IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA227/2023
[2024] NZCA 502

BETWEEN	TELEVISION NEW ZEALAND LIMITED First Appellant
	THOMAS MEAD Second Appellant
AND	TALLEY'S GROUP LIMITED First Respondent
	TALLEY'S LIMITED Second Respondent
	AFFCO HOLDINGS LIMITED Third Respondent
	AFFCO NEW ZEALAND LIMITED Fourth Respondent
	SOUTH PACIFIC MEATS LIMITED Fifth Respondent

Hearing:	9 May 2024
Court:	Courtney, Katz and Cooke JJ
Counsel:	D M Salmon KC and E D Nilsson for Appellants W R Potter and J L Gibson for Respondents
Judgment:	4 October 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The decision of the High Court striking out the appellants' bad reputation pleading is set aside, and the relevant paragraphs of the statement of defence are restored.

C The decision of the High Court striking out the third and fourth affirmative defences is upheld.

D The appellants are to file and serve a further amended statement of defence corresponding to this decision within 15 working days of this judgment.

E The respondents must pay the appellants one set of costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Cooke J)

Table of Contents

	Para No
Introduction	[1]
Background	[5]
Damage to reputation threshold	[12]
Argument	[14]
Assessment	[16]
Is bad reputation relevant to the more than minor harm threshold?	[28]
Arguments	[30]
Assessment	[38]
Is the bad reputation pleading included by the common law Restriction of such claims?	[50]
Arguments	[51]
Assessment	[56]
Do the pleaded instances relate to the aspect of reputation in issue?	[62]
Arguments	[63]
Assessment	[65]
Conclusion	[71]
Result	[74]

Introduction

[1] In these proceedings the respondents (collectively, the Talley's Group) sue Television New Zealand Limited (TVNZ) and one of its journalists in defamation. Between July 2021 and May 2022, TVNZ is alleged to have made a series of

broadcasts and associated publications on its website making allegations about the Talley's Group's operations. The Talley's Group say that the overriding message of these publications was that work conditions at the Talley's Group's factories were needlessly unsafe, that management was turning a blind eye, and that the businesses were being run in a manner detrimental to the employees. The Talley's Group do not seek damages, but rather limit their claim to seeking declarations that they have been defamed and indemnity costs.

[2] As part of its defence, TVNZ has pleaded that the Talley's Group already had a bad reputation, to the extent that the publications did not cause the requisite level of harm to the Talley's Group's reputation to succeed with a defamation claim (the bad reputation pleading). TVNZ also seeks to use the bad reputation pleading as an affirmative defence to the Talley's Group's claims for declarations and indemnity costs.

[3] The Talley's Group applied to strike out elements of the statement of defence, including the bad reputation pleading. By judgment dated 31 March 2023, Associate Judge Gardiner accepted the Talley's Group's arguments in relation to that plea and struck out the relevant paragraphs of the second amended statement of defence and the associated schedule.[1]

[4] TVNZ now appeals from the Judge's decision and seeks orders reinstating its bad reputation pleading.

Background

[5] Between July 2021 and May 2022, TVNZ broadcast through its *1News at Six* programme a series of stories about the Talley's Group. Those broadcasts were accompanied by articles published on the 1News website. The stories contained a series of investigative reports concerning the health and safety standards at the Talley's Group's sites, and the way in which the Talley's Group handled claims by injured workers.

---

1 *Talley's Group Ltd v Television New Zealand Ltd* [2023] NZHC 696 [Judgment under appeal].

[6] TVNZ pleads, in defence of the reputational harm element of the tort, that the Talley's Group had a pre-existing reputation that was so bad that any defamatory aspects of the reporting could not have materially worsened it. In support of that pleading, it identified a series of specific instances of alleged misconduct by the Talley's Group in relation to workplace health and safety issues going back to 2001. TVNZ has pleaded affirmative defences of truth and that it had reported responsibly on a matter of public interest. TVNZ has also advanced the bad reputation pleading as an affirmative defence to the claims for declaratory relief and indemnity costs.

[7] By application dated 15 July 2022, the Talley's Group sought orders striking out aspects of the statement of defence, including the bad reputation pleadings. They contended that TVNZ was not permitted to plead specific instances of alleged misconduct by the Talley's Group as a defence to the defamation claim. In particular, they submitted that the ability to advance a bad reputation pleading is limited to the circumstances identified in s 30 of the Defamation Act 1992.

[8] The Talley's Group argued this section did not apply because they were not seeking damages which a bad reputation pleading could mitigate. The Talley's Group's claim was addressed by s 24 of the Defamation Act which provides:

> **24 Declarations**
>
> (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
>
> (2) Where, in any proceedings for defamation,—
>
> (a) the plaintiff seeks only a declaration and costs; and
>
> (b) the court makes the declaration sought,—
>
> the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the court orders otherwise.

[9] The Judge upheld the Talley's Group's arguments. She held:[2]

> [77] To my mind, the issue is one of relevance. It can only be permissible for a defendant to raise particulars of a plaintiff's prior bad reputation if that reputation has a bearing on an aspect of the claim. As noted, in the past, the plaintiff's pre-existing bad reputation has only ever been considered relevant

2 Judgment under appeal, above n 1.

to mitigation of damages. The defendants suggest that this consideration has wider relevance to:

(a) the new common law threshold that the publication must tend to harm the plaintiff's reputation in a 'more than minor' way;

(b) the statutory requirement that the publication must cause or be likely to cause a corporate plaintiff financial loss; and/or

(c) the Court's discretionary decision to make a declaration.

[78] I will consider each of these aspects in turn. In doing so, I am mindful of the original rationale for the common law excluding evidence of specific instances of misconduct by the plaintiff, which, as explained by Cave J in *Scott v Sampson,* was:[3]

> It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of.

