IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1845
[2016] NZHC 2496

JORDAN HENRY WILLIAMS

v

COLIN GRAEME CRAIG

Hearing:	28 September 2016
Counsel:	P A McKnight and A J Romanos for plaintiff S J Mills QC and J Graham for first defendant
Judgment:	19 October 2016

REASONS FOR JUDGMENT OF KATZ J
[Defence of qualified privilege]

This judgment was delivered by me on 19 October 2016 at 11:00am
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

Introduction

[1] Jordan Williams is the founder and Executive Director of an organisation known as "the Taxpayers' Union". Colin Craig is the founder and former leader of the Conservative Party, a political party that unsuccessfully contested the 2011 and 2014 Parliamentary elections.

[2] Mr Williams brought these proceedings against Mr Craig, in defamation. He alleged that Mr Craig defamed him in remarks he made at a press conference on 29 July 2015 ("Remarks") and in a leaflet that was made available at that conference and was subsequently delivered nationwide ("Leaflet"). I will refer to the particular statements that are said to bear defamatory meanings as "the statements". Mr Williams claimed, amongst other things, that the natural and ordinary meaning of the statements was that he had told lies about Mr Craig, including that Mr Craig had sexually harassed a person and that he had sent her sexually explicit text messages. Mr Williams further alleged that a reasonable person who read or heard the statements would understand them to mean that Mr Williams is dishonest, deceitful, a serial liar, cannot be trusted and lacks integrity.

[3] The trial proceeded by way of a jury trial, before me, during the period 5 September 2016 to 30 September 2016. After the evidence had concluded, Mr Craig sought a ruling that the Remarks and the Leaflet were published on occasions of qualified privilege. The 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 might, in itself, be defamatory.[1]

[4] Determining whether a defence of qualified privilege arises in any given case requires a two stage analysis.[2] 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 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

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

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

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.[3]

[5] Although it is for the Judge to determine whether the statements were made on an occasion of privilege, he or she may only do so (where the trial proceeds before a jury) on the basis of undisputed facts. If factual issues need to be resolved in order for the Judge to determine the issue, then those factual issues must be put to the jury for determination. Only then can the Judge determine whether the occasion was one of qualified privilege.[4] As is apparent from the case law there are difficult demarcation issues between the role of the Judge and the role of the jury in cases where the defence of qualified privilege is raised, and that has certainly proved to be the case here.

[6] Mr Mills QC, for Mr Craig, submitted that the Court could be satisfied, on the basis of undisputed facts, that the statements were made on occasions of qualified privilege. Mr Romanos, for Mr Williams, disagreed. He submitted that, now that the evidence had closed, the Court could be satisfied that the defence of qualified privilege was incapable of prevailing as a matter of law. In the alternative, Mr Romanos submitted that the jury's findings in respect of a number of disputed factual issues were required before the Court could determine whether the statements were made on occasions of qualified privilege.

[7] I held that it was possible, on the basis of undisputed facts, to determine whether the statements were published on occasions of qualified privilege. I concluded that they were.[5] As a result, I ruled that the defence of qualified privilege should be put to the jury. It would then be for the jury to determine if the privilege had been lost. 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 that time. I accordingly advised that written reasons would follow. Those reasons are set out below.

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3 Defamation Act 1992, s 19(1).

4 *Hebditch v MacIlwaine* [1894] 2 QB 54 (CA) at 58. See also Lord Finlay in *Adam v Ward*, above n 2, at 318.

5 *Williams v Craig* HC Auckland CIV-2015-404-1845, 26 September 2016 (Ruling No 7).

[8] I note that events have moved on since I delivered my ruling on qualified privilege. Following my ruling, counsel delivered their closing addresses and the jury retired to consider their verdicts. They ultimately found that Mr Craig had defamed Mr Williams in both the Remarks and the Leaflet. It necessarily follows that the jury concluded that Mr Craig had lost the qualified privilege conferred on him, either because he acted with ill will, or because he took improper advantage of the occasion of publication (or both).

Qualified privilege - legal principles

[9] Section 16(3) of the Defamation Act 1992 ("Act") preserves the application of common law qualified privilege. Generally speaking, common law qualified privilege arises in circumstances where the person who makes the communication has an interest or a duty (legal, social or moral) to make it to the person to whom it is made, and the person to whom the communication is made has a corresponding interest or duty to receive it.[6] In such circumstances, the law places a particularly high value on the right to free speech, essentially as a matter of public policy. As Tipping J observed in *Vickery v McLean*:[7]

> All occasions of qualified privilege are based on an identified public interest in allowing people to speak and write freely, without fear of proceedings for defamation unless they misuse the privilege. On occasions of privilege the public interest is seen as prevailing over the protection of individual reputations.

[10] It has been observed that qualified privilege is a "rare example of the law permitting an individual to seek self-redress by conduct that would otherwise be unlawful".[8] In other words, it allows an individual to make defamatory statements. Common examples of occasions of privilege include reporting suspected criminal behaviour to the appropriate authorities and providing an employment reference to a prospective employer. Free speech is seen as having a particularly high value in such circumstances.

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6 *Adam v Ward*, above n 2, at 334 per Lord Atkinson as qualified by the Court of Appeal in *Lange v Atkinson (No 1)* [1998] 3 NZLR 424 (CA) at 441 *and Lange v Atkinson (No 2)* [2000] 3 NZLR 385 at [20]–[22].

7 *Vickery v McLean* [2006] NZAR 481 (CA) at [15].

8 *Trad v Harbour Radio Pty Ltd* [2011] NSWCA 61, (2011) 279 ALR 183 at [108].

[11] A less common situation where the common law recognises an occasion of privilege is where a person has been subjected to an attack on their character or reputation. This particular form of qualified privilege is described in *Gatley on Libel and Slander* as follows:[9]

> …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.
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> (footnotes omitted)

[12] The purpose and foundation of the "right to reply to an attack" privilege was explained by Dixon J in *Penton v Calwell*, as follows:[10]

> 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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> 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. 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 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.

