NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESS\ES OR IDENTIFYING PARTICULARS OF THE APPELLANT AND RESPONDENT REMAINS IN FORCE.

IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

I TE KŌTI MATUA O AOTEAROA
TŪRANGANUI-A-KIWA ROHE

CIV-2024-416-000007
[2024] NZHC 3642

UNDER	the Defamation Act 1992
BETWEEN	W Appellant
AND	S Respondent

Hearing:	23 September 2024
Counsel:	S R G Judd and A M Simperingham for Appellant G L Turkington and A J Bendall for Respondent
Judgment:	4 December 2024

JUDGMENT OF LA HOOD J

Appeal against dismissal of a defamation claim

[1] These defamation proceedings arise out of acrimony that developed between Dr W and Ms S due to their respective intimate relationships with Dr M. Dr W claims that Ms S defamed her by alleging that she accessed Ms S's medical records without her consent and intimidated her.

[2] Ms S was briefly in a relationship with Dr M shortly after the end of his long-term relationship with Dr W. Dr W and Dr M both worked at Gisborne Hospital, where Ms S was a patient.

[3] In 2019, the Tairāwhiti District Health Board (the DHB) conducted an investigation into Ms S's allegations, which concluded with a finding that Dr W had accessed Ms S's records without her consent and Dr W resigning. The DHB reported the allegations to the New Zealand Medical Council. A Professional Conduct Committee (PCC) of the Medical Council has an investigation on hold pending the determination of these proceedings.

[4] In September 2019, Dr W commenced defamation proceedings seeking a declaration and costs (but not damages). Dr W says that Ms S's allegations were deliberately false and defamatory as she had consent to access Ms S's medical records to provide her with informal advice, and she has never intimidated Ms S.

[5] The defamation claim was heard over a three-day trial in the Gisborne District Court in early 2024. Judge Tuohy dismissed Dr W's claim on the basis that Ms S had established a defence of truth.[1]

[6] In summary, I dismiss the appeal for the following reasons:

(a) The Judge did not err in his assessment of the evidence relating to Dr W's presence at Ms S's hospital appointment on 27 February 2019. There was no error in his finding that Dr W walked past while Ms S and her support person were in the waiting area, and that the interaction led to Ms S's suspicion about Dr W accessing her records and motivated a genuine complaint about it.

(b) The Judge's interventions during the evidence did not render the trial unfair. The tone of the Judge's questions was not hostile, overbearing, or in any way improper; and the nature and extent of the interventions did not prevent the effective presentation of Dr W's case.

(c) The Judge did not err in his assessment of Ms S's credibility. The Judge rightly concluded that her failure to correct an error relating to the date

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1 *W v S* [2024] NZDC 6125 [Decision under appeal].

of her hospital appointment had no bearing on her credibility, and the Judge properly considered Ms S's motive to lie.

(d) The Judge did not err in his assessment of factors supporting Ms S's case:

(i) The Judge did not err in finding that Ms S consenting to Dr W's access to her records was implausible in the circumstances of their relationship; that giving such consent to a stranger who she had just met was unlikely; and that Ms S could have consulted her own GP or her gynaecologist about her health concerns.

(ii) Nor can the Judge be criticised for rejecting Dr W and Dr M's explanations as implausible, nor placing weight on the lack of contemporaneous documentation to support their explanations. I consider the Judge was entitled to find their evidence untruthful on the essential issue of consent, and I agree with the conclusions reached.

(e) The Judge's error in suggesting that Dr W had withdrawn the causes of action relating to Ms S's allegations of intimidation was immaterial, as the allegations were insufficiently serious to cause more than minor damage (an offensive gesture and intimidatory stare, about which no finding was made against Dr W).

The circumstances of the alleged defamation

[7] Dr W and Dr M formed a relationship in 2012. Together they relocated to New Zealand from overseas, both taking up jobs at Gisborne Hospital. The relationship broke down in 2018. Dr W formed a relationship with another man, BP, and Dr M applied for work overseas. Dr M moved out of their shared home on 1 December 2018, to live with a friend, AN.

[8] On 23 November 2018, Dr M attended a social event, where he spoke to Ms S (having previously met her in 2017), who was also a friend of AN. Dr M told AN that he was interested in Ms S and AN passed on Ms S's phone number to him on 5 December 2018. Dr M initiated a text conversation with Ms S on that day, and from then on, the two began dating. That same day, Dr M accessed Ms S's medical records on Gisborne Hospital's computer system. I adopt the Judge's summary of those records:

> [8] The records included a cytology report dated 27 November 2018 in respect of a cervical smear taken that day. The report indicated cell abnormalities and the presence of potentially dangerous HPV (human papilloma virus) types. The records also included an urgent gynaecological referral to Gisborne Hospital dated 3 December for a colposcopy as a result of the abnormal smear result. The report and referral also provided incidental information relating to Ms S's previous gynaecological history, including the fact she had had a tubal ligation and the medications she was taking, one used for insomnia and the other an antidepressant. If there were other records which may have been accessible, they were not in evidence.

[9] Ms S's evidence at trial was that she was unaware Dr M had accessed her medical records until the DHB brought it to her attention in June 2019 — after she had lodged a complaint about Dr W. Dr M's evidence was that he had done so with Ms S's consent, to advise her in relation to concerns about potential antibiotic resistance if she were to get an infection on an upcoming trip to India.[2] As I will come to, the trial Judge found Dr M's account to be implausible.

[10] Dr M informed Dr W about his new relationship with Ms S on 13 December 2018, and said that they planned to take a holiday together to Singapore in March 2019. On Friday 14 December, Ms S went to dinner at Dr M's house. AN and other friends were present, but not Dr W. Ms S stayed the night, and the next day arrived home to find a letter from the Women's Health Clinic dated 11 December about her colposcopy appointment, advising that her referral was "P3", and that the Clinic would try to see her within six months. Concerned, she phoned Dr M and asked if he could arrange an earlier appointment. She sent a photo of the referral letter containing her NHI number to Dr M on WhatsApp on 16 December 2018.

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[2] His evidence maintained in substance the explanation he provided by letter to the Professional Standards Advisor of the Medical Council dated 20 November 2019. Decision under appeal, above n 1, at [10]–[11].

[11] The evidence at trial as to what occurred the weekend of 15–16 December differed between Dr W and Dr M, and Ms S. In summary:

(a) Ms S was adamant that she did not see Dr W at all that weekend, and never requested or consented to Dr W or Dr M viewing her medical records.