[79] Lord Guest in *Plato Films v Speidel* put it this way:[4]

> In my view, inconvenience and injustice would certainly follow if the law were to be as appellants argued it ought to be. If allegations of specific instances of misconduct were allowed to be proved in evidence in mitigation of damages, it would open the door to issues which were truly collateral, and which had but an indirect bearing on the main question in the case. It would inevitably prolong the trial and tend to confuse the minds of the jury by distracting their attention from the main issue. The result might be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations, whether or not relevant to the subject-matter of libel, introduced by the defendants for the purposes of mitigating damages.

[80] In my view these observations are still apposite today, in the sense that the defendants should not be permitted to plead particulars of prior acts of misconduct of the plaintiffs unless they are truly relevant to the matters at issue. Otherwise, the proceeding is at risk of becoming distracted from the truth or otherwise of the pleaded imputations (and the facts and circumstances that the defendants say prove the truth of those imputations) to remote and irrelevant matters.

[10] The Judge then concluded that pre-existing bad reputation was not truly relevant to the Talley's Group's claims for a declaration.[5] She also found that even if she were wrong, it would be inconceivable that the Court would find that the Talley's

---

[3] *Scott v Sampson* (1882) 8 QBD 491 (QB) at 505.
[4] *Plato Films Ltd v Speidel* [1961] AC 1090 (HL) at 1148.
[5] Judgment under appeal, above n 1, at [90]–[92].

Group's reputation was already so bad that it could not be made worse.[6] The bad reputation pleading was accordingly struck out.

[11] The parties' submissions on appeal raised a number of interrelated matters. We consider that these are best addressed by considering the following issues:

(a) What is the test for establishing harm to reputation as an element of the tort of defamation?

(b) Is previous bad reputation relevant to the claims?

(c) If so, does the previous common law restriction on raising specific matters when arguing bad reputation apply?

(d) If not, do TVNZ's pleaded instances relate to the area of reputation in issue?

Damage to reputation threshold

[12] We deal first with the identification of the harm to reputation threshold for an action in defamation before considering whether a bad reputation pleading can be raised given that threshold.

[13] In *Craig v Slater*, this Court held that the threshold was that the publication must cause "more than minor" harm to reputation.[7] TVNZ argued that its bad reputation pleading was legitimately addressed to this element of the cause of action, and that the alleged defamatory publication did not cause such harm to the Talley's Group's reputation. But TVNZ also invited us to reconsider the threshold set for that element by this Court in *Craig v Slater*.

---

6 At [93].
7 *Craig v Slater* [2020] NZCA 305 at [44]–[45].

Argument

[14] Mr Salmon KC, for TVNZ, argued that the "more than minor" harm threshold set by *Craig v Slater* was too low and had a potentially chilling effect on the freedom of expression. He relied on the judgment of Tugendhat J in *Thornton v Telegraph Media Group Ltd* which addressed the proper recognition of the right of freedom of expression and concluded that the lowest threshold that could be envisaged was the requirement for substantial harm.[8] He submitted that there is no compelling reason why the limits on freedom of expression should be different between the United Kingdom and New Zealand. The current threshold allows an action when there might only be a nominal award of damages.[9] There is no reason to allow such claims. Such an approach would allow the bringing of trivial claims that could not be struck out and would have to go to trial. This could involve a serious interference with the freedom of expression and have a chilling effect on media.[10] Serious interferences with fundamental rights can only be demonstrably justified when someone is substantially harmed.

[15] For the Talley's Group, Mr Potter argued that the Court should not change the current law. The issue has recently been considered by this Court in *Craig v Slater* with the existing test assessed as striking the right balance. Continual judicial tinkering with the threshold would be both unhelpful and unlikely to affect the outcome of the present case. The suggested chilling effect on media advanced by TVNZ is overstated. Moreover, there are also commercial pressures on media to distort, exaggerate, or unfairly represent the truth that supported the threshold set in *Craig v Slater*.[11]

---

8 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985 at [95].

9 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [68]–[69]; and *Craig v Slater*, above n 7, at [117], citing *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) at 159.

10 *Lonzim plc v Sprague* [2009] EWHC 2838 (QB) at [33] citing *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946 at [40] and [55].

11 *Reynolds v Times Newspapers Ltd*, above n 9, at 219 per Lord Cooke; and *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) at 45 per McKay J.

Assessment

[16] Historically, New Zealand courts have adopted the definitions of defamation developed at common law the courts of the United Kingdom, particularly, the definition proposed by Lord Atkin in *Sim v Stretch*:[12]

> … would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

[17] Later in this speech, Lord Atkin added:[13]

> That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character; and are treated as actionable wrongs.

[18] In *Thornton*, Tugendhat J accepted that Lord Atkin's definition could only be fully understood by reference to his later statement, which made it clear that there existed a threshold of seriousness for a statement to constitute defamation.[14] *Sim v Stretch* was therefore authority for the proposition that defamation included a threshold, albeit one that was not defined.[15] Thus, whatever definition was adopted, it had to include a threshold of seriousness so as to exclude trivial claims. Not only was this required because it accorded with the true interpretation of Lord Atkin's speech in *Sim v Stretch*, but it was also required by the right to freedom of expression protected by art 10 of the European Convention on Human Rights,[16] incorporated into United Kingdom law by the Human Rights Act 1998.[17] This Convention right had been expressly recognised in the conclusion of the Court of Appeal of England and Wales in *Jameel (Yoursef) v Dow Jones & Co Inc*, in the context of a strike-out application, that the rare cases in which a defamation claim was brought by a claimant who had suffered no or minimal damage might properly be struck out as an abuse of process.[18] This was because such a claim constituted an interference with freedom of expression which was unnecessary for the protection of the claimant's reputation.

