IN THE DISTRICT COURT
AT DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CIV-2018-012-000503
[2021] NZDC 2704

BETWEEN	MICHAEL BRIAN LAWS Plaintiff
AND	OTAGO UNIVERSITY STUDENTS ASSOCIATION Defendant

Hearing: 15 October 2020

Appearances: The Plaintiff appeared in person
J Eckford and E G Duncan for the Defendant

Judgment: 17 February 2021

RESERVED JUDGMENT OF JUDGE P R KELLAR

Introduction

[1] The plaintiff, Mr Laws has issued a proceeding in defamation for damages against the defendant, the Otago University Students Association ("the Association"). The Association publishes a magazine called Critic both online and in print. This proceeding concerns a story which Critic published online on 6 September 2018 and in print on 11 September 2018 under the headline:

> **Otago Regional Councillor Calls Africa 'very worst of humanity'**
>
> **Critic calls Michael Laws a "racist shitbag"** ("the words")

[2] The Association is defending the proceeding on the bases that:

(a) The words are not defamatory;

(b) The words were genuinely held honest opinion; and

(c) Mr Laws has not suffered any loss of reputation given his own remarks.

[3] Mr Laws has issued notice under s 39 of the Defamation Act ("the Act") asserting that the defence of honest opinion is not genuinely held.

[4] This judgment concerns Mr Laws' and the Association's respective applications. Mr Laws has applied:

(a) To strike out the defences of honest opinion and no causation or damage;

(b) For further and better particulars of the affirmative defences (honest opinion and no causation or damage);

(c) To rely on the notice under s 39 of the Act.

[5] For present purposes, Mr Laws does not take issue with the defence that the words are not defamatory on the basis that determination of that issue is a matter for trial. Nonetheless, whether the words can bear a defamatory meaning needs to be considered at this stage.

[6] The Association seeks dismissal of Mr Laws' proceeding or, in the alternative, summary judgment.

[7] The Association has also applied to strike out Mr Laws proceeding on the basis that, contrary to s 43(1) of the Act, his statement of claim has specified the amount of damages which he seeks. This issue can be put to one side because it could easily be cured by filing an amended statement of claim in which Mr Laws does not specify the amount of damages.

[8] This judgment will determine whether the affirmative defences should be struck out, leaving only the questions of whether the words are defamatory and if so what, if any, damages should be awarded.

[9] It will also determine whether Mr Laws' proceeding should be dismissed or, if not, whether summary judgment should be given in favour of the Association.

[10] A decision about whether to grant Mr Laws' application to order the Association to provide further and better particulars will be made once the application to strike out Mr Laws' proceeding has been determined.

[11] The Association has not indicated any objection to the notice under s 39 of the Act. So, that issue will be determined at trial, if the proceeding remains.

The legal principles

[12] Rule 15.1 of the District Court Rules 2014 allows the court to strike out all or part of a proceeding if it discloses no reasonably arguable cause of action or defence, is likely to cause prejudice or delay, is frivolous or vexatious or is otherwise an abuse of process.

[13] An order striking out a pleading under r 15.1(1) is a prerequisite to an order under r 15.1(2) to dismiss the proceeding.

[14] Rule 12.2 of the District Court Rules 2014 allows the court to give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[15] Summary judgment applications are appropriate where there is a complete and incontrovertible answer on the facts, whereas strike out applications are appropriate when there is a clear legal impediment to liability. [1]

[16] Strike out applications are usually determined on the pleadings alone, whereas summary judgment requires evidence.[2]

[17] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure, because the defendant can apply to strike out the claim.[3]

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[1] *Warehouse Limited v Westgate NO 1 Ltd* [2013] NZHC 2264.
[2] *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [60].
[3] *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [58] – [68].

[18] Therefore, the correct procedure is to deal first with the strike out application and then consider the defendant's application for summary judgment.[4]

Strike-out principles

[19] Rule 15.1 of the High Court Rules 2016 replicates 15.1 of the District Court Rules 2014, although the High Court can also strike out statements of claim under its inherent jurisdiction.

[20] The principles relating to strike out applications were set out by the Court of Appeal in *Attorney-General v Prince*[5] and affirmed by Elias CJ and Anderson J in *Couch v Attorney-General.*[6] A useful summary was provided by Palmer J in *Sellman v Slater*:[7]

(a) the facts pleaded are assumed to be true;

(b) the causes of action must be so untenable the court is certain they cannot possibly succeed;

(c) the jurisdiction is to be exercised sparingly and only in a clear case;

(d) the jurisdiction is not excluded by the need to decide difficult questions of law; and

(e) particular care is required in areas where the law is confused or developing.