(b) Dr M said that he invited Dr W to come to his house to meet Ms S. The three shared a cup of tea for 40 minutes, during which Ms S discussed her gynaecological health issues. Dr M reiterated he would try expediting Ms S's colposcopy appointment. Ms S told Dr W she had been diagnosed with pre-cancer cervical changes and of her longstanding HPV infection and was emotional and concerned it could progress to cancer. Dr W said it might be possible to predict the outcome, as some types of HPV viruses (identified by numbers) are more aggressive than others. As Ms S could not recall her HPV type, she asked Dr W to access her records to find out. Dr M said he remembered clearly that Dr W asked Ms S: "Do you agree for me to access your files?" and Ms S answering: "Yes, please".

(c) Dr W's account was consistent with those aspects of Dr M's account set out at (b) above; that she met Ms S at Dr M's house for about 40 minutes, likely on 15 or 16 December, during which she offered to alleviate Ms S's concerns by advising her on whether her HPV type was aggressive. She said she specifically asked and obtained Ms S's consent to checking her medical results for that purpose and would communicate the outcome through Dr M who shared an office with her.

[12] On 17 December, Dr M asked his colleague at the Women's Health Clinic to move forward Ms S's appointment. She did so, setting it down for 27 February 2019, and advising Dr M that "... having reviewed her results, you can reassure [Ms S] that this (a February date for the colposcopy) will be fine". Dr M informed Ms S of the change by message that afternoon.

[13] That same day, 17 December 2018, Dr W accessed Ms S's medical records between 19:51 pm and 19:57 pm.

[14] Dr M and Dr W stayed the night together on 17 December. The next evening, Ms S was with Dr M at his house, when Dr W arrived unexpectedly. Ms S became highly upset by Dr W's arrival. Ms S's account was that this is the first time she had encountered Dr W in person, and that she was upset that Dr M put his arm around Dr W to lead her away. Ms S went home and sent Dr M a range of text messages expressing her hurt, anger and upset at Dr M not being "over" Dr W, and "falling into her trap".

[15] Dr W accessed Ms S's medical file on numerous further occasions, including on 19, 27, 31 December 2018, and on 4 and 7 January 2019.

[16] On 1 February 2019, Dr W sent an email addressed to Ms S and a false email address which purported to be her new partner's address. Dr W wrote:

> My dearest [BP] and [Ms S]
>
> I'm really sorry for causing your distress by sending this email. But I feel I'm owing you honesty and you both deserve transparency.
>
> Together with [Dr M] we have had several conversations over the last few weeks. We came to conclusions we still love each other and we want to rebuild our relationship.
>
> Believe me that the most difficult part of our transition is to be separated from you. We are keen to do it gradually and not cancel our current commitments (Napier-[Dr M], Melbourne-[Dr W]).
>
> Please forgive us if you can, but love is so powerful...
>
> My [heart] really bleeding by sending you the email...
>
> Love you both (and I'm meaning it)
>
> [Dr W]

[17] Dr W attached a handwritten note purportedly written, signed, and dated by Dr W and Dr M which stated:

> I, [Dr W], love [Dr M] and decided to be together with him again. I want to give him my heart but develop a better, improved relationship with him.

I, [Dr M], love [Dr W] and want to spend my life with her.

[18] Ms S responded to the email, saying that Dr W was "a very sick woman who needs medical help..." and that "[Dr M] has informed me he does not wish to be with you as you have destroyed his life with his friends and family" among other things. Dr W was upset when she read the response.

[19] On 2 February, Ms S sent a further email to Dr W stating that she was concerned for Dr M's wellbeing, mentally and emotionally, and that Dr M was "very mixed up and upset by the games you play", asking Dr W to let him go if she was a "caring woman with a good heart".

[20] On 2 February, Dr M and Ms S went on their planned trip to Napier, and Dr W and BP went on their planned trip to Melbourne. On their return, Dr M told Ms S he wished to be single to clear his head. Ms S then decided not to continue with the relationship. Ms S initially wished to continue to go to Singapore with Dr M in March as planned, but Dr M disagreed, and ultimately Dr W accompanied him on that trip.

[21] On 8 February, Ms S informed Dr M via message of a confrontation she had with Dr W whereby Dr W "came at high speed" driving by her, making inappropriate body language at her. Ms S noted, "I honestly do not wish to be involved in your situation with [Dr W]" and "My request is [Dr M] please keep [Dr W] away from me as I gave her what she wanted and I don't feel I need more abuse."

[22] Dr W accessed Ms S's medical records again on 18 and 26 February.

[23] On the day of Ms S's colposcopy appointment, 27 February, Ms S sat in the waiting area of the hospital for the Women's Health Clinic. Ms S said that Dr W walked past the public waiting area and stared at her as she was passing. Dr W said she had no specific recollection of the interaction. Ms S became suspicious that Dr W deliberately passed the waiting area at that time prior to her appointment to intimidate her. She suspected that Dr W accessed her medical records to find out when she would be there. After she left the appointment, on AN's advice, she made a query through the DHB's website portal:

> I am wishing to know what staff at Hauora Health have been accessing my medical files.

[24] After receiving no response, on 4 March 2019, and after further discussion with AN, she submitted another query with more detail:

> I have concerns an unauthorised staff member Dr W has accessed my clinical records, she is not one of my advisors. I would appreciate contact with someone from the hospital as soon as possible, as this situation had caused me great distress ...

[25] The DHB responded by meeting with Ms S on 26 March to hear her concerns, and an investigation was launched. On 27 March, the DHB informed Dr W, advising her of the investigation in relation to a patient complaint directly concerning her (without including what the complaint was or who made it) and requesting a meeting on 11 April. Dr W obtained more information, and on 29 March, Dr M asked AN to ask Ms S to withdraw the complaint.

[26] Prior to Ms S meeting with the DHB on 26 March:

(a) On 14 March, Ms S received a letter from the specialist gynaecologist informing her of the colposcopy results which were positive as she had no pre-cancer cells.

(b) On 13, 14, 15, and 17 March, Dr W again accessed Ms S's medical records.

[27] Dr W met with the DHB representatives on 11 April. There is no evidential record of the contents of the meeting. The following day, Dr W wrote a letter containing her response to the complaint in which she acknowledges that she accessed Ms S's records, but stated that she did so at Ms S's direct request which was witnessed by Dr M, providing the explanation which she and Dr M gave in evidence, described above at [11](b)-(c).

