EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2017-085-000343
[2018] NZDC 17331

UNDER	THE DEFAMATION ACT 1992
BETWEEN	[V] First Plaintiff
AND	[NAME REMOVED] Second Plaintiff
AND	LINDA HANHUA ZHANG Defendant

Hearing:	2 July 2018
Submissions:	16 and 27 July 2018
Appearances:	S Price for the Plaintiffs A Romanos for the Defendant
Judgment:	24 August 2018

RESERVED JUDGMENT OF JUDGE S M HARROP
[AS TO PLAINTIFFS' APPLICATION FOR JUDGMENT BY FORMAL PROOF]

Introduction

[1] The plaintiffs sue the defendant in defamation for damages as a result of comments she made about them when speaking to [the witness] using a Chinese social media platform known as "WeChat".

[2] The plaintiffs filed a statement of claim on 3 May 2017 and this was served together with the notice of proceeding in August 2017.[1]

[3] The defendant did not file a statement of defence although she did engage counsel (not her current one) and apparently there were discussions about the possibility of settlement. Ultimately, on 28 March 2018 the plaintiffs filed an amended statement of claim. This contains five causes of action with the total claimed for damages being $450,000.[2]

[4] The plaintiffs seek judgment by formal proof only under the first cause of action in the amended statement of claim. They each claim $50,000 for compensatory (including aggravated) damages together with interest and costs, though in submissions it is suggested an appropriate award would be $10,000 each plus costs.

[5] The application for judgment by formal proof is opposed by the defendant. She raises two procedural grounds and several substantive ones. In brief, she says there is no proof of service of the amended statement of claim on her so that the Court may not properly deal with the application for judgment on its first cause of action. She further submits that the Court has no jurisdiction to deal with the plaintiffs' claims because the total claim exceeds the $350,000 jurisdictional limit of the District Court and the plaintiffs have not formally waived the excess. Finally, on the substance of

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1 Curiously the affidavit of service of the process server does not mention the date or even the month of service although the inference is that this was done in August 2017. All he says is that it was in August 2017 that he was asked to serve the documents. However, there is no dispute by the defendant that service occurred sometime in August 2017.

2 On one reading of the amended statement of claim the total is only $400,000 because the second cause of action being in two parts, relating to the first plaintiff and the second plaintiff, appears in the second of the prayers for relief to refer to a total claim of $100,000 under that cause of action despite there also being a prayer for relief for $50,000 at the end of the pleadings relating to the first plaintiff under that cause of action. For present purposes, the difference does not matter; as will be seen, it is the fact the total claimed exceeds the District Court jurisdictional limit of $350,000 that gives rise to one of the issues advanced by the defendant.

the claim the defendant submits that judgment cannot be entered because the evidence before the Court on the issue of publication is incomplete, making it impossible for the Court to determine the issue of defamatory meaning. She further submits there is no or insufficient evidence to meet the threshold of harm which a plaintiff is now required to establish in New Zealand in a claim of this type, and that any award of damages could only be at the nominal level.

Issues

[6] The five issues I need to determine in this judgment therefore are:

(a) Is the claim for formal proof, i.e. a default claim properly considered when there is no or insufficient proof of service of the amended statement of claim?

(b) Does the Court have jurisdiction to consider the plaintiffs' claim?

(c) Does the Court have sufficient information to determine the defamation claim?

(d) Has sufficient harm been demonstrated for the claim to be upheld (as to liability for damages)?

(e) What damages, if any, should be awarded to the plaintiffs against the defendant?

The Service Issue

[7] As Mr Romanos correctly observes, the Court's power to enter judgment by default arises from a defendant's failure to file a statement of defence within the time permitted from the date of service of the statement of claim. He submits that because there is no proof of proper service of the amended statement of claim under part of which judgment is now sought, the Court simply has no ability to do this.

[8] In my view, as Mr Price submits, this point is answered by District Court Rule 6.22:

> A party to a contentious proceeding who has not given an address for service is not entitled to be served with notice of any step in the proceeding or with copies of any further documents filed in the proceeding or to address the court.

