IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1845
[2017] NZHC 724

BETWEEN	JORDAN HENRY WILLIAMS	
	Plaintiff	
AND	COLIN GRAEME CRAIG	
	Defendant	

Hearing: 5 December 2016 (final submission received 17 February 2017)

Counsel: P A McKnight and A J Romanos for plaintiff
S J Mills QC and J W J Graham for first defendant

Judgment: 12 April 2017

JUDGMENT OF KATZ J

This judgment was delivered by me on 12 April 2017 at 2:00pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Solicitors: Langford Law, Wellington
Chapman Tripp, Auckland

Counsel: S J Mills QC, Barrister, Auckland
P A McKnight, Quayside Chambers, Wellington
A Romanos, Barrister, Wellington

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Introduction

[1] Following an almost four-week trial, a jury found that Colin Craig, the founder and former leader of the Conservative Party, had defamed Jordan Williams, the founder and executive director of The New Zealand Taxpayers' Union. The defamatory statements were made in the course of remarks that Mr Craig made at a press conference on 29 July 2015 ("Remarks"), and in a leaflet that was subsequently delivered nationwide ("Leaflet"). The jury awarded Mr Williams a total of $1.27m in damages, the maximum amount that Mr Williams had sought. This is the highest sum of damages ever awarded for defamation in New Zealand, by a significant margin.

[2] Immediately following delivery of the jury's verdicts Mr Craig's counsel, Mr Mills QC, requested that I defer entering judgment. He advised that Mr Craig intended to apply to set the jury's verdicts aside. I deferred entering judgment accordingly.

[3] Mr Craig's application to set the verdicts aside is now before me for determination. Mr Craig argues that the jury could not have properly reached its verdicts. He says that, to avoid a miscarriage of justice, the jury's verdicts must be set aside and either judgment entered in his favour or a retrial ordered. The three principal arguments advanced on behalf of Mr Craig are that:

(a) The jury's damages award is excessive and beyond the reasonable bounds of any damages that could have properly been awarded in the circumstances.

(b) There was no evidence, or no sufficient evidence, to support the jury's finding that Mr Craig was motivated predominantly by ill will towards Mr Williams or otherwise took improper advantage of the occasion. As a result, his defence of qualified privilege should have succeeded.[1]

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[1] I had determined during the course of trial that a defence of qualified privilege was available. It was for the jury to determine, however, whether Mr Craig had lost that privilege as a result of being motivated predominantly by ill will, or by taking improper advantage of the occasion.

(c) There were material misdirections in the summing up on the issue of qualified privilege. As a result, the jury's conclusion that Mr Craig had lost his qualified privilege is unsafe.

Background

The breakdown in the relationship between Mr Craig and his press secretary

[4] The Conservative Party contested the parliamentary elections in 2011 and 2014, with Mr Craig as its leader. On 18 September 2014, two days before the 2014 general election, Mr Craig's longstanding press secretary, Rachel MacGregor, resigned unexpectedly. At least in part, this was due to her ongoing discontent regarding the level of her remuneration. Ms MacGregor also subsequently alleged, however, that she had been sexually harassed by Mr Craig. She filed a claim of sexual harassment with the Human Rights Tribunal ("Tribunal") immediately following her resignation. Her claim settled at mediation in May 2015 and was therefore never formally determined.

[5] Ms MacGregor gave evidence in these proceedings. She outlined the reasons why she believed that Mr Craig had sexually harassed her, including that:

(a) She had received unsolicited letters and cards from Mr Craig of a deeply personal nature, including "romantic" poetry and compliments regarding her personal and physical attributes. She found this correspondence "odd, upsetting and inappropriate". The letters and cards were in evidence at trial.

(b) Mr Craig had once, during the 2011 election campaign, fallen asleep on her lap. He subsequently told her, on a number of occasions, that he had dreamt or imagined himself lying or sleeping on her legs and that this helped him get to sleep. Such disclosures made her feel very uncomfortable. Shortly before she resigned she asked him to stop making such comments, but he did so again on the morning that she resigned.

(c) Mr Craig had stopped paying her due to a dispute over her pay rate, but she also believed that her failure to reciprocate Mr Craig's romantic interest was a relevant factor.

(d) Mr Craig's harassment started off as comments and shoulder touches, but progressed and became more persistent, particularly after Mr Craig and Ms MacGregor had kissed and been physically affectionate towards each other on election night 2011 (it was common ground that this incident was consensual).

(e) Mr Craig had sent her inappropriate text messages, including one that said "You are wonderful, (you know what I mean by that) ;)".

(f) Mr Craig would pursue opportunities to spend one-on-one time with her under the guise of "debriefing" after meetings, or finding other excuses for her to work late.

(g) Mr Craig would get changed in front of her, and wanted her to move into the apartment above his office.

(h) Mr Craig had a curtain installed in her office that he would often close when they were together.

(i) Mr Craig had entered her hotel room uninvited and that she felt uncomfortable staying in the same hotel as him.

[6] Of note, Ms MacGregor did not assert that Mr Craig had ever sent her any sexually explicit text ("sext") messages. Nor was there any documentary or other evidence of such messages.

[7] Mr Craig asserted that his relationship with Ms MacGregor was, in essence, an emotionally close and intense mutual friendship. He strenuously disputed any sexual harassment, but acknowledged that his behaviour had at times been inappropriate for a married man, particularly during the first year or two of their

working relationship. Apart from the election night incident, which was consensual, he said that there had been no intimate or inappropriate physical contact.

Mr Williams' "attack" on Mr Craig's character and reputation

[8] On 19 November 2014, two months after her resignation, Ms MacGregor told Mr Williams, an acquaintance of hers, that Mr Craig had sexually harassed her. She showed Mr Williams the letters and cards that Mr Craig had sent to her. Mr Williams assured Ms MacGregor and her lawyer that he would keep this information as confidential as if he were her lawyer.[2]

[9] Mr Williams formed the view, as a result of what Ms MacGregor had told him, that Mr Craig was not fit to continue to lead the Conservative Party. In early 2015 he spoke to various leading figures associated with the Party, including Garth McVicar (the founder of the Sensible Sentencing Trust), Brian Dobbs (the Party Chairman), and Lawrence Day (a board member). He expressed his concerns regarding Mr Craig and variously told them that there was likely to be a leadership vacancy in the Party, that Mr Craig had sexually harassed Ms MacGregor, and that he had sent sext messages to Ms MacGregor, including one that referred to him lying between her naked legs.

[10] In March 2015, Mr Craig's lawyers (Chapman Tripp) sent a detailed letter to Ms MacGregor's lawyers strenuously rejecting the allegations she had made of sexual harassment. Copies of correspondence from Ms MacGregor to Mr Craig were annexed to Chapman Tripp's letter to support the proposition that the relationship was reciprocal.

[11] On 4 May 2015, Mr Craig and Ms MacGregor attended a mediation at the Human Rights Commission ("Commission"). This culminated in a Mutual Resolution Agreement in which both parties acknowledged that on occasion some of their conduct had been inappropriate. Mr Craig apologised to Ms MacGregor for any inappropriate conduct on his part. On her part, Ms MacGregor withdrew her complaint. It was agreed that neither party would make any comment to the media

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2 Mr Williams is a qualified lawyer, but he was not Ms MacGregor's lawyer.

or third parties other than a statement that the parties had met and resolved their differences. A further document recorded the terms on which the dispute regarding Ms MacGregor's invoices was settled.

[12] As far as Ms MacGregor was concerned, the settlement was the end of the matter. Mr Williams felt otherwise. For all intents and purposes he mounted a campaign in the following weeks to remove Mr Craig as Conservative Party leader on the basis of his treatment of Ms MacGregor (with whom, by this stage, Mr Williams was romantically involved).

[13] Mr Williams met, sent text messages to, or spoke with, Christine Rankin (the former Chief Executive of the Conservative Party), Bob McCoskrie (a director of Family First NZ and a supporter of the Conservative Party), Mr Day, Mr Dobbs, and John Stringer (a Conservative Party board member). He told them that Mr Craig had sexually harassed Ms MacGregor, and showed some of them Mr Craig's letters to Ms MacGregor. He referred repeatedly to Mr Craig having sent sext messages to Ms MacGregor, an allegation that Mr Williams acknowledged at trial was particularly damaging. Mr Williams also indicated to people that he had copies of the sexts, which he had not. He claimed that Mr Craig had made a big payout to settle Ms MacGregor's claim in the Tribunal.

