IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2021-485-386
[2023] NZHC 488

BETWEEN	TAFARA MUTINGWENDE Plaintiff
AND	MADELEINE PETERSEN-HODGE Defendant

Hearing: 13 February 2023

Appearances: J J Pietras and B H Woodhouse for Plaintiff
A C Singleton for Defendant

Judgment: 13 March 2023

Reissued: 15 March 2023

JUDGMENT OF ASSOCIATE JUDGE JOHNSTON

Introduction and background

[1] This is an application by the plaintiff, Tafara Mutingwende, for an order pursuant to r 15.1(1)(a) of the High Court Rules 2016 striking out aspects of a statement of defence entered by the defendant, Madeleine Petersen-Hodge.

[2] Mr Mutingwende is a musician. His stage name is "Theo Outlandish". He is a hip hop artist. He performs rap music.

[3] Ms Petersen-Hodge is also a musician. Her stage name is "Baby Lane". Like the plaintiff, she is a hip hop artist.

[4] Between 17 October 2020 and 4 February 2021, the defendant published eight tranches of material on the social media site known as "Instagram".

[5] In this proceeding, Mr Mutingwende is alleging that, in those publications, Ms Petersen-Hodge defamed him. He pleads eight causes of action — one related to each publication. He is claiming injunctive relief and substantial damages.

[6] The plaintiff has amended his claim twice. The most recent statement of claim — the second amended statement of claim — is dated 15 August 2022. The defendant has entered a defence to the second amended statement of claim dated 20 September 2022.

[7] On 30 September 2022 the plaintiff filed and served this interlocutory application. The defendant filed and served a notice of opposition on 21 October 2022. On 9 February 2023, immediately prior to the hearing, the plaintiff filed and served an amended application.

[8] It is this amended application that is before the Court for determination.

Strike out applications

[9] The principles that apply to applications pursuant to r 15.1(1)(a) are well settled. The Court's starting point is an assumption that the factual allegations in the impugned pleading will be established at trial. It then asks whether, on that assumption, there is a reasonably arguable claim, or defence, as the case may be. It follows that in most cases there is no evidence before the Court as to the facts — given the Court's starting point, there is no need for evidence. The Courts do, however, recognise that there is a need for some flexibility, and, if, for example, a party can categorically dispose of a factual issue with evidence, then affidavits will be permitted.

[10] In this case, there is more affidavit evidence than one would normally expect to see.

Scope of application

[11] By the time that the matter came on for hearing, the aspects of the defence that remained under attack had been reduced to the following:

(a) one aspect of the affirmative defence of truth, that is to say the defendant's signalled intention to establish the truth of the alleged defamatory statements that the plaintiff had "engaged in sexual conduct with underage females" (third cause of action) and that he "has committed sexual violence offences against minors" (seventh cause of action);

(b) the defence of honest opinion in its entirety; and

(c) the defence of qualified privilege for responsible communication concerning a matter of public interest in its entirety.

[12] The matters for determination are dealt with below in that order.

Truth

[13] The plaintiff's argument concerning the defence of truth focussed on the third and seventh causes of action, to the extent that it is alleged in those causes of action that the plaintiff has "engaged in sexual conduct with underaged females" or "committed sexual violence offences against minors".

[14] It is common ground that the women referred to were all over 16 at the time of the alleged incidents.

[15] The issue in relation to this limb of the application resolves itself into the meaning of the terms "underage" and "minor".

[16] The plaintiff has pleaded that the libellous meaning of the words published by the defendant was that he "had engaged in underaged sex and had committed sexual assault against children under 16", thus inviting the Court to equate the terms "underage" and "minor" with under the statutory age of consent — 16.[1] Mr Pietras, for the plaintiff, submits that it was "an incontrovertible fact" that the women were over 16 at the relevant time, and added that this "… would have been obvious to

[1] See s 134(6)(a) of the Crimes Act 1961.

anyone who had undertaken a cursory review of the evidence. With respect, the allegation is improper and should not have been pleaded by the Defendant's counsel".