---

12 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240.
13 At 1242.
14 *Thornton v Telegraph Media Group Ltd*, above n 8, at [90]
15 At [72].
16 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).
17 *Thornton v Telegraph Media Group Ltd*, above n 8, at [61] and [90].
18 *Jameel (Yousef) v Dow Jones & Co Inc*, above n 10, at [40].

[19] Tugendhat J considered other commonly-used definitions, drawn from Neill LJ's discussion in *Berkoff v Burchill*.[19] These included the definition proposed in *Sim v Stretch*,[20] the definition proposed by the Faulks Committee of a publication "which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally",[21] and that proposed by Neill LJ himself of a publication that "affects in an adverse manner the attitude of other people towards [the claimant]".[22]

[20] The Judge considered that the two definitions noted above — that of the Faulks Committee and that of Neill LJ in *Berkoff* — contained a threshold of seriousness through their use of the words "affect" and "adverse".[23] He added, though:[24]

> [95] If I am wrong in my conclusion that there is a threshold of seriousness in [those] definitions then I would consider that [*Jameel*] requires that these definitions should be varied so as to include a threshold of seriousness. The word that would give effect to this by imposing the lowest threshold that might be envisaged is the word "substantially", as recommended by the minority of the Faulks Committee in their Report, at p 197. If there is a higher threshold that ought to be set, then it does not appear from the above-mentioned cases what that threshold should be, and I say nothing about it.
>
> [96] On that basis [the definition in *Berkhoff*] would read: "the publication of which he complains may be defamatory of him because it [*substantially*] affects in an adverse manner the attitude of other people towards him, *or has a tendency so to do*."

[21] In *Jameel* — a strike-out application based on abuse of process — the Court of Appeal expressly considered that the irrebuttable presumption of damage inherent in the accepted definitions of defamation did not conflict with the Convention rights.[25] On this aspect, Tugendhat J made the following observations:[26]

> [94] … If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the

---

19 *Thornton v Telegraph Media Group Ltd*, above n 8, at [29], citing *Berkoff v Burchill* [1996] 4 All ER 1008 (CA) at 1011–1013.

20 *Berkoff v Burchill*, above n 19, at 1012, citing *Sim v Stretch*, above n 12, at 1240.

21 *Berkoff v Burchill*, above n 19, at 1013, citing Committee on Defamation *Report of the Committee on Defamation* (Cmnd 5909, March 1975) [Faulks Committee Report] at [65].

22 *Berkoff v Burchill*, above n 19, at 1018.

23 *Thornton v Telegraph Media Group Ltd*, above n 8, at [52].

24 Emphasis in original.

25 *Jameel (Yousef) v Dow Jones & Co Inc*, above n 18, at [41].

26 *Thornton v Telegraph Media Group Ltd*, above n 8.

> logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant. …

[22] Tugendhat J also confirmed the purpose of the threshold. There needed to be a "threshold of seriousness" that would exclude "trivial claims".[27] He concluded that this was best achieved by a requirement that "the publication … substantially affects in an adverse manner the attitude of other people towards [the plaintiff], or has a tendency do to do".[28]

[23] The threshold was then changed in the United Kingdom through s 1 of the Defamation Act 2013 by requiring the establishment of serious harm. In New Zealand, prior to the decision in *Sellman v Slater*, a threshold of seriousness was then applied.[29]

[24] In *Sellman* Palmer J reassessed the threshold that should apply before reputational harm was actionable, and he articulated the more than minor threshold. He said:[30]

> [68] There is a question about what the threshold of seriousness should be. Tugendhat J put it in terms of whether the statement does, or tends to, "substantially affect" reputation. The Court of Appeal in *Lachaux* considered that "serious harm" [required] by s 1 of the UK Act, was "something rather more weighty". Dobson J also followed the UK Act in using the term "serious harm" [in *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*]. I am concerned a threshold of "serious harm" is too high. The level of harm to reputation is assessed in a defamation proceeding, on the basis of evidence at trial and reflected in damages. It is possible for an actionable defamation that causes less than serious but more than minor harm to reputation to be reflected in a nominal award of damages, combined with a declaration of defamation. Such an outcome may still constitute a reasonable limitation on the right to freedom of expression. But protecting reputations against harm that is less than minor, in my view, unjustifiably chills the proper exercise of the right to freedom of speech. I consider a threshold of more than minor harm to reputation should be required to found an action for defamation in New Zealand.
>
> [69] So I consider the common law of defamation in New Zealand is that damage to reputation is presumed to occur on publication of a defamatory

---

[27] At [90].

[28] At [96] (emphasis omitted).

[29] *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854 (2015) 14 TCLR 149 at [120].

[30] *Sellman v Slater*, above n 9 (footnote omitted).

> statement. But that presumption is rebuttable. If a defendant can show their statement has caused less than minor harm to the plaintiff's reputation, that will defeat a defamation claim. It may therefore be a basis for showing a cause of action is clearly not tenable in a strike-out application. …

[25] This Court later approved this standard in *Craig v Slater*. Kós P said for the Court:[31]

> [44] For a meaning to be defamatory, it must tend to affect the claimant's reputation adversely. And it must do so in more than a minor way. That qualification was contended for by Mr Miles, for the appellant. Mr Akel queried it. It reflects the serious harm threshold developed in United Kingdom courts, and since legislated for there. The High Court in New Zealand has approved and adopted that qualification, but it has not yet been considered by this Court.
>
> [45] We approve adoption of the "more than minor" harm requirement in New Zealand common law, for three reasons. The first is that damage to reputation is an essential element of the cause of action of defamation, for the reasons Tugendhat J canvassed in *Thornton v Telegraph Media Group Ltd*. The fact that damage is rebuttably presumed (in most cases) does not alter the fact that damage to reputational credit remains an element of the tort. Principle and proof should not be confused. Secondly, a threshold of this kind is a necessary consequence of the right to freedom of expression protected by s 14 of the New Zealand Bill of Rights Act 1990. We agree with the reasoning of Palmer J in *Sellman v Slater* on that point. Thirdly, we consider the requisite threshold standard — "more than minor harm" — was correctly identified in the same decision and is to be preferred to a higher standard based on the word serious.