[14] Witnesses at trial also claimed (but Mr Williams disputed) that he had told them that the election night incident was non-consensual. Indeed one of Mr Williams' own witnesses, Mr Stringer, said that Mr Williams told him that Mr Craig had sexually assaulted Ms McGregor on election night in 2011. Other witnesses said that Mr Williams had told them that they had to keep his identity secret as he was breaching the confidentiality of the Tribunal processes, that Mr Craig had put pressure (including financial pressure) on Ms MacGregor to sleep with him, and that Ms MacGregor had resigned as a result of Mr Craig's sexual harassment in 2013 but had been lured back by an increased pay offer. Some of this evidence was supported by contemporaneous file notes made by the relevant witnesses.

[15] To the extent that there were factual disputes regarding precisely what Mr Williams said to various witnesses, it was for the jury to determine where the truth lay. Even on the basis of undisputed evidence, however, it is clear that there is a significant disconnect between Ms MacGregor's evidence as to the nature of the alleged sexual harassment (as set out at [5] above) and the significantly more serious behaviour described to various witnesses by Mr Williams.

[16] Ms MacGregor appears to have had little or no knowledge of what Mr Williams was doing. However, she had, by this time, become suspicious that Mr Williams may have taken copies of the letters Mr Craig had sent her, which she had stored in his office safe. On the morning that Mr Williams was scheduled to meet with Messrs Day and Dobbs she sent him an email requesting that he return the letters to her. She further stated in her email:

> Do not copy them. I do not want them to be used against Colin. I want this whole thing to go away and for there to be no more trouble.

Mr Williams disregarded Ms MacGregor's request.

[17] Mr Day met with Mr Craig on 19 June 2015 (the morning after he and Mr Dobbs had met with Mr Williams) and told him what an "informant" had told them. Mr Craig, by this time, was fairly sure who the informant was. Mr Craig agreed to stand down to enable the Board to undertake a full investigation of the issue.

[18] That same morning Mr Williams, using the nom de plume "Concerned Conservative", sent a draft blog post to blogger Cameron Slater for publication on the Whale Oil website. The draft blog post made allegations against Mr Craig of sexual harassment, a pay-out to a former staff member, and inappropriate touching. Mr Williams attached (without Ms MacGregor's knowledge or consent) a photo of a poem Mr Craig had sent to Ms MacGregor, entitled "Two of Me", and a photograph of Mr Craig's signature at the bottom of a letter to Ms MacGregor.

[19] The Whale Oil website published the blog post immediately prior to (or possibly simultaneously with) a press conference called by Mr Craig to announce

he was stepping aside. Over the course of the next three days, Whale Oil published a number of further articles containing allegations about Mr Craig and speculating about the leadership of the Conservative Party. Mr Williams was involved in instigating or drafting most of that material. These actions contributed to (but were not the sole cause of) what was described at trial as a subsequent "media firestorm."

Mr Craig's response – the Remarks and the Leaflet

[20] On 29 July 2015 Mr Craig called a press conference, during which he read out the Remarks to the media. The Remarks included a number of statements about a group referred to as the "Dirty Politics Brigade", identified as including Mr Williams, Mr Slater and Mr Stringer. Some of the key passages from the Remarks (with the words Mr Williams specifically complained of in italics) are as follows:

> Today is a good day because this is the day we start to fight back against the Dirty Politics Brigade who have been running a defamatory strategy against me.
>
> The first of the 2 major announcements today is the publication of a booklet that outlines *the dirty politics agenda and what they have been up to in recent weeks.* There is a copy here for each of you to take away after the statements today.
>
> Although I was broadly aware of *the dirty politics agenda*, I have after all read Nicky Hager's book, I had not expected to have such close and personal attention from them.
>
> In our booklet we reveal that *there has been a campaign of defamatory lies to undermine my public standing, a campaign that in the Dirty Politics Brigade's own words they describe as a "strategy that is being worked out". I shall briefly cover some of their lies so you have a taste of what the booklet contains.*
>
> *The first false claim is that I have sexually harassed one or more persons. Let me be very clear, I have never sexually harassed anybody and claims I have done so are false.*
>
> *The second false claim being bandied about by the Dirty Politics Brigade is that I have made a pay-out (or pay-outs) to silence supposed "victims". Again this is nonsense.* Take for example the allegations around my former press secretary. Let me be very clear, the only payment I have made to Miss MacGregor since her resignation is an amount of $16,000 which was part payment of her final invoice. It was a part payment because I disputed her account which I had every right to do. *Claims of any other amounts being paid and especially the suggestions of large sums of hush money being paid are utterly wrong and seriously defamatory.*

> Again in a similar vein *is the false allegation that I have sent sexually explicit text messages or "SEXTs" as they are known. Once more this is not true. I have never sent a sexually explicit text message in my life.*
>
> …
>
> We identify in the *booklet 3 key people in the campaign against me. Each of these will be held to account for the lies they have told.* Formal claims are being prepared and I expect these persons will have formal letters from my legal team within the next 48 hours. *Due to the serious, deliberate and repetitive nature of the defamatory statements* I will, for the first time, be seeking damages in a defamation claim.
>
> The first defamation action is against Mr Jordan Williams. I will be seeking damages from him of $300,000.
>
> The second defamation action is against Mr John Stringer. I will be seeking damages from him of $600,000
>
> The third defamation action is against Mr Cameron Slater. I will be seeking damages from him of $650,000.
>
> *Today the line is drawn. Either the dirty politics brigade is telling the truth or I am. The New Zealand public need certainty about the truth of these claims. This is about who is honest. Is Colin Craig telling the truth or is it the Dirty Politics Brigade. Let the courts judge this matter so we know whom to trust.*

[21] The Leaflet was made available at the press conference and subsequently distributed nationwide to letterboxes. Key passages included the following (the words of specific complaint are again emphasised):

> We are a nation that believes in a fair go. We want our referees to be fair and every game to be played in a sportsmanlike way. *We do not like corrupt people, and honesty is one of our core values. We must therefore reject the "Dirty Politics Brigade" who are seeking to hijack the political debate in New Zealand.*
>
> This booklet details the latest action by the Dirty Politics Brigade, *this time in an attack on Conservative Party leader, Mr Colin Craig. […]*
>
> …
>
> *Williams is a well-known member of the Dirty Politics Brigade* having already been identified in the "Dirty Politics" book as "acting as an apprentice to … Slater". He is a lawyer and currently works full time as a political lobbyist.
>
> *It was Williams who gathered the initial information and accusations against Craig. His source was Craig's former press secretary Rachel MacGregor* with whom Williams had a romantic relationship.

> *Using the information he had gathered, Williams built a compelling story of MacGregor's alleged harassment which he supported by an "attack dossier" of information.* His presentation of events was in part her story (as he says she told it to him), some personal notes by MacGregor regarding the matter, and *selected details of alleged correspondence from Craig to MacGregor.*
>
> *The allegations presented by Williams included claims that (a) Craig had sent MacGregor "SEXT" messages, (b) MacGregor had resigned due to harassment but was lured back by big money, and (c) Craig stopped paying MacGregor for 6 months and put sexual pressure on her with requests she stay the night.*
>
> *These are false allegations and easily proved so. Sexually explicit texts, resignations, and invoicing/payment records are by nature documented events.*
>
> *Once Williams had put together the "attack dossier" he provided the details to Cameron Slater [Whaleoil] which ensured that there would be a media agenda at work against Craig.*
>
> *Williams however did not stop there. He also had confidential meetings/discussions with people including some of Craig's key supporters and Board members. In these "confidential" discussions Williams would attack Craig's character undermining support for him. Williams was always careful that Craig did not know of the meetings, that no copies of the supposed "evidence" were taken, and that his [Williams'] involvement was kept secret.*

The qualified privilege ruling

[22] After the evidence at trial had concluded, but before closing addresses, Mr Craig sought a ruling that the Remarks and the Leaflet were published on occasions of qualified privilege. This particular category of privilege is one that entitles a person to reply to an attack on their character or reputation, even if what they say in response is, in itself, defamatory.[3] An analogy can be drawn with self-defence. Even though it is usually an offence to hit someone, if they attack you first then the law allows you to use reasonable force to defend yourself.

[23] Determining whether a defence of qualified privilege is available requires a two stage analysis.[4] The first stage is to identify whether the relevant statements were made "on an occasion of privilege". This is an issue for the Judge, on which

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3 See Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [14.51].