[9] Self-evidently this means that because Mrs Zhang had not filed a statement of defence to the original claim, including an address for service, by the time the amended statement of claim[3] was filed she was not entitled to be served with the amended statement of claim. The notice of proceeding with which Mrs Zhang was served in August 2017 also said in its standard advice:

> This document notifies you that unless, within 25 working days after the date on which you are served with this notice, you file in the registry of this Court a statement of your defence to the plaintiffs' claim (a copy of which is served with this notice), the plaintiff may proceed to a hearing and judgment on the plaintiffs' claim in your absence.

[10] Accordingly, by not having filed a statement of defence (and the requisite address for service) Mrs Zhang put herself at risk of an amendment to the claim and other steps being taken without reference to her, including an application for default judgment.

[11] I accept that there may on occasions be an argument based on the interests of justice if an amended claim were materially different from the original claim which was served despite the plain wording of r 6.22. Conceptually at least a defendant might elect for good reason not to defend an original claim, but have a basis to defend an amended claim. In this case, however, as Mr Price points out, as a matter of courtesy, Mrs Zhang's original solicitors and counsel were provided with copies of the amended claim and no step was taken to file an address for service, let alone a defence, until 18 June 2018 only a fortnight before the formal proof hearing. The application for a formal proof hearing was made by memorandum dated 15 May 2018; in any event, there is evidence that Mrs Zhang did personally receive the amended claim on 2 April 2018, some 31 working days before that.

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[3] Or any of the further alleged iterations of it to which Mr Romanos refers in his submissions.

[12] Importantly too, the essence of the claims on which judgment is now sought is not materially different from those contained in the original statement of claim which Mrs Zhang chose not to defend.

[13] Mr Romanos also submitted that the third iteration of the amended statement of claim, which Mr Price appears to have sent to the defendant's personal email address on 16 April 2018, meant the defendant had 25 working days to file a defence to the amended claim. This is not correct. Rules 7.69(6) and (7) provide:

> **7.69 Filing of amended pleading**
>
> (6) If an amended pleading introduces a fresh cause of action, the other party must file and serve that party's defence to it within 10 working days after the day on which the amended pleading is actually served on the other party.
>
> (7) When an amended pleading does not introduce a fresh cause of action, the other party may, within 5 working days after the day on which the amended pleading is served on that other party, file and serve an amended defence to it.

[14] Accordingly, even if I were to treat the amended statement of claim as having been served on 16 April 2018, it was still 21 working days before the formal proof hearing was sought, well beyond the maximum 10 working days within which a defence to an amended pleading must be filed and served.

[15] For these reasons, I conclude that the original claim was properly personally served, that the defendant was not entitled to be served with the amended claim and that the plaintiffs are entitled to proceed to seek judgment by default through formal proof, especially given that there is no material change, for present purposes, between the original and amended statements of claim.

Jurisdiction

[16] The total sum claimed for damages across the five causes of action in the amended statement of claim is $450,000, which is $100,000 beyond the monetary jurisdiction of the District Court. Section 74 of the District Court Act 2016 provides:

> (1) The court has jurisdiction to hear and determine a proceeding—

(a) in which the amount claimed or the value of the property in dispute does not exceed $350,000:

(b) that, under any enactment other than this Act, may be heard and determined in the court.

(2) The amount claimed in a proceeding under subsection (1) may be for the balance, not exceeding $350,000, of an amount owing after a set-off of any claim by the defendant that is admitted by the claimant.

[17] Mr Romanos therefore submits that the Court has no jurisdiction to hear and determine this proceeding. However, Mr Price submits that this proceeding may be nevertheless be heard in the District Court because while it consists of several independent causes of action that in aggregate do exceed the Court's jurisdiction, each one individually does not. In this he relies on s 83 of the Act which provides:

(1) A cause of action may not be divided for the purpose of bringing 2 or more proceedings or a counterclaim.

(2) Nothing in subsection (1) prevents a party from including in a single proceeding multiple causes of action that in the aggregate, but not individually, exceed the jurisdiction of the court.

[18] Both counsel have referred to the commentary on this section in the LexisNexis publication District Courts Practice (Civil) and to authorities which discussed the former relevant provision s 38 of the 1947 Act, there being none on the recently-enacted s83(2).

[19] Significantly for present purposes, s 38 simply stated:

A cause of action may not be divided for the purpose of bringing two or more [proceedings] or any counterclaim.

[20] This is replicated in s 83(1) but Parliament must be taken, by having added s 83(2), to have made a deliberate and material change to the law.