[28] Following its investigation, the DHB wrote to Dr W advising her that it did not accept her explanation, and indicated a preliminary view that termination of Dr W's employment without notice may be warranted; but provided her with an opportunity

to comment or provide further information prior to a final decision. Dr W and the DHB ultimately reached a settlement where she resigned from July 2019. As already noted, a PCC of the Medical Council is undertaking an investigation into the circumstances surrounding Dr W's resignation, which is on hold pending determination of the proceedings.

Overview of the District Court decision

[29] The primary issue for determination in the District Court was whether Ms S gave consent to Dr W for accessing her medical records.[3] Ms S had the onus of proving that Dr W did not have consent, to establish her defence of truth on the balance of probabilities.[4]

[30] The Judge undertook a credibility assessment of the evidence of Dr W, Dr M and Ms S. The Judge noted Ms S's strong motive to falsely accuse Dr W,[5] the deceptive nature of Dr W's actions in emailing Ms S and purportedly BP on 1 February 2019,[6] and Dr M's own alleged accessing of Ms S's medical files without her knowledge or consent.[7]

[31] The Judge concluded that Dr W accessed Ms S's medical records *without* her consent, and that no meeting between the three witnesses took place on 15–16 December 2018; finding the evidence of Dr M and Dr W implausible and untruthful. The Judge's primary reasons were as follows:

(a) The implausibility that Ms S gave her consent to Dr W viewing her medical records given the extreme antipathy she displayed towards Dr W at that time. In particular, Ms S's extreme reaction to Dr W's unexpected arrival at Dr M's house on 18 December and her reaction to finding Dr W's garage remote in Dr M's car on 30 December showed she was highly threatened on an emotional and sexual level by Dr W's

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3 Decision under appeal, above n 1, at [51].
4 At [51]–[52] following *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.
5 At [57]–[58] and [102].
6 At [59].
7 At [60]–[67].

relationship with Dr M (as documented in the phone records).[8] Her reaction on 18 December is irreconcilable with the three of them having a calm and courteous cup of tea two days earlier.

(b) The implausibility of the explanation given by Dr W and Dr M for the alleged request by Ms S for Dr W to access her records on 15-16 December 2018. In particular:

(i) It is unlikely Ms S would discuss such personal health matters with Dr M's ex-partner, a stranger who she had just met.[9]

(ii) The obvious available source of gynaecological advice was Ms S's longstanding GP, or Dr M's gynaecologist colleague who brought forward Ms S's appointment and volunteered reassurance about her condition when she did so.[10]

(iii) Dr W did not specialise, or have expertise, in gynaecology, and in evidence recalled Ms S having a different HPV type (type 6) than that recorded in her cytology report (type 16).

(iv) Ms S's evidence that her GP told her on 27 November 2017 that she had HPV type 16 which did not mean it was cancer or pre-cancer, rendering the alleged enquiry or advice by Dr W useless.

(c) The implausibility of the explanation given by Dr W and Dr M for Dr W's continued repetitive viewing of the records. In particular:

(i) The contemporaneous state of relations between Ms S and Dr W: Ms S refused to meet her on 18 December 2018; Dr W knew Ms S destroyed her garage remote on or before 1 February 2019; Dr W was upset by Ms S's response to her email on 1 February 2019; Dr W was angered by Ms S's text to Dr M

8 At [72]–[75].
9 At [77].
10 At [78].

accusing her of intimidating behaviour and dangerous driving on 8 February 2019; and on 20 February 2019, Dr W asked Ms S to reimburse her for a new garage remote. There were no records of positive communications between Ms S and Dr W.[11] It is implausible Ms S would want or seek assistance about her health from Dr W during this period or that Dr W would want to give it.

(ii) Dr W accessed Ms S's records on 17, 19, 27, 31 December 2018, 4, 7 January 2019, 18, 26 February 2019, and 13, 14, 15, and 17 March 2019. The explanations for the instances of substantial access (27 December, 18 February, and 17 March) were implausible, as the advice Dr W purported to offer to Ms S through Dr M was information that Ms S ought to have known, or there was no new advice or information to convey.[12]

(iii) Dr W retained a significant emotional attachment to Dr M during the period she was accessing Ms S's records and may have simply been keeping herself informed of the state of health of 'the other woman'.[13]

(d) The lack of any corroboration in contemporary records for the account given by Dr W and Dr M, and the existence of contemporary records that are inconsistent with the proposition that a meeting had taken place at which consent had been given. In particular:

(i) In all the evidence of electronic communications, there is no record of the consent or the relay of questions and advice between Dr W and Ms S through Dr M.[14] The need for Dr M to be a middleman is unclear.[15]

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11 At [83]–[84].
12 At [86]–[89].
13 At [91].
14 At [92].
15 At [94].

(ii) The evidence of Ms S's communications to AN on 19 December is irreconcilable with the prospect of Dr W and Ms S meeting over a cup of tea three or four days earlier (and providing consent).[16]

(iii) The nature and wording of Ms S's complaints to the DHB imply that she was not aware of Dr W accessing her records and merely suspected it following the 27 February interaction.[17]

[32] Consequently, the Judge was satisfied that Dr W accessed Ms S's medical records *without* her consent, preferring the evidence of Ms S over that of Dr M and Dr W. The defence of truth was established.[18]

Issues to be determined

[33] The issued raised on appeal are:

(a) Did the Judge wrongly assess the evidence relating to Dr W's presence at Ms S's appointment on 27 February 2019?

(b) Did the Judge's interventions in the evidence render the trial unfair?

(c) Did the Judge fail to assess Ms S's credibility?

(d) Was the Judge wrong in his assessment of the four factors that he considered supported Ms S's case?

(i) The implausibility of the proposition that Ms S gave her consent to Dr W to view her medical records given the extreme antipathy she displayed towards Dr W at the time.

(ii) The implausibility of the explanation given by Dr W and Dr M for the alleged request by Ms S for Dr W to access her records.

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16 At [95]–[97].
17 At [98]–[101].
18 At [102]–[103].

(iii) The implausibility of the explanation given by Dr W and Dr M for Dr W's continued repetitive viewing of the records.

(iv) The lack of any corroboration in contemporary records for the account given by Dr W and Dr M and the existence of contemporary records which are inconsistent with the proposition that a meeting had taken place at which consent had been given.

(e) Did the Judge err in his overall credibility assessment of Dr M and Dr W?

(f) Was the Judge wrong to find that the allegations of intimidation were incapable of more than minor harm?

