IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2019-004-000509
[2022] NZDC 21701

BETWEEN	IAN QUIGLEY Plaintiff
AND	NEW ZEALAND POLICE Defendant

Hearing:	20 October 2022
Appearances:	L Tothill for the Plaintiff H Reid for the Defendant
Judgment:	21 November 2022

RESERVED JUDGMENT NO. 2 OF JUDGE D J CLARK
[In Respect of Application to Strike Out]

Mr Quigley's Claim is Almost Struck Out

[1] On 30 March 2022 I delivered an interim judgment[1] in respect of the New Zealand Police's application to strike out the proceedings of Mr Quigley. It was my view then Mr Quigley's claim should be struck out. His claim, as pleaded, had no prospect of success. However, given the complexities of his claim and that he was self-represented, I gave him one last opportunity to engage counsel in an attempt to rectify his pleadings.

[2] My judgment followed an adjournment of the strike out application which was initially heard by Her Honour Judge M-E Sharp. Judge Sharp adjourned the hearing to appoint counsel to assist the Court given the nature of the claim.

[1] *Ian Quigley v New Zealand Police* [2022] NZDC 5276.

[3] What that means is this latest hearing is the third time the strike out application has come before the Court. It needs to be determined one way or the other. In doing so it is unnecessary for me to revisit the background to these proceedings. Those details are set out in my judgment of 30 March 2022.

The Amended Pleadings

[4] On 19 May 2022, Mr Quigley filed an amended statement of claim. The amended statement of claim has significantly rectified the defects in the previous pleadings. The focus now is based on one cause of action, that being misfeasance in public office. The continuing strike out application has been narrowed accordingly.

Legal Principles

Misfeasance in Public Office

[5] Misfeasance in public office is a well recognised tort in New Zealand. In *New Zealand Defence Force v Berryman*[2] Young P explained the tort as follows:

> Misfeasance in public office is concerned with preventing the abuse of public power. The tort is committed whenever a public officer *qua* public officer knowingly or recklessly acts either with malice towards another or in the knowledge that he or she is acting unlawfully and is likely to injure the plaintiff.
>
> (citations omitted)

[6] Young P also referred to the decision of the Court of Appeal in *Garrett v Attorney-General*[3] which explained the purpose behind the tort:

> The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty.

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[2] *New Zealand Defence Force v Berryman* [2008] NZCA 392 at [62].
[3] *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at [62].

[7] The conduct of the public officer must demonstrate a deliberate intention to cause harm.[4] In *Three Rivers District Council v Bank of England* (No. 3)[5] it was explained:

> If an officer deliberately doesn't act which he knows is unlawful and will cause economic loss to the plaintiff, I can see no reason for why the plaintiff should identify a legal right which is being infringed or a particular duty owed to him, beyond the right not to be damaged by the deliberate abuse of power by a public officer.

[8] The House of Lords in *Three Rivers District Council* emphasised that the tort involves an element of bad faith.

[9] The elements were summarised by the Court of Appeal in *Currie v Clayton*:[6]

(1) *Standing*: The plaintiff must have standing to sue.

(2) *Public office*: The defendant must be a public officer.

(3) *Unlawful conduct*: The defendant must have acted or omitted to act in purported exercise of her public office unlawfully either:

(a) intentionally, that is actually knowing her actions or omission to act were beyond the limits of her public office, or

(b) with reckless indifference as to whether (inaudible) or omitting to act outside those limits.

(4) *Intention*: The defendant must have so acted or omitted to act:

(a) with malice towards the plaintiff, that is with intention to harm the plaintiff; or

(b) knowing her conduct was likely to harm the plaintiff, or people in the general position the plaintiff; or

(c) with reckless indifference as to whether the plaintiff would be harmed. Subjective recklessness, not objective recklessness is required.

(Note: (a) is often called "targeted malice"; (b) and (c) are often called "non-targeted malice".)

(5) *Resulting loss*: The plaintiff must have actually suffered loss and the defendant's actions must have caused the plaintiff's claimed loss.

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[4] Ibid.
[5] *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1 (CA and HL) at 193.
[6] *Currie v Clayton* [2014] NZCA 511; [2015] 2 NZLR 194 at [40].

Submissions

[10] Ms Reid accepts many of the deficiencies in Mr Quigley's original pleadings have now been rectified. She has also accepted the cause of action based on misfeasance in public office is able to be pleaded but maintains the cause of action based on the pleaded facts is still untenable, is unable to meet the elements of the cause of action and therefore must be struck out.