[21] In *Millman Holdings Ltd (in liquidation) v Logan* Judge Joyce QC said:[4]

It seems anomalous to me that when, say, 2 defendants can be separately pursued in this Court for $200,000 each by claims arising from the self-same circumstances – so that consolidation will surely be inevitable or, at least, the

[4] *Millman Holdings Ltd (in liquidation) v Logan* [2006] DCR 317 at [29].

> claims will be heard together – there should be an embargo against joining them both in the one proceeding in the first place. But whether or not that view will ever hold sway (I may have missed some fundamental point) is in the future.

[22] Mr Price submits that "the future has arrived" and that Parliament has acknowledged the force of the point made by Judge Joyce QC and acted on it. Mr Romanos submits while this provision may possibly allow a plaintiff to sue multiple defendants, it does not allow multiple claims in individual causes of action against one defendant which exceed $350,000.

[23] In the *Millman Holdings* case Judge Joyce QC considered himself bound by the judgment of the High Court in *Dalton and Hutchinson v Cartwright and Hilt*.[5] Harrison J said of s29 of the District Courts Act 1947 [the predecessor of s74] that it:[6]

> …appears to impose an absolute limit on jurisdiction to $200,000 irrespective of the number of causes of action or defendants. It was common ground in argument on appeal that s 29 does not permit a plaintiff to unite in one statement of claim a number of causes of action against one defendant which although individually are less than $200,000 exceed that amount in aggregate. In my judgment the same principle applies to where there are more than one defendant. The Trust cannot claim more than $200,000 in aggregate.

[24] While I have been provided with no material shedding light on the process leading up to the amendment, in my judgment Parliament must be taken to have deliberately, in enacting s 83(2), overturned the approach of the High Court in that case and in effect upheld the common sense suggestion made by Judge Joyce QC. Although that was made in a case relating to multiple defendants, it is clear that the principle is not limited in that way, as *Dalton v Cartwright* itself confirms.

[25] In the end the plain meaning of s 83(2) must be applied; in my view it means in the present context that the amended statement of claim does not fall foul of the jurisdictional limit. Section 83(2) makes it plain that the plaintiffs are not prevented from including a single proceeding multiple causes of action which in aggregate do exceed the jurisdiction of the Court, provided that no individual causes of actions does so. That is what the plaintiffs have done here. Of course, in giving judgment, the Court may not ultimately award more than $350,000 but that is not sought here.

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5 *Dalton and Hutchinson v Cartwright and Hilt* HC Auckland AP 47 – SW02, 3 September 2002.
6 At [46].

[26] I therefore conclude there is no jurisdictional impediment to the Court considering the claim for judgment.

[27] In any event, Mr Price made it clear that, pursuant to s 80 of the District Court Act 2016, that the plaintiffs abandoned any excess so that even if my determination that s 83(2) permits the claims to be considered is in error, the Court clearly has jurisdiction by way of s 80(2)(a).

[28] The surrender has been confirmed twice by counsel for the plaintiffs, once in the synopsis of submissions dated 2 July 2018 and again in the more detailed submissions in reply dated 27 July 2018.

[29] Mr Romanos argues that this manner of conveying abandonment of the excess is ineffective. He submits the plaintiffs are obliged, if they wish to abandon the excess, to file an amended statement of claim in which they formally do so.

[30] In *Doyle v Talbot Motor Co Limited* May LJ[7] referred to a practice mentioned by counsel that in drafting particulars of claim in the Country Court there would be words inserted such as "limited to £300" after a claim for damages. His Lordship observed that there did not seem to be any rule in the Country Court Rules 1981, nor any decided case which required that to be done. His Lordship referred to two earlier opportunities which the Court of Appeal had had in 1952 and in 1960 to lay down a rule that the limitation of damages should be specified in this way, but on each occasion the Master of the Rolls had expressly declined so to rule.

[31] May LJ said he also did not propose to lay down any such rule on this occasion, but nevertheless thought it good practice to follow. LJ, but his Lordship did not commit to making this a requirement; he saw it as "good practice".

[32] Section 80 does not prescribe any formal procedure for abandonment of the excess and there is no provision in the District Court Rules 2014 addressing this issue directly. However, as is well-known, r 1.3 says:

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[7] At [985].

> The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.