[17] In her response, Ms Singleton, for the defendant, submitted that there was "… no reason to assume at this preliminary stage that, in the full context in which it was used, the word "underage" (I infer that the submission was intended also to cover the term "minor") has the specific legal meaning contended for by the plaintiff. It may be that the Court ultimately finds that the women in question were "underage …" within the particular meaning of the impugned statement. Once the meaning has been determined at trial, if that meaning is determined to be defamatory, the affirmative defences will need to be considered. It would be inappropriate to attempt to consider the affirmative defences now while the meaning of the impugned statement remains at large, and prior to hearing all relevant evidence".

[18] Whilst there is considerable force in Ms Singleton's submission that context is everything, and that the Court should not readily involve itself in interpreting the meaning of words or phrases alleged to have carried defamatory meanings without having first heard all the evidence and gained an appreciation of the context in which they were used, it is equally the case that where words are only capable of bearing one meaning it is incumbent on the Court to intervene to prevent an injustice, that is to say in the plaintiff having to face allegations that cannot succeed.

[19] I have considered what meaning the words used by the defendant in the two posts might carry other than those pleaded. I have considered, for example, whether they might be interpreted as meaning not that the plaintiff had sexual relations with women who were under the legal age of consent, but rather that he had such relations with women who, although 16 or over, were nonetheless of such an age that he was taking advantage of them.

[20] The question of whether the words complained of are capable of bearing the meaning alleged by the plaintiff will of course be a question for the trial judge. Only if they are found to be so capable will the question of whether they in fact bore that meaning in all the circumstances be put to the jury. To that extent, this is an issue that lends itself to determination at an interlocutory stage.

[21] The view I have reached is that any interpretation of the words used other than as referring to the statutory age of consent would be contrived. They are used in the context of a series of accusations of serious criminal offending. The words "underage" and "minor" are only capable of having discernable meaning when referenced to the legal age of consent and the relevant legal age of consent is 16. In short, my view is that there is only one possible meaning of the terms "underaged" and "minors" in this context: women who had not reached the statutory age of consent. I am simply unable to conceive of any other reasonable available interpretation.

[22] On that basis, I accept the contention advanced on the plaintiff's behalf that sub-paras 67(j) and (gg) of the defendant's second amended statement of defence cannot stand.

Honest opinion

[23] In contrast to the first limb of the plaintiff's application concerning the pleaded defence of truth, which involved a straightforward question of whether there was irrefutable evidence that the defendant would not be able to establish the truth of an aspect of the alleged defamatory meaning as pleaded, the plaintiff's case relating to the defence of honest opinion is complex.

[24] Mr Pietras began his submission in relation to this aspect of the case as follows:

> 63. Section 10 of the Defamation Act 1992 provides:
>
> > *"In any proceedings for defamation in respect of a matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion"*
>
> 64. There are three main elements to consider:[2]
>
> (a) The statement itself must include or consist of an *expression of opinion*.[3]
>
> (b) The opinion must be indicated on some factual basis known by the defendant at the time.[4]

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2 *Laws v Otago University Students Association* [2021] NZDC 2704.
3 Section 10(1) of the Defamation Act 1992; *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [16] and [17].
4 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2010] 1 NZLR 315 (SC) at [36].

(c) The opinion expressed must be the defendant's genuinely held opinion.

[25] He submitted that the pleaded defence of honest opinion could not succeed "because none of the publications are reasonably capable of being construed as mere opinions — they are all bare assertions of fact".