[26] We accept that the formulation of the test is important. We also accept that there was little analysis provided in *Craig v Slater* explaining why the "more than minor" harm threshold was preferable to the "substantial" harm threshold, or explaining any materiality of the different formulations in real terms. The various potential verbal formulations overlap and exist on a continuum, and they may become material. Neither was there an assessment in *Craig v Slater* of the significance of the "more than minor" harm threshold being rebuttable.

[27] But *Craig v Slater* is nevertheless a recent decision of this Court upholding the rebuttable "more than minor" harm threshold as an element of the tort. This Court is ordinarily bound by its earlier decisions and will only review earlier decisions in rare cases. That principle was restated by a full Court following the establishment of the Supreme Court

[31] *Craig v Slater*, above n 7 (footnotes and emphasis omitted).

in *R v Chilton*.[32] Such an approach is necessary for certainty and stability in the law. None of the well-recognised reasons for departing from an earlier decision arise in the present case. For that reason, we do not think it is open to us to reassess what the test should be. *Craig v Slater* has established it unless the issues are further considered by the Supreme Court.

Is bad reputation relevant to the claims?

[28] The next question is whether TVNZ's bad reputation pleading is relevant to an element of the cause of action, or as an affirmative defence.

[29] In upholding the Talley's Group's argument, the Judge concluded that the bad reputation pleading was not relevant to the reputational harm element of the cause of action. She considered that the investigation into whether the threshold had been met was confined to issues concerning the meaning of the relevant statement, and possibly the circumstances of its publication.[33]

Arguments

[30] TVNZ argued that the Judge's approach was wrong. The common law historically developed limits to be applied to bad reputation pleadings (addressed below) but otherwise bad reputation is necessarily relevant to establishing whether a plaintiff's reputation has been harmed by the publication in issue. There are different ways in which a defendant can succeed in establishing that the plaintiff has not suffered sufficient harm. The meaning of the publication may not establish the element, or there may have been limited publication.[34] But these are not the only ways that a defendant can establish lack of actual harm. A defendant can also do so by calling evidence to rebut the presumption.[35]

[31] This is reflected in the decisions in the United Kingdom, albeit in the context of the serious harm threshold now applying there. *Banks v Cadwalladr* involved an

---

32 *R v Chilton* [2006] 2 NZLR 341 at [83]–[100]. See also *Singh v New Zealand Police* [2021] NZCA 91, (2021) 29 CRNZ 665 at [13]–[17].

33 Judgment under appeal, above n 1, at [90]-[92].

34 At [91] citing *Driver v Radio New Zealand* [2019] NZHC 3275, [2020] 3 NZLR 76 at [74]; and *Sellman v Slater*, above n 9.

35 At [69].

appeal from a claim that had been dismissed, including because those to whom a publication had been made already had a low regard for the plaintiff. The Court held:[36]

> [58] This is a legally permissible line of reasoning, up to a point. Proof that the relevant sector of the claimant's reputation is bad among those to whom the statement complained of was published can reduce damages, perhaps very substantially. A claimant is only entitled to recover compensation for injury to the reputation he actually has. By the same token proof of an existing bad reputation in the relevant sector must be relevant to the question of whether the publication of a statement caused serious harm to the claimant's reputation.

[32] This confirmed that previous bad reputation was relevant to the reputational harm element of the tort as well as the level of damages. It was then wrong for the High Court to find that the defence could not succeed on the facts on a strike-out application, especially given the measured approach to striking out articulated recently by the Supreme Court in *Smith v Fonterra Co-Operative Group*.[37]

[33] TVNZ also submitted that there are three additional elements that demonstrate why the bad reputation plea is relevant in the present circumstances. First, an application for declaratory relief is discretionary.[38] The extent of the actual harm caused to a plaintiff can be relevant to determining whether a declaration should be granted. Secondly, the plaintiffs here are corporate bodies, and for them to maintain a claim in defamation they must prove actual or likely pecuniary loss.[39] The existence of a pre-existing bad reputation may go to show that no actual loss was caused by the defamation. Finally, an award of indemnity costs for declaratory claims under s 24(2) of the Defamation Act is discretionary. The Court could decline to award indemnity costs because the adverse effect of the defamation was only modest given a pre-existing bad reputation.

[34] For the Talley's Group, Mr Potter supported the analysis of the Judge, contending that the alleged instances of bad reputation are not truly relevant to the more than minor threshold. This threshold is still directed to whether the publications

---

36 *Banks v Cadwalladr* [2023] EWCA Civ 219, [2023] KB 524.

37 *Smith v Fonterra Co-Operative Group* [2024] NZSC 5, [2024] 1 NZLR 134 at [74]–[76], citing *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).

38 *Smith v Dooley* [2013] NZCA 428 at [95] citing *Salmon v McKinnon* [2007] NZCA 516 at [47]; and *Van de Klundert v Clapperton* [2015] NZHC 425 at [35].