[33] With that in mind, I see no reason why a formal abandonment in writing (twice) of the excess, in memoranda signed by counsel should not be effective and binding on the plaintiffs and sufficient to achieve abandonment. I am sure an attempt to resile from such an unconditional concession, given contrary to interest, on the basis that it was insufficiently formal and not intended to be sufficient, would be given short shrift or be met with a significant costs award, at least where any prejudice arose from reliance on it by a defendant.

[34] In any event, the reality of the current application for judgment is that it is limited to the first cause of action in the amended statement of claim, i.e. to a maximum of $100,000, well below the jurisdictional limit. Mr Price advised me that if judgment is obtained then the plaintiffs would seek a stay of the other causes of action. The Court is entitled, as is the defendant, to rely on that advice. It is consistent with that advice to the Court that Mr Price also said in paragraph [6] of the memorandum in which he sought listing of the case for formal proof that it was anticipated that the causes of action added in the amended statement of claim would be withdrawn if judgment by default were obtained in relation to the first cause of action. That was confirmed in paragraph [94] of Mr Price's closing submissions where he submits that an award of $10,000 for each plaintiff together with costs would be appropriate and sufficient and that in that event "claims on the other causes of action should be stayed".

[35] In the circumstances, I am satisfied that even if the finding I have made based on s 83(2) is incorrect, the plaintiffs have validly abandoned any excess over the $350,000 jurisdictional limit of the District Court.

The Substantive Claim

[36] On or about 12 May 2016 the defendant spoke to [the witness] using the WeChat facility. I understand this to be, as [the witness] says, "Like email but instead uses voice messages." [The witness] did not know Mrs Zhang very well. A full transcript of what she said (this being a one-way statement rather than a conversation)

has been filed, but the amended statement of claim highlights particular words about and concerning [name deleted – the first plaintiff], who is a volunteer [hobby deleted] in Wellington. The defendant is a Justice of the Peace.

[37] The words complained of are:

> 6.1 And now [first plaintiff] is mainly doing her own things. She's making money for herself. She set up that [details deleted] group for the sake of money. She's using the centre as a political advantage to make money.
>
> 6.2 [First plaintiff] is a slut. She is able to fool around with any man. I just need to tell you this for you to understand. And she resorts to dirty tricks.
>
> 6.3 She is fine sleeping with white guys and black guys. It's better to stay away from people like her.
>
> 6.4 She used to be [occupation deleted], but she went around telling everyone she was a doctor. I dislike people who lie.
>
> 6.5 The slut, [first plaintiff], is responsible for the closing down of [organisation 1 details deleted]. In just three years, the two of them made [organisation 1] come to a stand-still and there was no longer any election. It was illegal, but the leaders chose to turn a blind eye to it.

[38] The first plaintiff pleads that the natural and ordinary meaning of those statements is that she:

> 7.1 Exploits children by profiteering from her volunteer work with them;
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> 7.2 Is promiscuous and deceptive;
>
> 7.3 Is promiscuous and is best avoided;
>
> 7.4 Is a liar who deceives people about her professional qualifications;
>
> 7.5 Corruptly connived in preventing lawful elections in the [organisation 1].

[39] It is further alleged that these statements in paragraphs 6.2 and 6.3 conveyed by innuendo the meaning that she was unfaithful to her husband and family.

[40] It is alleged that there are aggravating factors in relation to the WeChat publication in that:

9.1 The defendant's word carries particular weight and input because of her status as a Justice of the Peace.

9.2 The defendant's conduct was exacerbated by her descriptions of the plaintiffs, in her statement, as "utterly despicable" and "ungrateful dogs" who "do everything to show menace" and of the first plaintiff as being a "scumbag" and as "having evil in her eyes".

9.3 The allegations are extremely serious, but the plaintiff must have known that there was no evidence for them.

9.4 The defendant intended or must have anticipated that her smears would be passed around, including to people who knew that the first plaintiff was married and had children.

9.5 The defendant knew that [the witness] was a very active member of Chinese senior groups and intended or must have anticipated that her smears would be circulated amongst those groups.

9.6 The defendant specifically asked [the witness] to pass on her smears to [person 1] who worked at the Chinese Culture Centre.

9.7 The defendant asked [the witness] to hide the defendant's identity as the author of the smears.

9.8 The defendant's motives for publishing the first statement were malicious, in that the defendant was the organiser of the non-profit cultural group that was to some extent competing with the first plaintiffs' group for support and status from the China Culture Centre.