[21] In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* the Court of Appeal the Court of Appeal considered the different grounds for strike out in r 15.1:[8]

> The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of

[4] *Burley v Samoilov* HC Tauranga CIV-2003-070-123, 19 September 2006 at [26].
[5] *Attorney-General v Prince* [1998] 1 NZLR 262, (1997) 16 FRNZ 258, [1998] NZFLR 145 (CA) at 264.
[6] *Couch v Attorney-General* [2008] NZSC 45 at [33].
[7] *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [16].
[8] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53 at [89].

> the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceeding that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

Summary judgment principles

[22] The leading authority for applications for summary judgment by a defendant remains the Court of Appeal's decision in *Westpac Banking Corporation v MM Kembla New Zealand Ltd* where the Court identified the following principles: [9]

(a) The defendant bears the onus of satisfying the Court on the balance of probabilities that none of the claims can succeed;

(b) Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim;

(c) It is not necessary for the plaintiff to put up evidence, although if the defendant supplies evidence which would satisfy the court a claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. However, it is not helpful to describe the onus as having been transferred;

(d) Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination

[9] *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [58] – [64].

turns on a judgement only able to properly arrived at after a full hearing of the evidence;

(e) At the end of the day, the Court must be satisfied that none of the claims can succeed it is not enough that they are shown to have weaknesses;

(f) The assessment interlocutory applications is not one to be arrived at on a fine balance of the available evidence, as at trial.

The application to dismiss Mr Laws' proceeding or for summary judgment against him

The article

[23] At 7.28 am on 4 September 2018 Mr Laws posted content on his Facebook page commenting on a BBC news story regarding the killing of elephants in Botswana. His Facebook post stated:

> Since I was a small child I've always believed that Africa represents the very worst of humanity – that our ancestors walked out of the continent because they were smart enough to make that assessment. Jesus wept.

[24] The Association published the following article online and then in print:

> **Otago Regional Councillor Calls Africa 'very worst of humanity'**
>
> **Critic call Michael Laws a "racist shitbag"**
>
> Otago Regional Councillor Michael Laws has made a racist statement on his public Facebook account, in which he referred to Africans as "very worst of humanity".
>
> The councillor shared a post about dozens of elephants being killed in Botswana, along with his own caption, which read, "since I was a small child I've always believed that Africa represents the very worst of humanity – that our ancestors walked out of the continent because they were smart enough to make that assessment. Jesus wept."
>
> …

[25] Mr Laws asserts that the sub-headline "Critic calls Michael Laws a racist shitbag" is defamatory of him.

Whether the words are defamatory

[26] The first issue is whether a reasonable person could regard the words as defamatory. If they are capable of being so regarded, then a decision must be made whether the words did bear a defamatory meaning in all the circumstances.

[27] The Act does not define "defamation". The common law has developed definitions the following four of which, read together, provide a reasonable impression of what is capable of being regarded as defamatory:

(a) A statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally;

(b) A false statement about a person to their discredit;

(c) A publication without justification which is calculated to injure the reputation of another by exposing them to hatred, contempt or ridicule;

(d) A statement about a person which tends to make others shun and avoid him them.

[28] The second of these definitions makes the point that if a statement about a person is true, an action for defamation will not succeed in respect of it, however, it is not for the plaintiff to establish falsity. The defendant will have a defence if they can prove the statement to be true. This is not directly in issue in the present case because the Association has not asserted that the words are true. However, the Association asserts that Mr Laws has suffered no loss of reputation because a reader of his Facebook post would come to the same conclusion as the words convey.

[29] It does not take reference to authority or imagination to consider that the words "racist shitbag" are both capable of being regarded as being defamatory and do bear a defamatory meaning in the circumstances. The Oxford English Dictionary defines a

"racist" as "a person who is prejudiced, antagonistic, or discriminatory towards a person or people on the basis of their membership of a particular racial or ethnic group, typically one that is a minority or marginalized; a person who subscribes to the belief that members of a particular racial or ethnic group possess innate characteristics or qualities, or that some racial or ethnic groups are superior to others. Also, a person who is prejudiced, antagonistic, or discriminatory towards a person or people of another nationality".[10]

[30] The Oxford English Dictionary does not contain a definition of the word "shitbag", but a "shit" is defined as "an offensive or despicable person (usually a man); a person (usually a man) whose behaviour is regarded as obnoxious."