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 it attacked, and noted that the right of

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9 Mullis and Parkes, above n 1, at [14.51]. See also Ursula Cheer *Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 143-146.

10 *Penton v Calwell* (1945) 70 CLR 219 (HCA) at 233–234 per Dixon J.

retaliation did not require the recipients of an attack "to keep one hand behind their backs".[11]

[13] The traditional "duty and interest" analysis can be somewhat difficult to apply in the context of reply to an attack privilege, as the High Court of Australia acknowledged in *Harbour Radio Pty Ltd v Trad*.[12] As a result, Courts have taken a broad view of the relevant duties and/or interests in the context of this type of privilege. In *Mowlds v Fergusson*, Dixon J summarised the position as follows:[13]

> Any communication which the defendant might make tending to vindicate his conduct or rehabilitate his reputation would be a subject of privilege provided that the person to whom he made the communication were one proper to receive it. It is commonly said that the recipient must possess an interest or be under a duty which corresponds with the interest of the person making the communication…Where the defamatory matter is published in self-defence or in defence or protection of an interest or by way of vindication against an imputation or attack, the conception of a corresponding duty or interest in the recipient must be very widely interpreted.

[14] The law presumes that the audience of the original attack "will generally have a sufficient reciprocal interest to receive the refutation by the person defamed".[14] In *Loveday v Sun Newspapers Ltd*, Starke J said that where the defendant "has appealed to the public and provoked or invited a reply. A person attacked has both a right and an interest in repelling or refuting the attack, and the appeal to the public gives it a corresponding interest in the reply".[15]

[15] The privilege of right of reply to an attack has been recognised as a robust one. It may entitle "violent or excessively strong" language to be used.[16] Similarly, the terms of the "reply are not measured in very nice scales".[17] They may be strictly a denial or may move to a "counter-attack"[18] or "counterpunch",[19] including on the

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11 *Alexander v Clegg* [2004] 3 NZLR 586 (CA) at [61]-[63].
12 *Harbour Radio Pty Ltd v Trad* [2012] HCA 44, (2012) 247 CLR 31 at [23]-[24].
13 *Mowlds v Fergusson* (1940) 64 CLR 206 (HCA) at 214–215 per Dixon J.
14 *Watts v Times Newspapers* [1997] QB 650 (CA) at 662 per Hirst LJ citing *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495.
15 *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 (HCA) at 515 per Starke J.
16 *Adam v Ward*, above n 2, at 339 per Lord Atkinson.
17 *Penton v Calwell*, above n 10, at 243 per Latham CJ and Williams J.
18 At 233 per Dixon J.
19 *Alexander v Clegg*, above n 11, at [62].

attacker's character.[20] A person who is defamed has a recognised interest in being able to reply forcefully to those allegations made against him or her in order to "prevent the charges operating to his prejudice".[21]

[16] The response, however, must be *relevant* to the attack in order for an occasion of qualified privilege to arise. The decision of the High Court of Australia in *Harbour Radio Pty Ltd v Trad* illustrates the approach courts take to determining relevance.[22] Mr Trad attacked the radio station 2GB, accusing it of racism and inciting the Cronulla riots (a series of racially motivated riots in Sydney). The Court ruled that most of the responses made by the radio station were relevant, including that Mr Trad had himself stirred up hatred, had incited people to commit acts of violence, held racist attitudes, was a dangerous and disgraceful individual, and gave out misinformation about the Islamic community. All of these responses were found to be relevant, given the nature of the attack. Such comments were linked to Mr Trad's credibility and also to pointing out his hypocrisy in criticising 2GB.[23] Two statements, however, were found to be irrelevant to the attack. First, the allegation that Mr Trad was a "pest" and, second, that he was abusing a position he had been given by others. These allegations were completely unconnected to his credibility or hypocrisy.[24] They were accordingly not protected by qualified privilege.

[17] Statements made in reply will be irrelevant if it is "plain and obvious"[25] that they were "entirely irrelevant and extraneous material",[26] or "unrelated or insufficiently related to the attack".[27] I note that this is a fairly high threshold.

[18] In light of the above legal principles, I must consider the following issues in order to determine whether the statements were made on occasions of qualified privilege:

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20 *Adam v Ward*, above n 2, at 321 per Earl Loreburn; *Penton v Calwell*, above n 10, at 233–234 per Dixon J.
21 *Penton v Calwell*, above n 10, at 233 per Dixon J.
22 *Harbour Radio Pty Ltd v Trad*, above n 12.
23 At [36]–[37].
24 At [40].
25 *Hamilton v Clifford* [2004] EWHC 1542 (QB) at [74]. Mullis and Parkes, above n 1, at [32.41].
26 *Watts v Times Newspapers Ltd*, above n 14, at 671.
27 *News Media Ownership v Finlay*, above n 2, at 1095.

(a) Did Mr Williams attack Mr Craig's character and/or reputation?

(b) If so, was Mr Craig's reply relevant to the attack?

(c) If so, were the statements made to an audience having an interest in receiving them?

[19] I will consider each issue in turn, following which I will briefly address several additional arguments advanced on behalf of Mr Williams.

Did Mr Williams attack Mr Craig's character and/or reputation?

[20] I summarise below the relevant factual background, based on facts either admitted in Mr Williams' reply to Mr Craig's statement of defence, or which have been accepted (or were not disputed) in evidence at trial. I will endeavour to focus on primary facts and will only refer to secondary facts, such as either party's state of mind or motives, where there has been an admission or concession by the relevant person on that issue. Where a person's state of mind is in dispute it is for the jury to decide what inferences can properly be drawn from the facts found to be proven.

The relevant facts

[21] Mr Craig was the founder and leader of the Conservative Party, which unsuccessfully contested the Parliamentary elections in both 2011 and 2014.

[22] On 18 September 2014, two days before the 2014 general election, Mr Craig's press secretary, Rachel MacGregor, resigned. Ms MacGregor resigned following a conversation in which Mr Craig refused to discuss increasing her remuneration rate, at least at that time. Other aspects of the conversation are in dispute.