9.9 The defendant has been making similar allegations about the first plaintiff to others, particulars of which will be supplied after discovery.

[41] It is important to note that, as currently pleaded, the allegation is limited to a publication by the defendant to [the witness] in one WeChat message; the other causes of action which are not being pursued do allege further occasions of publication but I ignore these for present purposes.

[42] As to the [second plaintiff], he is a Chinese doctor in Wellington and the words complained of concerning him are:

10.1 [Second plaintiff], that old man, is her sugar daddy. He drives her everywhere and picks up food with his chopsticks and puts it on her plate. He is shameless. I detest him.

10.2 He tells everyone that he is the owner of [organisation 2 deleted] and that [person 2] works for him. He also claims to be the president of [organisation 3 deleted]. He said in a meeting [quote deleted] he said he was the president of [organisation 3] and the owner of [organisation 2]. Isn't he shameless?

10.3 [Person 2] is being hoodwinked by [the second plaintiff], but he still thinks highly of [the second plaintiff].

10.4 He owns a [business], yet calls himself Dr [name removed] and goes around deceiving people.

[43] It is alleged that the natural and ordinary meaning of those statements is that the second plaintiff:

11.1 Shamelessly panders to a young married woman;

11.2 Deceives people with false claims about his status;

11.3 Is deceiving [person 2];

11.4 Deceives people about his skill in Chinese medicine.

[44] It is said that there are aggravating features of the publication of these statements by the defendant to [the witness] in that:

12.1 [The witness] was a patient of the second plaintiff.

12.2 The defendant's husband practices Chinese medicine. He is in competition with the second plaintiff.

12.3 Shortly before the time of the first statement, the second plaintiff was conducting an advertising campaign offering free treatment for senior people.

12.4 The defendant's motives for publishing the first statement were malicious, in that she sought to tar the reputation of the second plaintiff in order to undermine the second plaintiff's professional reputation and advance her husband's business.

12.5 The allegations are extremely serious, but the defendant must have known that there was no evidence for them.

12.6 The defendant's word carries particular weight and input because of her status as a Justice of the Peace.

12.7 The defendant's conduct was exacerbated by her descriptions of the plaintiffs, in her statement, as "utterly despicable" and "ungrateful dogs" who "do everything to show menace".

12.8 The defendant must have anticipated that her smears would be passed around.

12.9 The defendant knew that [the witness] was a very active member of Chinese senior groups and intended or must have anticipated that her smears would be circulated amongst those groups.

> 12.10 In particular, the defendant specifically asked [the witness] to pass on her smears to [person 1] who worked at the China Culture Centre.
>
> 12.11 The defendant asked [the witness] to hide the defendant's identity as the author of the smears.
>
> 12.12 The defendant has been making similar allegations about the second plaintiff to others, particulars of which will be supplied after discovery.

[45] Again, it is important to note that as currently alleged the publication about the second plaintiff by the defendant is limited to what she said on the one occasion on WeChat to [the witness].

[46] Affidavits have been filed by each of the plaintiffs and by [the witness] together with translations. [the witness] said that she is a friend of the second plaintiff and had been a patient of his. She does not know the first plaintiff very well, but she is aware that she is married and president of the [organisation 4] in Wellington. She did not know the defendant that well, but is a friend of her sister. She said her reaction when receiving the message on her phone was that they were "very serious" allegations and she felt that she should tell [the second plaintiff] about them so she did. She let him and his wife listen to the messages and take a copy of them on his phone.

[47] Although the amended statement of claim seeks damages of $50,000 for each plaintiff, Mr Price made it clear in his submissions that the primary remedy sought was vindication. The plaintiffs have not been able to obtain a public retraction and apology and accordingly seek an award from the Court of the damages that "in the opinion of the Court are sufficient to vindicate the defamations as expressed". Mr Price suggests an award of $10,000 for each plaintiff would be appropriate together with costs and disbursements, including the translation fees.

[48] Mr Romanos submits that although the defendant does not rely on the "*Jameel*"[8] , the principle that trivial claims should be excluded[9], United Kingdom legislation provides:

> A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

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8 *Jameel v Dow Jones and Co Inc* [2005] EWCA Civ 75 [2005] QB 946.
9 Section 1(1) of the Defamation Act 2013 (UK).