[31] Even without the invective, describing someone as "racist" would lower a person in the estimation of right-thinking members of society generally and make others shun or avoid the person.

Whether the affirmative defence of honest opinion can succeed

Whose "opinion" is it

[32] The author of the article in which the words appeared was Mr Charles Mahoe Manning Hilton who wrote in Critic under the name of Charlie O'Mannin. He was employed as the editor of Critic.

[33] Mr Hilton has sworn an affidavit in which he deposes that the words were his honestly held opinion. He deposes that he came to that opinion after reading Mr Laws' Facebook post. He took Mr Laws' remarks to be a direct criticism of the intelligence of the people of Africa. Mr Hilton found Mr Laws' remarks to be abhorrent and unbecoming to a regional councillor. He deposed that it was his honest belief that people who are racist to the degree he considered Mr Laws' remarks to be are reasonably described as "shitbags".

[34] Mr Hilton also deposed that at the time the article was published, he was the controlling mind of Critic and that his state of mind and honest opinion can be

[10] Oxford English Dictionary 3rd edition 2008.

attributed to the Association. Mr Hilton's statements are relevant because section 10(1) and (2)(a) of the Act provides that a defence of honest opinion will fail unless the defendant proves certain matters.

[35] Section 10 of the Act provides:

> **10 Opinion must be genuine**
>
> (1) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.
>
> (2) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is not the author of the matter containing the opinion shall fail unless, —
>
> (a) where the author of the matter containing the opinion was, at the time of the publication of that matter, an employee or agent of the defendant, the defendant proves that—
>
> (i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant; and
>
> (ii) the defendant believed that the opinion was the genuine opinion of the author of the matter containing the opinion:
>
> (b) where the author of the matter containing the opinion was not an employee or agent of the defendant at the time of the publication of that matter, the defendant proves that—
>
> (i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and
>
> (ii) the defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion.
>
> (3) A defence of honest opinion shall not fail because the defendant was motivated by malice.

[36] Section 39 of the Act provides that where the plaintiff intends to challenge that the defendant's opinion was not genuine, they must serve notice (as Mr Laws has done) to that effect on the defendant within 10 working days of the service of the statement of defence. The notice must give particulars specifying any facts or circumstances on which they intend to rely to support that allegation. This having been done, the onus then rests on the defendant to overcome the plaintiff's allegations by proving that the opinion was indeed genuinely held.

[37] In both situations in s 10, the defendant must show that the opinion did not purport to be its own. An opinion in an editorial may be attributable to the medium in which it appears, in this case both online and in print. But there are difficulties with a media organisation proving that it believed its editor genuinely held the opinion expressed. A news media organisation, being a corporation, cannot itself believe anything. The question is whose belief is to be attributed to the organisation.

[38] Section 10(2) creates another difficulty. As drafted, the sub-section provides that if either of the stated conditions is not made out, the defence "shall fail". Where the opinion is expressed to be the news media's own, as is likely in the case of an editorial, the defence of honest opinion must necessarily fail. In such a case the newspaper entity would itself be treated as the author of the opinion and would succeed if it could show that the opinion was genuinely held by the person whose state of mind could be attributed to the company for this purpose.

[39] In *Hubbard v Fourth Estate Holdings Ltd* Venning J dealt with a claim based on publication of various articles said to defame the plaintiff, a prominent businessman, during a mayoral electoral campaign in which he was standing.[11] Venning J clarified when a publisher is to be treated as the author of an opinion for the purposes of the honest opinion defence, and how the opinion may be shown to be genuine:[12]

> as I read s 10 it contemplates three situations where the defendant is a media publisher:
>
> > First, where the media publisher adopts as its own the opinion in the article. In such case the defendant must prove the opinion was genuinely held by the person who state of mind can be attributed to the defendant for this purpose (s 10(1).
> >
> > Second, where the defendant is not the author but where the author was an employee or agent of the defendant media publisher. In such a case the defendant must prove that the opinion did not purport to be the defendant's opinion and that the defendant believed it was the genuine opinion of the author. An example might be with the newspaper has a guest columnist. The column may be qualified by a statement that the opinions of the contributor are not necessarily the opinions of the newspaper. The focus in such a case would then be on the second requirement, namely the genuineness or otherwise of the opinion of that author (s 10(2)(a).

[11] *Hubbard v Fourth Estate Holdings Ltd* HC Auckland CIV-2004-404-5152, 13 June 2005.
[12] At [18].

