced to £750.

[30] In real dollar terms, taking account of Treasury records of inflation in New Zealand, the initial award of damages would have been approximately \$82,000 in 2022 dollars, and the reduced amount awarded by the Court of Appeal approximately \$30,900 in 2022 dollars.

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<sup>5</sup> Minute of Downs J, dated 18 March 2022.

<sup>6</sup> *Clark v Vare* [1930] NZLR 430.

<sup>7</sup> *Truth (NZ) Ltd v Bowles* [1966] NZLC 303 (CA).

[31] In *V v Zhang*<sup>8</sup> the defendant had said the first plaintiff was a “slut” and “able to fool around with any man”. The District Court Judge accepted that the slur was that the plaintiff was promiscuous, best avoided and deceptive. He awarded damages of \$1,000.

[32] Mr Zhang submitted *V v Zhang* could be distinguished from the present. In the present Ms Yu was referred to directly as a *ji*, or prostitute. Calling someone a prostitute goes beyond an allegation of promiscuity. It suggests the person is willing to offer sexual favours for material gain, especially where the term is used in a derogatory and pejorative manner as it was here. Further, it was exacerbated in the present case by the suggestion that Ms Yu’s husband was aware and was willing to accept it.

[33] Finally, in *V v Zhang*, the distribution of the defamatory statement was very limited. The statement was only made to a single person who was a friend of the second plaintiff. The publication in the present case is, on the plaintiff’s submission, considerably broader.

[34] Mr Zhang also referred to two Australian cases, *Random House Australia Pty Ltd v Abbott*, and *Cornes v Ten Group Pty Ltd*.<sup>9</sup> The first case is not particularly helpful. The context was a scandal involving Australian politicians’ partners and the high public interest in the scandal. The second case is more relevant. It involved an allegation that Ms Cornes had committed adultery, was unfaithful to her husband and was promiscuous. While rejecting an imputation of promiscuity the Judge found the statement imputed that Ms Cornes had committed adultery and was unfaithful to her husband and made an award of \$85,000.

[35] In *Cornes v Ten Group Pty Ltd*, as Mr Zhang acknowledged, the statements were widely published. They were made in the course of a television interview broadcast and would likely have been seen by about 120,000 people. The damage to Ms Cornes was also exacerbated by the availability of the programme for download

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<sup>8</sup> *V v Zhang* [2018] NZDC 17331.

<sup>9</sup> *Random House Australia Pty Ltd v Abbott* [1999] FCA 1538; and *Cornes v Ten Group Pty Ltd* [2011] SASC 104.



and thus republication of the statement. Further, the statement was republished in a newspaper, albeit with an assertion that the author’s opinion was that it was said as a joke.

[36] Standing back and looking at the matter overall, I consider the most helpful case to be that of *Truth (NZ) Ltd v Bowles*.<sup>10</sup>

[37] In my judgment an award of \$30,000 for general compensatory damages is appropriate in this case. That reflects the limited nature of the statement, but also takes account of the impact on Ms Yu. It also takes account of the relatively limited distribution of the defamatory statement and that in the present case the statement was taken down within a few days. Finally, I note the Court of Appeal’s observation in *Williams v Craig*:<sup>11</sup>

[t]he function of general damages is solely compensatory. They must bear a “relation to the ordinary values of life [and not operate] as a road to untaxed riches”. Assessment of compensatory damages is by its very nature a subjective exercise. But it must be kept within reasonable bounds.

## **Result**

[38] The plaintiff is to have judgment in the sum of \$30,000 against the defendant.

## **Costs**

[39] The plaintiff is entitled to costs. Costs are to be fixed on a 2B basis for all appearances, together with disbursements as fixed by the Registrar.

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Venning J

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<sup>10</sup> *Truth (NZ) Ltd v Bowles*, above n 7.

<sup>11</sup> *Williams v Craig* [2018] NZCA 31, at [32], (footnote omitted).