[49] This principle has been approved, obiter, by the New Zealand High Court; *CPA Australia Limited v The New Zealand Institute of Chartered Accountants*.[10] Nevertheless, Mr Romanos submits that applying the appropriate principles and particularly those set out in the recent judgment of Palmer J in *Sellman v Slater*[11] the plaintiffs are unable to overcome Palmer J's "more than minor harm" threshold. Mr Romanos submits there is now in New Zealand a threshold of harm as a pre-requisite to the establishment of an actionable claim in defamation. Mr Romanos relied on the following passage from Palmer J's judgment:[12]

> 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.** (emphasis added).

[50] The plaintiffs accept that *Sellman v Slater* is the controlling authority in the present case, but submit that the "more than minor harm" aspect is a defence and therefore cannot be raised at a formal proof hearing. In any event there is a burden on the defendant to show that the publication caused less than minor harm and the defendant has tendered no such evidence. They further submit there is any event ample evidence before the Court of more than minor harm to the reputation of each plaintiff.

[51] Mr Price notes that Palmer J emphasised that damages in a defamation case are presumed. Immediately before the passage above his Honour said:

> The presumption of damage remains a sensible element in the law of defamation.[13]

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[10] *Australia Limited v The New Zealand Institute of Chartered Accountants* [2015] NZHC 1854 at [104] – [121].
[11] *Sellman v Slater* [2018] 2 NZLR 218.
[12] At [68].
[13] At [64].

[52] His Honour added that the law presumes harm to reputation to have occurred on publication of a defamation.[14]

[53] On this basis Mr Price submits that proof of any sort of damage is not a required element of a defamation claim, but that Palmer J finds that that presumption of damage is rebuttable by a defendant. His Honour observed:[15]

> A defendant may rebut the presumption by showing any harm to reputation is less than minor.

[54] Further,[16] Palmer J explains the mechanics of this rebuttable presumption:

> **If the publisher can show** that there is not, and is not likely to be, sufficient damage to reputation, above a certain threshold, then that should be able to be raised as a defence to a claim of defamation. (emphasis added).

[55] Mr Price submits that in the present context, where judgment is sought by formal proof, the defendant is not permitted to engage with any affirmative defences. For this proposition he cites *Kim v Cho*.[17]

[56] In that judgment Courtney J said:

> [4] It is, however, generally accepted that a Judge in formal proof proceedings is not required to engage with any matters of affirmative defences, set-off or counterclaim. That is relevant because the evidence advanced in support of Mr Kim's case suggests that affirmative defences under the Defamation Act 1992 may have been available to Mr Cho in relation to some of the statements sued on. However, the Defamation Act requires affirmative defences to be specifically pleaded.
>
> [5] The objective of r 15.9 is to achieve just, speedy and inexpensive determination of the proceedings. Decisions under that rule can be varied or set aside if it appears there may have been a miscarriage of justice. But there is no indication that a Judge considering the formal proof of a claim can consider matters beyond proof of the claim and calculation of damages. (Footnotes omitted).

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15 At [3].

16 At [65].

17 [2016] NZAR 1134.

[57] In any event, by contrast with *Kim v Cho*, the defendant here has neither filed a statement of defence nor adduced any evidence that there has been and is not likely to be less than minor damage to the reputation of the plaintiffs.

[58] On this issue, I accept Mr Price's submission for the reasons he advances. In the present context I consider the onus is on the defendant to establish that what was said caused no more than minor harm. The defendant has, because of the formal proof context, not discharged that onus.

[59] Against that background I turn to consider the framework for the assessment of the allegations of defamatory statements. The learned authors of *The Law of Torts in New Zealand*[18] highlight the following definitions of "defamation" as having achieved some common currency:

> 1. A statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally.
>
> 2. A false statement about a person to his or her discredit.
>
> 3. A publication without justification which is calculated to injure the reputation of another by exposing him or her to hatred, contempt or ridicule.
>
> 4. A statement about a person which tends to make others shun and avoid him or her. (Footnotes omitted).

[60] In *Sellman v Slater* Palmer J observed, after setting out these definitions:[19]

> Alternatively, adding the above threshold for harm, it might suffice to say, generally, that a statement is defamatory if it causes the reasonable person reading or hearing it to think worse of the person concerned in a more than minor way.