[23] Ms MacGregor stated to the media at the time of her resignation that Mr Craig was "manipulative," but did not comment further. She filed a sexual harassment claim in the Human Rights Review Tribunal ("Tribunal") shortly after her resignation, but Mr Craig did not become aware of this until a couple of months

later. Ms MacGregor's resignation, coming as it did on the eve of the general election, received widespread publicity.

[24] Two months later, on 19 November 2014, Ms MacGregor told Mr Williams, an acquaintance of hers, that Mr Craig had been sexually harassing her. Ms MacGregor showed Mr Williams letters and cards that Mr Craig had sent to her that were of an affectionate, and at times romantic, nature. Mr Williams made notes of the discussion, which he subsequently emailed through to Ms MacGregor for checking. She did not reply, confirming the accuracy of the notes or otherwise, because she understood the notes to be an aide-mémoire for herself, for the purposes of preparing for her proceedings before the Tribunal. She did not authorise Mr Williams to use the notes for any other purpose.

[25] Mr Williams understood that what Ms MacGregor had told him, and the correspondence she had shown to him, was confidential. He assured her and her lawyer that he would keep the information confidential, "as if he were her lawyer". Although Mr Williams is a qualified lawyer, and held a current practising certificate at the time, he was not Ms MacGregor's lawyer.

[26] Mr Williams' motives for his subsequent actions are in dispute. It is not in dispute, however, that, based on Ms MacGregor's disclosure to him, Mr Williams formed the view that Mr Craig was not fit to continue to lead the Conservative Party.

[27] In early 2015, Mr Williams spoke to Garth McVicar, the founder of the Sensible Sentencing Trust. Mr McVicar had stood as a candidate for the Conservative Party in the 2014 general election. There is some dispute about precisely what Mr Williams said to Mr McVicar, but it is undisputed that, at a minimum, he told Mr McVicar that he had seen material that he was deeply disturbed by and this material meant that Mr Craig was vulnerable. He told Mr McVicar that there was likely to be a leadership vacancy that Mr McVicar should prepare to fill.

[28] Also in early 2015, Mr Williams embarked on a romantic relationship with Ms MacGregor. Ms MacGregor asked him to store the bundle of letters and cards

she had received from Mr Craig, together with some handwritten notes she had made, in his office safe, which he did. These documents were referred to at trial as "the dossier".

[29] Mr Williams then contacted Brian Dobbs, the Conservative Party Board Chairman, and told him (amongst other things) that Mr Craig had been sending sexually explicit texts ("sexts") to Ms MacGregor and, in particular, one that referred to lying between her naked legs. This was not true, as there is no evidence (from Mr Craig, Ms MacGregor, or the documents produced in evidence) that such a text ever existed. Mr Williams acknowledged at trial that he had never seen such a text. Whether Mr Williams genuinely, but mistakenly, believed that such a text existed, or was deliberately untruthful, was in dispute at trial. For present purposes, I simply note that there is no evidence that Mr Craig ever sent the alleged text, or any other sexually explicit text, or indeed any letters or cards containing sexually explicit material. Nor, apart from a relatively minor and fleeting incident on election eve 2011, is there any evidence to suggest that there was ever any physical contact between Mr Craig and Ms MacGregor that was overtly sexual in nature.

[30] At about this time (early 2015), Mr Williams also contacted Laurence Day, another Conservative Party Board member, and told him (at a minimum) that he had every reason to be concerned regarding the rumours about Mr Craig and Ms MacGregor.

[31] In March 2015, Mr Craig's lawyers (Chapman Tripp) sent a detailed letter to Ms MacGregor's lawyers regarding her allegations of sexual harassment. Chapman Tripp's letter set out, in some detail, the reasons why Ms MacGregor's claim of sexual harassment was rejected. The relationship between Mr Craig and Ms MacGregor was essentially characterised as an emotionally close and intense friendship, which was mutual. Copies of correspondence from Ms MacGregor to Mr Craig were annexed to Chapman Tripp's letter in support of that characterisation of the relationship. Without setting out details of the relevant correspondence, it is fair to say that it tends to support the view that the relationship was one of mutual admiration and deep affection, particularly in the first year or two. This conclusion is also broadly supported by the text messages adduced in evidence at trial.

Although the exchange of more personal (but not sexual) text messages appears to have declined over time, the text message evidence was consistent with an ongoing close friendship as well as a working relationship. Indeed, this appears to have still been the case only a week or so before Ms MacGregor resigned, when Ms MacGregor confided in Mr Craig the reasons (which were of a highly personal nature) that she was feeling down at that time.

[32] Returning to March 2015, Ms MacGregor worked on a response to Chapman Tripp's letter in Mr Williams' office, in the presence of Mr Williams. It is not entirely clear what the level of Mr Williams' involvement was in helping Ms MacGregor prepare a response to the Chapman Tripp letter. As a minimum, it is not disputed that he was a "sounding board" and helped her on some little points. Mr Williams' evidence, however, was that he did not read the whole letter (or possibly any of it). He did accept, however, that he learned for the first time, at around this date, that it was alleged that there had been some responses from Ms MacGregor to Mr Craig's correspondence, although he said that he did not actually read the correspondence from Ms MacGregor that was annexed to the Chapman Tripp letter.

[33] On 4 May 2015, Mr Craig and Ms MacGregor attended a mediation at the Human Rights Commission ("Commission"), following which they both signed a Mutual Resolution Agreement. They agreed that a significant part of their working/friendship relationship had been positive, constructive and mutually beneficial. Both parties acknowledged, however, that on occasions some of their conduct was inappropriate. Mr Craig apologised to Ms MacGregor for any inappropriate conduct on his part. On her part, Ms MacGregor withdrew her complaint to the Commission. It was agreed that:

> Neither party will make comment to the media/third parties other than a statement that the parties met and have resolved their differences.

A separate agreement was reached in relation to Ms MacGregor's disputed invoices and a loan that had been made to her by Mr and Mrs Craig, which was forgiven.