[11] Firstly, she submits there is no reasonable cause of action and says the claim is an abuse of process. While accepting the first two elements of the tort are satisfied, the remaining elements are not.

[12] She starts with the extent of Mr Quigley's injuries. He pleads he was in hospital for 10 days. In fact, it would appear he was in hospital for seven. Based on the evidence to date, Ms Reid says the extent of the injuries suffered by Mr Quigley are exaggerated. To the extent they are accepted, Accident Compensation (ACC) has covered him for those injuries. If Mr Quigley continues to maintain he has not been compensated for his injuries,[7] then any claim for compensation is an issue between Mr Quigley and ACC. That claim cannot be sheeted home against the New Zealand Police.

[13] Secondly, Ms Reid says the "New Zealand Police" is not a legal entity and cannot be sued. In normal circumstances, Ms Reid says either the Commissioner of the New Zealand Police is named as a party or the Attorney General. In this instance even if they were named, neither the Commissioner or the Attorney General could be vicariously liable for the conduct of Officer Sin or any other employee.

[14] Thirdly, Ms Reid is critical of the pleadings against Officer Sin. He is the only named officer in the pleadings but is not a party. Yet she says the pleadings fail to set out the foundations of the alleged conduct which amounts to bad faith. The pleadings refer to Officer Sin and generically to other unnamed officers who individually (in the case of Officer Sin) or together (being the unnamed officers) have:[8]

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[7] It is common ground Mr Quigley has had running battles with ACC over his cover and with medical practitioners in this Court and the High Court over the care he received.

[8] Paragraphs 34 and 35 of the amended statement of claim.

(a) Recorded a lesser charge of "careless driving" when "they" should have recorded a charge of "dangerous driving causing injury";

(b) In entering a charge of careless driving (instead of dangerous driving causing injury) acted illegally and in breach of the New Zealand Police of Code Conduct;

(c) In entering a charge of careless driving, knew of the illegality or acted with reckless indifference as to its illegality.[9]

[15] Ms Reid says the unnamed officers must be Officer Sin's supervising sergeant and the officers involved in the prosecution of Mr Toi and the decision to grant him diversion. For the alleged conduct to be successfully proven, Mr Quigley will need to prove they conspired[10] to intentionally charge Mr Toi with the lesser offence (or acted with reckless indifference) knowing such conduct would cause harm to Mr Quigley.

[16] Ms Reid says there is no evidential foundation to make these allegations, yet alone prove them. She is especially critical of the allegations of dishonesty, especially when such a pleading must satisfy r 13.1.8 of the Lawyers: Conduct and Client Care.

[17] Mr Quigley alleges by deliberately incorrectly charging Mr Toi and incorrectly recording the details of the accident, Officer Sin was acting illegally in breach of the New Zealand Police Code of Conduct. This illegality caused harm to Mr Quigley being the lack of medical care, victim support and compensation he was entitled to.

[18] Ms Reid argues there is nothing to support Officer Sin "knew" his conduct would cause harm nor did he act with "reckless indifference" as to the consequences of his conduct. There is nothing to support any improper motive or conduct amounting to bad faith. Furthermore, any grievance which Mr Quigley has with the Officer Sin's conduct or the Police generally were examined through the Independent Police

[9] These same allegations are made against the New Zealand Police.
[10] Reference is made at paragraph 19 of the amended statement of claim Mr Toi was an employee of Corrections New Zealand which the officers knew about. The inference is he was treated lightly because of his employment.

Conduct Authority. Mr Quigley exercised this right, and the complaint was dealt with resulting in an apology by the Police.

[19] Irrespective of the apology which issued, she says the elements numbered 3 and 4 in *Currie v Clayton* are not satisfied.

[20] Fourthly, Ms Reid says there is no resulting loss (element 5). There is a disconnect between the allegations, even if they could be proved, and any harm which Mr Quigley says he suffered. This is because the medical treatment he received, the victim support he obtained through Ministry of Justice and, the compensation he was entitled to through ACC was not contingent on the charge which was laid. Mr Quigley was entitled to receive all of these entitlements and indeed, did.

[21] Finally, Ms Reid argues that irrespective of the reframing of the damages claim, ultimately the damages claim is debarred by the ACC regime. All damages which are claimed by Mr Quigley are as a result from his injuries, both physical and emotional harm. These are damages which are covered by ACC and therefore no other compensation can be claimed elsewhere.