[26] In advancing that submission, Mr Pietras went through a careful analysis of each of the causes of action, parsing the defendant's words and the plaintiff's pleaded allegation as to the meaning of the same. In each case his contention was that the defendant's statements were assertions of fact as opposed to expressions of opinion because none of the statements were couched in the language of opinion. For example, publication 3 is in narrative form, describing a specific incident relating to the plaintiff, as told to, and then retold by, the defendant. The words complained of include, "they abducted someone from town. Like there was a girl who was drunk off her face, someone messaged me. They scooped her up and ran away with her". Mr Pietras described this as a series of "scathing allegations of fact" which leave no room to be understood as anything but fact. He says the same is true for all the publications so that the defence of honest opinion cannot be relied upon for any of them because none reaches the prerequisite of being "obviously" and "clearly" expressed as an opinion.[5]

[27] Ms Singleton submitted that, at the strike out stage, the issue before the Court is a broader one. The threshold inquiry is not whether the statement is obviously and clearly expressed as an opinion, but whether it is capable of being understood as an expression of an opinion. She drew my attention to this Court's judgment in *Durie v Gardiner*[6] where Mallon J dealt with interlocutory applications largely paralleled in this case, including a challenge to the defence of honest opinion on the ground that the defamatory meanings conveyed were not capable of being understood as expressions of opinion.

[28] In that case, Sir Edward Durie and Donna Hall sued the Māori Television Service and one of its journalists alleging defamation in relation to an item covering

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5 *Craig v Slater* [2020] NZCA 305 at [94]; and Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (8th ed, LexisNexis, Wellington, 2021) at [3.3.2].

6 *Durie v Gardiner* [2017] NZHC 377, [2017] 3 NZLR 72.

the termination by the Māori Council of the services of Ms Hall's firm. Beyond that the factual circumstances of that case are not important for present purposes.

[29] In response to the plaintiffs' claim that they had been defamed, the defendants pleaded both honest opinion and the then emerging category of qualified privilege generally referred to as responsible communication concerning a matter of public interest (amongst other defences). The plaintiffs sought orders striking both of those defences out.

[30] In her analysis of the appropriate approach to an application to strike out affirmative defences in the context of defamation proceedings, drawing on s 10 of the Defamation Act 1992 and the relevant authorities, Mallon J identified the requirements for the defence of honest opinion as follows:

> (a) the words complained of are an expression of opinion (the opinion question);
>
> (b) the facts on which the opinion is based are indicated in the publication at issue or are generally known to the public (the publication facts);
>
> (c) those facts are proved to be true or not materially different from the truth (proving the publication facts);
>
> (d) where the defendant is the author of the opinion, the opinion expressed must be the defendant's genuine opinion;
>
> …
>
> (Footnotes omitted.)

[31] Mallon J went on to refer to the United Kingdom's Supreme Court's judgment in *Joseph v Spiller*[7] where that Court explained — in relation to (b) above — that a defendant need only identify in general terms what had led the commentator to make the comment. This, her Honour observed, was so that the reader could understand what the comment was about and the commentator could, if challenged, explain, by giving particulars of the subject matter of the comment, why they reached the views they did.[8]

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7 *Joseph v Spiller* [2010] UKSC 53, [2011] 1 All ER 947.

8 *Durie v Gardiner*, above n 6 at [117].

[32] The Judge also referred to the pleading requirement of the defence contained in s 38 of the Defamation Act that a defendant must, insofar as it is asserted that a publication contains statements of fact that are true, and insofar as it is asserted that it consistsof honest opinion, provide particulars.[9]

[33] In *Durie* the challenges to the pleading of honest opinion were:

(a) the defamatory meanings conveyed were not capable of being understood as expressions of opinion;

(b) there were no reasonable grounds to believe the opinions of the Māori Council were genuine; and

(c) that the publication facts provided an insufficient basis for an honest opinion defence.

[34] In this case, Mr Pietras' exclusive focus was on the first of those.

[35] There is, in my view, a particular difficulty with divorcing the issues of what the words complained of can and do mean on the one hand and whether they are capable of being regarded as opinion on the other.

[36] A cursory analysis of the first cause of action in this case will illustrate the point.

[37] The words published by the defendant are as follows:

> @theooutlandish thinks its cool to threaten to run trains on girls with his friends and too pussy to admit he said it and gotta get his brother @tapzgallantino to cover up for him.