[34] Ms MacGregor did not show "the dossier" to anyone after that date (or authorise anyone else to do so). She believed that matters between her and Mr Craig had been resolved.

[35] Several weeks later, on 26 May 2015, Mr Williams (without Ms MacGregor's knowledge or consent) contacted Christine Rankin, the former Chief Executive of the Conservative Party, by text message. He told her he had read "explicit hand written letters from Colin where he talks about his fantasies" and that he "presume[d] he's [Mr Craig] paid Rachel to keep her quiet". He said he knew that "she had made a big claim to the Human Rights Review Tribunal". He also stated that he had read the letters where "Colin wrote stuff like 'I slept well last night because I dreamt of being between your legs'," along with other "sexual fantacises [sic], poems, kisses etc and at one point even an acknowledgement it was unwanted".

[36] Ms Rankin shared this information with Bob McCoskrie, a director of Family First NZ and a supporter of the Conservative Party. She also informed Mr Dobbs that a source had given her information, including sexually explicit text messages that the source had read to her, and that the source had also referred to a large settlement sum being paid in respect of Ms MacGregor's sexual harassment claim.

[37] On 26 May 2015, Ms Rankin informed Mr Craig that she had been provided with information about his relationship with Ms MacGregor from a confidential informant. She subsequently put the matters Mr Williams had disclosed to her to Mr Craig in person, on 29 May 2015. Although Ms Rankin did not disclose her source, Mr Craig strongly suspected it was Mr Williams.

[38] In June 2015, Mr Williams spoke directly to Mr McCoskrie, telling him that he believed that Mr Craig had committed serious sexual harassment, including sending sexts to Ms MacGregor, including one referring to sleeping between her legs. He also showed Mr McCoskrie poems written by Mr Craig using FaceTime (an internet video telephone service). Mr McCoskrie subsequently asked Mr Williams to "put up or shut up" in relation to the alleged sext messages, which were of particular concern to him, but was never shown the actual messages.

[39] On 8 June 2015, Mr Craig conducted an interview with David Farrier, which took place in a sauna. When asked about the circumstances of Ms MacGregor's departure, he rejected any suggestion of impropriety and stated (or at least implied) that she had resigned due to work stress. In particular, Mr Craig said that Ms MacGregor's position had been "job shared" to try and reduce the stress on her. Ms MacGregor was deeply upset by this comment, which she saw as an attack on her professional reputation and ability.[28]

[40] On 15 June 2015, Mr Williams spoke again with Mr Day, offering to disclose documents supporting the allegations he had made regarding Mr Craig. Mr Williams arranged to meet with Messrs Day and Dobbs in Hamilton on Thursday 18 June 2015, to show them the dossier.

[41] Ms MacGregor had no knowledge of the planned meeting. 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 of the proposed meeting, she emailed Mr Williams 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.

[42] Mr Williams disregarded Ms MacGregor's email. He claimed that, in doing so, he was acting in her best interests. As his motives are in dispute I put them to one side. What is clear, however, is that, without Ms MacGregor's knowledge or consent, Mr Williams flew to Hamilton and met with Messrs Day and Dobbs on the afternoon of 18 June 2015. There is some dispute as to precisely what Mr Williams said at that meeting. It does not appear to be seriously disputed, however, that (at a minimum) he told Messrs Day and Dobbs that:

(a) Mr Craig was smitten with Ms MacGregor (or words to that general effect).

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[28] The evidence at trial established that Beverley Adair-Beets was engaged, in the lead up to the election period, to provide support to Ms MacGregor in her role. Ms MacGregor rejected, however, any suggestion that her role of Press Secretary was "job-shared" with Ms Adair-Beets.

(b) Mr Craig had sexually harassed Ms MacGregor over an extended period.

(c) Mr Craig kissed Ms MacGregor and touched her in a sexual way on election night 2011. (The evidence of Messrs Day and Dobbs was that Mr Williams had presented the incident as being non-consensual. Mr Williams denied that. In any event, the undisputed evidence at trial was that what was referred to as "the election night incident" was consensual).

(d) Mr Craig sent sexts to Ms MacGregor including one that referred to sleeping between her legs.

(e) Ms MacGregor had settled the sexual harassment claim for a significant sum (although Mr Williams denied saying it "was in six figures".)

(f) Mr Craig had stopped paying Ms MacGregor for a period prior to her resignation, but had lent her money, with the effect or intent of putting pressure on her.

[43] Mr Williams showed Messrs Day and Dobbs the dossier. In addition, he read to them, from his phone, extracts from the notes he had prepared following his meeting with Ms MacGregor in November 2014. The general tenor of the disclosures made to Messrs Day and Dobbs was that Mr Craig's attention had been unwelcome and unreciprocated by Ms MacGregor (and hence constituted sexual harassment). There was some discussion about the alleged sext message in which Mr Craig is said to have referred to sleeping between Ms MacGregor's legs. Mr Williams indicated he had the sext but could not find it at that time, but would do so later. The existence of this sext was of huge significance to Messrs Day and Dobbs. Mr Williams acknowledged, under cross examination, that his allegations regarding the sext message were enormously damaging to Mr Craig.

[44] The meeting with Messrs Dobbs and Day concluded on the basis that the Conservative Party Board would need to consider the allegations. In an email to Mr Day immediately prior to the meeting, Mr Williams had stated that after he had

laid out the material he had, he would leave the next steps to Messrs Day and Dobbs. This included the option of "letting sleeping dogs lie".

[45] Mr Williams acknowledged in cross-examination that, if he had seen the correspondence from Ms MacGregor that was adduced in evidence at trial, he could not have conveyed to Messrs Dobbs and Day at least some of what he told them. He also acknowledged that, as a result of what he knew about the Chapman Tripp letter, he was aware that there may be another side to the story and that he could have informed himself of that by reading the letters from Ms MacGregor that were annexed. Mr Williams also accepted that the people he was talking to might have seen matters differently if they had been aware of "the other side". He acknowledged that he was wrong when he informed people he had read a sext message from Mr Craig (albeit he said that any error on his part was inadvertent). Mr Williams also accepted, after looking again at the dossier during the course of cross examination, that its contents may suggest a degree of reciprocity, in the sense of there being a possible broader context that might include something also coming from Ms MacGregor. Mr Williams also said that he knew that it was likely Ms MacGregor had settled her claim for a small amount, not a large amount.