39 Defamation Act 1992, s 6. See also *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) at [57] and [62].

had the required defamatory meaning. This does not make the actual impact of the publications relevant. Parliament has not reformed the law in New Zealand in the same way as the United Kingdom. A plaintiff's pre-existing bad reputation could mitigate the level of compensation to be recovered from defamatory publication but such an argument could not completely excuse the defamation. The decision in *Craig v Slater* has not moved New Zealand away from the common law of England before its legislative reform. It remains in the form described by Lord Sumption in *Lachaux v Independent Print Ltd*.[40] The more than minor threshold concerns the inherent tendency of the defamatory words to affect reputation. This does not involve questions of fact. In that way, it did not replace the classic formulation of Lord Atkin in *Sim v Stretch*.[41] The Judge was accordingly right to say that the pleaded bad reputation was irrelevant.

[35] It was further submitted there was a rationale for allowing a bad reputation pleading in a damages claim that is absent when only a declaration is sought. It would be wrong for a person of poor reputation to receive the same level of compensation as a person of good reputation. But that rationale does not arise when only a declaration is sought. The purpose of s 24 was to allow a plaintiff to elect to pursue a declaration only and avoid the complications associated with claims for damages. The discretion in relation to the grant of a declaration does not make bad reputation relevant. As this Court found in *Fourth Estate Holdings (2012) Ltd v Joyce*, it would be inconsistent with the policy of s 24 for the discretion to be used to decline relief too readily.[42] The discretion is properly directed to the way the proceedings have been conducted.[43] For the same reasons, previous bad reputation is not relevant to the award of indemnity costs contemplated by s 24.

[36] The requirement for a corporate plaintiff to establish pecuniary loss also did not make the Talley's Group's pre-existing reputation relevant, as it is not necessary

---

40 *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), [2016] QB 402 at [16]–[17].

41 *Sim v Stretch*, above n 12, at 1240: "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

42 *Fourth Estate Holdings (2012) Ltd v Joyce* [2020] NZCA 479, [2021] 2 NZLR 758 at [85].

43 *Salmon v McKinnon*, above n 38, at [46]–[50]; and *Smith v Dooley*, above n 38, at [95]–[105].

for the plaintiff to quantify that loss.[44] That is because such loss can be established by inference and be based on likely effects only.[45]

[37] It was submitted that the Judge was also right in concluding that it was inconceivable that any previous bad reputation was an answer to the Talley's Group's allegations. There was an "air of unreality" to the submission that a story by the national broadcaster on its flagship programme revealed nothing new to viewers or simply reinforced what they already knew. It was not wrong to strike out the defence based on an assessment that it could not succeed on the facts. The courts are not bound to accept pleadings of fact that do not contribute towards the solution of the issue to be tried.[46]

Assessment

[38] We consider that evidence of a pre-existing bad reputation is relevant to the claims brought by the Talley's Group as it goes to an element of the cause of action. For that reason, particularising a defence based on alleged bad reputation is required by s 42 and this pleading ought not to have been struck out.

[39] The determination of the threshold for reputational harm has involved a careful balance of the relevant rights and interests at play. In deciding that the more than minor harm threshold was appropriate, the right of freedom of expression recognised by s 14 of the New Zealand Bill of Rights Act 1990 has been balanced against the right of those harmed by defamatory publications to access to the court to seek a remedy. That balancing is evident from similar assessments conducted in other jurisdictions, such as the United Kingdom and Australia. It has also been the subject of legislative consideration, such as the amendments to the United Kingdom legislation in 2013.

[40] These assessments have involved consideration of procedural as well as substantive law. In *Sellman v Slater*, Palmer J concluded that the reputational harm threshold should be addressed as an element of the tort rather than through an

---

44 *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 2846, [2018] 2 NZLR 587 at [40]–[44].

45 *Rural News Ltd v Communications Trumps Ltd*, HC Auckland AP167-SW00, 4 April 2001 at [14].

46 *Plato Films Ltd v Speidel*, above n 4, at 1149 per Lord Guest.

application to strike out a claim in accordance with the approach adopted in the United Kingdom in *Jameel*.[47] He considered that it was unsatisfactory for this issue to be dealt with by way of an allegation of abuse of process.[48] This Court then approved the more than minor harm requirement as an element of the cause of action in *Craig v Slater*.[49]

[41] This formulation involves a rebuttable presumption. The requisite harm is presumed to exist as a consequence of the meaning of the publication, but the defendant is able to put in issue whether the publication did in fact harm the plaintiff's reputation to the requisite level, and call evidence on that issue at trial. We consider that it follows that a defendant can argue that the plaintiff had a pre-existing bad reputation in the relevant area to the point that the threshold has not been satisfied. Moreover, for a corporate plaintiff the only relevant harm is pecuniary loss as a consequence of s 6 of the Act. Pecuniary loss is not presumed to arise from the meaning of the publication. It must be proved as a matter of fact, albeit it can be established as a matter of inference.[50]

[42] We do not agree with the Judge that, where only a declaration is sought, the relevant inquiry associated with this element is limited to the defamatory meaning of the words and the extent of the publication. A defendant is also entitled to say at trial that the apparently defamatory publication had only a minor impact on the plaintiff's existing reputation as a matter of fact, and/or that no likely pecuniary loss was caused. The harm caused by untrue statements is not ascertained by the meaning of the statements alone. The nature of any harm will depend on the plaintiff's existing reputation. Something that is very damaging to one person may be water off a duck's back to another. A pre-existing bad reputation may mean that an apparently harmful statement creates no more than minor harm for the plaintiff.

[43] We do not consider it appropriate to strike out such a defence — in effect a summary determination that a defendant cannot succeed with its denial of this element

---

47 *Sellman v Slater*, above n 9, at [58]–[69], citing *Jameel (Yousef) v Dow Jones & Co Inc*, above n 10.

48 *Sellman v Slater*, above n 9, at [63].

49 *Craig v Slater*, above n 7, at [44]–[45].