> Finally, where the author of the matter containing the opinion was not an employee or agent of the defendant media publisher. In such case the defendant must prove that the opinion did not purport to be its opinion or that of any employee or agent and that the defendant had no reason or cause to believe that the opinion was not the genuine opinion of the author. An example might be a letter to the editor (s 10(2)(b).

[40] In *Hubbard* it was relevant that the article had featured on the front page of the newspaper. Venning J thought that it would be difficult for the publisher to prove under s 10(2) that the opinion was not its own, and the same would apply for an editorial. Therefore, he found that the defendant had adopted the opinion as its own qua author and could use s 10(1) to plead the defence. This required the publisher to establish that the opinion expressed was genuinely held by the persons whose state of mind were attributed to it for this purpose, in this case, to individual writers employed by the newspaper.

[41] In the present case, the article in which the words appeared featured both on the online and print version of its publication. It would be difficult for the Association to prove under s 10(2) of the Act that the opinion was not its own. Therefore, the Association has adopted the opinion as its own and may plead s 10(1) as a defence. The Association is therefore required to establish that the opinion expressed was genuinely held by the person whose state of mind, in this case Mr Hilton, is attributed to the Association for this purpose.

Is the "opinion" recognisable as opinion?

[42] Whether the words are capable of being opinion is, in the first instance, for the trial judge to determine. And, if they are so capable, the determination of whether they were opinion in the circumstances is for the jury where the trial is one by judge and jury. In determining whether imputations were conveyed as opinion or as fact, the fact finder needs to look at the whole of the publication rather than how the imputations have been pleaded. Much depends on the context in which the statement is made.

[43] The first issue is whether the opinion is recognisable as opinion. It must appear to a reasonable person reading the article complained of, that the author is merely presenting his or her comment or opinion on the facts in question and is not purporting to put forward another fact. A bare and unsupported statement will sometimes be

classified as an assertion of fact rather than as a statement of opinion. Thus, to write "this man is a disgrace" would probably be defamatory, for the statement is presented as bald statement of fact. But, if one says, "This man has stolen from his mother; therefore, he is a disgrace", it might well be held that the latter part of the sentence is comment based upon the facts stated in the earlier part.[13]

Mr Laws submissions

[44] Mr Laws submits reading the whole publication, the article is clearly designed to be read as a fact-based news story. Furthermore, he submits that if the headline of the article is regarded as portraying a fact, namely Otago Regional Councillor Michael Laws Calls Africa 'very worst of humanity', then the sub-headline namely "Critic calls Michael Laws a "racist shitbag" must also be considered as a factual description of Mr Laws especially when the next sentence reads "Otago Regional Councillor Michael Laws has made a racist statement on his public Facebook account, in which he referred to Africans as "very worse of humanity".

Whether the opinion is based on true facts

[45] The basis of the defence of honest opinion is that the reader should be able to assess the opinion and compare it with his or her own. Thus, the reader must know what the commentator is commenting on. It is normally enough that the commentator merely gives some indication of the facts on which he or she is commenting. The question is whether there is subject matter indicated with enough clarity to justify comment being made. In this case, the article sets out the whole of Mr Laws' Facebook post.

Whether the facts on which the commentator relies were true

[46] The defence of honest opinion will not protect a defendant if he or she is commenting on things which never happened or which he or she has got wrong. One cannot legitimately criticise a public figure for something that person never did. The commentator must get their basic facts right. In terms of s 38 of the Act, a defendant must specify in their statement of defence, which of the statements complained of are

[13] *Hunt v Star Newspaper Co* [1908] 2 KB 309 (CA) per Fletcher Moulton LK.

statements of fact and must give particulars specifying the facts and circumstances on which the defendant relies in support of the allegations that those statements are true.

[47] In the present case, the commentator is commenting on the statement which Mr Laws made in his Facebook post that:

> Since I was a small child I have always believed that Africa represents the very worst of humanity – that our ancestors walked out of the continent because they were smart enough to make that assessment. Jesus wept.

[48] By s 11 of the Act, if a publication consists partly of statements of fact and partly statements of opinion, a defence of honest opinion will not fail merely because the defendant does not prove the truth of every statement of fact, if the opinion is shown to be a genuine opinion having regard to:

(a) Those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or

(b) Any other facts that were generally known at the time of the publication and are proved to be true.

