

How to lose when you win by Andrew Geddis

Jordan Williams' apparently crushing defamation victory from last year carried within it the seeds of its own demise. And in overturning that victory, the High Court has shown less than complementary things to say about his own behaviour.

This week is shaping up as a banner one for those few unusual individuals who consider defamation law an area worthy of academic study, what with both the Hagaman v Little and Williams v Craig cases seemingly heading for some kind of appeal or retrial.

The former case, sadly, may get resolved by Earl Hagaman's death - assuming his health is as grave as his wife stated during the original trial. A jury rejected all Lani Hagaman's claims that Mr Little defamed her, so her action against him cannot continue. And should Mr Hagaman pass away, then any defamation action taken in his name on the remaining matters the jury could not agree on must come to an end.

However, the latter Williams v Craig case looks certain to trundle on for some time yet, with both Colin Craig and Jordan Williams' legal representative telling RNZ's Morning Report that they have no plans to back down. While every individual may in theory have recourse to the courts to vindicate their legal rights, allow me as a citizen and taxpayer to register my deep unhappiness that our already overburdened judicial process is being put to this use. Frankly, if there was some "Mercurio verdict" available here, I'd wish for it to be delivered in ringing tones.

That grump over, let's recap where we are at with Messers Craig and Williams. Back in September last year, a jury found that Mr Craig had defamed Mr Williams and so awarded Mr Williams \$1.27 million in damages - the full amount that Mr Williams had asked for. Mr Craig then appealed both the jury's rejection of his "qualified privilege" defence to Mr Williams' claim and also the amount of damages awarded against him, as he is entitled to do under the Defamation Act.

Yesterday, the judge in the case (Katz J) issued her decision on that appeal, ruling that while the jury could reasonably have concluded Mr Craig had lost any defence of qualified privilege that he enjoyed when responding to Mr Williams' attacks on him, its decision on damages nevertheless was so excessive that it constituted a miscarriage of justice. Consequently, the whole of the jury's verdict has to be set aside and a new trial held ... unless the parties agree to Katz J setting a different damages award ... which Mr Craig does not seem minded to do despite her Honour's between-the-lines pleading to put the matter to an end.

On its face, there's nothing particularly surprising about Katz J's decision here. The amount awarded to Mr Craig was some 50% higher than the previous largest defamation award in New Zealand - and that was a 2008 case involving what the Court of Appeal called "the worst case of defamation that it could find in the British Commonwealth." Whatever wrong and defamatory things Mr Craig wrote about Mr Williams, they certainly don't come anywhere near that level of seriousness.

Furthermore, as we shall see below, Katz J found that the jury must have made a number of mistakes when calculating the damages Mr Williams should receive for the defamatory things written about him. In particular, the evidence showed that at least some of the allegedly defamatory statements made about Mr Williams were in fact true - so no reasonable jury could possibly give the full amount of damages asked for as not all Mr Williams' claims were made out.

Of course, we'll never know exactly what motivated the jury in the case (because it is illegal to ask them), meaning their reasons for giving such a (with hindsight) ludicrously large damages award can only be inferred. But, again with hindsight, it is now apparent that Mr Williams and his legal team made something of a tactical error in their case. By asking the jury for such a high level of damages at the outset, they inadvertently set themselves up for losing on appeal.

I suspect that they probably never actually expected to win so heavily. Probably their reasoning was something like "if we ask for a really big amount, it'll make the jury take this matter seriously and we might end up with a decent chunk of money from them (even if not all we ask for)". Or perhaps the hope was that the sheer size of the claim might cause Mr Craig to cave in and settle the matter in their favour. Or similar.

Unfortunately, as it turns out, the jury took the claimed amounts at face value and went ahead and awarded it in full. Which not only has now resulted in the original win being annulled on appeal, but it also opened the way for a written judgment from Katz J that (in my considered opinion) does not cast Mr Williams in a particularly favourable light.

(Note that because juries don't have to give reasons for their decisions, all we got from the earlier trial was a verdict (Mr Craig defamed Mr Williams) and a consequence (Mr Craig must pay Mr Williams money).)

I think it is a fair comment, based on my honest opinion after reading the judgment, that Katz J does not view Mr Williams' conduct in this matter as being particularly noble. Here is how her Honour describes Mr Williams actions in respect of both Mr Craig and Mr Williams' then-romantic partner Ms MacGregor (who had been Mr Craig's press secretary, before she resigned and reached a confidential settlement with him on allegations of sexual harassment):

[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 McCoskie (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 MacGregor (sic) 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 ... 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 [a blogger we need not name] for publication on the [unimportant] 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 [unimportant] 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, [unimportant website] 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."

Even given Mr Williams' asserted moral objection to Mr Craig continuing to lead the Conservative Party and desire to halt that state of affairs, pursuing his ends in the way that he did seems somewhat questionable to me (and, I think, to Katz J).