4 See *Adam v Ward* [1917] AC 309 (HL) at 326; and *News Media Ownership v Finlay* [1970] NZLR 1089 (CA) at 1094.

the defendant bears the onus of proof. If an occasion of privilege exists, then the second stage of the analysis is to consider whether it has been lost (hence the phrase "qualified" privilege). This is an issue for the jury, on which the plaintiff bears the onus of proof. Qualified privilege will be lost if the plaintiff proves that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.[5]

[24] There can be difficult demarcation issues between the role of the Judge and the role of the jury where qualified privilege is raised. That is particularly so where the form of qualified privilege relied on is that of "defence to an attack". Determining whether there was an "attack" on the defendant's reputation is an issue of law. However, it is an issue of law that can only be decided based on undisputed facts, or facts as determined by the jury. Deciding which facts are relevant to determining whether the remarks were made on an occasion of privilege, and which facts are relevant to determining whether the privilege has subsequently been lost, is far from an easy exercise. Some facts are potentially relevant to both questions, raising serious risks of role confusion or role overlap between judge and jury. In some cases (and Mr Craig argues this is one of them) this could even result in the need for a retrial. Such difficulties do not arise in Judge alone trials, where the Judge has responsibility for both determining whether the occasion is privileged, and (if so) whether the privilege has been lost.

[25] Ultimately I concluded, on the basis of facts that I found to be undisputed, that Mr Williams had attacked Mr Craig's character and reputation. I ruled accordingly.[6] As a result, the defence of qualified privilege was put to the jury. It was then for the jury to determine if the privilege had been lost. It must necessarily be inferred from the jury's verdicts that they concluded that Mr Craig had lost his qualified privilege, either because he was predominantly motivated by ill will, or had improperly used the privileged occasion, or both.

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5 Defamation Act 1992, s 19(1).

6 *Williams v Craig* HC Auckland CIV-2015-404-1845, 26 September 2016 (Ruling No 7). Given the trial pressures, and the need to determine the application overnight (following a full day of argument), it was not possible to provide full reasons for my decision at the time of my ruling. My reasons for that decision were accordingly delivered post-trial: see *Williams v Craig* [2016] NZHC 2496, [2016] NZAR 1569.

In what circumstances can the Court set aside the jury's verdicts?

[26] Mr Craig seeks to have the jury's verdicts set aside and for the Court to either order a retrial or enter judgment in his favour, contrary to the jury's verdicts.

[27] A trial judge has the power to set aside the jury's verdict and order a new trial where to do so is in the interests of justice and the judgment has not been sealed.[7] This essentially reflects the position prior to the revocation of rr 494 and 495 of the High Court Rules, which expressly permitted a trial judge to order a retrial if there had been a "miscarriage of justice". The most common circumstances in which this might arise are where:

(a) the Judge misdirected the jury on any material point of law;[8]

(b) the damages awarded by the jury were excessive or too small;[9] or

(c) there is no evidence, or no sufficient evidence to support the jury's verdict, or the jury's verdict was against the weight of evidence.[10]

[28] If an applicant establishes that entering judgment on the verdicts would be contrary to the interests of justice, the appropriate course is usually to set aside the jury's verdicts and order a retrial, in whole or in part.[11] Indeed an excessive award of damages can only be remedied by way of retrial. A judge cannot set a new amount unless both parties consent.[12]

[29] It is also possible, however, for the trial judge to enter judgment contrary to the jury's verdicts, in fairly limited circumstances. This jurisdiction arises pursuant

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7 *Smallbone v London* [2015] NZCA 391, (2015) 22 PRNZ 768 at [36]-[42].

8 See *Jamieson v Green* [1957] NZLR 1154 (CA) at 1165; and *Dellabarca v Northern Storemen and Packers Union* [1989] 2 NZLR 734 (HC) at 760.

9 See *Black v MacKenzie (No 2)* [1916] NZLR 235 (CA) at 246; and *Hutchinson v Davis* [1940] NZLR 490 (CA) at 505.

10 *Black v MacKenzie (No 2)*, above n 9, at 246; *Hutchinson v Davis*, above n 9, at 505; *Clouston & Co Ltd v Corry* [1906] AC 122 (PC) at 131; *Black and White Cabs, Ltd v Anson* [1928] NZLR 321 (CA) at 331.

11 *Smallbone v London*, above n 7, at [42]. See also *Hip Foong Hong v H Neotia and Co* [1918] AC 888 (PC) at 894 per Lord Buckmeister; *Television New Zealand Ltd v Keith* [1994] 2 NZLR 84 (CA) at 88; *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024 at 3051–3052 per Lord Scott.

12 Defamation Act 1992, s 33(1).

to r 11.15 of the High Court Rules and/or the Court's inherent jurisdiction. Judgment contrary to the jury's verdict can only be given if there is no evidence, or no sufficient evidence, that could reasonably support the verdict, or the verdict is one that no 12 reasonable people could have arrived at.[13] Such a course is recognised to be a drastic one.[14] The rationale appears to be that if it is clear that the plaintiff cannot succeed on all of the available evidence, then the Court should avoid the waste of time and expense associated with a further trial.[15]

[30] Applying these principles to this case, if I conclude that the jury's damages award is excessive, or that I materially misdirected the jury in my summing up, then the appropriate course is to order a retrial. If there was no evidence (or no sufficient evidence) to support the jury's finding that Mr Craig lost his qualified privilege, then the appropriate would likely be to enter judgment for Mr Craig, contrary to the jury's verdicts, although the option on ordering a retrial is also available.

Was the damages award excessive?

[31] The jury awarded Mr Williams a total of $1.27m in damages for the Remarks and the Leaflet comprising:

(a) $400,000 in compensatory damages for the Remarks and $650,000 in compensatory damages for the Leaflet; and

(b) $90,000 in punitive damages for the Remarks and $130,000 in punitive damages for the Leaflet.

[32] This was the full amount of damages sought by Mr Williams. If left undisturbed, it will be the highest damages award in a defamation case in New Zealand.

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13 *Benson v Kwong Chong* [1931] NZLR 81 (CA) at 107 per Reed J; *Jane v Stanford* [1935] NZLR 891(SC) at 896; *Black v MacKenzie*, above n 9, at 242 per Chapman J; *Hutchinson v Davis*, above n 9, at 505; *Hayward v O'Keeffe* [1993] 1 NZLR 181 (HC) at 186.

14 *J M Heywood and Co, Ltd v Attorney-General* [1956] NZLR 668 (CA) at 677, discussing the Code of Civil Procedure, r 286.

15 *Jensen v Hall* [1961] NZLR 800 (CA) at 804 per Gresson P.

[33] Mr Mills argued that the damages award is unsafe, as it went well beyond the reasonable bounds of any damages that could have been properly awarded in all the circumstances of the case. Mr McKnight argued, on the other hand, that the damages award was within the available range. He noted that the jury had seen and heard evidence over 15 days; they had a bundle of documents in excess of 2,000 pages; they had the benefit of addresses by senior counsel; and they had been directed in the summing up as to the issues of damages both as they relate to general damages and punitive damages. Mr McKnight submitted that the jury's award is simply a reflection of what happens when a defendant publishes an extremely serious and widespread defamation, and then conducts his defence in the manner Mr Craig did. From Mr Williams' perspective the jury's decision to award the maximum damages available reflects the pitfalls of taking such a high stakes approach.

Reviewing a damages award – legal principles

[34] The starting point in reviewing a damages award is that the Court must recognise that "damages are the province of the jury and the Court cannot intervene to set the award aside simply because the award exceeds, even by some margin, the amount which the Court thinks proper".[16] However, if the jury have made an award of damages that is out of all proportion to the injury suffered by the plaintiff, so that it may be inferred that they could not have properly applied their minds to the relevant evidence, the damages award will be set aside.[17]

[35] In *Television New Zealand Ltd v Quinn* McGechan J said that:[18]

> The traditional approach has been to assess whether "the amount is so high or so low that it is outside the range of what could reasonably be regarded as appropriate to the circumstances of the case", ie is irrational, or as it sometimes is put is "so excessive as to shock conscience" … All circumstances are relevant.

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16 *Columbus v Independent News Auckland Ltd* HC Auckland CP600/98, 7 April 2000 at [48].
17 *News Media Ownership v Finlay* [1970] NZLR 1089 (CA) at 1099.
18 *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) at 52 (citations omitted).

[36] In the same case, McKay J said that in determining what the reasonable bounds of the award are the best guide is:[19]

> ... to apply the experience of other verdicts in other defamation cases to arrive at what appears to be the appropriate level in the particular case, and to recognise that a reasonable jury may properly go some distance above or below that figure.

[37] If the Court determines that the jury's award is excessive (outside of reasonable bounds) it must be set aside. The Court cannot substitute a new damages figure, unless the parties consent.[20] If the award is within reasonable bounds (even if it is at the upper end of the range), it will stand.