Approach on appeal

[34] This is a general appeal governed by the principles articulated in *Austin, Nichols & Co Inc v Stichting Lodestar*. The appellant is entitled to judgment in accordance with the independent opinion of the appellate court.[19] If the appeal court forms a different view to that of the original decision maker, the decision under appeal is wrong and the appeal must be allowed, even if it was a conclusion on which reasonable minds might differ.[20] However, as the Court of Appeal has reiterated, two fundamental principles remain constant:[21]

> [30] First, it is still axiomatic that the appellant bears the onus of persuading the appellate court to reach a different conclusion. Of necessity, in discharging that onus the appellant must identify the respects in which the judgment under appeal is said to be in error.
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> [31] Second, it is also axiomatic that in determining whether the judgment was wrong the appellate court will take into account any particular advantages enjoyed by the trial court. The advantages possessed by a trial judge in determining questions of fact are obvious, especially where assessments of credibility and reliability are involved. The trial judge gets to see and hear the witnesses, and is able to evaluate the strength of the evidence as it

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19 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 [*Austin, Nichols*] at [16].

20 *Green v Green* [2016] NZCA 486 restating the relevant principles in *Austin, Nichols.*

21 At [29]–[32] (footnotes omitted).

> progressively unfolds within the context of the trial as a whole. As this Court pointed out in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*:
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> > As the evidence unfolds the trial Judge gains an impression from the evidence which is not necessarily or usually apparent from the cold typeface of the transcript of that evidence on appeal. The Judge forms a perception of the facts in issue from which he or she adds or subtracts further facts as witnesses give their evidence, and so obtains as complete a picture as is possible of the events in issue. The Judge perceives first hand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result.
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> [32] It was for those reasons the Supreme Court in *Austin, Nichols* expressly stated an appellate court should exercise caution in considering challenges to findings of credibility.

[35] The impression the trial Judge was able to gain from hearing and seeing the oral evidence is not available from the "cold typeface" of the written record.[22] The Judge had the benefit of seeing the oral evidence progressively unfold before him in the context of the trial as a whole, and observing the nuances of the oral evidence.[23] The transcript is "the dead body of the evidence, without its spirit; which is supplied, when given open and orally, by the ear and eye of those who receive it".[24] Although caution is required in relying on demeanour, the full Court of Appeal has noted that tone of voice "is important in conveying meaning" and "cannot be captured in a written transcript".[25] And that pauses can be significant, and gestures and facial expressions can also convey meaning and are not recorded in a transcript.[26] For all of these reasons, I must exercise "customary" caution before disturbing the Judge's credibility findings.[27]

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22 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 199, followed in *Austin Nichols*, above n 19, at [13] and recently restated in *Green v Green* [2016] NZCA 486 at [31].

23 At [40]; See also *Patterson v R* [2024] NZHC 2307 at [51].

24 *R v Bertrand* (1867) LR 1 PC 520 at 535 cited in *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [73].

25 *Munro*, above n 24, at [74]. The Court in *Munro* went on to discuss the difficulties with credibility assessments, including those based on demeanour (at [79]), but said "[83] However, it is equally true that assessing credibility from a written transcript in many cases will not achieve better results, particularly in the absence of other contemporary evidence. There remain advantages in hearing and seeing the witnesses as outlined in the previous section. Further, appellate courts are often directed only to parts of the evidence and do not obtain a full sense of the whole trial and the dynamics of the trial process."

26 *Munro*, above n 24, at [74].

27 *Austin, Nichols*, above n 19, at [13].

Did the Judge wrongly assess the evidence relating to Dr W's presence at Ms S's appointment on 27 February 2019?

[36] The appellant submits that the Judge erred in accepting that Dr W walked past the clinic while Ms S was waiting for her appointment on 27 February 2019. The Judge considered that whether Dr W walked past the clinic on 27 February while Ms S was waiting for her appointment is relevant to why she accessed her records on 26 February 2019.[28] This was because on that date she viewed only one item, namely Ms S's outpatient appointments. The Judge accepted Ms S's evidence that Dr W did walk past while Ms S and her support person were in the waiting room.[29] The Judge gave a number of reasons for this, including that:[30]

> Although [Ms S's support person] did not give evidence, the record of the DHB meeting where she confirmed Dr W's presence was in evidence. While Dr W said she did not remember it she did not deny it. In those circumstances the failure to cross-examine Dr W on the incident does not detract from the evidence that she was there. The fact that she walked through the waiting area the next day at the time Ms S was there is unlikely to be a coincidence in those circumstances but could have been because it was on the way to her office.

[37] The Judge then immediately said that he was not satisfied that Dr W was deliberately staring at Ms S (which Dr W denied) because Ms S was "predisposed to think the worst of any behaviour of Dr W and failure to cross-examine has to be given weight on that point".[31] But the Judge considered that Ms S's genuine suspicion about Dr W's presence supported her account she was concerned that Dr W was accessing her records, rather than being a malicious complaint.[32]

[38] I do not accept that the Judge erred in his assessment of the record of the DHB meeting (on 26 March 2019) as it relates to Ms S's support person's corroboration of Dr W's presence. The support person was present at the meeting. The record of the meeting includes the following quotation:

> [The support person] who also works at the hospital in ICU had spent the morning with Dr [W] who was in ICU. It was a strike day and Dr [W] was the on call house surgeon – [the support person] explained that she believed

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28 Decision under appeal, above n 1, at [99].
29 At [99].
30 At [99].
31 At [100].
32 At [100]–[101].

> that this made it very unlikely as to why she was down near that department and there didn't appear to be any reason for her to visit Tui Te Ora.

[39] This document was part of the common bundle. The plain words used provided a clear basis for the Judge's comment that the record of the DHB meeting included confirmation from the support person that Dr W was present.

[40] I also reject the submission that the Judge erred by concluding that Dr W walked past the clinic "at the same time Ms S was there". Somewhat inconsistently, for this contention Dr W relies on the same paragraph of the DHB's record of meeting referred to at [38] above. Another part of that paragraph states that the support person "left work to collect [Ms S] (which was a 10/15 min period)". Based on this, and the time a colposcopy report was printed (10.22 am), it is submitted that Dr W cannot have been seen by the support person until at least after 10.22 am. This, it is submitted, calls into question that Dr W had accessed the records to deliberately walk past and intimidate Ms S because, if she had done so, she would have arrived at 10.00 am not 10.22 am.