[61] Accordingly, I proceed on the basis that while the plaintiffs do not need to establish as an element of the tort that any defamatory statement published by the defendant caused more than minor harm to their reputation, they do nevertheless need to point to a threshold level of reputational damage in determining whether the statement was defamatory at all.

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[18] Stephen Todd (Ed) and Ors The Law of Torts in New Zealand (7th ed Thomson Reuters, Wellington, 2016 at 16.3.01).

[19] At [75].

[62] As Mr Romanos pointed out, the principles for determining defamatory meaning are well-established and he cited the observations of Blanchard J in *New Zealand Magazines v Hadley (No 2)*:[20]

> (a) The test is objective; under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
>
> (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
>
> (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
>
> (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
>
> (e) The Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
>
> (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared.

[63] Although Mr Romanos submitted that the latter was particularly problematic for the plaintiffs here because of the absence of sufficient information about context, I am satisfied there is sufficient information for me to make the necessary assessment. I accept Mr Price's submission that Mr Romanos appears to be under the misapprehension that a WeChat message is a conversation which had two sides. The evidence suggests it is simply a one-way statement (albeit conveyed in more than one message) equivalent to an email. I accept there is sufficient context therefore for me to consider the necessary issues. Again, if there were relevant context providing a foundation for affirmative defences or bearing on the gravity of the alleged defamation the defendant should have filed a statement of defence putting matters in issue and affidavit evidence substantiating it. This is a formal proof application and I have no

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[20] *New Zealand Magazines v Hadley (No 2)* [2005] NZAR 621 at [625].

defence information on which I can rely in this regard; the submissions of Mr Romanos therefore cannot be upheld in this respect.

Have the plaintiffs established the elements of a defamation claim?

[64] There is no doubt on the evidence that the defendant made the WeChat statement at issue and that it referred to both plaintiffs. The sole issues are whether the statement can bear the pleaded meanings and whether those meanings are defamatory.

[65] As to the first plaintiff, I have already set out the alleged defamatory words and the alleged natural and ordinary meanings they bear.

[66] I consider the words about the first plaintiff's use of the centre for political advantage is not capable of bearing the meaning that she exploits children by profiteering from her volunteer work with them. The statement on the face of it means that [the first plaintiff] had a financial motive for starting the "[group details deleted]" and to obtain political and financial advantage as a result. The assertion that she "exploits children" goes well beyond this. Taken in context the WeChat message overall does not assert child exploitation or abuse.

[67] I do accept, however, that the reference to [first plaintiff] being a slut, being able to fool around with any man and resorting to dirty tricks does bear the natural and ordinary meaning that she is promiscuous, best avoided and deceptive. The extent to which this is defamatory may be debated. Context is always important, but I accept that describing a woman as a slut amongst other derogatory remarks is defamatory, though perhaps it might be less so in 2018 than in former times. I think a reasonable person hearing that statement would think worse of [first plaintiff] in a more than minor way. It was clearly intended to be derogatory of her character.

[68] As to the assertion that the statement means she is a liar who deceives people about her professional qualifications, I also consider this meaning is the natural and ordinary meaning of the statement and that it is defamatory. A reasonable person hearing those words would think worse of [first plaintiff] in a more than minor way

and they appear calculated to lower her reputation. Alleging that a person has misrepresented their qualifications in an employment context is clearly defamatory.

[69] I also consider that the statement about [organisation 1] does carry the natural and ordinary meaning that [first plaintiff] corruptly connived in preventing lawful elections in the [organisation 1] and that this is defamatory. The allegations are of corruption and illegality would clearly meet the threshold of leading a reasonable person to think worse of her in a more than minor way.

[70] Accordingly, I conclude that all of the alleged meanings except the first were the natural and ordinary meanings of the words at issue and that all of those natural and ordinary meanings were defamatory.

[71] As to the second plaintiff, I accept that the alleged natural meaning of the words is that the second plaintiff "shamelessly panders to young married women", but I do not consider that a reasonable person hearing that would think worse of the second plaintiff in a more than minor way.

[72] I accept, however, that the other three alleged meanings alleging deceit are both the natural meanings of the words and defamatory. Mrs Zhang is alleging professional dishonesty. That is undoubtedly a serious allegation and the damage to [the second plaintiff]'s reputation would objectively be more than minor.

[73] I conclude therefore that three of the four alleged natural meanings are as asserted and that they are all defamatory of the second plaintiff on an objective view.

