IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-3091
[2024] NZHC 539

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

Appearances:	S Mills KC, R Butler and D Nilsson for the plaintiff F King and R Che Ismail for the defendants
Judgment (on the papers):	13 March 2024

COSTS JUDGMENT OF ROBINSON J

This judgment was delivered by me on 13 March 2024 at 4:00 pm pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

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

Introduction

[1] On or about 3 December 2017 the defendants wrote and/or published an article in *NZ Horse & Pony* magazine titled "What goes on tour; doesn't stay on tour" (Article). On 22 December 2017 the plaintiff issued proceedings alleging that by publishing the Article the defendants had defamed her in various ways.

[2] On 18 August 2022, following a 14-day trial, a jury returned verdicts that: the Article held each of the 16 defamatory meanings alleged; the defendants had not established that the plaintiff had suffered only minor harm; and that it was appropriate to award compensatory damages of $225,000 and punitive damages of $15,000.

[3] On 3 March 2023 the Court held that the defendants had not made out their affirmative defence that the Article was a responsible communication on a matter of public interest[1] – the so called "public interest" defence as recognised by the Court of Appeal in *Durie v Gardiner*.[2]

[4] The plaintiff is entitled to costs. The parties have filed memoranda. The plaintiff seeks scale costs of $252,928 with a 50 per cent uplift to $379,392, together with disbursements of $48,729.60. The defendants say costs should be no more than $51,617.75, together with disbursements.

[5] The parties are poles apart and there is little, if any, common ground between them. Their differences can be summarised as follows:

(a) **Scale:** The plaintiff says Category 3 costs are appropriate to reflect the complexity of the case and the specialist skill reasonably required of counsel. On the other hand, the defendants say the District Court costs regime should apply with costs calculated on a 2B basis.

(b) **Uplift/reduction:** The plaintiff says scale costs should be increased by 50 per cent in light of: the defendants' unreasonable rejection of various *Calderbank* settlement offers; and other unreasonable conduct

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1 *Cato v Manaia Media Limited* [2023] NZHC 385.
2 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.

throughout the proceeding. On the other hand, the defendants say costs should be reduced by 10 per cent because the plaintiff took unnecessary steps in the proceeding.[3]

(c) **Defendants' costs:** The defendants themselves claim costs of $15,853 (being 8.3 days at the District Court rate of $1,910) in relation to various steps in the proceeding.

[6] The defendants also suggest that the Court could award them indemnity costs under s 43(2) of the Defamation Act 1992 (Act).

[7] Finally, the plaintiff submits that notwithstanding the second defendant's grant of legal aid on 18 May 2020, the Court should order that the second defendant be jointly and severally liable with the first and third defendants for all costs (other than those relating to the statements of defence filed by those defendants), pursuant to s 45(2) of the Legal Services Act 2011.

[8] The defendants have appealed. Their appeal is due to be heard on 3 May 2024. Naturally, this costs judgment reflects the jury's verdicts, the judgment concerning the affirmative public interest defence[4] and the Court's other rulings as they stand.

Scale: 3B or 2B?

[9] It appears the proceedings were never categorised under r 14.3 of the High Court Rules. It is unclear why. However, costs have been awarded on a 2B basis in respect of various interlocutory applications[5] and on a Band A basis in respect of interlocutory appeals.[6]

[10] As noted, counsel for the plaintiff submits Category 3 costs are appropriate for the entire proceeding. Alternatively, that costs for certain steps in the proceeding be calculated on a Category 3 basis, including: the commencement of the proceeding; the

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3 High Court Rules 2016, r 14.7(f)(ii).
4 Note 1.
5 See for example: *Cato v Manaia Media Ltd* [2019] NZHC 1574; and *Cato v Manaia Media Ltd* [2020] NZHC 1240 at [18].
6 *Cato v Manaia Media Ltd* [2021] NZCA 226.

plaintiff's replies to the defendants' statements of defence; and preparing for and appearing at trial.