[38] While the courts adopt a cautious approach to reviewing awards of compensatory damages, recognising that "the assessment of compensation for loss of reputation involves a highly subjective element", intervention is not uncommon.[21] The courts intervene more readily in relation to awards for punitive damages.[22] This recognises that courts are equally, if not better, placed than juries to determine the appropriate amount required to punish a party for its conduct.

[39] The learned authors of *Gatley on Libel and Slander* provide a helpful (albeit non-exclusive) list of matters that are relevant to damages, including the conduct of the claimant; his or her credibility; their position and standing, and the subjective impact that the libel has had on him; its gravity, and the mode and extent of its publication; the absence or refusal of any retraction or apology; and the conduct of the defendant from the time when the libel was published down to the verdict.[23]

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19 At 45.

20 Defamation Act 1992, s 33.

21 *Television New Zealand Ltd v Quinn*, above n 18, at 45.

22 See *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) at 1066 per Lord Hailsham, citing *Rookes v Barnard* [1964] AC 1129 (HL) at 1227–1228. In *Rookes*, Lord Devlin explained that the power to award exemplary damages constitutes a "weapon" that can be used against a person's liberty. His Lordship was unprepared to permit general deference to a jury to prevent him from seeing that the "weapon" is used with restraint.

23 Alistair Mullis and Richard Parkes, above n 3, at [9.5].

The purpose of damages

[40] A plaintiff who is defamed is entitled to receive compensation for both the injury to his or her reputation and the injury to his or her feelings, which includes any grief and distress caused by the defamatory publication. Compensatory damages operate to publicly vindicate the plaintiff, to repair the harm done to their reputation and to provide consolation for the wrong that has been done to them.[24] There is no need to prove pecuniary loss.[25] When considering the sum that would be appropriate to compensate a plaintiff for any injury to their reputation or feelings, the jury is entitled to take into account things that the defendant has done following publication of the defamatory material that may have aggravated or increased the injuries to the plaintiff's reputation and feelings.

[41] Punitive damages are relatively rare. The purpose of civil damages is generally not to punish people but to compensate them. The test for punitive damages is therefore set very high. Such damages can only be awarded where the defendant acts in flagrant disregard of the plaintiff's rights and there is therefore a need for punishment beyond that inflicted by an award of compensatory (including aggravated) damages.[26]

Previous defamation damages awards

[42] The damages award in this case is significantly greater than any previous defamation damages award in New Zealand. The five previous highest damages awards (with inflation-adjusted figures in brackets) are:

(a) *Korda Mentha v Siemer* (2008)[27] - $825,000 ($930,434) (includes aggravated and punitive damages);

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[24] See Alistair Mullis and Richard Parkes, above n 3, at [9.4].

[25] Section 4 of the Defamation Act 1992 makes clear that a plaintiff is not required to allege or prove "special damage".

[26] Defamation Act 1992, s 28. See also *Television New Zealand Ltd v Quinn*, above n 18, at 36 per Cooke P and at 46 per McKay J.

[27] *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008. This award was upheld in the Court of Appeal: *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 (CA). Korda Mentha had been awarded damages of $75,000 while Mr Stiassny was awarded damages totalling $825,000.

(b) *Television New Zealand Ltd v Quinn* (1996)[28] - $650,000 ($955,034) (includes aggravated and punitive damages);

(c) *Columbus v Independent News Auckland Ltd* (2000)[29] - $500,000 ($702,719) (includes aggravated and punitive damages);

(d) *Karam v Parker* (2014)[30] - $350,500 against Mr Parker ($353,423) and $184,500 against Mr Purkuss ($186,038) for a total damages sum of $535,000 ($539,462) (includes aggravated and punitive damages); and

(e) *Truth (NZ) Ltd v Holloway* (1960)[31] - £11,000 ($478,381).

[43] The damages award in *Siemer* ($825,000) is the highest award to date for defamation. The Court of Appeal described that case as the worst case of defamation that it could find in the British Commonwealth.[32] Mr Siemer was held in contempt of Court for his continued defamatory campaign against Mr Stiassny and his accountancy firm. He was even imprisoned for continuing to defame Mr Stiassny in contempt of Court, but this did not deter him. Mr Siemer's defamation was characterised by the Court as "unprecedented in terms of the length and severity of the campaign that Mr Siemer has mounted against the plaintiffs, and the extent to which he has defied the rule of law".[33] Cooper J observed that "[i]t is difficult to imagine what more [Mr Siemer] could have done to ensure that his defamatory remarks hit home or were brought to the attention of a wider public".[34]

[44] The damages award in this case is almost 50 per cent greater than the damages award in *Siemer*, or about 30 per cent greater if the impact of inflation is taken into account.

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28 Above n 18; *Quinn v Television New Zealand Ltd* HC Auckland CP1098/90, 29 November 1996.
29 *Columbus v Independent News Auckland Ltd*, above n 16.
30 *Karam v Parker* [2014] NZHC 737.
31 *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA).
32 *Siemer v Stiassny*, above n 28, at [85].
33 *Korda Mentha v Siemer*, above n 27, at [31].
34 At [60].

[45] The next highest defamation damages award to date was that in *Quinn*, where the total damages awarded (following appeals) was $650,000. In that case the Holmes television programme had broadcast a story alleging that Mr Quinn had been supplying drugs for doping horses. A month later, despite being put on notice that the allegations were defamatory and untrue, a further story was broadcast repeating the allegation of supplying drugs and also alleging that Mr Quinn was involved or implicated in financial irregularities at the Auckland Trotting Club. The jury awarded compensatory, aggravated and punitive damages of $400,000 in respect of the first broadcast and $1.1m in respect of the second broadcast.

[46] The Court of Appeal considered that the jury was entitled to regard each programme as "a bad piece of defamation" and was entitled to have found that those responsible for the programmes had deliberately made insinuations which they knew they could not prove, with the motive of increasing or maintaining ratings.[35] The Court also accepted that both programmes targeted a different part of Mr Quinn's character and this had to be reflected in the award.[36] The Court considered that while the first award was "high, it causes no shock"[37] even though this award was at the "upper limit" of what the jury could have awarded.[38] However, the Court overturned the second award as being excessive, as it failed to properly assess only the added harm of the second story.[39] At a rehearing, Anderson J awarded Mr Quinn $250,000 in compensatory, aggravated and punitive damages for the second story.[40] This brought the total damages to $650,000. The damages award in this case is almost double that.

[47] In New Zealand it has been difficult to assess the punitive aspect of awards as in many earlier awards damages were awarded globally. However, more recently, awards have been separated out. A review of the case law indicates that punitive damages are rarely granted and when they are the amount awarded is low. Punitive damages have been awarded in the following cases over the past 20 years (inflation adjusted figures are in brackets):

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35 At 38 per Cooke P.
36 At 39 per Cooke P and at 45 per McKay J.
37 At 39 per Cooke P.
38 At 45 per MacKay J.
39 At 39 per Cooke P.
40 *Quinn v Television New Zealand Ltd*, above n 29.

(a) *Wells v Haden*[41] (2008) - $7,500 ($8,546);

(b) *Karam v Parker*[42] (2014) - $10,000 ($10,177);

(c) *Williams v Hallett*[43] (2010) - $15,000 ($16,323);

(d) *O'Brien v Brown*[44] (2001) - $12,000 ($16,467); and

(e) *Korda Mentha v Siemer*[45] (2008) - $25,000 ($28,195).

[48] The highest identifiable award of punitive damages is the award of $25,000 in *Siemer.* As I have previously noted, the Court of Appeal identified that to be the worst defamation case they could find in the Commonwealth. The punitive damages award in this case ($220,000) is almost nine times higher than the punitive damages award in *Siemer.*

Did the jury fail to take into account that several of the pleaded defamatory statements were true or substantially true?

[49] Mr Mills submitted that it must be inferred from the sheer size of the damages award that the jury overlooked or failed to take into account that a number of the defamatory statements made in the Remarks and Leaflet were true or substantially true. Mr McKnight, on the other hand, submitted that this was entirely an issue for the jury and that the submission that they did not take into account that some of the pleaded defamatory statements were true "is based on pure speculation and a rose-tinted view of Mr Craig's case".

[50] Evidence relied on to support the truth of defamatory statements, even where the defence of truth does not succeed, may mitigate damages. In *Pamplin v Express Newspapers Ltd* Neill LJ said:[46]

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41 *Wells v Haden* [2008] DCR 859.
42 Above n 30.
43 *Williams v Hallett* DC Auckland CIV-2008-004-2897, 18 October 2010.
44 *O'Brien v Brown* [2001] DCR 1065.
45 Above n 27.
46 *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 (CA) at 120, as cited in *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024 at 54 Lord Hobhouse.