[49] Thus, to succeed in a plea of honest opinion, the defendant need prove only those statements of fact which are relevant, and which provided the foundation for the opinion. Statements of fact unconnected with the opinion do not need to be proved true in a defence of honest opinion. In the present case, Mr Laws' Facebook post is referred to in the article. Mr Laws wrote that he "believed that Africa represents the very worst of humanity". Further, he provides a reason for that "belief", namely that "our ancestors walked out of the continent because they were smart enough to that assessment". Those are the facts on which the article commented.

Whether the opinion was genuine

[50] Section 10(1) of the Act provides that a defence of honest opinion by a defendant who is the author shall fail "unless the defendant proves that the opinion expressed was the defendant's genuine opinion". Moreover, under s 103(3) of the Act, the defence will not fail because the defendant was motivated by malice.

[51] The test is the honesty of the opinion, not its reasonableness.[14] It is still possible for a defendant to succeed even though his or her opinion may be obstinate or even prejudiced.[15] The onus is on the defendant to prove the genuineness of the opinion. Section 39 of the Act requires a plaintiff, who intends to allege that the opinion was not genuine, to serve notice to that effect specifying any facts or circumstances on which they rely to support that allegation. Then the onus rests on the defendant to overcome the plaintiff's allegations by proving the opinion was indeed genuinely held.

[52] The sorts of matters that will cast doubt on the genuineness of the opinion include, where a defendant had an ulterior motive for publishing the opinion, bad relations between the parties in the past or the prominence given to the publication of the comment. As the provisions of the Act are worded, even a defendant with an improper motive for publishing could still succeed if able to satisfy the court that the opinion expressed was genuinely held. This will be so even if ill will towards the plaintiff had warped the defendant's views, provided those views were still genuinely held.

[53] Furthermore, the mere fact an opinion is expressed in strong language is not enough to impeach its genuineness. As Jordan CJ eloquently wrote "A critic is entitled to dip his pen in gall for the purpose of legitimate criticism".[16] That said, unreasonably extravagant language may invite the court to hold that the defendant did not genuinely believe what was said. Also, opinion so extravagant as to amount to invective is unlikely to be found to be genuine. Although decided under the old law, comment about an actress that she had "a stage presence which jams lavatories" was held not be fair comment.[17]

[54] Mr Laws has filed and served a detailed notice under s 39(1)(b)(ii) of the Act of his allegations that the opinion was not genuinely held. Mr Laws' notice outlines the bases for his allegations that the opinion was not genuinely held:

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[14] *Mitchell v Sprott* [2002] 1 NZLR 766 (CA).
[15] Ibid at 773.
[16] *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 (NSWSC) at 174.
[17] *Cornwall v Myskow* [1987] 2 All ER 504 (CA).

(a) The failure of the defendant to contact him for comment prior to publication. Mr Laws is critical of the fact that instead of contacting him through his publicly available email address or personal cell phone, the editor attempted to contact him by sending a message to Mr Law's Facebook page at 11.24 am on 6 September. And, that only a little more than two hours later, the article was published online with the comment that "Laws didn't respond to Critic's request for comment". Hence, Mr Laws submits that there was no genuine or sincere attempt to contact him prior to publication.

(b) The prominence of the headline "confirms the lack of genuine opinion";

(c) The "unreasonably vitriolic language" used in the headline confirms the lack of genuine opinion.

[55] The gist of Mr Laws' assertion that the "opinion" was not genuinely held is that there was no urgency to publish and Critic staff made no reasonable to contact him before publishing the words. Mr Laws' submission is to the effect that the magazine should have made a reasonable attempt to contact him for comment before publishing the words. He supported that submission by reference to *Craig v Slater* where the Court of Appeal wrote:[18]

> [107] Thirdly, as this Court said in *Durie v Gardiner*, "the more serious the allegation, the greater the degree of diligence [needed] to verify it".[19] The Court also observed:[20]
>
> The stakes for publishers – mainstream or otherwise – who do not attempt to verify the truth of the defamatory allegations are high. They are likely to do so at their peril and accordingly the incentive to make the attempt remains high.
>
> Diligent efforts at verification is the heart of the defence. Without evident efforts to do – on which the publisher bears the onus of proof – the defence is unlikely to be engaged.

[18] *Craig v Slater* [2020] NZCA 305 at [107].
[19] *Durie v Gardiner* [2018] NZCA 278 at [67(a)].
[20] At [77].

[56] The Court of Appeal made those remarks in its consideration of whether the Judge in the High Court had erred in finding that the defence of responsible public interest communication had been made out. The Court of Appeal observed that:[21]

> The nomenclature indicates the primary elements of the defence: the subject matter must be of public interest, and the communication must be responsible, albeit it has proved not to be true.