[11] Rule 14.3 provides that Category 2 proceedings are those of average complexity, requiring counsel of skill and experience considered average in the High Court. Category 3 proceedings are those that, because of their complexity or significance, require counsel to have special skill and experience in the High Court. The different categories respond to the skill and experience required by the proceeding, not necessarily to the skill and experience of particular counsel acting. The categorisation of proceedings under r 14.3 generally applies to the whole proceeding, although the Court may re-categorise in relation to certain aspects of the proceeding.[7]

[12] Counsel for the plaintiff points out that the Court has previously recognised that defamation is a specialist area, and that some aspects of defamation procedure warrant input from counsel with particular expertise in that area.[8] In *Young v Television New Zealand Limited,*[9] Gilbert J considered costs on an interlocutory application in a defamation proceeding, holding that:

> [10] I agree with Mr Young that not all defamation proceedings should be classified as Category 3. It will depend on the complexity of the proceeding and their significance. However, on balance, I am persuaded that Category 3 is appropriate for this proceeding which involves seven causes of action and raises matters of considerable significance, not only to the parties, but more generally. The claims, defences and reply to defences will all require detailed pleading and careful presentation at trial. I consider that the proceeding requires counsel with specialist skill and experience in the High Court. The parties appear to have made the same assessment as is evidenced by the decision to retain leading defamation lawyers to represent them.

[13] Counsel for the plaintiff submits that the current proceeding, like *Jones v Lee* and *Young*, involved areas of significant complexity arising from the specialist nature of defamation procedure. This included the presentation of the pleaded meanings and careful and detailed responses by the plaintiff to the pleaded affirmative defences (in the form of the plaintiff's notice under ss 39 and 41 of the Act).

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7 See for example *J v J* [2013] NZHC 1822 at [10] – [11].

8 Citing *Jones v Lee* HC Wellington CIV-2007-485-1510, 3 September 2010 at [15] and [21].

9 *Young v Television New Zealand Ltd* [2012] NZHC 3460.

[14] On the other hand, Mr King for the defendants submits that, pursuant to r 14.13, costs should be calculated in accordance with the District Court Rules. He points out that the damages awarded were within the jurisdiction of the District Court and submits that the proceeding could have been brought there.

[15] Alternatively, Mr King says Category 2 is the appropriate category. He says that although he has no defamation experience, he found the law to be readily accessible. He submits that the evidence and facts were "reasonably straightforward", and that matters only became complex as a result of the plaintiff's "over-resourced litigation". He points out that previous costs awards in relation to interlocutory matters throughout the proceeding have been made on a 2B basis.

Discussion

[16] I do not consider that r 14.13 should apply in this case. Damages were at large throughout the proceeding by virtue of s 43(1) of the Act, which prohibits a plaintiff from specifying in their statement of claim the amount of the damages claimed. In his closing address to the jury, counsel for the plaintiff submitted that damages of $350,000 would be appropriate. In any event, I accept counsel's submission that the size of a damages award is not determinative for the purposes of r 14.13 in the context of a defamation proceeding. In *Killalea v In Print Publishing Co Limited*,[10] Woodhouse J made the following comment about the predecessor to r 14.13:

> In my opinion R.559 is intended to serve a double purpose. It is designed to minimise costs, and it is intended to persuade litigants to accept the jurisdiction of the lower court in all proper cases. Nevertheless, these practical considerations need to be applied with some reasonable flexibility… There can be no doubt that the Magistrate's court is well able to dispose of many cases which involve complicated or important questions; and with respect I agree with MacGregor J, who was not prepared in the *Anderson* case… To accept the view that every plaintiff bringing an action for defamation was justified in bringing it before a jury in the Supreme Court. On the other hand it is not enough to show that a case could have been disposed of satisfactorily in the lower court; the question is rather whether the case was a proper one to bring in the Supreme Court… In the final analysis this problem becomes one of degree.