[46] John Stringer, another Conservative Party Board member and a candidate for the party in the 2014 general election, appeared as a witness for Mr Williams. Under cross-examination he confirmed that Mr Williams had told him, on 19 June 2015, that Mr Craig had sexually assaulted Ms MacGregor by grabbing her by her breast and forcing her onto a bed, "or something like that" (this is a reference to the election eve incident). In addition, he said that Mr Williams had told him that Mr Craig sent sexts to Ms MacGregor, including a sext stating, "I slept well because I dreamed I was between your legs", and another sext using the phrase "magic hands down your panties" or something similar. As I have noted above, there was no evidence at trial of any sext messages from Mr Craig to Ms MacGregor (or anyone). Further, the undisputed evidence at trial was that the election night incident was consensual. As with Messrs Dobbs and Day, however, Mr Williams disputed having told Mr Stringer that the election incident was non-consensual. I therefore put Mr Stringer's evidence on this issue to one side for present purposes.

[47] 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 the "informant" had told them. He also provided details of the correspondence he and Mr Dobbs had been shown. Mr Craig agreed to stand down to enable the Board to undertake a full investigation of the issue.

[48] That same morning, without awaiting the outcome of the Board process, Mr Williams, using the nom-de-plume "Concerned Conservative", sent a draft blog post to 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. The draft blog post referred to other "selected material" that had been provided to Whale Oil, which was currently being worked through. In addition to exchanging emails, Mr Williams and Mr Slater texted each other 29 times and phoned each other twice on 19 June 2015.

[49] Mr Slater published the blog that Mr Williams had drafted on the Whale Oil blog immediately prior to (or possibly simultaneously with) a press conference called by Mr Craig to announce he was stepping down. Publication of the blog post contributed to (but was not the sole cause of) what was referred to at trial as "a subsequent media firestorm". Mr Williams acknowledged that he knew and intended that the publication of the blog post would attract all sorts of media attention and that his intention was that this would put Mr Craig under pressure and place the Board in a position where it would be forced to sack Mr Craig.

[50] Following publication of the blog, Mr Williams maintained his frequent communication with Mr Slater. He sent follow up emails to Mr Slater setting out a list of questions that could be asked of Mr Craig, including such questions as: "Did you try to use a financial dispute to try to pressure a young staff member to sleep with you?" He continued to write further emails and draft blog posts, including one, prior to Mr Craig stepping down, that asked who would take over from Mr Craig as

leader of the Conservative Party given that "Colin Craig's departure [was] now inevitable".

[51] 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.

[52] Mr Williams acknowledged that he knew that there would be serious consequences for Mr Craig's personal reputation and leadership of the Conservative Party, stemming from the material he disclosed to Mr Slater. He also acknowledged that he knew that publication of the "Two of Me" poem on the Whale Oil website would be humiliating for Mr Craig. Mr Williams admitted knowing that the Whale Oil blog was the most visited blog in New Zealand and that the mainstream media frequently pick up material from the Whale Oil blog and run their own stories on the basis of that material. Mr Williams acknowledged that he knew that the publication of the allegations against Mr Craig would be likely to have a detrimental (and likely terminal) effect on his position as leader of the Conservative Party, and more generally on the Conservative Party itself.

[53] Mr Williams also admitted that he knew, at all material times, that Mr Craig was a party to a confidentiality agreement with Ms MacGregor that prevented him from saying anything more than "we have met and have resolved our differences" in response to any questions put to him, or issues raised, by the media in relation to the allegations published by Mr Williams. Mr Craig would therefore be unable to provide a substantive response and denial of the allegations, without breaching (or further breaching) the confidentiality agreement. (Mr Williams noted, however, that Mr Craig had already breached the confidentiality agreement by this time, most notably in the sauna interview when he referred to Ms MacGregor's position having been "job-shared").

[54] On 22 June 2015, Mr and Mrs Craig held a press-conference. At the press conference, Mr Craig stated that he and Ms MacGregor had met and resolved outstanding matters, but that a lack of detail had meant that some people were "filing in gaps very creatively". He said that the financial settlement with

Ms MacGregor was based on an invoicing dispute. He denied any sexual harassment or that the payment he had made was connected with the sexual harassment complaint. He stated that, while both he and Ms MacGregor had behaved inappropriately, they had both agreed this was the case, so they could move on.

[55] If the press conference was intended to douse the flames of speculation and rumour it failed dismally in that objective. The intense media speculation and commentary, both on blog sites such as Whale Oil and in the mainstream media, continued unabated.

[56] On 29 July 2015, Mr Craig called a further press conference at which he made the Remarks, outlining his belief that he was the subject of a "dirty politics" campaign based on false allegations. The Leaflet was available to the media at that conference. It was also distributed nationwide.

Did Mr Williams' conduct amount to an attack on Mr Craig's character and/or reputation?

[57] Mr Romanos did not dispute that, from (at least) February through until June 2015, Mr Williams published various allegations, as summarised above, which cast aspersions on Mr Craig's character and reputation. Indeed, Mr Williams did not dispute at trial that, based on what Ms MacGregor told him, he formed the view that Mr Craig was not morally fit to lead the Conservative Party. Further, he believed that he had a duty or obligation to draw Mr Craig's character failings to the attention of influential people within the Conservative Party. During the course of cross examination, Mr Williams acknowledged that he knew the messages he was going to convey about Mr Craig would be likely to be destructive of Mr Craig's personal reputation.