[41] The first problem with this submission is that it relies on assumptions about the proper interpretation of the record of meeting in relation to the support person's time of arrival at the appointment, and the printing of the colposcopy report, that were not explored in the evidence (for example, in cross-examination of Ms S). Also, the Judge accepted that Dr W walking past "could have been" a coincidence and focused on Dr W's presence being the motivation for a genuine complaint rather than making a finding that Dr W's presence showed an intention to intimidate. Moreover, even if Dr W was seen by the support person after 10.22 am, that in itself does not preclude her presence being consistent with accessing the records. Whatever the exact time Dr W was seen, it was at a time proximate to 10.00 am when Ms S and her support person were in the waiting area.

[42] In these circumstances, I see no error in the Judge's approach to the weight he placed on the evidence of Dr W's presence at or around the time of the appointment on 27 February.

[43] There was also no error in the Judge's approach to the failure to cross-examine Dr W specifically on the incident. Dr W was fully aware of the allegations through the pleadings and Ms S's brief of evidence. She had a clear opportunity to respond, and in response said that she had no recollection of being present but did not deny it. In these circumstances, there was no breach of the obligation to cross-examine under s 92 of the Evidence Act.[33]

Did the Judge's interventions in the evidence render the trial unfair?

[44] Dr W complains that the Judge erred in taking an active role in the cross-examination of Dr M and Dr W and rejecting their evidence, which gave an appearance of bias. I will set out the relevant legal principles, before considering each passage of evidence complained about, and then determine whether the cumulative effect of the Judge's interventions rendered the trial unfair.

Legal principles relevant to judicial intervention at trial

[45] The decision of Ellis J in *W v W* contains a helpful summary of the relevant principles.[34] I agree with Ellis J that the most useful authority is the decision of the United Kingdom Supreme Court (UKSC) in *Serafin v Malkiewicz and others*.[35]

[46] In *Serafin* the Court held the tone and nature of the trial Judge's interventions during a defamation claim brought by a litigant in person transgressed the core principle of impartiality. The Court found that the Judge had acted with hostility towards the claimant and his case, and did not allow the claim to be properly presented. This meant the Judge could not fairly appraise the claim, rendering the trial unfair.

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33 A party is not required to cross-examine to provide a witness with an opportunity to improve their evidence, or an opportunity to respond to allegations of which they are already aware and have had an opportunity to respond: see Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV92.01(1)–(2)] and [EV92.02(1)].

34 *W v W* [2023] NZHC 3491, [2023] NZFLR 782. Counsel for the appellant relied on Cull J's decision in *Rongotai Investments Ltd v Land Valuation Tribunal* [2022] NZHC 1669. However, I find that case less helpful as it involved allegations of bias in judicial review proceedings demonstrated by a Tribunal's interventions during the hearing of oral evidence.

35 *Serafin v Malkiewicz and others* [2020] UKSC 23, [2020] 1 WLR 2455 [*Serafin*].

[47] The Court in *Serafin* focused on whether the trial was unfair, rather than apparent bias.[36] The Court referred to authority drawing a distinction between allegations of bias (meaning prejudice to a party or its case for reasons unconnected with the merits of the case) and trial unfairness. On the assumption that this meaning of bias was correct, the Court dealt with the case on the basis of trial unfairness. This was because the transcript of the trial indicated the Judge's conduct was a product of his "almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources."[37] I will follow the same approach as there is no allegation in this case that the Judge's interventions were motivated by anything other than the merits of the case.

[48] I consider the following principles can be drawn from the authorities:

(a) In the criminal jury trial context, it has been said there is nothing wrong with a Judge intervening in the evidence "to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear."[38] However, judicial interventions during oral evidence inevitably carry the risk identified in *Yuill v Yuill*, that a Judge who himself conducts the examination, "... descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."[39]

(b) An apparently balanced and well-reasoned judgment may not cure an unfair trial: "[t]he careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent … of prejudicing the exploration of the evidence."[40]

(c) The principles apply with equal rigour to criminal and civil proceedings.[41]

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36 At [37]–[39].
37 At [39].
38 *R v Tuegel and others* [2000] 2 All ER 872 (CA) at 888.
39 *Serafin*, above n 35, at [43]; and *Yuill v Yuill* [1945] P 15, [1945] 1 All ER 183 at 20.
40 At [44]; *re G (A Child)* [2015] EWCA Civ 834, [2015] All ER (D) 46 (Sep) at [52].
41 At [42].

(d) An assessment of the overall tone, nature and frequency of the interventions is required in determining whether the trial was unfair.[42]

(e) A judgment resulting from an unfair trial is, in effect, a nullity, and requires an order for a complete retrial.[43]

[49] In *Rongotai Investments Ltd v Land Valuation Tribunal and others*,[44] Cull J endorsed the *Serafin* principles in the context of an allegation of apparent bias in judicial review proceedings.[45] The Judge noted the following commentary from a leading text:[46]

> New Zealand judges commonly take an active part in a trial, usually by asking questions of witnesses. Such questioning, even if vigorous and substantial, will not normally give rise to apparent bias. In contrast, where the authority's actions, seen in the context of a series of disciplinary actions, appeared to be ad hominem not ad rem, bias was found.

[50] It is clear from these principles that an allegation that judicial intervention has caused an unfair trial requires careful assessment of the overall context of the trial and the tone, nature and frequency of the interventions.

[51] A Judge taking an active role in the trial by asking questions of witnesses to clarify issues or better understand the parties' cases will not in itself render the trial unfair. But the tone, nature and frequency of those interventions may prevent a party from properly presenting their case to the point of unfairness.

[52] However, not every improper judicial intervention will render a trial unfair. For a criminal trial to be unfair, the error or irregularity must be "so gross, or so persistent, or so prejudicial, or so irredeemable that an appellate Court will have no choice but to condemn the trial as unfair ...".[47] Given the principles relating to judicial

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42 *W v W*, above n 34, at [110].
43 *Serafin*, above n 35, at [49]; and *W v W*, above n 34 at [65].
44 *Rongotai Investments Ltd*, above n 34.
45 At [138]–[141].
46 Graham Taylor (ed) *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [13.66] (footnotes omitted).
47 *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [78] citing *Randall v R* [2002] 1 WLR 2237 and *R v Howse* [2006] 1 NZLR 433 (PC).

intervention apply with equal rigour to criminal and civil proceedings,[48] I consider this test provides helpful guidance. *Serafin* and *W v W* are clear cases where the nature, tone, and frequency of the interventions were so gross, persistent and prejudicial that the courts had no choice but to condemn the trials as unfair. Prejudice caused by improper judicial intervention that does not reach this level can, in Judge-alone civil trials, likely be remedied by an appellate court's unconstrained ability to intervene on a general appeal.[49]

The Judge's interventions in the evidence of Dr W

[53] The first passage complained about is during evidence-in-chief.[50] About two pages into the passage complained about the transcript records "The Court addresses Mr Judd – Court ask questions".[51] This indicates that the Judge addressed Mr Judd about whether there was an issue with the Judge asking questions at this point.