50 See *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854 at [78]–[79].

of the cause of action — because a court considers that the defendant will not prevail on this question. That is a matter for trial. For that reason, we do not accept the argument, described as the Talley's Group's fundamental point, that TVNZ cannot succeed on the facts. That is not a matter to be addressed on a strike-out application under r 15.1 of the High Court Rules 2016. Factual findings at the strike-out stage can only be appropriate when "an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further".[51] That is not the case here.

[44] Even if a robust approach to the facts were adopted, we do not agree that it is inconceivable that the bad reputation pleading would succeed as the Judge said. As Mr Salmon argued, it may be that the Talley's Group's claims potentially succeed only in part — that only some of the statements made about them were shown to be untrue and potentially harmful to the Talley's Group's reputation. Were that so, we agree that it is not inconceivable that a jury could conclude that the Talley's Group's general reputation in this area was such that any harm from the harmful publication was not more than minor. This conclusion is also supported by the requirement that a corporate plaintiff prove financial loss. A pre-existing bad reputation may mean that no pecuniary loss from the statement is likely.

[45] The position is different in relation to TVNZ's affirmative defences, however. We do not accept TVNZ's submission that the discretion to be exercised in relation to the grant of the declaration or the award of indemnity costs under s 24 independently makes bad reputation relevant.

[46] As the Talley's Group submit, a plaintiff should be allowed to elect the remedies contemplated by s 24. A plaintiff is able to forego their claim for damages and thereby be able to recover indemnity costs if the claim for a declaration succeeds. A declaration could only be withheld in very limited circumstances when the elements of the cause of action are satisfied. As this Court said in *Fourth Estate Holdings (2012) Ltd v Joyce*:[52]

---

51 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.
52 *Fourth Estate Holdings (2012) Ltd v Joyce*, above n 42.

> [85] … It seems to us that a plaintiff who has chosen to seek a declaration under s 24 rather than claiming damages should not lightly be denied any relief at all, and (as a result) exposed to an award of costs. If a claim for damages would have succeeded, it will generally be inconsistent with the policy rationale for enacting s 24 to refuse relief. If the courts are too ready to deny declaratory relief under s 24, plaintiffs will be discouraged from pursuing a s 24 claim for a declaration in place of a claim for damages. Rather, it seems to us that any concerns about the way in which the claim has been pursued by the plaintiff are more likely to be reflected in the costs award that is made following grant of a declaration.

[47] Whilst there is a discretion in relation to the award of indemnity costs, as the Court indicated it would usually only be appropriate to exercise the discretion not to so award them because of the manner in which the proceedings have been conducted, or if the claim only succeeded in part. Rule 14.7 of the High Court Rules might be applied by analogy in such cases. But discretionary decisions in this respect should not be exercised to undermine the object of s 24.

[48] For these reasons, we agree that the third and fourth affirmative defences — which plead that no declaration should be made and no indemnity costs should be awarded as a matter of discretion because of the Talley's Group's pre-existing bad reputation — should remain struck out.

[49] But a plaintiff electing to proceed under s 24 cannot render irrelevant evidence that goes to the elements of the cause of action. And because reputational harm is an element of the tort a defendant is able to put in issue whether the publication had no actual impact, or only a minor impact on the plaintiff's reputation because it was already so poor and that no financial loss was likely. For that reason, subject only to the remaining issues addressed below, TVNZ's pleading that the reputational harm element of the cause of action is not satisfied because of the Talley's Group existing bad reputation ought not to have been struck out.

Is the bad reputation pleading subject to the common law restriction on such claims?

[50] In striking out the bad reputation pleading, the Judge referred to the common law rule that restricted the extent to which the defendant to a defamation action could

put in issue specific matters associated with the plaintiff's alleged bad reputation.[53] She considered that this approach was still applicable and it informed her assessment about whether allegations were truly relevant.[54] On appeal, TVNZ argues that the common law position should no longer apply. The Talley's Group rely on the common law position.

Arguments

[51] TVNZ referred to the common law rule that prevented a defendant from leading specific instances of bad character. That rule did not apply to prior relevant criminal convictions which were treated as being in a class of their own, however.[55] The rule was criticised as logically flawed by Lord Radcliffe in his dissenting judgment in *Plato Films Ltd v Speidel*.[56] The position in the United Kingdom was then considered by the Faulks Committee in 1975, with that Committee concluding that the distinction could not be supported and the rule should be abolished.[57] New Zealand's Committee on Defamation, the McKay Committee, agreed with the Faulks Committee on this point and made the same recommendations for reform.[58] Those recommendations were adopted and are reflected in ss 30 and 42 of the Defamation Act.

[52] Whilst s 30 relates solely to a claim for damages, TVNZ argues that the opinions of the McKay Committee reflect the view that the distinction previously applied at common law could not be sustained as a matter of logic. The conclusion that the distinction could not be sustained is accordingly just as relevant when a plaintiff elects to sue for a declaration only.

[53] The common law restriction on putting the plaintiff's reputation in issue was also based on policy considerations — that proceedings would be diverted into such matters and be turned into an unconstrained inquiry into the plaintiff's reputation.[59]

---

53 Judgment under appeal, above n 1, at [77]–[80].
54 At [80].
55 *Goody v Odhams Press Ltd* [1967] 1 QB 333 (QB) at 340–341.
56 *Plato Films Ltd v Speidel*, above n 4, at 1130.
57 Faulks Committee Report, above n 21, at [366].
58 Committee on Defamation *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (Government Printer, December 1977) at [394].
59 *Scott v Sampson*, above n 3, at 505; and *Plato Films Ltd v Speidel*, above n 4, at 1130.

But that concern has not manifested itself following the inclusion of s 30 in the 1992 Act. This demonstrates that the concern was likely overstated.