[22] Ms Tothill argues that the matters raised by Ms Reid are evidentiary matters which require proof. As such, they should be dealt with at a substantive hearing and not through a strike out application. Accepting there may be changes needed for the relevant defendant, those issues can be dealt with by filing further pleadings which in terms of strike out principles, an opportunity should be afforded for this to occur.

[23] Particular reliance is placed on the case of *Peter Elliott v Chief Constable of Wiltshire Constabulary* where it was stated:[11]

> A police officer will be held to account if in their performance of their functions they commit misconduct. If the elements of misfeasance are made out then a strike out application will not be successful. Rather it should be heard at a substantive hearing for determination.

[11] *Peter Elliott v Chief Constable of Wiltshire Constabulary* The Times, 5 December 1996; cited in *Cornelius v London Borough of Hockney* [2002] EWCA Civ 1073 at [16].

[24] In terms of the illegality which has been committed, Ms Tothill relies on the provisions set out in the Policing Act 2008 and the New Zealand Police Code of Conduct which deals with misconduct and serious misconduct of a police officer. Accepting that actual malice may not be able to be established, she argues nevertheless the officers involved would have known their actions or omissions of failing to record the details of the accident and failing to properly charge Mr Toi would cause harm to Mr Quigley. She says, that in doing so the officers were "recklessly indifferent" to the harm Mr Quigley would suffer.

[25] Furthermore, she says that Officer Sin (and any other police officer involved in the investigation and prosecution) know about the ACC system and the importance of recording details accurately so victims can be properly compensated for harm suffered. She says these details were not properly recorded which resulted in prejudice to Mr Quigley in terms of his medical treatment and subsequent treatment by ACC. However, she emphasises each of the allegations should ultimately be left for trial rather than being struck out now.

[26] As far as the damages are concerned, she says the losses extend beyond the personal injury claims covered by the ACC regime. She says Mr Quigley is not seeking compensation resulting from the losses resulting from the crash, but rather the *additional losses suffered as a result of the police failing to act within their duties when responding to the crash*.[12] Because the failures by the officers in their duties, she says Mr Quigley was denied care that he would have otherwise received from the accident.

[27] Finally, she emphasises the point that notwithstanding the damages may be difficult to prove, causation, foreseeability and losses are all matters of fact which require investigation and should not be summarily dismissed.[13]

Discussion

[28] In *Couch v Attorney-General* Elias CJ stated:

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[12] Ms Tothill's submissions para [89].
[13] Relying on *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [30]-[40].

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.
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> …
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> We consider that a claim should not be struck out as disclosing no duty of care unless there is clear legal impediment to its succeeding at trial.
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> (citations omitted)

[29] In determining Mrs Couch's proceeding should not be struck out, the Supreme Court overturned the Court of Appeal, concerned that it was premature to predetermine whether the Probation Service may owe a duty of care to the victim of a criminal assault by a parolee under its supervision. The issue was unresolved by New Zealand authority.[14] The issue however was fact specific to the circumstances of that case, which the Supreme Court recognised would be the case in areas where ascertaining whether a duty of care was continuing to be developed.

[30] In these proceedings, the duty arises out of whether police officer(s) have committed the tort of misfeasance. The tort is not developing law, and neither is whether police officers owe duties when undertaking and discharging their duties as police officers. They do but only in defined circumstances. Circumstances which in my view are not present in these proceedings.

[31] Where police officers have been held liable for misfeasance include deliberate decisions of police officers to act illegally or with the intention to abuse legal processes.

[32] Those examples include executing a warrant knowing they had an incorrect address;[15] a police officer fabricating evidence;[16] or in a prosecutorial case where a prosecutor allegedly failed to disclose evidence.[17]

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[14] Ibid at [2].
[15] *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*] at 675.
[16] *L (A Child) v Reading Borough Council* [2001] EWCA Civ 346, [2001] 1 WLR 1575.
[17] *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195.

[33] In *Currie v Clayton*,[18] Ms Currie, was a Crown prosecutor but a partner in a law firm which held the Crown warrant. The strike out application was successful in the High Court, however the Court of Appeal determined that notwithstanding Ms Currie may not have been a "public officer", her alleged decision not to provide disclosure was potentially an illegality needing to be tested as a substantive hearing.

[34] In these proceedings the underlying allegation of illegality remains the alleged incorrect characterisation of the details of the accident and the failure to "properly charge"[19] Mr Toi.

[35] There are several difficulties Mr Quigley faces in claiming these acts were illegal.