[57] The Association has not pleaded the defence of responsible public interest communication. In contrast to the requirements of the defence of responsible public interest, a defendant who pleads honest opinion needs to establish that:

(a) The words were an expression of opinion that is recognisable as such and not an imputation of fact. The ultimate question is how the words would strike the ordinary, reasonable reader. Presentation is critical to the assessment of whether a statement is or is not an expression of opinion;[22]

(b) If the words are found to be an opinion, the author must next be able to point to the existence of true facts upon which the opinion is based. That is because a sufficient factual basis for the opinion will allow the audience or reader to "assess the validity of the opinion for themselves against the relevant facts truly stated";[23]

(c) The author must show that in making the statement, the opinion was genuinely held.

Overall assessment - honest opinion

[58] Although it is unnecessary to determine the issue, at first appearance, the words are defamatory of Mr Laws. As noted above, it takes little imagination to conclude that to call a person a "racist shitbag" would tend to lower that person in the estimation of right-thinking members of a society generally.

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[21] *Craig v Slater* [2020] NZCA 305 at [97].
[22] *Mitchell v Sprott* [2002] NZLR 766 (CA) at [17] – [18].
[23] *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2010] 1 NZLR 315 at [18].

[59] The issue then is whether the defence of honest opinion is reasonably arguable. The words need to be read in the context in which they appeared. The headline of the article read "Otago Regional Councillor calls Africa 'very worst of humanity'". The words, which Mr Laws asserts are defamatory of him feature in the sub-headline and are: 'Critic calls Michael Laws a "racist shitbag"'. The article refers to Mr Laws post about dozens of elephants being killed in Botswana, along with a caption in which he wrote: "Since I was a small child I've always believed that Africa represents the very worst of humanity – that our ancestors walked out of the continent because they were smart enough to make that assessment. Jesus wept."

[60] To succeed on the defence of honest opinion, the words must be an expression of opinion that is recognisable as such and not an imputation of fact. The key question is how the words would strike the ordinary, reasonable reader. It is at least arguable that the words "Critic calls Michael Laws a racist shitbag" are an expression of opinion rather than an imputation of fact.

[61] The use of the word "calls" is significant. The word is used in the sense of referring to someone as being something. The use of the word "calls" in the words complained of is significant because the headline contains the words "[Mr Laws] calls Africa very worst of humanity". The sub-headline repeats the use of the word "calls" in referring to or describing Mr Laws as a "racist shitbag."

[62] The next issue is whether the author of the words can point to true facts on which the opinion is based. This is because a sufficient factual basis for the opinion will allow the reader to assess the validity of the opinion for themselves against the relevant facts. It is a fact that Mr Laws posted the words that he had always believed that Africa represents the very worst of humanity. Hence, a person reading the article in Critic knows on what the magazine is commenting, namely Mr Laws belief that Africa represents the very worst of humanity and that "our" ancestors "were smart enough to make that assessment". It is the fact that Mr Laws made those comments that is true not that the comments themselves are true that is important.

[63] The Association must then be able to show that in making the statement, the opinion was genuinely held. Mr Laws criticism of the magazine is not unjustified. There does not appear to have any urgency to publish the words and there was scant

opportunity for Mr Laws to respond. Although, the magazine endeavoured to contact Mr Laws through his Facebook page on which Mr Laws had posted the comments, he would not have been hard to track down. He has a high public profile and various means of contact. The use of the invective also points against the genuineness of the opinion.

[64] However, the test is the honesty of the opinion, not its reasonableness. The affidavit of Mr Hilton, as the author of the article, states "In my opinion, being racist is privileging your own race over others and viewing them as inferior. This is exactly what the Facebook post showed, as [Mr Laws] stated that he believed that the people of Africa are inferior. It is my honest belief that people who are racist to this degree are reasonably described as 'shitbags'".[24] On balance, it is at least arguable that the opinion was genuinely held. Mr Laws' application to strike out the defence of honest opinion therefore fails.

No causation of damage

[65] The Association pleads that Mr Laws' claim should be struck out or summary judgment entered against him because he has suffered no loss of reputation. Conversely, Mr Laws has applied to strike out the defence of "no causation of damage."

[66] The Association asserts that any reasonable reader of Mr Laws' Facebook post would come to the same conclusion, as that described in the sub-headline, minus the invective. Further, as such, any loss suffered by Mr Laws is essentially of his own making.