> There may be many cases, however, where a defendant who puts forward a defence of justification will be unable to prove sufficient facts to establish the defence at common law …. Nevertheless the defendant may be able to rely on such facts as he has proved to reduce the damages, perhaps almost to vanishing point. Thus a defence of partial justification, though it may not prevent the plaintiff from succeeding on the issue of liability, may be of great importance on the issue of damages.

[51] Similarly, in *Quinn* McGechan J observed that:[47]

> [i]f the defamatory statement is that plaintiff is 'a constant liar', and justification proves no more than an occasional lie, that blemish may degrade general reputation, and reduce damages, to some extent.

Indeed, McGechan J said that such a reduction was "almost an inevitability".[48]

[52] When summing up in this case, I directed the jury as follows:

> Do not take into account, in assessing damages, any meanings which you did not consider defamatory or which Mr Craig proved were true or his honest opinion. It is only the meanings that you considered to be defamatory and that Mr Craig did not prove were true or his honest opinion which are relevant when you come to consider damages.

[53] In my view the fact that the jury awarded the full amount of damages sought by Mr Williams strongly supports the inference that the jury must have concluded that Mr Williams was entirely successful in his claim, or almost entirely successful. He was not. Several of the defamatory imputations he pleaded were proved to be true at trial. For example, the allegation that Mr Craig had sent sext messages to Ms MacGregor was a key plank of Mr Williams' attack on Mr Craig's reputation. Mr Williams pleaded that Mr Craig defamed him by saying that he (Mr Williams) had lied when he told people that Mr Craig had sent sext messages to Ms MacGregor. The undisputed evidence at trial, however, was that Mr Williams did tell a number of people that Mr Craig had sent Ms MacGregor "sext" messages and that this was not true. This information had a significant impact on those who heard it and was a key factor in the pressure on Mr Craig to step down as leader of the Conservative Party.

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47 Above n 18, at 70.
48 At 70.

[54] It was open to the jury to conclude that, initially at least, Mr Williams may have been mistaken as to the existence of sext messages from Mr Craig to Ms MacGregor. The over whelming weight of the evidence at trial was inconsistent with any continued mistaken belief, however, as pressure mounted on Mr Williams to produce evidence of the sext messages, which he was unable to do. Further, Mr Williams told at least one witness that he had seen copies of sext messages, when he had not.

[55] Mr Williams also pleaded that Mr Craig had defamed him by saying that he (Mr Williams) had lied by falsely alleging that Mr Craig had made a pay-out (or pay-outs) of large sums of money to silence Mr Craig's victim(s) of sexual harassment. The evidence established that Mr Williams did tell people that Mr Craig had paid large sums of money to settle Ms MacGregor's sexual harassment claim. Mr Williams acknowledged, however, that he knew that any settlement sum was likely to be small, not the large figure he had mentioned.

[56] There was also undisputed evidence at trial that provided at least some support for a number of the other defamatory imputations pleaded, such as imputations that Mr Williams had been dishonest, deceitful, and could not be trusted. Examples of undisputed evidence at trial that supported such imputations included Mr Williams' admitted breach of his undertaking to Ms MacGregor to keep her information and documents as confidential as if he were her lawyer, his disclosing of her confidential documents to Messrs Day and Dobbs within hours of Ms MacGregor requesting their return, his lying to Ms MacGregor about going to Hamilton to meet with Messrs Day and Dobbs, his claims that he had seen copies of "sexts" from Mr Craig to Ms MacGregor when he had not, his creation of the nom de plume "Concerned Conservative" to provide confidential information and a draft blog post to Cameron Slater for publication on the Whale Oil website, and his subsequent denials to Ms MacGregor when he was confronted regarding this.

[57] In my view, the necessary inference from the fact that the jury awarded the maximum sum of damages available to them is that they ignored my direction not to take into account any meanings that Mr Craig proved were true. If the jury had

correctly followed that direction, an award of the maximum amount of damages sought could not have been justified.

Did the jury fail to take into account that Mr Craig was responding to an attack on his own reputation?

[58] Mr Mills submitted that it must be inferred from the size of the award that the jury overlooked that, in publishing the Remarks and Leaflet, Mr Craig was responding to an attack on his own reputation, as he was lawfully entitled to do. Mr McKnight submitted, on the other hand, that the fact that Mr Craig was responding to an attack on his own reputation should have absolutely no bearing on the appropriate level of damages. He argued that the jury had obviously found Mr Craig's response to be excessive, given that he lost the qualified privileged conferred on him. He argued that it is speculative to say that the jury did not take into account that Mr Craig was responding to an attack.

[59] The "defence to an attack" form of qualified privilege is described in *Gatley* as follows:[49]

> … a person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made.

[60] The purpose and foundation of the "right to reply to an attack" privilege was explained by Dixon J in *Penton v Calwell*, in the following way:[50]

> When the privilege of the occasion arises from the making by the plaintiff of some public attack upon the reputation or conduct of the defendant or upon some interest which he is entitled to protect, the purpose of the privilege is to enable the defendant on his part freely to submit his answer, whether it be strictly defensive or be by way of counter-attack, to the public to whom the plaintiff has appealed or before whom the plaintiff has attacked the defendant. The privilege is given to him so that he may with impunity bring to the minds of those before whom the attack was made any bona fide answer or retort by way of vindication which appears fairly warranted by the occasion.
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> …

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[49] Alistair Mullis and Richard Parks, above n 3, at [14.51] (footnotes omitted). See generally Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 143-146.

[50] *Penton v Calwell* (1945) 70 CLR 219 at 233–234 per Dixon J.

> The foundation of the privilege is the necessity of allowing the party attacked free scope to place his case before the body whose judgment the attacking party has sought to affect. In this instance, it is assumed to be the entire public. The purpose is to prevent the charges operating to his prejudice. It may be conceded that to impugn the truth of the charges contained in the attack and even the general veracity of the attacker may be a proper exercise of the privilege, if it be commensurate with the occasion. If that is a question submitted to or an argument used before the body to whom the attacker has appealed and it is done bona fide for the purpose of vindication, the law will not allow the liability of the party attacked to depend on the truth or otherwise of defamatory statements he so makes by way of defence.

[61] An analogy is sometimes drawn with the right of self-defence to a physical attack. In *Alexander v Clegg*, the Court of Appeal described the privilege as one to "hit back" or "counterpunch" when one's reputation is attacked, and noted that the right of retaliation did not require the recipients of an attack "to keep one hand behind their backs".[51] The privilege has been recognised as a robust one. It may entitle "violent or excessively strong" language to be used when responding to an attack.[52] Similarly, the terms of the "reply are not measured in very nice scales".[53] They may be strictly a denial or may move to a "counter-attack"[54] or "counterpunch",[55] including on the attacker's character.[56] The law recognises that a person who is defamed has a recognised interest in being able to reply forcefully to the allegations made against him or her in order to "prevent the charges operating to his [or her] prejudice".[57]

[62] The jury found that Mr Craig had lost the qualified privilege the law conferred on him, presumably on the basis that he was predominantly motivated by ill will towards Mr Williams, rather than (for example) simply setting the record straight or vindicating his own reputation. Mr Craig's motives were a factual issue, for the jury to determine. When assessing damages, however, the jury was not entitled to disregard the broader context, namely that Mr Craig was responding to an attack on his own character. Applying the assault analogy, the culpability of a person who assaults another, after being provoked, will not generally be as high as where an

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51 *Alexander v Clegg* [2004] 3 NZLR 586 (CA) at [61]-[63].
52 *Adam v Ward*, above n 4, at 339 per Lord Atkinson.
53 *Penton v Calwell*, above n50, at 243 per Latham CJ and Williams J.
54 *Penton v Calwell*, above n50, at 233 per Dixon J.
55 *Alexander v Clegg*, above n 51, at [62].
56 *Adam v Ward*, above n 4, at 321; and *Penton v Calwell*, above n 50, at 233–234 per Dixon J.
57 *Penton v Calwell*, above n 50, at 233 per Dixon J.

attack is entirely unprovoked. The same applies to excessive self-defence. The culpability of a person who is entitled to defend themselves, but does so excessively, will rarely be as high as that of a person who was not entitled to act in self-defence in the first place.