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[10] *Killalea v In Print Publishing Co Ltd* [1966] NZLR 70 (SC).

[17] Although the level of damages the jury found appropriate was within the jurisdiction of the District Court, I am satisfied that it was appropriate for the proceeding to be brought in the High Court. It involved issues of some complexity, including the public interest defence recognised by the Court of Appeal in *Durie v Gardiner*.[11] As noted, damages were at large throughout the proceeding and the defendants insisted on their right to a trial by jury, as they were entitled to do. For these reasons I consider that costs should be determined in accordance with the allowances and other relevant provisions of the High Court Rules 2016.

[18] I do not consider that Category 3 is appropriate for the entire proceeding. Many aspects of the proceeding appear to have been relatively straight forward, and costs have already been allocated on a 2B basis in respect of some particular steps taken during the proceeding. However, I accept counsel for the plaintiff's submission that particular aspects of the proceeding were of such complexity or significance as to require counsel with special skill and experience. Category 3 costs should be awarded in relation to these aspects of the proceeding. With reference to the attendances and steps set out in Schedule A of the memorandum of counsel for the plaintiff, I consider costs should be awarded on a 3B basis for the following attendances:

(a) the commencement of the proceeding on 22 December 2017;

(b) the plaintiff's notice of particulars under ss 39 and 41 of the Act and the plaintiff's reply to each of the defendants' statements of defence;

(c) preparation and appearance at the pre-trial conference before Campbell J on 20 August 2021;

(d) preparation and appearance at the pre-trial conference before Robinson J on 26 July 2021 and 28 July 2021;

(e) the plaintiff's memorandum of counsel concerning the plaintiff's objections to the defendants' new evidence; and

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[11] The Court of Appeal's judgment in that case was reserved at the time the plaintiff commenced the current proceeding.

(f) the preparation for the hearing and appearance at trial.

Should there be an uplift or reduction of scale costs?

[19] The plaintiff seeks an uplift of 50 per cent. She says that the defendants unreasonably refused numerous reasonable settlement offers, and conducted their defence in a way that unnecessarily prolonged the proceeding and increased costs.

Failure to accept reasonable settlement offers

[20] The plaintiff made a number of offers to settle the proceeding on an open and *Calderbank* basis. They are accurately summarised in the memorandum of counsel for the plaintiff as follows:

Date	Offer	Comment
8/12/2017	Removal of the article, publication of an agreed apology, and working with the plaintiff to ensure that the apology would be reactive to internet searches. No costs or damages.	Open offer made pre-commencement.
13/12/2017	Publication of apology (annexed to the letter) and payment of $75,000 in damages, plus reasonable costs to date.	Pre-commencement *Calderbank*.
11/06/2018	Publication of apology (annexed to the letter) and payment of $80,000 (plus GST).	*Calderbank*.
24/08/2018	Publication of apology (annexed to the letter) and payment of $90,000 (plus GST).	*Calderbank*.
8/02/2019	Payment of $200,000 (no apology).	*Calderbank*.
9/09/2020	Publication of apology and payment of $95,000 (plus GST).	*Calderbank*.

[21] Mr King acknowledges that the initial offers in December 2017 were not accepted and that the damages award by the jury exceeded those initial offers.[12]

[12] The defendants did publish an amended Article on the *Horse & Pony* website following receipt of the first of these letters from the plaintiff's solicitors on 8 December 2017. However, the jury must have accepted that this was defamatory and did not mitigate the damage to the plaintiff's reputation.

However, he says the plaintiff's submissions concerning an uplift do not take into account that:

(a) The plaintiff's initial correspondence in December 2017 was treated seriously and defences were clearly communicated by the defendants' former solicitors.

(b) The plaintiff withdrew her request pursuant to s 26(1) of the Act for a recommendation from the Court that the defendants publish a correction. Hinton J later described this as "regrettable".[13]

(c) The protracted nature of the case the defendants say the plaintiff pursued against them, including two appeals to the Court of Appeal about interlocutory matters, once of which was successful and one of which was not.