[67] These arguments engage what is known as the "Jameel" principle. In *Jameel (Yousef) v Dow Jones & Co Inc* the Court of Appeal of Appeal of England and Wales dismissed a defamation proceeding as an abuse of process holding:[25]

> If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of this exercise will have been out of

[24] Affidavit of Charles Mahoe Manning Hilton sworn 13 March 2019 at [10].
[25] *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946 at [69].

> all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

[68] Subsequent to the decision in *Jameel*, the Defamation Act (UK) 2013 was enacted. Section 1 of that Act provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

[69] In *Lachaux v Independent Print Ltd* Davis LJ contrasted this approach, where the claim is not actionable because it does not meet the threshold test, with the *Jameel* principle where a serious and actionable claim is struck out as an abuse of process because it is no longer serving the purpose of protecting the claimant's reputation.[26]

[70] On appeal the Supreme Court, held that s 1 of the United Kingdom Act not only raises the threshold of seriousness above that envisaged in *Jamee*l but now requires the statement not only to have an inherent tendency to cause serious harm but to have caused or be likely to cause, serious harm.[27]

[71] In *Opai v Culpan* Katz J found the *Jameel* principle applied in New Zealand, including to an application under 15.1 District Court Rules, to strike out all or a part of the proceeding.[28] Her Honour found the principle was not a confused or developing area of law and was consistent with the purpose of r 15.1 of avoiding unnecessary cost or delay.[29]

[72] Katz J held that while a person has a right to protect their reputation, this interest may be subordinated to the right to free speech where the resources required to determine the claim are "grossly disproportionate to any reputational harm suffered".[30]

[73] Her Honour found the *Jameel* principle was also not inconsistent with the presumption of damage in defamation cases as this only relieves a plaintiff of an

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[26] *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] QB 594.
[27] *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612 at [12].
[28] *Opai v Culpan* [2017] NZHC 1036.
[29] At [65].
[30] At [63].

obligation to prove pecuniary loss in order to bring a claim, it does not prevent a defendant arguing this disproportionality renders the claim an abuse of process.[31]

[74] Relevant to vindication is the likely quantity of damages. In *Craig v Slater* the Court of Appeal held that the High Court was wrong to find that because the reputational damage resulted from Mr Craig's own actions, a declaration he was defamed would provide sufficient vindication.[32] It held where defamation is established a nil damages award is a defective verdict because proof of the action imports a finding of some damage.[33]

[75] In *X v Attorney-General* Simon France J struck out a defamation proceeding pursuant to r 15.1 and the Jameel principle.[34]

Threshold test

[76] In *Sellman v Slater*, Palmer J accepted that the *Jameel* principle would apply in extreme circumstances where the legal proceedings place such a proportionate burden on the litigants and court system in terms of time and resources that they should not be allowed to proceed.[35]

[77] However, his Honour expressed concern with a court routinely stopping a proceeding properly founded in law based on insufficient damage, when there is no requirement to prove this. Palmer J found a threshold approach, whereby the presumption of harm is rebuttable by a defence of insufficient damage, is more consistent with s 4 of the Act.

[78] His Honour held "a threshold of more than minor harm to reputation should be required to found an action for defamation in New Zealand," finding the United Kingdom threshold was too high.[36]

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[31] At [58].
[32] *Craig v Slater* [2020] NZCA 305.
[33] At [117].
[34] *X v Attorney-General* (No 2) [2017] NZHC 1136; [2017] NZAR 1365.
[35] *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [59].
[36] At [68].

[79] It should be noted Palmer J's decision relied heavily on the decision in *Lachaux v Independent Print Ltd*[37] which was criticised by the Supreme Court (UK), although the appeal was dismissed on the facts[38].

[80] In the later decision of *Sellman v Slater* Palmer J noted the distinction between harm caused to reputation and the damaging consequences of that harm.[39] His Honour found while a defendant can defeat a claim of defamation by showing that few people have read the statement or the statement could not have harmed reputation, it cannot by showing a lack of identifiable consequences.

[81] In *Craig v Stikema* Fitzgerald J noted the two grounds could be said to be the "flip side" of one another.[40] Under the *Jameel* principle, the plaintiff's claim is strictly actionable but struck out on proportionality grounds because the minimal harm involved means the claim will not advance the legitimate purpose of vindicating or protecting the plaintiff's reputation. Under a minimum threshold test, the claim is simply not actionable as the requisite degree of harm is not established.

[82] Fitzgerald J held that in that case, it would have not made any difference which principle was applied and that the first cause of action could have been struck out under either.