[63] In this case, Mr Craig's actions must be viewed in the broader context that his own character and reputation were under sustained attack from Mr Williams. The law therefore conferred a privilege on him, for important reasons of public policy.[58] Here, the importance of the privilege was particularly significant because the category of speech involved is one that is deserving of a high level of protection in a free and democratic society, namely political speech.[59] Mr Craig, a politician, was responding to an attack on his reputation by Mr Williams, who was also politically active (through the Taxpayers' Union) and whose aim was to remove Mr Craig from his position as leader of the Conservative Party albeit because he believed that he was not a fit person for the role.

[64] Given this broader context, it is difficult to see how Mr Craig's actions can objectively justify an award of damages that it is significantly higher than any other previous damages award for defamation. In none of the other cases I have referred to was the defendant responding to a defamatory attack on their own reputation, whether in a political context or any other.

Did the jury "double count" the damage to Mr Williams' reputation caused by the Remarks and the Leaflet?

[65] Mr Mills submitted that when assessing compensatory damages the jury must have failed to properly consider the extent to which there was any *additional* damage caused to Mr Williams' reputation by the Leaflet, above and beyond the damage already caused by the Remarks. Their failure to turn their mind to this issue, he submitted, must necessarily have led to at least some element of "double counting" in the compensatory damages award.

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58 For a discussion of these reasons, see *Vickery v McLean* [2006] NZAR 481 (CA) at [15].

59 See *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [148] per Baroness Hale.

[66] Mr McKnight submitted that it was for the jury to assess the additional harm or otherwise of the Leaflet. Having heard the evidence over 15 days, they were in the best position to assess the harm that may have been occasioned by each publication. They were in the best position to assess the extent of the publication of the Leaflet (distributed to over 1.6 million households), and its contents and tone. They were entitled to conclude that the Leaflet, as part of Mr Craig's defamatory campaign against Mr Williams, gave rise to substantial damages of its own accord.

[67] In awarding damages for the Leaflet, the jury had to avoid compensating twice for the same thing. A similar issue arose in *Quinn*, as discussed at [45] to [46] above. I directed the jury on this issue, in the following terms:

> You should also be careful, when assessing compensatory damages for the second cause of action, that's for the Leaflet, if you get this far, not to "double count". This means that you are only considering the damage to Mr Williams' reputation caused by the Leaflet, not damage to his reputation which had already occurred before the Leaflet was published, including the damage caused by the remarks at the press conference. Because if that comes first there's going to be some damage then and then the Leaflet goes out a few days later. So you don't want to double count the damage. You need to assess what damage, beyond that already occurred, was caused to Mr Williams by the publication of the Leaflet.

[68] The Remarks and Leaflet made substantially the same allegations about Mr Williams, albeit the Leaflet set out the allegations in greater detail and made some additional statements about Mr Williams' involvement in the attack on Mr Craig. By the time the Leaflet was published, Mr Williams' reputation was therefore already damaged by the nationwide media coverage given to the Remarks (resulting in the jury's compensatory damages award of $400,000). In my view it is extremely difficult to see how *additional* damage to Mr William's reputation in the sum of $650,000 could be caused by what was largely a further publication of the same defamatory imputations to a similar nationwide audience, unless there was a significant element of double counting. It must necessarily be inferred, therefore, that the jury failed to adequately turn their minds to this issue.

Were errors made in the assessment of punitive damages?

[69] I now turn to consider Mr Mills' submission that the punitive damages award was also clearly excessive. In particular, he submitted that the award bears the

hallmarks of the jury ignoring the Court's direction and "instead doing what Mr McKnight urged them to do in his closing address, which was to award an amount to 'put a stop to [Mr Craig] from ruining so many people's lives'".

[70] Mr McKnight disputed that the punitive damages award was excessive. He submitted that the facts of the case warranted a very large punitive damages award.

[71] The jury awarded punitive damages totalling $220,000, being $90,000 for the Remarks and $130,000 for the Leaflet. Because the Leaflet and Remarks covered much the same ground, the appropriate course is to consider the two awards together.[60] Mr Mills acknowledged that punitive damages cannot be the subject of precise calculation.[61] Nevertheless, in awarding punitive damages a jury must not get carried away.[62] Punitive damages are rare in defamation cases and the amount awarded must "be no more than necessary to constitute any additional punitive element needed" above that provided for by the compensatory (including aggravated) damages awarded.[63]

[72] Like compensatory damages, punitive damages cannot double up. Mr Mills submitted that it can reasonably be inferred that there had been some degree of double counting in the punitive damages award, on two bases. First, there was likely some double up between the punitive damages award and the aggravated (compensatory) damages award. Second, there was likely some double up between the punitive damages awarded in respect of the Remarks and the punitive damages awarded in respect of the Leaflet.

[73] Turning first to the issue of whether there was a likely double up as between the punitive and aggravated damages awards. The grounds for claiming punitive damages were the same as those for aggravated (compensatory) damages, with the exception that it was alleged Mr Craig acted maliciously in distributing the Leaflet without first informing Mr Williams. I accept that the fact that almost identical

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60 *Television New Zealand Ltd v Quinn*, above n 18, at 38 per Cooke P.
61 *Television New Zealand Ltd v Quinn*, above n 18, at 44 per McKay J.
62 *Television New Zealand Ltd v Quinn*, above n 18, at 37 per Cooke P.
63 *Television New Zealand Ltd v Quinn*, above n 18, at 70 per McGechan J.

grounds were relied on does raise the very real prospect of some element of "double counting" as between the aggravated and punitive damages awards.

[74] Mr Mills queried whether *any* additional punitive element could be justified if the identical matters had already been taken into account as matters that justified an aggravated damages award. In my view, some award of punitive damages could still be justified. The jury could have properly concluded that some "added punishment" was necessary in all the circumstances. The jury would need to take into account, however, that most of the specific matters that supported a punitive damages award had already been taken into account in assessing aggravated damages. Given that the maximum quantum of punitive damages was awarded, it is a reasonable inference that they did not.

[75] The second area of possible double up relates to the fact that punitive damages were sought in respect of both the Remarks and the Leaflet. The grounds pleaded for both were the same, save for additional grounds that the Leaflet had been mailed out without Mr Williams being first informed, and that it had been uploaded to Facebook and to another website. Although I do not accept Mr Mills' submission that it necessarily follows that the jury must have awarded $130,000 (the punitive damages award for the Leaflet) on the basis of these two additional grounds alone, I do accept that there was likely an element of duplication in the punitive damages awards as between the first and second causes of action.

[76] I further note that a number of the matters I have previously addressed in the context of considering the reasonableness of the compensatory damages are equally relevant here. For example, when assessing punitive damages, the jury should have taken the broader context into account, including that Mr Craig was responding to an attack on his own character and reputation. Further, a number of the defamatory statements made by Mr Craig in the Remarks and Leaflet were proven to be true at trial. Such matters are relevant to the degree of "punishment" that was warranted in the circumstances.

Was there sufficient evidence to support the jury's finding that Mr Craig had lost his qualified privilege?

[77] I now turn to consider the second argument advanced on behalf of Mr Craig, namely that there was no evidence, or insufficient evidence, on which a reasonable jury could have found that he had lost his qualified privilege.

[78] Mr Mills also argued that even if there was *some* evidence that could reasonably support the verdicts, they should nevertheless be set aside as being against the weight of the evidence. The distinction is a fairly fine one. Further, Mr Mills acknowledged that if there some evidence to support the jury's verdicts, but the verdicts are against the weight of the evidence, the Court cannot enter judgment for Mr Craig but can only order a retrial. I have already found, however, that Mr Craig is entitled to a retrial on the ground that the damages award is excessive. I will therefore focus solely on the issue of whether there was no evidence, or insufficient evidence, to support the jury's verdicts. It is only if that is established that the Court can go further, and take the somewhat drastic step of entering judgment for Mr Craig.

[79] Where, as here, the jury's finding is necessarily a matter of inference from proven facts, the Court's role is to assess the evidence and determine whether the primary facts were capable of supporting the necessary inference and whether that inference was properly drawn.[64] In doing so, the Court needs to ensure that the finding is not speculation or conjecture.

[80] Mr Craig's qualified privilege could only be lost if, in publishing the Remarks and Leaflet, he was predominantly motivated by ill will or took improper advantage of the occasion. Ill will requires a desire on Mr Craig's part to injure Mr Williams,[65] while improper advantage traditionally refers to seeking some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege.[66]

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64 *Smith v Auckland Hospital Board* [1965] NZLR 191 (CA) at 220; *Alexander v Arts Council of Wales* [2001] EWCA Civ 514, [2001] 1 WLR 1840 at [40].

65 *Horrocks v Lowe* [1975] AC 135 (HL) at 149 per Lord Diplock.