Discussion

[22] The fact that the award of damages ultimately exceeded all the plaintiff's settlement offers does not in itself entitle the plaintiff to an uplift of costs. The Court must consider whether the rejection was unreasonable in the circumstances. Relevant factors include:[14]

(a) the size of the offer relative to actual costs;

(b) the amount of the claim;

(c) the reasonable expectations of the party that refuses the offer;

(d) the amount of preparation for trial already undertaken;

(e) whether the proceeding concerns an uncertain area of law;

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13 *Cato v Manaia Media Ltd* [2019] NZHC 440 at [53].

14 *Weaver v HML Nominees Ltd* [2016] NZHC 473 at [30].

(f) whether the parties were in a position to assess the merits when the offer was received;

(g) the information available to the party who receives the offer and the extent to which they can assess the offer;

(h) the timing of the offer; and

(i) the conduct of the offeror.

[23] Counsel for the plaintiff submits that all of her offers were reasonable, made in good faith to achieve finality and to avoid the costs of trial. They say that the defendants had no reasonable justification for rejecting the offers, and that if they had engaged constructively and reasonably with the pre-commencement offer on 8 December 2017, the proceeding would not have been filed.

[24] In my view the most significant factor is the jury's indication that damages of $240,000 were appropriate, including $15,000 punitive damages. Between 8 December 2017 and 9 September 2020, the plaintiff made six offers to settle for considerably less than that amount. The offers were made over a period of almost three years. During that time, the Court (and the Court of Appeal) confirmed that the Article was at least capable of the defamatory meanings alleged.[15]

[25] I have reviewed carefully the correspondence between the parties' solicitors between 8 December 2017 and 13 December 2017. Although the parties were predictably positional about the merits of the plaintiff's claim, there are some genuine attempts by the defendants to resolve matters through amendments and apologies. Prior to the commencement of the proceedings, the correspondence shows that the major issues between the parties were the wording of the apology and disagreement as to whether the Article should be amended or withdrawn. However, in light of the jury's findings that the Article contained all the defamatory meanings alleged, the plaintiff can hardly be criticised for insisting upon the publication of a more fulsome apology and the deletion of the Article, rather than merely its amendment. In any

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15 *Cato v Manaia Media Ltd* [2019] NZCA 661.

event, the plaintiff made four more settlement offers between 11 June 2018 (seven months after proceedings were issued) and 9 September 2020.

[26] In all of the circumstances, and particularly on account of the jury's verdicts and award of damages, I am satisfied that an uplift on scale costs is appropriate in light of the defendants' rejection of the plaintiff's various settlement offers.

The defendants' conduct

[27] The plaintiff also submits that the defendants have conducted their defences in a manner that has unnecessarily increased her costs. In particular, the plaintiff submits:

(a) **Meritless defences**: The defendants maintained meritless defences. The defence of honest opinion was contrary to other aspects of the defendants' case but was only withdrawn towards the end of trial. Similarly, their defences of "failure to mitigate" and "no causation" were misconceived and struck out.

(b) **Timetable breaches**: The defendants served eight new briefs of evidence over one year late and just before the jury trial was due to commence. This required last-minute argument concerning relevance, admissibility of evidence and trial duration. Ultimately, most of the late briefs were held to be inadmissible and the others did not support the affirmative defences.

(c) **Trial bundle**: The defendants sought to include irrelevant documents in the trial bundle, which the plaintiff submits were designed solely to embarrass her and an expert witness.

(d) **Discovery breaches**: The defendants did not preserve relevant documents, including Facebook analytics data. Perhaps more significantly, the third defendant misleadingly manipulated an email chain that she relied on in her evidence at trial. Counsel for the plaintiff submits quite rightly that this is serious misconduct not to be countenanced by the Court.