[54] The Judge then asked a series of detailed questions to clarify how the computer system worked and how the records of the appellant accessing that system should be interpreted. The questions were open ended and not in the nature of cross-examination. They clearly demonstrate the Judge attempting to better understand a complex system to assist with determining relevant issues. At the conclusion of the questions, counsel for Dr W asked further questions to clarify Dr W's access to the computer system. There is no allegation that the nature and tone of the questions was hostile or overbearing, or considered in isolation in any other way improper.

[55] The next complaint relates to a passage during Dr W's cross-examination.[52] This questioning was to clarify when Ms S's test results would have been looked at by other professionals prior to 17 December 2018. Again, there is nothing in the transcript to suggest that the nature or tone of the questions was improper. On its own,

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48 Although the principles apply with equal rigour, their application must be context specific. For example, judicial interventions that may indicate a Judge's views during a jury trial are likely to have a greater impact on the fairness of the rial than in a Judge-alone trial.

49 *Austin, Nichols*, above n 19. For example, if the improper intervention has prevented the adducing of relevant evidence, an application to adduce fresh evidence can be made and the appellate court can assess that evidence on appeal.

50 Notes of Evidence at 20–35.

51 At 22.

52 At 39–40.

there is nothing objectionable about this passage. It is another example of the Judge seeking clarification of an issue he considered relevant to determination of the case.

[56] The other complaints relate to questions during evidence-in-chief about Dr W's opportunity to respond to the DHB investigation (covering two pages of transcript);[53] and in cross-examination about the wrong date on a piece of correspondence.[54] My reading of the transcript of these interventions is that they are further examples of the Judge clarifying points he considered relevant to the issues he needed to determine, with nothing in their nature or tone to suggest impropriety.

The Judge's interventions in the evidence of Dr M

[57] The first complaint relates to questions (during cross-examination) about Dr M and Dr W's expertise and its relevance to accessing Ms S's medical records.[55] This is another example of the Judge asking questions to clarify issues that he considered relevant. There is no suggestion (or indication in the transcript) that the nature and tone of the questions was hostile or overbearing, or otherwise improper (considered in isolation).

[58] The next complaint is about questions (during cross-examination) relating to Dr M's efforts to bring forward Ms S's appointment due to her anxiety about the wait-time, and whether those steps reassured Ms S.[56] This culminated in Dr M saying that those steps had not reassured Ms S because her underlying anxiety disorder meant she was behaving differently than a person without such a disorder.[57] The transcript reveals nothing improper about the nature and tone of these questions. There is no suggestion that they were hostile or overbearing, or otherwise improper (in isolation).

[59] The next complaint is about the Judge, of his own motion, directing the recall of Dr M given the respondent's failure to cross-examine properly. I consider there is nothing improper, in a Judge-alone trial, about the Judge considering that the fair

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53 At 15–16.
54 At 46–47.
55 At 72–76.
56 At 80, 83, 85, 86–92.
57 At 92.

presentation of the case for both parties requires the recall of a witness. I have been referred to no authority to the contrary.

[60] Counsel for Ms S cross-examined on two topics following recall, namely Dr M going out to dinner with Ms S and others on the evening of 16 December 2018; and Dr M's own accessing of Ms S's records on 5 December 2018 and 3 February 2019.

[61] At the conclusion of that cross-examination, the Judge had questions for the witness. The Judge's questions were focused on the second issue: the reasons for Dr M accessing Ms S's medical records. This became an important issue of credibility because Ms S said that she had never given Dr M permission to access her medical records for any purpose. The Judge's questions focused on Dr M's purpose in checking the records. The nature of the questioning is consistent with the Judge wanting to explore the issue and obtain relevant evidence. Again, there is no allegation that the tone was hostile or overbearing, or in any other way improper (in isolation). I accept there is one question that looked more like cross-examination by counsel than a Judge seeking clarification, namely:

> Q. I will put it to you directly, if it hasn't been put to you directly, were you looking at [Ms S's] medical records on the 5th of December because you were about to, you were thinking of embarking on a relationship with her and you were checking for what medications she might be on like these or whether there were any STDs or anything like that?

[62] In context, I do not consider this was an improper question. The Judge considered resolution of the issue of the conflict between Ms S's and Dr M's evidence on accessing her records to be crucial to his credibility findings. The issue had been explored in cross-examination by counsel. The Judge was then provided with answers to his questions that raised in his mind whether the checking of the records on 5 December 2018 was for the purpose of Dr M preparing to embark on a relationship with Ms S. The Judge considered, as a matter of fairness, that this proposition should be put to the witness directly. I consider it was not improper to ask a single question of this nature in this context.

Overall assessment

[63] The Judge's interventions, considered in isolation, did not have features that rendered the trials unfair in *Serafin*[58] and *W v W*,[59] or that supported a finding of bias in *Rongotai*,[60] such as a hostile, dismissive, overbearing, offensive or discourteous tone, or unjustified warnings about perjury.

[64] I accept that there may be cases where the persistent intervention of a Judge in the questioning of witnesses may be so extensive and intrusive that it renders a trial unfair, even if the nature and tone of the questions in isolation were not improper. That is likely to be so if the interventions prevent a party from effectively presenting its case. I consider the Judge's interventions fall well short of this level. For example, there is no suggestion that counsel was prevented from adducing relevant evidence, or any suggestion that a relevant line of questioning was unable to be explored. Moreover, if the interventions were getting to the point of preventing Dr W from effectively presenting her case, I would have expected experienced and competent counsel to politely raise such a concern with the Judge, which did not occur here.[61]

[65] Accordingly, I consider the Judge's interventions did not render the trial unfair.

Did the Judge fail to assess Ms S's credibility?

Failure to correct the error about an appointment on 17 February 2019

[66] The appellant submits that the Judge was wrong not to place any weight on the incorrect assertion that Ms S had been intimidated while waiting for an audiology appointment on 17 February 2019.

[67] Ms S was clear that the DHB email summarising the initial conversation with her about the complaint misstated what she told the person who wrote the email about the date of the appointment. She has never alleged there was an appointment on

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58 *Serafin*, above n 35.
59 *W v W,* above n 34.
60 *Rongotai Investments Ltd*, above n 34.
61 Although counsel's failure to raise a concern may be of limited relevance to an assessment of whether the trial was fair, it is at least an indication of counsel's perception of the effect of the Judge's interventions at the time they occurred.