66 *Horrocks v Lowe* [1975] AC 135 (HL) at 150 per Lord Diplock

[81] Mr Romanos submitted that, following *Lange v Atkinson (No 2)*, the New Zealand Courts have significantly diverged from the classic statement of the law on ill-will and improper advantage in *Horrocks v Lowe* by extending the concept of taking improper advantage to encompass those who are reckless and do no exhibit the necessary responsibility when purporting to act under the cloak of qualified privilege.[67]

[82] Mr Mills submitted, on the other hand, that the relevant passage in *Lange v Atkinson (No 2)* must be read in context. In particular, the Court of Appeal was addressing a "newly-recognised privilege" relating to reporting on politicians. Up until *Lange* the courts had rejected any argument that journalists or others had a duty to publish matters in the public interest, with the courts saying that journalists had no special recognition or protection. In recognising a new duty, the Court was mindful that it was creating a privilege where the duty on the publisher and the corresponding interest in the recipients of the publication were weaker than other forms of qualified privilege. The Court said that:[68]

> To that extent we are able to take a more expansive approach to defining an occasion of privilege because we have the ability in s 19 to take a correspondingly more expansive approach to what constitutes misuse of the occasion. One development is therefore capable of being matched by another so that the overall balance is kept right.

[83] Given that the "defence to an attack" form of qualified privilege is of fairly ancient origin, there is arguably less need to take a more expansive approach to what constitutes a misuse of the occasion of privilege. If so, the wider interpretation of s 19 in *Lange* may be inapt in this context. On the other hand, the prospect of s 19 being interpreted differently according to the particular form of qualified privilege invoked is a somewhat unattractive one.

[84] Ultimately, however, it is not necessary for me to determine this issue. Even on the narrower approach to s 19 advocated by Mr Mills, I am satisfied that there was sufficient evidence to support the jury's finding that Mr Craig had lost his qualified privilege, for the reasons set out below.

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67 *Lange v Atkinson (No 2)* (2000) 3 NZLR 385 (CA) at [39].

68 At [39]

[85] Mr Mills submitted that it can be properly inferred from the very large punitive damages award (which required the jury to conclude that Mr Craig had acted in flagrant disregard of Mr Williams' rights) that the jury must have concluded that Mr Craig was predominantly motivated by ill will. I accept that that is a reasonable inference in all the circumstances. It is not clear whether the jury also concluded that Mr Craig took improper advantage of his right to reply to Mr Williams' attack on his reputation, in either the traditional sense or on the expanded basis set out in *Lange*.

[86] Mr Mills submitted that there was no sufficient evidence on which the jury could have properly concluded that Mr Craig was predominantly motivated by ill will. Mr Romanos submitted, on the other hand, that there was ample evidence to support such a finding. He submitted (and I accept) that the jury's assessment of Mr Craig's credibility was likely to have a significant impact on their assessment of this issue. Mr Romanos also noted that there was no suggestion by Mr Mills (one of New Zealand's leading defamation lawyers), prior to the jury retiring, that there was insufficient evidence on which a properly instructed jury could find that Mr Craig had lost his qualified privilege. This rests uneasily, he submitted, with the claim now being advanced.

[87] The pleadings define the facts and circumstances that the relevant factual findings may be based on.[69] Section 41 of the Act requires that an allegation of ill will be specifically pleaded. The jury was entitled to consider the evidence relating to all of the pleaded particulars in totality, in order to determine whether a finding of ill will was justified. The most damaging particulars in the s 41 notice, however, are the assertions that:

(a) the allegations Mr Williams made about Mr Craig to various third parties were substantially true, and that Mr Craig knew that; and

(b) Mr Craig's response to those allegations included matters that he knew to be false, and/or he was reckless as to their truth or falsity.

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[69] *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [20]–[21]; *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279 (HCA) at 286–287 per Mason CJ and Guadron J.

Was there sufficient evidence to support a finding that some of the allegations Mr Williams made about Mr Craig were substantially true, and that Mr Craig knew that?

[88] Ill will or improper advantage may be established if the defendant is responding to an attack that he or she knows to be true.[70] The rationale is that if a defendant knows the allegations against him or her are true, he or she will not be protecting any legitimate interests (namely their reputation) in "rebutting" those allegations.

[89] Some of the allegations that Mr Williams made about Mr Craig, or that Mr Craig understood that he had made, were untrue, based on undisputed evidence at trial. For example, it was not true that Mr Craig had sent sext messages to Ms MacGregor, or that the election night incident between Mr Craig and Ms MacGregor was non-consensual. The truth of other allegations, however, was disputed. It was for the jury to resolve such disputes. For example, the allegation that lay at the heart of Mr Williams' "attack" on Mr Craig's character and reputation was that Mr Craig had sexually harassed Ms MacGregor. If there was sufficient evidence to support a finding that the sexual harassment allegation was true, and that Mr Craig did not genuinely believe otherwise, then this could support an inference that Mr Craig was predominantly motivated by ill will.

[90] Central to the definition of sexual harassment is that the language, behaviour or image has to be "of a sexual nature", combined with a threat or promise, or was unwelcome or offensive.[71] Sexual harassment is not limited, however, to sexually explicit words or conduct, but also captures actions and language that are of a kind that would be done or used in an intimate relationship.[72]

[91] Ms MacGregor was absolute in her conviction that Mr Craig had sexually harassed her. She gave examples of behaviour that, in her view, constituted sexual harassment, some of which I have set out at [5] above. Mr Craig was equally

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70 *Fraser-Armstrong v Hadow & Nelson* [1995] EMLR 140 (CA) at 143 per Staughton and Simon Brown LJJ; Alistair Mullis and Richard Parkes, above n 3 at [14.51]; Michael A Jones (ed) *Clerk & Lindsell on Torts* (21st ed, Sweet & Maxwell, London, 2014) at [22-120].

71 Human Rights Act 1993, s 62.

72 *Carlyon Holdings Ltd v Proceedings Commissioner* (2000) 5 HRNZ 527 (HC).

strenuous in his denials. From his perspective their relationship was reciprocal and there was nothing to indicate that anything he said or did was unwelcome.

[92] Matters of witness credibility are entirely for the jury. The jury was entitled to reject Mr Craig's evidence that he did not believe that his actions amounted to sexual harassment. It is not for the Court to substitute its own views for that of the jury on a disputed factual issue. The question is simply whether it was *open* to the jury on the evidence before the Court to conclude that Mr Craig had sexually harassed Ms MacGregor, and that he did not genuinely believe otherwise. The evidence to support the latter inference, in particular, is not strong. I would not be prepared to go so far as to say, however, that no reasonable jury could have reached such a conclusion on the evidence before the Court. If the jury did conclude that Mr Craig had sexually harassed Ms MacGregor and that he did not genuinely believe otherwise, this is a matter that could have supported a finding of ill will.

Was there sufficient evidence to support an inference that Mr Craig had no genuine belief in (at least some of) the statements he made regarding Mr Williams?

[93] The second key particular that Mr Mills accepted could support a finding of ill will was the allegation that Mr Craig had no genuine belief in (at least some of) the statements he made regarding Mr Williams.

[94] Once it is ruled that the publication of the Remarks and the Leaflet were on occasions of qualified privilege, there is a presumption that the defendant honestly believed the reply and acted in good faith.[73] That presumption is, however, rebuttable.

[95] Mr Craig clearly did genuinely believe several of the statements he made about Mr Williams in the Remarks and Leaflet, because those statements were true based on undisputed evidence. The jury must obviously have concluded, however, that some or all of the statements Mr Craig made that were the subject of disputed evidence were not true and, further, that Mr Craig had no genuine belief in their

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73 *Adams v Ward* [1917] AC 309 (HL) at 334 per Lord Atkinson*; Horrocks v Lowe* [1975] AC 135 at 150 and 152 per Lord Diplock*; Alexander v Arts Council of Wales* [2001] EWCA Civ 514, [2001] 1 WLR 1840 at [34] per May LJ.

truth. I am satisfied that such a conclusion was open to the jury on the evidence. For example, if the jury concluded that Mr Craig had sexually harassed Ms MacGregor and did not genuinely believe otherwise, it would necessarily follow that he also did not genuinely believe the various statements he made in the Remarks and Leaflet to the effect that Mr Williams had made false sexual harassment claims against him.