[28] Counsel for the plaintiff submits that the severity of the defendants' default during the pre-trial and trial phases justifies an uplift in excess of 50 per cent. However, they also say that an uplift of 50 per cent would result in an overall costs award that is fair in the circumstances, whilst avoiding the need for a granular analysis of the additional costs incurred in respect of each individual step.

[29] Mr King for the defendants submits that none of the grounds described in r 14.6(3) upon which the Court may order increased costs apply in this case. He submits that it was the plaintiff, rather than the defendants, who unnecessarily contributed to the time and the expense of the proceeding, including by: withdrawing evidence to which a witness for the defendants had replied; amending the brief from an expert witness after an earlier brief from a plaintiff's witness was held to be inadmissible; unsuccessfully challenging some of the defendants' evidence; and unsuccessfully applying for a judge-alone trial. On the other hand, he submits that the defendants merely conducted a defence that was reasonably arguable, particularly in light of the severe financial consequences at stake for them.

[30] Referring to r 14.6(3)(c), Mr King submits that there was some general interest in the case beyond that of the parties. He notes the Court's finding that the Article was of some public interest for the purposes of the affirmative public interest defence recognised in *Durie v Gardiner*. In this regard, Mr King goes further and submits that the proceeding concerned a matter of public interest and therefore the costs payable by the defendants should be reduced pursuant to r 14.7(e).

Discussion

[31] I accept counsel for the plaintiff's submission that an uplift is justified in light of the defendants' decision to reject the plaintiff's various offers to settle for less than the amount of damages the jury ultimately awarded.

[32] I also accept that an award of increased costs is appropriate in relation to the attendances required shortly before and during trial to deal with the defendants' very

late filing and service of lay and purported expert evidence, largely said to be relevant to the public interest defence but most of which were ruled to be inadmissible.[16]

[33] On the other hand, I do not consider that an uplift is required on account of the affirmative defences that were ultimately withdrawn or struck out at trial. The time spent dealing with those matters is adequately captured by the award of scale costs, particularly given that Category 3 costs have been awarded in respect of the pleadings, preparation and appearance at trial.

[34] Nor do I consider that an uplift is required in relation to the documents the defendants wished to include in the bundle but which the Court ultimately excluded. Whilst I agreed with counsel for the plaintiff that these documents were clearly irrelevant and potentially prejudicial, it did not take very long to uphold those objections.

[35] Nor do I consider the third defendant's attempt to rely in evidence on her altered email chain to advance the defendants' case itself justifies an award of increased costs. This is not to countenance the third defendant's misconduct in any way. However, I am not satisfied it is appropriate in all the circumstances to use an award of costs purely to punish the third defendant for that misconduct. There is no suggestion that the first and second defendants (or their legal advisors) were aware of the misconduct. They bought it to the Court's attention during the trial, apparently as soon as they were aware of it. So, whilst the misconduct was entirely inappropriate, it did not add significantly to the length or complexity of the proceeding.

[36] Finally, and for completeness, I do not accept Mr King's submission that the plaintiff has pursued unnecessary steps in the litigation with the result that costs should be reduced by 10 per cent pursuant to r 14.7(f)(ii). Hinton J may have characterised the withdrawal of the request under s 26 as regrettable, but as noted there were previous and subsequent settlement offers from the plaintiff that the defendants rejected. Costs orders have already been made in relation to interlocutory matters in which both parties have had some success.

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16 In fairness, I record that the defendants have appealed these rulings.

[37] Standing back and taking these various factors into account, I consider that an uplift of 25 per cent is appropriate. This primarily reflects the defendants' various refusals to accept reasonable settlement offers, but also the issues arising out of the defendants' very late filing of additional evidence.

Second defendant's legal aid

[38] Counsel advise that the second defendant was granted legal aid from 12 May 2020.