[74] For these reasons, I conclude that both plaintiffs have made out their defamation claims in respect of the WeChat messages from the defendant to [the witness].

Remedy

[75] I have already mentioned that the plaintiffs primarily seek vindication and suggest an award of $10,000 for each plaintiff together with costs and disbursements. By contrast Mr Romanos submits that, particularly having regard to the very limited

publication here in a one-way WeChat message, there has been no real reputational harm caused and it could, at best from the plaintiff's perspective, only give rise to nominal damages.

[76] The extent and circumstances of publication in any defamation case is a critical factor. Here the messages were only sent to one person, [the witness], who promptly told the second plaintiff about them and let him and his wife listen to them. Any damage to the reputation of either plaintiff was limited to what [the witness] thought of them. She says she did consider the allegations in the messages were very serious.

[77] [the witness] does not know the first plaintiff, but considered the second plaintiff a friend. It is reasonable to infer that her friendship and prior knowledge of the second plaintiff would have substantially blunted any real damage to [her assessment] of his reputation, especially as he had an immediate opportunity to comment and presumably to set the record straight.

[78] Because [the witness] did not know the first plaintiff, she had no frame of reference in which to assess or in any way negate the damage to her reputation which the words otherwise would have caused. However, the extent of harm to the first plaintiff must necessarily be circumscribed by the very limited nature of the publication.

[79] It is inevitably difficult to determine the extent of any resulting harm to the reputation of either plaintiff, which is limited to what [the witness] thought of them. But she thought the comments were very serious and I consider that overall they were significantly derogatory and reasonably extensive. They were also made by a Justice of the Peace who appeared to be speaking from a position of detailed knowledge.

[80] Having regard to all the circumstances, I accept more, but not much more, than minor reputational harm is likely to have been caused, but I am satisfied that the appropriate award of damages is very much at the nominal end of the spectrum. The statements are clearly and quite significantly defamatory, but they were made to a very limited audience; it could not have been more limited.

[81] In all the circumstances, I conclude that the appropriate award of damages to each plaintiff is the sum of $1000. They are each entitled to judgment accordingly. I consider that, against the background of the finding of liability in defamation, which in large measure achieves the public vindication the plaintiffs say they primarily seek, an award of damages at that level (and costs) is a sufficient overall remedy.

Conclusions

[82] I have found:

(a) The plaintiffs are entitled to proceed to seek judgment by formal proof regardless of whether the amended statement of claim was properly served.

(b) The Court has jurisdiction to consider the plaintiffs' claims but, even if not, the plaintiffs have validly waived any excess of jurisdiction.

(c) The Court has sufficient information on which to determine the defamation claims.

(d) Sufficient (more than minor) reputational harm has been demonstrated to be likely to have been incurred for the claim to be upheld as to liability.

(e) The appropriate award of damages, taking into account the finding of liability and an entitlement to costs, is the sum of $1000 to each plaintiff.

Costs

[83] Despite Mr Romanos' submission that, if the plaintiffs succeed at a modest level, costs should be awarded to the defendant, because of the substantial difference between the amount claimed and the amount awarded, I nevertheless consider in principle that the plaintiffs are entitled to costs. However, I formally reserve them as requested by Mr Price because of correspondence between the parties on a "without prejudice save as to costs" basis.

[84] I strongly urge the parties, in view of the no doubt substantial costs incurred to date on both sides to endeavour to settle all issues without further recourse to the Court and the inevitable incurring of further costs.

[85] Any award to the plaintiffs must reflect the level of success, as Mr Romanos submits. On the other hand, the plaintiffs are in principle entitled to costs both on the proceeding generally and the opposed application for formal proof judgment, because they have succeeded on all of the issues which were contested, albeit to only a modest extent in respect of remedy.

[86] That said, the plaintiffs, whose main purpose was vindication, could simply have sought a declaration under s 24 of the Defamation Act. Equally however, the defendant could easily have avoided the risk of any liability and costs by acknowledging her wrong-doing at an early stage and apologising, but she did not do so. Faced with that the plaintiffs were entitled to proceed and they have succeeded.

[87] If the issue of costs needs to be determined by me, the plaintiffs' submissions are to be filed and served by 17 September 2018, with the defendant to reply by 12 October 2018.

S M Harrop
District Court Judge