[96] The precise reasoning of the jury is, obviously, unknown. I must simply determine if there was sufficient evidence to support a finding that Mr Craig was predominantly motivated by ill will. In my view, with reference to the two specific particulars addressed above, there was. It is accordingly not necessary for me to address each of the other particulars of ill will in detail. I note, however, that the jury was entitled to take into account the totality of the evidence relating to the pleaded particulars into account when considering the issue of ill will. Several (but not all) of them were capable of providing further support to a finding of ill will. It follows that there is no basis to enter judgment in favour of Mr Craig, as this was the only ground advanced that could have supported such an outcome.

Were the jury materially misdirected on how they should approach the issue of qualified privilege?

[97] Mr Craig's third and final challenge to the jury's verdicts is that they should be set aside on the basis of material misdirections in the summing up on the issue of qualified privilege.

[98] As I have outlined above, if I were to find that there were material misdirections in the summing up, this could not justify entering judgment in favour of Mr Craig. Rather, the appropriate course would be to order a retrial. I have already found, however, that Mr Craig is entitled to a retrial on the basis that the jury's damages award was excessive. As a result, it is not strictly necessary to consider this alternative basis for seeking a retrial in any detail, and I do not propose to do so. I will, however, make some brief observations.

[99] First, it is somewhat unfortunate that none of the present issues were raised when I asked counsel if they had any issues immediately following the summing up.

Any opportunity to address the relevant issues with the jury was accordingly lost. I do not accept Mr McKnight's submission, however, that the failure to raise any of the alleged misdirections during the course of the trial precludes them from being raised now.

[100] Some of the criticisms now made of the summing up are relatively minor, whereas others are more substantial. A number of them are at least arguable. One of them, in my view, is clear cut. In particular, I am satisfied that there was at least one misdirection in the summing up. It relates to the demarcation line between judge and jury on the qualified privilege issues, which I have already noted is a particularly fraught area. When summing up to the jury on whether Mr Craig had lost the qualified privilege due to the fact that he was predominantly motivated by ill will, I made the following comments:

> How can you figure out what Mr Craig's dominant motive was? It is hard to know what someone was thinking, inside their head. But, as I mentioned to you before, you are able to draw inferences. You need to look at all of the circumstances to figure out what Mr Craig's motive was. Was Mr Craig's response appropriate or over the top? What kind of language did he use? *Did he say things that were not relevant to the attack or was everything relevant?* Did he publish the response to more people than he needed to in order to respond, or did he publish it to the right range of people? These kind of questions might help you figure out whether Mr Craig's main purpose was to respond to the attack and protect himself, or whether his main purpose was to hurt Mr Williams.
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> (Emphasis added)

[101] Mr Mills submitted, and I accept, that whether the statements made by Mr Craig in the Remarks and Leaflet were *relevant* to Mr Williams' attack on him was ultimately a question of law (for the Court), not one of fact (for the jury). It was for me to determine if the statements were relevant to the attack or whether some statements were not and so did not come within the occasion of privilege.[74] A response must be relevant to an attack in order for an occasion of qualified privilege to arise. I determined that the matters raised by Mr Craig in response were relevant to the matters raised in Mr Williams' attack on his character, as set out in my Reasons for Judgment on the qualified privilege issue.

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[74] *Adam v Ward*, above n 3, at 327 per Lord Dunedin and 340 per Lord Atkinson; *Harbour Radio Pty Ltd v Trad* [2012] HCA 44, (2012) 247 CLR 31 at [23]-[24].

[102] Mr McKnight submitted that, if my direction on this issue was in error, the error was immaterial in the context of the summing up as a whole. He submitted that, when viewed in totality, the summing up afforded the jury a fair and accurate guide to what it was required to do in assessing the issue of ill will. The jury is unlikely to have been led materially astray by what was a relatively minor error, limited to one sentence in a lengthy summing up.

[103] It is not necessary for me to reach a concluded view on whether the misdirection was material. I simply note for the record that I accept that this particular direction was incorrect. Whether or not there were also other misdirections is an issue that can be credibly argued either way. Given that there is no need to determine the issue, I do not propose to do so.

Summary and conclusion

[104] Following an almost four-week trial, a jury found that Mr Craig had defamed Mr Williams in the course of remarks that Mr Craig made at a press conference on 29 July 2015 and in a leaflet that was subsequently delivered nationwide. It awarded Mr Williams a total of $1.27m in damages, the maximum amount that Mr Williams had sought. This is the highest sum of damages ever awarded for defamation in New Zealand, by a significant margin.

[105] Viewed objectively, Mr Craig's statements cannot be said to have been markedly worse than the statements made in all of the previous defamation cases that have come before the Courts in New Zealand. Yet the damages awarded in this case are significantly higher than any previous award.

[106] The highest damages award prior to this case was the damages award of $825,000 in *Siemer v Stiassny*.[75] Mr Siemer's defamation was described as being "unprecedented in terms of the length and severity of the campaign that Mr Siemer has mounted against the plaintiffs, and the extent to which he has defied the rule of law".[76] The Court of Appeal described the case as the worst case of defamation that

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75 *Korda Mentha v Siemer,* above n 27.
76 *Korda Mentha v Siemer*, above n 27, at [31].

it could find in the British Commonwealth.[77] Mr Craig's conduct falls far short of that described in *Siemer* and yet the jury's total damages award is almost 50 per cent greater than the award in that case.

[107] The position is even more stark in relation to punitive damages. Punitive damages are generally awarded only in extreme cases. Even then, the sums awarded are modest. This reflects that the primary aim of civil law is to compensate plaintiffs, not to punish defendants. Punishment is the realm of the criminal law. The highest previous award of punitive damages for defamation appears to be the punitive damages award of $25,000 in *Siemer*. Other punitive damages awards in New Zealand defamation cases over the last 20 years have ranged from $7,500 to $15,000. The jury in this case, however, awarded punitive damages against Mr Craig totalling $220,000. This is almost nine times the award in *Siemer* and fifteen times the next highest punitive damages award that counsel were able to identify. A punitive damages award of this magnitude is unprecedented.

[108] Although precise details of the jury's reasoning process are not known, it can be reasonably inferred (for the reasons more fully set out at [49] to [76] above) that:

(a) the jury failed to take into account that several of the more serious defamatory imputations were true;

(b) the jury failed to take into account the broader context in which the Remarks and Leaflet were published, including that Mr Craig was responding to an attack on his own reputation and character by Mr Williams;

(c) in assessing compensatory damages the jury likely double counted (to some extent) the damage caused to Mr Craig's reputation by the Remarks and Leaflet;

(d) there was likely some double up between the punitive damages award and the aggravated (compensatory) damages award; and

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[77] *Siemer v Stiassny*, above n 28, at [85].

(e) there was likely some double up between the punitive damages awarded in respect of the Remarks and the punitive damages awarded in respect of the Leaflet.

[109] Taking all of these matters into account, I am satisfied that the damages award is well outside the range that could reasonably have been justified in all the circumstances of the case. The consequence is that a miscarriage of justice has occurred. The jury's verdicts must therefore be set aside and a retrial ordered, unless both parties are willing to consent to my substituting a new damages award in place of the jury's award.[78] It is not possible to have a new trial solely on the issue of damages, as any assessment of damages must necessarily be based on the jury's overall factual findings.

[110] In relation to Mr Craig's second ground of challenge to the jury's verdicts, I reject the submission that there was no evidence, or insufficient evidence, to support the jury's finding that he had lost his qualified privilege. My reasons for this conclusion are set out at [77] to [96] above. As a result, there is no basis for entering judgment in favour of Mr Craig (as opposed to ordering a retrial).

[111] It was not necessary for me to consider, in any detail, Mr Craig's submission that there were material errors in the directions given to the jury in summing up. That is because, at most, this ground of challenge could result in a retrial being ordered. Mr Craig has already established his entitlement to a retrial, however, on the basis that the damages awarded were excessive. I did find, however, that there was at least one misdirection in the summing up. Given my other findings it was not necessary to decide whether that misdirection was material.

Result

[112] The parties are to file memoranda by 3.00 pm on Wednesday 26 April 2017 advising whether they consent to the Court substituting its own award of damages for the jury's award, pursuant to s 33 of the Act. If confirmation is not received by that date that both parties consent to such a course, then I order that the jury's

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[78] Defamation Act 1992, s 33(1).

verdicts be set aside and the proceedings be set down for a re-trial on the first available date that is convenient to senior counsel.

[113] This outcome is likely to raise some difficult costs issues. Leave is accordingly reserved to file costs memoranda in relation to both the trial and the present application, if costs cannot be agreed. Any memorandum on behalf of Mr Williams is to be filed by 5 May 2017. Any memorandum on behalf of Mr Craig is to be filed by 19 May 2017. Counsel are to indicate in their memoranda whether a hearing is sought in respect of costs.

Katz J