[39] Section 45(2) of the Legal Services Act 2011 provides that no order for costs may be made against an aided person in a civil proceeding unless the Court is satisfied that there are exceptional circumstances to make such an order. If so, that person's liability for an order for costs must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.[17] The plaintiff submits that exceptional circumstances exist to justify an order that the second defendant be jointly and severally liable for the full costs award.

[40] A non-exhaustive list of conduct by the aided person the Court may take into account in determining whether there are exceptional circumstances justifying an award of costs against them includes:

(a) conduct that causes the other party to incur unnecessary cost;

(b) failure to comply with procedural rules and orders of the court;

(c) misleading or deceitful conduct;

(d) any unreasonable pursuit of one or more issues on which the aided person fails;

[17] Legal Services Act 2011, s 45(1).

(e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution; and

(f) any other conduct that abuses the processes of the court.

[41] For circumstances to be exceptional, they must be 'quite out of the ordinary'. The Court should be cautious not to assess the reasonableness of conduct with the benefit of hindsight.[18]

[42] In *McCollum v Thompson*,[19] the Court of Appeal observed (footnotes omitted):

> [77] The purpose of s 45 is to reduce, but not eliminate entirely, the risk that a legally aided person, if unsuccessful in the litigation, may be required to pay substantial costs despite having limited means. This promotes access to justice by ensuring that persons of limited means are not deterred from pursuing or defending claims by the prospect of an obligation to pay costs that they cannot afford to meet.

[43] In support of her claim for an order against the second defendant, counsel for the plaintiff essentially rely on the same factors upon which they relied in support of the plaintiff's request for increased costs. They point out that the second defendant has been represented with the other defendants throughout the proceeding, and substantively they have conducted a joint defence. Counsel says that the defendants have acted in unison in a way that has unreasonably delayed the proceeding thereby increasing the plaintiff's costs. In particular, counsel says that the second defendant: pursued untenable defences; jointly provided misleading discovery; refused to engage with reasonable settlement proposals; and failed to comply with timetable directions regarding the service of briefs of evidence. They submit that it is difficult to imagine a case more deserving of an award of costs against a legally aided defendant.

[44] I have already accepted counsel for the plaintiff's submission that, because of the complexity and specialised nature of the proceeding, costs should be awarded on a Category 3 basis in respect of the pleadings, trial preparation and the trial itself. I have also referred to the substantive legal developments during the course of the proceeding arising out of the Court of Appeal's decision in *Durie v Gardiner*. In my

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18 *Ngati Tama Custodian Trustee Ltd v Phillips* [2020] NZCA 252, (2020) 25 PRNZ 465 at [7].

19 *McCollum v Thompson* [2017] NZCA 269, [2017] 23 PRNZ 467.

view, these factors are also relevant in assessing the reasonableness of the second defendant's conduct for the purposes of s 45(2) of the Legal Services Act 2011.

[45] Although certain defences were struck out or withdrawn during trial, I do not consider that the second defendant's pursuit of those (or other) defences were so exceptional or out of the ordinary as to justify an award of costs against her, notwithstanding that she is legally aided. Similarly, although the defendants' public interest defence was unsuccessful, their pursuit of that relatively new defence was not exceptional or out of the ordinary for the purposes of s 45(2). That is also the case with the very late service of additional briefs of evidence purportedly in support of that defence.

[46] Although I have found that the defendants' rejection of the plaintiff's settlement offers warrants an uplift on scale costs, I do not consider that this amounts to exceptional circumstances for the purposes of s 45(2). All but one of those offers were made (and rejected) prior to the second defendant's grant of legal aid. I also take into account that all of the defendants rejected those offers, not just the second defendant.

[47] Finally, and for completeness, I record that there is no evidence to suggest that the second defendant was aware that the third defendant had manipulated the discovered email chain, as discussed at [35] above.