[36] Firstly, Mr Quigley's claim the incorrect recording of the details of the accident caused him to receive inappropriate medical care, victim support or ACC benefits is extremely unlikely and, in my view speculative. There is no evidence the details of the accident were incorrectly recorded. It is extremely unlikely any medical officers who examined Mr Quigley when he was initially admitted into hospital and then subsequently a few days later, ever had access to Officer Sin's notes of the accident. Even if they did, any medical officers would treat Mr Quigley in accordance with symptoms which he presented with, not on notes which were taken by a non-medical person. The same position would apply to how Mr Quigley would be assessed for any ACC entitlements. None of the details relating to the recording of the accident nor what Mr Toi would be charged with would have an impact on those ACC entitlements.

[37] Secondly, Mr Quigley must prove Officer Sin acted with targeted or non-targeted malice, knowing the consequences of his conduct would cause the harm alleged by Mr Quigley. The relevant pleading is found at paragraph 29 of the amended statement of claim. It states:

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[18] Ms Currie, the prosecutor involved was a partner in a law firm which held the Crown warrant. The strike out application was successful in the High Court, however the Court of Appeal determined that notwithstanding Ms Currie may not have been a "public officer", her alleged decision not to provide disclosure was nevertheless potentially an illegality needing to be tested as a substantive hearing. The appeal was upheld.

[19] See Ms Tothill's submissions at paragraph [43].

> The Police knew, or must have known, that to incorrectly record information and to charge the driver with a lessor offence would cause difficulty in receiving treatment for his injuries.

[38] Ms Tothill urges an investigation is needed to establish the allegation and it should not be dismissed on a summary basis. I disagree. There is simply no evidentiary or indeed legal foundation which would support the allegation. Mr Quigley has already challenged the quality of the medical treatment he received, and the extent of ACC cover he received. The proceedings have all been unsuccessful in that they have been struck out, discontinued or in the case of ACC unsuccessful on review.[20]

[39] It follows Officer Sin (and any unnamed officers) would not have knowledge of any harm which was allegedly caused by his/their actions when proceedings have already determined no harm occurred. The care and cover he received was in accordance with the injuries he suffered.

[40] Thirdly, I return to one of the claimed illegalities, that being the failure to charge Mr Toi with a more serious offence and granting diversion. As I have already noted in my first judgment:[21]

> … it was open for the New Zealand Police to agree to diversion. It is not mandatory that the other driver would lose his license. It is also not a matter for Mr Quigley to dictate the type of charge that should be brought against the driver. That was a matter for the prosecution and the decision by the prosecutor is protected. No cause of action can exist for Mr Quigley in this regard.

[41] The New Zealand Police, for sound policy reasons are entitled to determine how a prosecution may proceed. If the decision which was made is protected, then it

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[20] See *Quigley v Gaunder and Oths* [2020] NZHC 1027; *Quigley v Fenwicke and Oths* [2021] NZHC 2718; *Quigley v Fenwicke* [2021] NZDC 3881.

[21] At [17] and see *King v Attorney General* [2017] NZLR 556 at [61-[64] where Associate Judge Smith applied the leading English authorities *Elguzouki-Daff v Commissioner of Police of the Metropolis* [1995] QB 335 (CA) and *Jain v Trent Strategic Health Authority* [2009] UKHL 4. Also at [21] and the cases of *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL); *Brook v Commissioner of Police for Metropolis* [2005] UKHL 24 and *Michael v Chief Constable of South Wales* [2015] UKSC 2.

cannot be an illegal act. Accordingly, element 3 in *Currie v Clayton* cannot be satisfied.

[42] For the reasons given I reach the conclusion Mr Quigley's proceedings must be struck out. Mr Quigley has no prospect of satisfying elements 3 and 4 set out in *Currie v Clayton*. In doing so, it is unnecessary to consider element 5 in *Currie v Clayton* as to whether the damages claimed were likely to be refused, or the other concerns raised by Ms Reid such as the incorrect defendant(s) being named (or not named).

Result

[43] The New Zealand Police application for strike out is granted. It is entitled to costs.

[44] I appreciate there have been effectively three hearings and the requirement to prepare separately for two of those hearings. If costs are sought and cannot be agreed, I direct Ms Reid to file memoranda setting out the quantum of costs within seven days. Ms Tothill should file memoranda seven days thereafter.

[45] My initial view is 2B costs should be granted for the third hearing (together with the step for preparation) and one set of 1C costs for the first and second hearings (preparation and attendance at the hearing). The other steps incurred would be on a 2B basis.

Signed at Auckland this 21st day of November 2022 at 2.45 pm

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Judge D J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 21/11/2022