[58] Given this context, Mr Romanos did not seriously dispute that Mr Williams had attacked Mr Craig's character or reputation. Rather, although he acknowledged that some of the allegations Mr Williams had published were false (in a "literal" sense) Mr Romanos submitted that the overall "sting" of Mr Williams' attack on Mr Craig's character was justified. For example, it was open to the jury to conclude

that, even if the relationship was reciprocal at the outset, by 2014 it was not and that, by that time, Mr Craig's conduct constituted sexual harassment, in the sense of being unwelcome and an abuse of power. If so, it was neither here nor there that Mr Williams had erred in believing that Mr Craig had sent sext messages to Ms MacGregor. Similarly, although the jury may not find that Mr Craig had withheld payment of Ms MacGregor's invoices to exert pressure on her to sleep with him (an allegation that was not supported on the evidence) they may nevertheless find that Mr Craig demonstrated a general lack of integrity in his financial dealings with Ms MacGregor. Essentially, Mr Romanos' position was that any attack by Mr Williams on Mr Craig's character and reputation was justified, when viewed in the round.

[59] I was not persuaded, however, that the issue of justification was a matter that I should take into account when determining whether or not Mr Williams' conduct constituted an attack. As I have already noted, there are difficult demarcation issues between the role of Judge and jury in relation to the defence of qualified privilege. This is particularly so when the sub-category of privilege involved is that of "defence to an attack". Cases involving this particular defence are, in my view, fairly challenging ones to proceed by way of jury trial because of the difficulty in drawing a clear line between (factual) issues for the jury and (legal) issues for the Judge. For example Mr Romanos submitted that the central issue before me, namely whether Mr Williams attacked Mr Craig at all, was a factual issue that should be put to the jury. However, determination of this issue goes to the very heart of whether the occasion is one of qualified privilege, which is a legal issue for the Judge. I therefore proceeded on the basis that determining whether there was an attack was an issue for the Court, albeit one that must be decided based on undisputed facts (which raises its own challenges).

[60] Similarly, there are differing views as to whether issues of justification should be considered by the Judge at the first stage of the inquiry (whether the occasion is one of qualified privilege) or by the jury at the second stage of the

inquiry (whether the privilege has been lost). The learned authors of *Gatley on Libel and Slander* state:[29]

> If the defendant is responding to an attack which he knows to be justified he is guilty of malice, though the view has also been expressed that in such a case one might equally well say that there was no privileged occasion.
>
> (footnotes omitted)

[61] In the particular circumstances of this case, I concluded that the most efficient and appropriate way forward would be for the issue of justification to be considered by the jury, at the second stage of the inquiry (whether the privilege had been lost). I was not attracted to Mr Romanos' suggestion that I put the issue of justification to the jury for determination as a preliminary issue, and then determine whether the occasion was one of qualified privilege in light of their answer. Such a course appeared to me to be unduly cumbersome and unnecessary in all the circumstances.

[62] Given that (on this approach) issues of justification are not relevant at the first stage of the inquiry, I had no hesitation in concluding that Mr Williams did attack Mr Craig's character and reputation in the first six months or so of 2015. Indeed, the acknowledged purpose of Mr Williams' communications to the various people I have referred to was to bring to light what he believed to be Mr Craig's moral unsuitability to lead the Conservative Party. It goes without saying that alleging that a person is guilty of sexual harassment, or that a married man has sent sexually explicit (and unwelcome) text messages to a younger female employee, or that he is dishonest or lacked financial integrity, are matters that are likely to negatively impact the recipient's views of that person's character. The disclosures that Mr Williams made were undoubtedly damaging to Mr Craig's reputation, as Mr Williams acknowledged. The content of the disclosures progressively escalated as the various people that Mr Williams spoke to talked to each other. The allegations therefore gained increasing traction, culminating in the publication of the Whale Oil blog (drafted by Mr Williams) on 19 June 2015, which was in turn picked up by the mainstream media.

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[29] Mullis and Parkes, above n 1, at [14.51].

[63] I do accept, however, Mr Romanos' submission that, for the purposes of determining whether the occasion was one of qualified privilege, the focus must be on Mr Craig's state of knowledge at the relevant time.[30] At the time he published the statements, Mr Craig would not have been aware of all of the detail I have summarised at [21] to [56] above. It is quite clear, however, that he would have been aware (and was aware) of the core substance of many of the allegations made against him, as relayed back to him by Ms Rankin, Mr Day and others. He was also aware of the content of the Whale Oil blog posts, although he likely believed they were based on information provided by Mr Williams, rather than having been authored (in at least one case) by Mr Williams himself. Based on such information, Mr Craig was clearly aware, by the time he published the Remarks and the Leaflet, that his character and reputation were under attack and that Mr Williams was one of the key people responsible for that attack.

Was Mr Craig's "reply" relevant to the attack?

[64] I must now determine the relevance of the statements to the attack. Did Mr Craig's statements meet and respond to the allegations made by Mr Williams against him? Or did they raise matters that were irrelevant to the attack?

[65] I have outlined the relevant legal principles at [16] to [17] above. In summary, statements made in reply to the attack must be a genuine response to the matters raised by the attack in order to be protected by qualified privilege. If some of the statements are irrelevant to responding to the attack then, as a matter of law, those statements are not covered by qualified privilege. The threshold of irrelevance is a fairly high one, however.

[66] It was up to Mr Williams to prove that portions of the statements were irrelevant or extraneous to the occasion.[31] Mr Romanos did not submit that any specific portions of the statements were irrelevant to the attack. I am satisfied that the statements, taken as a whole and in context, were relevant. Their aim was to either demonstrate that particular allegations made by Mr Williams were false, or were directed to Mr Craig's belief that he had been subjected by Mr Williams and

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30 *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 536, [2001] 4 All ER 115. (headnote).
31 *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 318 per Jordan CJ.

others to a "dirty politics" attack of the nature outlined in Nicky Hager's book "Dirty Politics".

[67] I also accept Mr Mills' submission that the credibility of Mr Williams was relevant to Mr Craig's reply, as it was in *Harbour Radio Pty Ltd v Trad*. Where the strength of an attack is tied in some way to the veracity or character of the person who made it, attacking those characteristics is relevant.[32] As Earl Loreburn in *Adam v Ward* put it:[33]

> …a judge may well think that a man is justified in inculpating his accuser in order more effectively to exculpate himself, and also may well think that the defendant has not exceeded [again in terms of relevance] the privilege when he has expressed himself with some warmth under real provocation.