Other matters

Certification for second counsel

[48] The plaintiff seeks certification for second counsel. The defendants oppose. Mr King points out that he and his junior counsel acted for three parties, whilst the plaintiff alone instructed three counsel. He submits that this shows the unnecessary "over-resourcing" of the proceeding by the plaintiff.

[49] How the plaintiff chose to resource her litigation is a matter for her. Her actual costs are irrelevant. The plaintiff has responsibly not sought certification for a third counsel. Of relevance is that this was a defamation jury trial that ran for almost three

weeks and involved the relatively new public interest defence. I have no hesitation in certifying for second counsel.

Defendants' crossclaim for costs

[50] The defendants seek costs of $15,853, being 8.3 days at $1,910 per day, broken down as follows:

(a) Filing for amended statements of defence to the plaintiff's amended statement of claim. Mr King submits that the plaintiff's amendments were without justification. He seeks one day in relation to each of the four amended statements of defence (4 x 1 days).

(b) The defendants seek costs in relation to the preparation of Mr Ireland's evidence, prepared in response to Mr Ng's evidence which was ultimately withdrawn (estimated 3 days).

(c) The defendants seek costs 0.4 days for successfully opposing each of:

(i) the plaintiff's application for a judge-alone trial, dismissed by Campbell J on 27 August 2021; and

(ii) the plaintiff's objection to Mr Hood's evidence that was ruled admissible by Woolford J shortly before trial.

(d) The costs for filing counsel's memorandum in relation to costs (0.5 days).

[51] Dealing with each in turn:

(a) I accept counsel for the plaintiff's submission that the first amended statement of claim contained no new allegations, and the fourth amended statement of claim made no amendments beyond the pleaded meanings. This did not require a response (and none was made). The third amended statement of claim added a claim for punitive damages

which was ultimately upheld at trial. I accept counsel's submission that, to a significant extent, this was based on documents discovered by the defendants.

The second amended statement of claim contained amendments following the High Court's judgment on capability of meaning (some of which were struck out, and some of which required further particulars). It also included a claim for aggravated damages, partly with reference to documents discovered by the defendants. Counsel for the plaintiff correctly points out that the reply pleading was limited to targeted admissions to a small number of sub-paragraphs and a general denial. In this regard, I allow a 2B claim of 0.2 days.

(b) I do not award costs in relation to Mr Ireland's evidence. I accept counsel for the plaintiff's submission that, in the circumstances, it was reasonable not to call Mr Ng. In any event, counsel correctly points out that the allowance for briefing witnesses in item 33 of Schedule 3 is a function of trial duration, not of the number of witnesses briefed.

(c) Costs in relation to the plaintiff's application for a judge-alone trial was dealt with by Campbell J when he dismissed that application.[20] The plaintiff's unsuccessful objection to the admissibility of Mr Hood's evidence was raised in the context of a pre-trial conference dealt with in a one-hour fixture on 19 July 2022, and resulted in a 37-paragraph judgment.[21] Woolford J did not deal with costs. I allow 2B costs of 0.4 days.

(d) I do not propose to make an award to either party of costs in relation to costs.[22]

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20 *Cato v Manaia Media Ltd* [2021] NZHC 2240 at [30].

21 *Cato v Manaia Media Ltd* [2022] NZHC 1727.

22 *Jackson v Kerr* [2022] NZHC 29 at [28].

Section 43(2) of the Defamation Act 1992

[52] Mr King suggests that it is open for the Court to apply s 43(2) of the Act, which provides that the Court should award indemnity costs to an unsuccessful defendant where the amount of damages awarded is less than the amount claimed, and in the opinion of the Judge the damages claimed are "grossly excessive". Mr King refers to counsel for the plaintiff's submission in his closing address to the jury that an award of compensatory damages of $300,000 and punitive damages of $50,000 would be appropriate. Obviously, the jury did not accept this submission, which Mr King says illustrates a significant over-reach in the plaintiff's claim.