[54] The Talley's Group argue that there is a sound reason for the common law rule. The asserted probative value of a particular matter associated with the plaintiff's reputation needs to be balanced against the tendency to divert the trial into peripheral issues. As Lord Denning said in *Plato Films*, the limits of a roving inquiry would be hard to control and there would be trials within a trial.[60] A similar position has been recognised in Australia.[61]

[55] Whilst the approach has been changed by legislation through the enactment of s 30, this only relates to claims for damages. There was also a recognised exception arising from criminal convictions, but this was not unlimited as it was still necessary to show that such matters had a sufficient connection to the plaintiff's current reputation.[62] There is also an important difference between a claim for damages and a claim for a declaration. A plaintiff electing to seek only a declaration under s 24 should be able to avoid the lines of inquiry that can arise with damages claims. The legislative policy inherent in allowing a party to elect to seek a declaration only should be allowed to be given full effect.

Assessment

[56] We agree with the criticisms of the common law rule which restricted how a bad reputation defence could be advanced. Once it is accepted that a defendant can raise poor reputation by way of a defence to a defamation proceeding, then the rule that the defendant cannot raise specific instances of poor reputation is logically unsustainable. As Lord Radcliffe said in *Plato Films Ltd v Speidel:*[63]

> I cannot see, however, how it can prove possible to treat the … classes [of evidence relevant to a plaintiff's reputation] as altogether exclusive of each other and I do not believe that in practice anyone ever does. The difficulty is that "general evidence of reputation" does not convey an idea of any content. Life not being a morality play or a Victorian melodrama, men do not enjoy reputations for being bad or good simpliciter: nor if they did, would the proof

---

60 *Plato Films Ltd v Speidel*, above n 4, at 1143.
61 See for example *Rayney v Western Australia (No 4)* [2022] WASCA 44 at [163].
62 *Jorgensen v New Zealand Newspapers Ltd* [1974] 2 NZLR 45 (SC) at 51.
63 *Plato Films Ltd v Speidel*, above n 4, at 1130–1131.

> of such generalities throw any light upon the loss of reputation suffered from a particular libel. So far as the ordinary man enjoys a public reputation at all, it is a reputation, favourable or unfavourable, in respect of particular aspects or sectors of his life, and, of course, he is likely to have a good reputation in some aspects and a bad reputation in others. In any event, the existence of these reputations will, if tested, be found to rest on nothing more than particular incidents of some general notoriety or else on rumour or suspicion, which may or may not be well founded.

[57] Whilst the legislative acceptance of this criticism of the common law rule was primarily directed to damages, the logic of Lord Radcliffe's criticism cannot be faulted. Parliament cannot be understood to have accepted the logic only for the purposes of the assessment of damages. Neither is that the substance of the McKay Committee Report or the earlier Faulks Committee Report. In *Craig v Slater*, this Court confirmed that reputational harm is an element of the cause of action. Section 6 requires that harm to have likely caused pecuniary loss as the plaintiffs are corporate entities. Given these factors, evidence going to that reputation and the harm to it is relevant to determining whether the element is satisfied.

[58] This is illustrated by a consideration of the particulars of bad reputation set out in TVNZ's statement of defence. The schedule of particulars identifies 22 instances associated with the Talley's Group's alleged bad reputation. Some of these involve the successful prosecution of the Talley's Group for offences. Others involve decisions of the Employment Relation Authority, Employment Court, or the High Court. Still others relate to instances where there were no such court decisions. These matters are all potentially relevant to the Talley's Group's reputation generally.

[59] Moreover, it is difficult to identify the appropriate dividing line for when such instances can and should be raised based on the exception for convictions recognised by the old common law rule. The justification for drawing distinctions between these categories is not persuasive. In our view, provided that the pleaded instances sufficiently relate to the area of reputation that is subject to the alleged defamation, TVNZ ought to be able to defend the allegation on the basis that the Talley's Group's reputation has not been harmed in a more than minor way, and no pecuniary losses are likely, given the existing reputation as evidenced by specific matters.

[60] We also do not consider that the statutory changes made following the report of the McKay Committee can be said to relate solely to a claim for damages as the Talley's Group argue. Whilst s 30 relates solely to claims for damages, s 42 does not. It provides:

> **42 Notice of evidence of bad reputation**
>
> In any proceedings for defamation, where the defendant intends to adduce evidence of specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate, the defendant shall include in the defendant's statement of defence a statement that the defendant intends to adduce that evidence.

[61] This section arises whenever a defendant wishes to adduce such evidence. The Court in *Craig v Slater* confirmed that the harm to reputation can be rebutted by evidence.[64] Again, therefore, once it has been confirmed that evidence of more than minor harm to reputation causing likely pecuniary loss is an element of the tort of defamation, and the defendant denies the plaintiff satisfies that element, the state of the plaintiff's existing reputation is relevant. Section 42 then applies and the defendant must particularise the instances of bad reputation it wishes to rely on in denying that element has been satisfied.

Do the pleaded instances relate to the aspect of reputation in issue?

[62] The final issue is whether TVNZ's pleaded instances of bad reputation relate to the area of the Talley's Group's reputation that is in issue in the proceedings.

Arguments

[63] The Talley's Group supports the High Court judgment on the ground that the particular instances of bad reputation pleaded by TVNZ were not relevant to the aspect of their reputation impugned by the publications in issue. A person's reputation is composed of different aspects.[65] Two distinct aspects of the Talley's Group's reputation are in issue — the safety of their Blenheim and Ashburton factories, and their operation of the ACC scheme. But half of the bad reputation particulars did not

---

64 *Craig v Slater*, above n 7, at [45].