[68] None of the statements were plainly and obviously irrelevant or extraneous to the attack.

Were the statements made to an audience having an interest in receiving them?

[69] The final issue that must be considered in order to determine whether the occasion was one of qualified privilege is whether the statements were made to an audience having an interest in receiving them.

[70] The occasion of privilege in making a reply only extends to the audience of the attack. Accordingly, if Mr Williams had only published his allegations regarding Mr Craig to various individuals, such as Ms Rankin and Messrs Dobbs, Day, Stringer and McCoskrie, and they had not disseminated the allegations publicly, then a response to the general public could not have been justified.

[71] Mr Williams did not, however, only publish his allegations to the identified individuals. He also provided information to Mr Slater and published a blog on the Whale Oil website making a number of allegations regarding the relationship between Mr Craig and Ms MacGregor. He knew and intended that this would be picked up by the mainstream media, which it was. It then contributed to (but was not the sole cause of) a subsequent media "firestorm".

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[32] *Penton v Calwell*, above n 10, at 243 per Dixon J; Mullis and Parkes, above n 1, at [14.68].
[33] *Adam v Ward*, above n 2, at321 per Earl Loreburn.

[72] Mr Williams' attack therefore ultimately reached a nationwide audience, through the Whale Oil blog and the mainstream media. Because the attack was made, at least in part, through the media, it was legitimate for Mr Craig to respond in the same way.[34] As Barton ACJ in *Norton v Hoare (No 1)* stated:[35]

> The defendant is allowed to defend himself in the same field in which the plaintiff has assailed him – if the attack is through the press, then again the press may be used in answer: see *Laughton v Bishop of Sodor and Man*.
>
> (footnote omitted)

[73] Mr Craig was not restricted to responding through the Whale Oil blog (assuming that would have been possible) on the basis that that was the primary means through which the attack became public. It is apparent from the case law that the relevant focus is not on the particular medium used, but on whether the attack was conducted and communicated to the public at large. If it was, a response to the public at large is permitted. Mr Mills noted that, in at least two of the leading cases, the attack and reply were through different media (albeit both to the public at large).[36]

[74] I also accept Mr Mills' submission that it is relevant that, from Mr Craig's perspective, he was responding to what he saw as a "dirty politics-styled" campaign against him. Mr Craig was aware that Mr Williams had been identified in Nicky Hager's book "Dirty Politics" as a person who had had some previous involvement in political attacks falling within the category identified by Mr Hager of "dirty politics". Mr Craig believed that he was the victim of such an attack.

[75] The courts recognise a hierarchy of speech value.[37] Speech that relates to democratic values is at the top of this hierarchy.[38] Baroness Hale in *Campbell v MGN Ltd* explained the position as follows:[39]

> There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The

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[34] *Adam v Ward*, above n 2, at 319 per Lord Findlay LC, at 324 per Lord Dunedin, and at 343 per Lord Atkinson; *Harbour Radio Pty Ltd v Trad*, above n 12, at [120].

[35] *Norton v Hoare (No 1)* (1913) 17 CLR 301 (HCA) at 318 per Barton ACJ as quoted in *Harbour Radio Pty Ltd v Trad*, above n 12, at [26].

[36] *Harbour Radio Pty Ltd v Trad*, above n 12; and *Penton v Calwell*, above n 10.

> free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all.

[76] It is therefore relevant that Mr Craig's intention, at least in part, was to speak out against what he saw as the tactics of "dirty politics "in New Zealand, which he believed to be destructive to the fabric of New Zealand's democracy. Whether or not Mr Craig was correct in his view is not a matter I need to determine.

[77] Mr Craig was the leader of the Conservative Party, which was the fifth-highest polling party in New Zealand in the 2014 general election. The context in which the privilege is asserted is therefore clearly political and the issues involve governance and democratic values, both of which are "core" values under s 14 of the New Zealand Bill of Rights Act 1990.[40] It has been recognised that there is a general public interest in the actions and qualities of a current or aspiring politician insofar as they affect the ability or capacity of the person to meet their responsibilities as a politician.[41] There is also a "transcendent public interest in the development and encouragement of political discussion" which "extends to every member of the community".[42]

[78] Although it is arguably of less relevance, I also accept Mr Mills' submission that Mr Williams was himself actively engaged in the political world. In 2011, he was the national spokesperson for the "Vote No" MMP referendum campaign. He subsequently founded, and is the Executive Director of, the Taxpayer's Union. During the relevant period he frequently appeared in the media and was retained by some media outlets for commentary roles.

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37 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [132] per Gault P and Blanchard J, and at [235] per Tipping J; *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [243]–[247] per Thomas J; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 at [21]; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 (HL) at [148] per Baroness Hale.

38 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 312; *Lange v Atkinson* [2000] 1 NZLR 257 (PC) at 260; *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [14] per Elias CJ; For similar statements in the United Kingdom see: *R v Shayler*, above n 37,at [21]; in Australia see *Monis v The Queen* [2013] HCA 4, (2013) 249 CLR 92 at [60]; and in Canada see: *Harper v Canada* 2004 SCC 33, [2004] 1 SCR 827 at 828–829.

39 *Campbell v MGN Ltd*, above n 37, at [148].

40 Rishworth, above n 38, at 312; *Lange v Atkinson (No 1)*, above n 6, at 458, 462–464 and 468; *Lange v Atkinson*, above n 38, at 260.

41 *Lange v Atkinson*, above n 6, at 468.

42 *Lange v Atkinson*, above n 38, at 260.

[79] Taking all of these matters into account, I am satisfied that Mr Craig's statements in reply were made to an audience with a proper interest in receiving them.

Was Mr Williams responding to an attack by Mr Craig on Ms MacGregor?

[80] I now turn to address an argument advanced by Mr Romanos to the effect that the statements were not made on occasions of qualified privilege because it was Mr Craig who first attacked Ms MacGregor. Mr Williams then simply responded to that attack, in Ms MacGregor's defence. Although this proposition was not pleaded, I granted leave to make the necessary amendments[43] and considered the argument on its merits.