[53] I do not consider that s 43(2) applies. As noted previously, s 43(1) of the Act prohibited the plaintiff from specifying in her statement of claim the amount of damages claimed. This statutory prohibition is to prevent the chilling effect of oppressive claims against news media defendants. I therefore accept the submission of counsel for the plaintiff that there was no formal "claim" for damages capable of being "grossly excessive" for the purposes of s 43(2). Damages remained at large throughout the trial. Counsel's submission to the jury as to what might be an appropriate level of damages was simply that.

[54] In any event, I accept counsel for the plaintiff's submission that even if there had been a claim for $350,000 damages, it was not "grossly excessive". In *Wiremu v Ashby*,[23] Osbourne J noted that "grossly" must be given its normal meaning, being "in a gross manner; plainly; excessively; flagrantly … of conspicuous magnitude; palpable, striking; … glaring; flagrant; monstrous". In that case, the plaintiff had claimed damages of $50,000, but was awarded only $10,000. In these circumstances, Osbourne J considered that the margin between damages claimed and damages recovered was excessive, but not grossly so.[24] Similarly, in circumstances where the jury awarded damages of slightly more than two-thirds of the amount claimed, I do not consider that the amount claimed is excessive.

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[23] *Wiremu v Ashby* [2019] NZHC 1334.
[24] At [17].

Summary

[55] I award the plaintiff costs on the following basis:

(a) Scale costs calculated on a 2B basis in relation to each of the attendances set out in Schedule A of the Memorandum of Counsel for the plaintiff, save that for the following attendances costs are awarded on a 3B basis:

(i) the commencement of the proceeding on 22 December 2017;

(ii) the plaintiff's notice of particulars under ss 39 and 41 of the Act and the plaintiff's replies to each of the defendants' statements of defence;

(iii) the preparation and appearance at the pre-trial conference before Campbell J on 20 August 2021;

(iv) preparation and appearance at the pre-trial conference before Robinson J on 26 July 2021 and 28 July 2021;

(v) the plaintiff's memorandum of counsel concerning the plaintiff's objections to the defendants' new evidence; and

(vi) the preparation for the hearing and appearance at trial.

(b) An uplift of 25 per cent.

(c) Reduction of 0.6 days (Band B) in relation to the defendants' statements of defence to the plaintiff's second amended statement of claim, and the plaintiff's unsuccessful challenge to Mr Hood's evidence.

(d) I certify for second counsel.

(e) I decline to make any order pursuant to s 45(2) of the Legal Services Act 2011.

[56] On this basis costs are calculated as follows:

(a)	Scale costs:	$215,944.
(b)	An uplift of 25 percent:	$53,986
		$269,930
(c)	Less: 0.6 x $2,390 =	$1,374
		$268,556

Disbursements

[57] The plaintiff claims disbursements of $48,729.60. This largely comprises filing fees (excluding those for amended pleadings), hearing fees and the costs of expert witnesses. Save for the issue discussed below the defendants agree these are reasonable, as do I.

[58] The defendants pointed out that two invoices of $4,140 and $2,070 were from an expert witness whose first brief of evidence was originally ruled inadmissible. The defendants do not challenge the reasonableness of these invoices per se, but they submit the Court should make enquiries to ensure the attendances on preparing inadmissible evidence are not claimed.

[59] Justice Campbell ruled that the witnesses first brief of evidence was inadmissible because the basis upon which he had been asked to express an expert opinion relevant to reputation did not reflect the plaintiff's pleaded defamatory meanings.[25] The plaintiff was granted leave to file a supplementary brief of evidence from the witness, which she did. This was materially different from the first brief, but in some ways built upon it. Having reviewed the two invoices, I am satisfied it is appropriate for the plaintiff to be awarded $5,210 of the total disbursement of $6,210.

[25] *Cato v Manaia Media Ltd* [2021] NZHC 229 at [92] – [93].

Result

[60] The plaintiff is awarded costs of $268,556 together with disbursements of $47,729.60.

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Robinson J