65 *Banks v Cadwalladr*, above n 36, at [55]; and *Plato Films Ltd v Speidel*, above n 4, at 1130–1131.

relate to health and safety and all were irrelevant to the ACC scheme. Employment relations issues resulting in unjustified dismissals, unfair disciplinary actions, or unjustifiable disadvantages do not relate to these matters. Neither do alleged instances of suppression of union activities. Moreover, many of these instances are now some time ago. These matters have limited probative value and would divert the trial away from the true issues.

[64] TVNZ argues that the pleaded instances relate to the health and safety conditions at the Talley's Group's sites, the responses to such health and safety concerns, and the responses to claims by workers at its sites for compensation when they have suffered workplace injuries. It says that these instances all relate to the way in which the Talley's Group treats and cares for their workers. They accordingly relate to the area of reputation in issue.

Assessment

[65] We agree that any evidence TVNZ wishes to lead concerning the Talley's Group's alleged existing bad reputation needs to be directed to the issue to be addressed in the proceedings — whether the Talley's Group's existing reputation was so bad that any untrue matters in TVNZ's publications would not have harmed that reputation in a more than minor way, or caused no likely pecuniary loss. We also agree that the bad reputation pleading must relate to the area of the plaintiff's reputation in issue.

[66] The assessment of whether it relates to the relevant area needs to be undertaken by the fact-finder at trial in a realistic way. The relevant area should not be drawn artificially.[66] Here, we do not accept that the pleaded matters do not sufficiently relate to the area which has been put in issue by the alleged defamatory publications. Workplace safety is closely associated with workplace conditions and the treatment of employees. Evidence of unjustified dismissals, or disputes with unions can accordingly be relevant to the relevant area of reputation.

[66] *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA) at 524 and 547.

[67] It is important to emphasise that the current arguments only arise at the pleadings stage, and before evidence has been served. The Judge concluded that it was inconceivable that the Court would find that the Talley's Group's pre-existing reputation was so bad that the more than minor harm threshold was not met.[67] Warby LJ, in *Banks v Cadwalldr*, said that the pre-existing bad reputation line of reasoning is only permissible "up to a point".[68] In *Hobbs v Tinling (CT) & Co Ltd*, Scrutton LJ doubted that bad reputation could be a complete answer to a claim in defamation.[69]

[68] We accept that, if the alleged publications are untrue as the Talley's Group allege, it may be hard to establish that the Talley's Group's reputation was so bad that no more than minor harm and no likely pecuniary loss to it was caused. As we have said, however, the Talley's Group's claims may only succeed in part. In any event, the main difficulty in addressing such issues in any fuller way at this stage is that the Court is being invited to do so as part of a strike-out application. No evidence has yet been served. At this stage, the Court is dealing only with what may be pleaded. We have concluded that TVNZ should be able to plead that the Talley's Group has not established the required harm to its reputation, and that s 42 requires TVNZ to particularise any instances of bad reputation that it wishes to rely upon in that respect. We consider that TVNZ's particulars relate to the area of reputation in issue. The Court is not in a position to assess the relevance of any evidence, or whether the element of the cause of action is satisfied given that evidence at this stage.

[69] Having said that, we consider there is one difficulty with TVNZ's current pleading. Existing alleged bad reputation is only relevant if those to whom the publication has been made are aware of the instances of alleged bad reputation that are relied upon, and accordingly have a pre-existing view of the Talley's Group's reputation as a consequence. That pre-existing view may be such that the alleged defamations did not have a more than minor impact on the Talley's Group's reputation such that pecuniary loss was not likely. But the particularisation in TVNZ's schedule makes no reference to the instances being known to such persons. For instances of

---

67 Judgment under appeal, above n 1, at [93].
68 *Banks v Cadwalldr*, above n 36, at [58].
69 *Hobbs v Tinling (CT) and Company Ltd* [1929] 2 KB 1 (CA) at 17.

bad reputation to be relevant the instances must not only have occurred, but they must be known by those to whom the allegedly defamatory publication was made such that the alleged harm to reputation did not arise.

[70] The current pleading is inadequate because it does not identify whether and how the pleaded instances were publicised in a way that affected the Talley's Group's reputation amongst those who were recipients of the publications that are the subject of the claim. TVNZ's pleading will need to be amended to address that deficiency. We give no particular directions in that respect, however. That will be a matter to be addressed by the High Court.

Conclusion

[71] For the above reasons, we conclude that the Judge erred in striking out the bad reputation pleading in TVNZ's statement of defence. In particular, we consider the Judge was wrong to strike out the paragraphs of the statement of defence identified in [133(d)] of the High Court's judgment. Those paragraphs of the statement of defence should not have been struck out.

[72] We accept, however, that the third and fourth affirmative defences — which pleaded that no declaratory relief should be given and no award of indemnity costs awarded, because of the pre-existing bad reputation — ought to remain struck out.[70] The bad reputation plea is only relevant to the reputational harm element of the cause of action and if that element is satisfied a declaration and the award of indemnity costs ought not to be withheld as a matter of discretion because of existing bad reputation.

[73] In practical terms we consider that the most efficient course to regularise the position is to direct TVNZ to file and serve a further amended statement of defence corresponding to this decision within 15 working days of this judgment.

[70] These do not appear to have been expressly addressed in the Judge's orders, but the substance of her decision suggests they were to be struck out.

Result

[74] The appeal is allowed in part.

[75] The decision of the High Court striking out the appellants' bad reputation pleading is set aside, and the relevant paragraphs of the statement of defence are restored.

[76] The decision of the High Court striking out the third and fourth affirmative defences is upheld.

[77] The appellants are to file and serve a further amended statement of defence corresponding to this decision within 15 working days of this judgment.

[78] The respondents must pay the appellants one set of costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

Solicitors:
Lee Salmon Long, Auckland for Appellants
Meredith Connell, Auckland for Respondents