[38] The plaintiff identifies the particular words about which he complains as:

> @theooutlandish thinks its cool to threaten to run trains on girls with his friends …

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9 At [118].

[39] As required by the legislation, he then identifies the meaning that he alleges should be ascribed to those words, which is that:

> The Plaintiff and his friends threatened to gang rape one or more females.

[40] It seems inevitable that, at trial, there will be a contest as to whether the words complained of are capable of bearing the meaning the plaintiff alleges they have. In my assessment it would at least be open to the defendant to argue that believing it is "cool" to threaten to do something is different from actually threatening to do so. On the opinion question too, there is room for argument as illustrated by counsel's submissions. While Mr Pietras submitted that the publication is a "bald and gross assertion of fact", Ms Singleton's contention was that it is an expression of the opinion the defendant holds as to the type of person the plaintiff is.

[41] It was considerations of this sort that ultimately led Mallon J in *Durie* to dismiss the application for an order striking out the honest opinion defence. Here are the relevant paragraphs containing of her Honour's analysis:

> [131] The question is whether any of the plaintiffs' pleaded meanings are capable of being understood as an expression of opinion. If they are, it is then for the jury to decide whether in the circumstances they were an expression of opinion. The jury must look at the publication as a whole in order to determine whether the writer or speaker conveyed the defamatory statement as an expression of opinion or as a statement of fact.
>
> [132] In this case the plaintiffs accept that some of the statements in the broadcast and website are capable of being understood as opinions but they say this is not the relevant question. They submit that when the focus is properly placed on the pleaded imputations in the context of the publication as a whole, those imputations are not capable of being understood as expressions of opinion.
>
> [133] I do not accept this submission. Taken as a whole, the broadcast and website story could be understood to convey a dysfunctional Māori Council, within which one faction is making serious allegations against Sir Edward and Ms Hall. Read in that context the defamatory imputations (such as that they are behaving unprofessionally, irresponsibly and undermining the Māori Council's mana) are capable of being understood as expressions of opinion by those making the allegations. Whether, in the circumstances of the publication, they are expressions of opinion or statements of fact is a jury matter.
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> (Footnotes omitted.)

[42] I respectfully adopt the same approach here.

[43] I am not persuaded that it would be appropriate for the Court to intervene at this stage by making an order striking out the honest opinion defence. As already said, the first question — which will be a question for the Judge — is whether the words complained of are capable of bearing the meaning that the plaintiff ascribes to them. That analysis will then enable certain meanings to be put before the jury, and, insofar as the honest opinion defence is concerned, the question will be whether, having regard to the evidence in its totality, the meanings that emerge from that process are statements of fact or expressions of opinion. That, as Mallon J emphasised, is very much a jury question. It is entirely conceivable that what emerges from the first stage in that process is a series of meanings that are different from those pleaded.

[44] I am not prepared to make an order striking out the defence at this stage.

Qualified privilege

[45] The defence of qualified privilege for responsible communication concerning matters of public interest is a relatively recent development. It was recognised for the first time at appellate level in this country in the Court of Appeal's judgment in *Durie v Gardiner*.[10] This was an appeal from the judgment of this Court discussed above. The appeal was focussed exclusively on the existence and application of the then novel defence.

[46] The Court of Appeal's judgment covers in detail the history of the development of the defence.[11]

[47] In this case, the defence is pleaded in a perfunctory way. The pleading begins by repeating the pleadings relating to the defence of honest opinion, and then continues:

> 87. In the alternative, even if untrue, the alleged defamatory meanings are protected by qualified privilege as the alleged defamatory meanings:
>
> (a) form a part of a statement interest; and
>
> (b) the communication of the statement was responsible.

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10 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 (the CA judgment).
11 At [36]-[52].