[83] The Court of Appeal has had occasion to consider this issue in *Craig v Slater*.[41] The High Court had found Mr Slater liable in defamation for two statements but declined to award damages, reasoning that Mr Craig's reputational loss was caused almost entirely by his own actions, and that a declaration would be adequate vindication.[42]

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[37] *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334; [2018] QB 594
[38] *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612.
[39] *Sellman v Slater* [2018] NZHC 3057 at [48].
[40] *Craig v Stiekema* [2018] NZHC 838 at [51].
[41] *Craig v Slater and another* [2020] NZCA 305.
[42] *Craig v Slater and another* [2018] NZHC 2712 at [652].

[84] The Court of Appeal held that the High Court judge had erred in that a nil damages award where defamation has been established is a defective verdict. The Court stated:[43]

> In Reynolds v Times Newspapers Ltd Lord Bingham CJ held that:[44]
>
> > [We] think it right to say that in our judgement the judge was correct in his ruling that a plaintiff who is successful in a libel action must be awarded some damages, even if they amount to no more than the smallest coin of the realm. Proof of actionable libel necessarily imports a finding of some damage… For a jury to find that a plaintiff has been libelled but to award no damages whatsoever would be contrary to both principle and authority.
>
> Although this point does not seem to have been considered explicitly in New Zealand, we see no justification for departing from this long established rule of common law.[45]
>
> … As Lord Judge CJ said in *Cairns v Modi*[46]
>
> There will be occasions when the judgment will provide sufficient vindication, but whether it does so is always a fact specific question. The judge will be well placed to assess whether the terms of the judgment do indeed provide sufficient vindication in the overall context of the case. In the present case, we think it unlikely that cricket fans will have downloaded the judgment of Bean J and read it with close attention. It is more likely, as in so many cases, that the general public (or rather, interested "bystanders" who need to be convinced) will be concerned to discover what might be called the "headline" result. What most people want to know, and that includes those who read the judgment closely, as Mr Caldecott submitted, is simply "how much did he do it?"

[85] In *Craig v Stringer* the Court of Appeal noted the line of cases applying *Jameel* but held that as it was not suggested the claim should be struck out or stayed on that basis, it was unnecessary to address them.[47]

[86] Therefore, the overall position seems to be:

(a) less than minor harm may act as a defence to a claim of defamation, by rebutting the presumption of harm;

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[43] Court of Appeal judgment at [116] – [117].
[44] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (EWCA) at 159.
[45] *Television New Zealand v Keith* [1994] 2 NZLR 84 (CA).
[46] *Cairns v Modi* [2012] EWCA Civ 1382; [2013] 1 WLR 1015 at [32].
[47] *Craig v Stringer* [2020] NZCA 260 at [21].

(b) If an action is proved, there must have been some harm requiring damages, however, if the harm is so low that the likely vindication, which includes damages, is outweighed by the cost to the parties and court, an actionable claim may be struck out for abuse of process.

[87] While Mr Laws own actions in publishing the post, may have caused harm to his reputation, there was arguably additional harm caused by calling him a "racist shitbag" which was more than minor and the resources required to proceed would not be disproportionate to the likely vindication.

[88] If it is ultimately determined at trial that the words defamed Mr Laws and the defence of honest opinion fails, then the amount of damages will need to be fixed. The purpose of an award of "compensatory" damages is to restore a plaintiff to the position he or she would have been in if the deformation had not occurred. However, damage to reputation is obviously difficult to assess in terms of money, and any assessment of what a defamatory statement is "worth" will to some extent include subjective factors.

[89] This judgment is not the time to even hazard a guess as the amount of damages might be awarded for any damage to Mr Laws' reputation because of publication of the words. What is almost certain, though, is that Mr Laws' remarks in his Facebook post would be considered as part of the overall assessment. However, it cannot be said, at this stage of the proceeding that Mr Laws' remarks completely negate any award of damages he might otherwise receive.

Result

[90] It follows that Mr Laws' application to strike out the defences of "honest opinion" and "no causation of damage" must fail. Similarly, the Association's application to strike out Mr Laws' claim or for summary judgment against him, must also fail.

[91] Neither party has succeeded in their respective applications. Costs shall lie where they fall.

[92] The issue of Mr Laws' application for further and better particulars of the defence remains outstanding. That issue and the future management of the case can be addressed in a Case Management Conference that the Registrar will convene in consultation with the parties.

Judge P R Kellar
District Court Judge

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