[81] There is Australian case law to the effect that those who initiate an attack, and are then the subject of a reply, cannot claim privilege for any "riposte" or response to that reply.[44] The reason for this is that allowing "an initial defamer to have a right of reply to the retort of the victim would defeat the policy upon which the privilege … is founded".[45] Allowing a right of reply in such circumstances would enable the initial defamer to defame the victim twice. This principle has not yet been judicially considered in New Zealand, and it has been observed that, although it has been recognised in Australia, "the limits of this doctrine have not yet been clearly established".[46]

[82] It is not necessary in this case, however, to embark on a detailed analysis of the limits of the doctrine. In my view, the facts I have outlined above do not support the contention that Mr Williams was simply responding to an attack by Mr Craig on Ms MacGregor.

[83] The sauna interview on 8 June 2015 is the event that Mr Williams relied on in his evidence as the event that formed the basis of Mr Craig's alleged attack on Ms MacGregor, which Mr Williams then responded to. As I have noted above, in

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43 Ruling No 7, above n 5.

44 Mullis and Parkes, above n 1, at [14.52]; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1219]–[1225]; *Echo Publications Pty Ltd v Tucker* [2007] NSWCA 73 at [78]–[82].

45 *Kennett v Farmer* [1988] VR 991(VSC) at 1003–1004.

46 *Echo Publications Pty Ltd v Tucker*, above n 44, at [80].

the sauna interview, Mr Craig asserted that Ms MacGregor's Press Secretary role had been job-shared to reduce the stress on her. He implied, in effect, that Ms MacGregor had resigned due to the job being too much for her (although those were not his words). Ms MacGregor was deeply upset at such a suggestion being made, and saw it as casting aspersions on her professional abilities.

[84] The difficulty with the submission that the sauna interview somehow justified Mr Williams' actions (as a reply to an attack on Ms MacGregor) is that Mr Williams' own attack had commenced well prior to the sauna interview. By 8 June 2015, Mr Williams had already spoken with Messrs McVicar, Dobbs and Day. He had also made various allegations, in late May, to Ms Rankin. Sometime in early June he made similar allegations to Mr McCoskrie.

[85] I further note that Mr Williams' conduct would likely fail to meet the relevance threshold required for a response to an attack, given the fairly narrow scope of the comments made by Mr Craig in the sauna interview. In particular, the various allegations of sexual harassment that Mr Williams made did not engage with Mr Craig's key assertion in the sauna interview, which was that Ms MacGregor's position had been job shared to relieve her stress. This was the statement that caused Ms MacGregor particular concern.

Is the reasonableness of the response relevant to determining whether the occasion is one of qualified privilege?

[86] Mr Romanos also submitted that the Remarks and Leaflet should not be recognised as being made on occasions of qualified privilege, because they constituted a totally disproportionate response to Mr Williams' attack on Mr Craig in terms of their content. In essence, Mr Romanos submitted that Mr Craig's response was unreasonable.

[87] Provided a response is relevant, however, the fact that it is excessive or unreasonable does not prevent an occasion of privilege arising. Rather, an excessive or unreasonable response is a matter that may properly be taken into account by the jury when determining whether the privilege has been lost, as it goes to malice

(or, in New Zealand, ill will).[47] As Kiefel J observed in *Harbour Radio Pty Ltd v Trad*:[48]

> A question which therefore arises on this aspect of the appeal is whether some test of reasonableness of response is to be applied to limit the scope of the privilege in a case of this kind. The law clearly requires that defamatory statements made in response to an attack be relevant to the allegations made in the attack or to the vindication of a defendant's reputation. Statements which seem excessive in their language or content are to be considered in connection with the question of the defendant's malice, in respect of which the plaintiff bears the onus of proof. A consideration of the operation of the privilege and its relationship with the question of malice does not, in my view, provide support for a requirement additional to that of relevance, in order for the privilege to apply.

[88] I accordingly did not take this issue into account in determining whether the statements were made on occasions of privilege. Rather, I directed the jury in my summing up that this was a matter that they could take into account in deciding if the privilege had been lost. I note again, however, that this is a further example of the demarcation line between the role of Judge and jury being a fairly fine one in the context of reply to an attack privilege, as evidenced by the fact that Mr Romanos viewed this issue as relevant to whether an occasion of privilege arose, whereas Mr Mills saw it as one going to the loss of privilege. Further, it is apparent from the case law that even counsel (and occasionally Judges) can struggle with the distinction between the *relevance* of a response and its *reasonableness*. No doubt drawing such fine distinctions is even more difficult for a jury.

Summary and conclusion

[89] For the reasons outlined I was satisfied that:

(a) Mr Williams' conduct during the first half of 2015, based on undisputed facts, constituted an attack on Mr Craig's character and reputation;

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[47] Mullis Parkes, above n 1, at [14.64]. See also *Adam v Ward*, above n 2, at 339 per Lord Atkinson; see also 334–335.

[48] *Harbour Radio Pty Ltd v Trad*, above n 12, at [108]. While the majority at [27] and [29] appeared to say that reasonableness is an element, they did not. These statements were in relation to the submissions by either party. The majority said "Neither submission should be accepted"(at [20]).

(b) Mr Craig's reply (as set out in the Remarks and the Leaflet) was relevant to the attack; and

(c) The Remarks and the Leaflet were published to an audience who had an interest in receiving them.

[90] I rejected Mr Romanos' submission that Mr Craig had mounted the original attack (on Ms MacGregor) and that Mr Williams had simply been responding to that.

[91] I determined that the issues of whether Mr Williams' attack was justified and whether Mr Craig's response was excessive or unreasonable were issues for the jury to consider, in the context of deciding if the qualified privilege has been lost. I summed up to the jury on that basis.

[92] In light of these various findings, it necessarily followed that the Remarks and the Leaflet were published on occasions of qualified privilege. I ruled accordingly.

Katz J