[48] In *Durie*, the Court of Appeal concluded:[12]

> … it [was] again time to strike a new balance [between the right to the protection of reputation (intimately related to the protection of personal privacy) and the right to freedom of expression which includes the freedom to impart and receive information and ideas] by recognising the existence of a new defence of public interest communication that is not confined to parliamentarians or political issues, that extends to all matters of significant public concern and which is subject to a responsibility requirement.

[49] The Court of Appeal indicated that, in identifying the scope of the new defence, they were adopting the approach taken by Abella J in the Canadian case of *Grant v Torstar Corp.*[13]

[50] The Court of Appeal then went on to describe the scope of the new defence in these terms:

> [63] Accordingly, in a case tried by a jury in New Zealand, it will be for the trial judge to determine whether the two elements of the defence are established based on the primary facts as found by the jury.
>
> [64] In determining whether the subject matter of the publication was of public interest, the judge should step back and look at the thrust of the publication as a whole. It is not necessary to find a separate public interest justification for each item of information. As already mentioned, public interest is not confined to publications on political matters. It is also not necessary the plaintiff be a public figure.
>
> [65] Defining what is a matter of public interest in the abstract with any precision is a notoriously difficult exercise. Trial judges are however likely to find the discussion of public interest in *Torstar* of assistance. There it was said that to be of public interest the subject matter should be one inviting public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.
>
> [66] As regards determining whether the communication was responsible, that is to be determined by the judge having regard to all the relevant circumstance of the publication.
>
> [67] Relevant circumstances to be taken into account may include:
>
> (a) The seriousness of the allegation – the more serious, the allegation, the greater the degree of diligence to verify it.
>
> (b) The degree of public importance.

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12 At [56].

13 *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640.

(c) The urgency of the matter – did the public's need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity.

(d) The reliability of any source.

(e) Whether comment was sought from the plaintiff and accurately reported – this was described in *Torstar* as a core factor because it speaks to the essential sense of fairness the defence is intended to promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens the risk of inaccuracy. The target may well be able to offer relevant information beyond bare denial.

(g) The tone of the publication.

(g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

[68] The list of factors is not exhaustive and in some cases the circumstances may be such that not all factors in the list are relevant. In some cases, publishing defamatory allegations from an unidentified source may not be responsible. In other cases it may be responsible if for example the publisher had good reason to consider the source reliable and the article made it clear it was relying on a confidential source or sources. In short, the factors must be applied in a practical and flexible manner with regard to the practical realities and with some deference to the editorial judgment of the publisher, particularly in cases involving professional editors and journalists.

[51] The reasons that I have given for declining to strike out the defence of honest opinion apply a fortiori to this defence.

[52] Again, there is the issue of whether the plaintiff will be able to establish that the words complained of in each cause of action are capable of bearing the meaning that he ascribes to them.

[53] Again, the issue will be whether, having regard to all of the evidence, the publication related to a matter of public interest. In this case, that may not be difficult for the defendant to establish. In the course of submissions, Ms Woodhouse, on behalf of the plaintiff, accepted that the publication material relating to serious criminal offending was likely to be regarded as in the public interest. Be that as it may, as the Court of Appeal said in *Durie*, determining what is in the public interest in the abstract is an extremely difficult exercise. Then will come the issue of whether the

communication was a responsible one, bearing in mind considerations such as those identified by the Court of Appeal in *Durie* and possibly others in this case.

[54] The view I have reached is that it would be premature to attempt any such analysis in a vacuum in this case, particularly when an order in the terms sought would ultimately have the effect of depriving the defendant of her entitlement to run this defence. I am not prepared to make such an order.

Conclusion

[55] There will be an order striking out sub-paragraphs 67(j) and (gg) of the defendant's statement of defence dated 20 September 2022.

[56] Otherwise, the plaintiff's application is dismissed.

[57] Costs are reserved. If counsel are unable to agree on these, as I would expect them to be able to do, they may file memoranda in the usual way.

Associate Judge Johnston

Solicitors:
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Robinson Legal, Wellington for First Defendant