17 February 2019. She was asked in cross-examination why she had never corrected this point over the course of the four years of the proceedings or corrected the position with the PCC. Ms S said she had not had the opportunity to correct the position with the PCC because it has not been able to talk to her due to the defamation proceedings, but in any event she has been following legal advice. I consider the Judge was entirely correct to conclude this had no bearing on Ms S's credibility in these circumstances.

Failure to properly assess Ms S's motive to lie

[68] I also do not accept Dr W's submission that the Judge erred by noting the allegations of intimidation and the events they refer to as relevant to the defence of truth and the issue of ill-will,[62] but not referring to them later when making his credibility findings.

[69] The Judge had earlier set out the full background of the events relating to the allegations of intimidation, including the aggressive text messages sent by Ms S to Dr M about Dr W. [63] When discussing Ms S's credibility, the Judge expressly took into account the extreme antipathy which she demonstrated towards Dr W over the period of her relationship with Dr M and after it ended. This included her behaviour demonstrating a level of emotional investment in her relationship with Dr M and consequent jealousy; and fear of the threat posed by Dr W, which was extreme, particularly given the brief duration of the relationship. [64] The Judge noted it included an expression of a desire to destroy Dr W, and it continued overtly while Dr M was trying to end the relationship at the beginning of 2019.[65] Therefore, the Judge appropriately assessed the evidence of Ms S's ill-will towards Dr W in making his credibility findings.

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62 Decision under appeal, above n 1, at [48].
63 At [3]–[44].
64 At [57].
65 At [57].

Was the Judge wrong in his assessment of the four factors that he considered supported Ms S's case?

Factor (i): The implausibility of the proposition that Ms S gave her consent to Dr W to view her medical records given the extreme antipathy she displayed towards Dr W at the time

[70] The appellant contends that the Judge's finding that it was implausible that Ms S gave consent to Dr W given her extreme antipathy towards Dr W was not based on evidence but on the Judge's own view of how reasonable people are likely to behave. The submission that the Judge required expert evidence on how people behave before reaching this conclusion is untenable. It is the proper function of a Judge to make findings about the plausibility of a factual proposition having regard to the evidence, and an assessment of whether the proposition makes sense based on the Judge's knowledge and experience.

[71] There is a suggestion that the Judge has confused Ms S's state of mind after learning that Dr M had slept with Dr W on the evening of 17 December 2018 with her state of mind prior to finding that out on 18 December 2018.[66] However, the Judge carefully analysed the timeline of events in this part of the decision. He made a finding of fact that although Ms S was aware that Dr W and Dr M had slept together at 9.24 pm on 18 December 2018, she was not aware of this earlier in the evening when Dr W showed up at the house and she reacted very badly.[67] He did not therefore confuse the timeline.

[72] Rather than confusing the timeline, the Judge was simply making the point that how Ms S reacted to Dr W during the course of her relationship with Dr M, particularly on 18 and 30 December 2018, was relevant to how she was likely to have behaved prior to those dates. This made it implausible that she would have sat down with the two of them for a cup of tea on the weekend of 16 and 17 December 2018 and asked Dr W to access her medical records.

[73] Moreover, the hostility displayed by Ms S to Dr W following 18 December 2018 in the contemporaneous electronic messages supports the Judge's conclusion that

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66 At [70]–[75].
67 At [73].

it would be virtually inconceivable that she would have given consent to access of the records that occurred after that date.

Factor (ii): The implausibility of the explanation given by Dr W and Dr M for the alleged request by Ms S for Dr W to access her records

[74] The appellant contends that the Judge was wrong to suggest it is unlikely that a person would discuss her medical problems with a doctor who was a stranger to her in the absence of evidence to support this view. However, I consider this is simply another example of the Judge applying his judgment (including his knowledge and experience of the world) to draw conclusions from the evidence. The suggestion that the Judge needed some expert or similar evidence before doing so is untenable.

[75] The appellant makes further criticisms of the Judge's assessment of the implausibility that Ms S would have consulted Dr W when she had access to advice through her GP and her gynaecologist. It is submitted that the Judge elevated Dr W's evidence about her level of expertise in relation to gynaecology in order to knock it down and support the conclusion that she could not have assisted much with Ms S's concerns. The appellant submits that this was never meant to be a formal consultation but a chat to relieve Ms S's anxiety over a cup of tea, and as the case was about defamation not about Dr W's level of expertise, the criticism of her evidence in this regard was unfounded and unfair. Moreover, it is submitted that it was Ms S's perception of the reassurance that Dr W could give that was relevant rather than her actual level of expertise. She was a senior consultant at Gisborne Hospital who, it is submitted, Ms S knew could at least assist her to some degree.

[76] In the end, these are simply complaints about the Judge's assessment of the weight to be given to various pieces of evidence. There is no error in a Judge determining how events occurred by referring to the parts of the evidence he considered of most assistance. And a Judge is not required to refer to every piece of evidence or submission advanced by a losing party.[68] There can be no doubt that Ms S's access to her doctors and Dr W's level of expertise were relevant matters for

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[68] *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZAR 882 (HC) at [42]; and *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [37].

the Judge to weigh in the mix in deciding whether it was likely that Ms S sought Dr W's advice. I consider there was no error in the Judge's approach.

Factor (iii): The implausibility of the explanation given by Dr W and Dr M for Dr W's continued repetitive viewing of the records

[77] The appellant notes that all the evidence about the operation of the computer system came from her because no expert evidence was called. The appellant says that most of the questioning regarding the operation of the system was undertaken by the Judge, but as I have held above there was nothing improper about this. It was crucial to the Judge's understanding of the case that the operation of the system was properly explained. And there is no suggestion that the Judge misstated its operation in reaching his conclusions.

[78] The appellant criticises the Judge's assessment of the explanations given by the appellant looking at the records on 27 December, 18 February and 17 March.[69] The appellant submits the Judge should not have looked at it from the perspective of whether a reasonable person in the position of Ms S would have needed to make such requests given no further tests have been carried out and a specialist appointment was coming up. The appellant says that Ms S was not acting reasonably or rationally and therefore this lens was inappropriate.

[79] The evidence that Ms S was not acting rationally due to her anxiety disorder did not prevent the Judge from taking into account, as one further matter in support of Ms S's case, that the explanations Dr W gave for accessing the medical records on those dates did not make sense in the context of the evidence as a whole.