Then, later in the case, Katz J turned to examine whether the Jury erred in giving Mr Williams the full amount of damages he asked for. In particular, did it give damages for statements made by Mr Craig that were in fact true? Because if some of allegedly defamatory statements claimed by Mr Williams were not actually defamatory - because they were true - then no reasonable jury could possibly give the full amount of damages sought (as not all the plaintiff's claims have been made out).

[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.

[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 consistent 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 includes 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 [some minion] for publication on the [unimportant] 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.

I'll allow Katz J's comments on Mr Williams' basic truthfulness to stand as they are. But I will note that it certainly seems like Katz J considers some of the claims Mr Williams made about Mr Craig - that he sent "sexts", that he made "large payouts" to settle sexual harassment allegations, etc - were false. Which could have interesting implications for Mr Craig's own defamation claim against a certain blogger, whom we do not name, who chose to publish Mr Williams' claims under the "Concerned Conservative" pseudonym.

Oh, and that blogger also is counter-suing Colin Craig for defamation. As is a former member of the Conservative Party board, John Stringer ... who already has apologised and paid compensation for defaming Colin Craig. And now we look set to go back to court for a redo of Williams v Craig.

Sigh, I guess one good thing that graduates out of all this is that it ensures an ongoing employment market for court-fans from law faculties like my own. But that really seems to be the only good thing you can say about any of it or any of the people involved.

COMMENTS (8)

by Rich on April 13, 2017



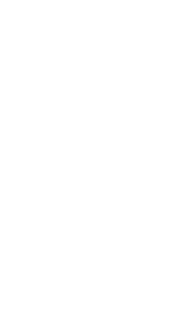
allow me as a citizen and taxpayer to register my deep unhappiness that our already overburdened judicial process is being put to this use. My alternative view is that this is comedy gold worthy of Charlie Brooker at his finest. Perhaps NZ on Air could provide some cross-funding to Courts NZ in recognition of this?

by Peter Grant on April 13, 2017



So Craig ought to apologise to Williams, and they both should pay each others legal costs, fair?

by Chuck Bind on April 13, 2017



Andrew, while there are some judges I would not trust as far as I could throw them Judge Katz is an excellent judge. I appeared before two or three times in my civil case against a crooked lawyer. He cannot sue as he is now an adjudicated bankrupt. She is smart and fair and not bullying and arrogant as a minority of judge are. It is a minority but none the less a significant minority.

by Chuck Bind on April 14, 2017



One thing I find outrageous is the way juries are treated and paid or more accurately not paid. I think there is some argument in criminal cases that it is people's civic duty. I still do not agree with it considering what judges are paid. However, when people with massive egos what to prove something to the public or whoever they stand jurors or their employer pay for it? Maybe some political party should make paying jurors fairly a policy. I do not have the figures but I would guess that filing fees do not cover actual costs even in the case of a judge only trial. I think that would definitely be the case when there is a jury. If Craig thinks that even if he somehow wins in a new trial that the public are going to change view of him he a bigger fool than I think he is. However, I have a solution for him. He could challenge Williams in the ring in a Fight for Live event. He is older at 49 but he has a height and reach advantage. He has the money for the best trainers. Even if he lost but put up a good fight the public would have a lot more respect for him.

by Ian Dalziel on April 14, 2017

"Mr Craig and his then-romantic partner Ms MacGregor" - is this a fact? Was there a full affair? I had the impression during the case that it was one-sided with Craig pursuing Ms MacGregor.

You might want to delete this bit after reading: I also note variant spellings of McGreggor / MacGreggor throughout - which is correct? - not to mention the wrong 'complementry' should've been 'complementary' and a truly innovative attack on the construction of 'pseudonymy' :-) peace ian d

by Andrew Geddis on April 14, 2017

"Mr Craig and his then-romantic partner Ms MacGregor" - is this a fact? Was there a full affair? Sorry for the ambiguity - the judgment states that Mr Williams and Ms MacGregor (correct spelling) had commenced a relationship.

by Raymond A Francis on April 14, 2017

I have to say I don't just get this. Someone is deemed to be guilty by a jury but another Judge decides that the damages they set are to high and effectively overrides their finding for another new trial. Next jury finds someone guilty but doesn't set any damages, so Judge decides we need another trial. Why bother to use the jury system if judges are going to overrule them. Just a pily Judges can't set the costs/damages after the jury decides guilt or lack of guilt.

by Megan Pledger on April 14, 2017

Peter Grant said: So Craig ought to apologise to Williams, and they both should pay each others legal costs, fair?

~~~~~ How about Williams apologise to Craig. The judges makes it quite clear that Williams lied about Craig to the Conservative Party hierarchy. And from what the judge wrote above, what Williams said was nagely influential in the actions they took.

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