[80] I also reject the submission that the Judge was wrong to say that Dr W "may simply have wished to keep herself fully informed about the state of health of 'the other woman'" as "she retained a significant emotional attachment to [Dr M] during the period she was accessing Ms S's records".[70] The Judge was not making, and was not required to make, a positive finding of the motivation for Dr W's unconsented access to the records (proof of motive was not required to prove unconsented access).

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69 Decision under appeal, above n 1, at [87]–[90].
70 At [91].

The Judge was simply disposing of the submission (repeated on appeal) that there appeared to be no reason at all for Dr W to access the records unless she had been asked to. There was no error in this approach.

Factor (iv): The lack of any corroboration in contemporary records for the account given by Dr W and Dr M and the existence of contemporary records which are inconsistent with the proposition that a meeting had taken place at which consent had been given

[81] I do not accept the contention that the Judge erred by placing weight on the lack of any contemporaneous electronic messages or other documentation to support Dr W's account. It is common for Judges to look to the contemporaneous documentation to resolve credibility issues.

[82] I also reject the criticism of the Judge's assessment of the contemporaneous documents that did exist. I consider the Judge was right to place weight on Ms S's message to AN on 19 December 2018 at 7.52 am describing the encounter the previous evening when Dr W had showed up at Dr M's house in the following terms:

> [Dr M] might need a friend...as i think [Ms W] is turning into crazy lady and going to give me lots of crap.
>
> She walked into the house asked to meet me..i said no..as i would at a coffee bar etc not in house...then she comes into the bedroom. She is a crazy lady...sorry to say.
>
> He fell into her trap...his choice but not going to be good for him.

[83] I consider the Judge was right to conclude that the messages are irreconcilable with the proposition that Dr W and Dr S had first met each other over a cup of tea three or four days earlier at Dr M's house.[71] The Judge considered the point was so obvious it needed no explanation. But given the submissions advanced on appeal, I will explain that the message indicates that Dr W walked into the house and "asked to meet" Ms S, which is a surprising request if she had already met her. The contention on appeal is the words "meet me" do not mean meet for the first time and can just as logically mean meet a person on an occasion, having met them before. But the message needs to be looked at in context. Not only are the words "meet me" used but

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[71] At [97].

also “I said no…as i would at a coffee bar etc not in a house”. Again, a surprising choice of words if Ms S had already met Dr W over a cup of tea a few days earlier.

[84] The appellant further submits that the message could suggest that Ms S had met Dr W before as she refers to her by her first name. Also, the reference to “turning into crazy lady” suggests an earlier meeting, and that it would be unlikely she would come into Ms S’s bedroom if she had not met her before. In relation to the last point, this was Dr M’s bedroom not Ms S’s bedroom, and I consider the other matters unpersuasive in the context of messages sent to another person who also knew Dr W. I consider the plain words of the message in context support the Judge’s conclusion.

[85] I therefore find there was no error in the Judge’s conclusions in respect of the fourth factor.

Did the Judge err in his overall credibility assessment?

[86] The appellant submits that the Judge’s overall credibility assessment is improbable because Drs W and M are highly regarded professionals of otherwise good character and would not collude to lie about accessing records without consent. Further, Dr M had no motive to lie to support Dr W. The appellant submits it is more likely that Dr W accessed the records because she was asked to relieve Ms S’s anxiety than for there to be some “grand conspiracy” as found by the Judge.

[87] In relation to Dr M’s motive to lie, the Judge held that Dr M’s own improper access to Ms S’s records on 18 December 2018 meant he “has a personal motive to support Dr W’s account of the crucial meeting, additional to loyalty to his long-term colleague and life partner”.[72] This meant the Judge felt unable to “place any weight upon his evidence to corroborate Dr W’s evidence about the disputed meeting” on 16-17 December.[73]

[88] I do not accept that the Judge has found a “grand conspiracy”. Rather, the Judge carefully assessed the credibility of the witnesses by reference to the oral and contemporaneous documentary evidence. And concluded, on the balance of

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72 At [67].
73 At [67].

probabilities, that Dr W and Dr M had not been truthful on the essential issue of whether Dr W had consent to access Ms S's records. The Judge gave detailed reasons for reaching those conclusions with which, having reviewed the evidence, I agree.

[89] It is not so inherently improbable that Drs W and M would lie that the Judge was *required* to accept they were telling the truth despite evidence to the contrary. This would require the Court to accept that highly regarded professionals of otherwise good character always tell the truth. The reality is that they may decide to lie when they have been caught doing something that they should not have been doing. Moreover, the same reasoning would apply to Ms S, a qualified early childhood teacher who was teaching at local kindergartens at the time of these events.

Was the Judge wrong to find that the allegations of intimidation were incapable of more than minor harm?

[90] The appellant submits that the Judge erred in treating Ms S's allegations of intimidation as not serious enough to warrant findings in defamation. I accept the Judge erred in suggesting that the appellant had withdrawn the causes of action based on allegations of intimidation. But the Judge himself accepted that he may have made this error by saying that if he misunderstood Dr W's position regarding the statements alleging intimidation he did not think it would make any difference to the result.[74] As already noted, the Judge then found that those statements could do "no more than minor harm to Dr W's reputation so could not support a claim in defamation".[75]

[91] I accept Ms S's submission that there is no evidence of the allegations of intimidation doing more than minor harm. In finding against Dr W on whether she had Ms S's consent to access her records, the DHB found it unnecessary to resolve the balance of the allegations (which included the intimidation). Therefore, the allegations of intimidation were inconsequential to the finding that Ms S had not given consent to access her records. The allegations enjoyed no wider audience than the investigating committee of the DHB. The Judge also rightly focused on the nature of the allegations themselves (giving the "fingers" to, or staring at, a person in an intimidatory way) as not being sufficiently serious to cause damage to reputation justifying a defamation

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74 At [48].
75 *Cameron v Slater* [2020] NZCA 305 at [44]–[45].

action.[76] In all these circumstances, I consider there is no error in the Judge's conclusion that the allegations of intimidation could do no more than minor harm to Dr W's reputation.

Conclusion

[92] I therefore dismiss the appeal.

Costs

[93] If costs cannot be agreed, the parties are to file memoranda (limited to five pages) within 10 working days of receipt of this judgment and reply memoranda (limited to two pages) five working days thereafter. I will determine costs on the papers.

La Hood J

Solicitors:
Woodward Chrisp, Gisborne for Appellant
Ali Bendall Law, Gisborne for Respondent

[76] Decision under appeal, above n 1, at [48].