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Whaleoil, ex MP, PR man to face jury trial

Whaleoil blogger Cameron Slater has failed to get his defamation case knocked out. Photo: Getty Images

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Controversial blogger Cameron Slater, public relations manCarrick Graham and former MP Katherine Rich have failed in a court bid to knock out a defamation claim by three health experts.

The High Court would not strike out the case, which was prompted by revelations in the 2014 book *Dirty Politics*, and said the defamation action could yet proceed to a jury trial.

Slater, founder of the Whaleoil blog, is accused by Dr Doug Sellman and two other health academics Boyd Swinburn and Shane Bradbrook, of defaming them in a series of posts on his site.

They allegeGraham, son of the former National cabinet minister Sir Douglas Graham, arranged for the posts to be published on the Whaleoil site for a fee and was in turn paid by the ex-National MP Rich through her employer the Food and Grocery Council, for having the pieces posted.

The case claims Graham wrote one of the pieces himself, “authored, commissioned or procured Slater to publish the others and authored and published” comments made about the articles.

Justice Matthew Palmer, who declined to strike out the case on the grounds of it being out of time, being the honestly-held opinion of the writer or as having qualified privilege as part of robust political debate about alcohol, sugar, fat and tobacco, suppressed the “alleged defamatory statements” until after a trial.

But he said: “In general they are personally abusive about the plaintiffs as well as their positions on matters of public policy relating to the regulation of alcohol, tobacco, sugar and fat.”

Sellman is a Professor of Medicine and director of the National Addiction Centre at the University of Otago; Swinburn is a Professor of Population Nutrition and Global Health at the University of Auckland and Bradbrook is a senior public health advisor at Regional Public Health.

They disputed the defences put up by Slater, Graham and Rich: “If the posts were expressions of opinion, the opinions were not genuine in that they were published by Slater, Graham and FCL [Graham’s PR firm Facilitate Communications Ltd] without an honest belief in the truth of the facts underlying them or with recklessness or indifference as to their truth.”

They argued the blogger, PR man and industry chief were “predominantly motivated by ill-will” towards the academics.

Justice Palmer was asked by Slater, Graham, Rich and the Food and Grocery Council to strike out the case.However he determined the actions were not ‘time-barred’ despite being brought beyond a two-year period after first publication - because they continued to be published ‘multiple-times’ by still being available on the Whaleoil website. Defence lawyers had argued a ‘single-publication’ rule should be applied, thus making the defamation action too late.

The judge said: “If the blog is still up on the web and the publisher cannot show the post has not been accessed in the past two years, I see no reason why a defamed person should not be able to sue for the continuing publication of a blog in order to vindicate their reputation. Accordingly, I consider the multiple publication rule is the law in New Zealand.”

He noted: “A defendant may be able to disprove the reading or listening that is essential to publication. That would mean an element for defamation is not present, as reputation would not be harmed. That can be raised at trial, on the basis of evidence … There is no evidence before me that demonstrates the blogs here have not been read.”

Justice Palmer also found that Slater’s republishing of hyperlinks to several earlier posts amounted to re-publications of them. “That is an additional reason not to strike out those causes of action.”

Sellman, Swinburn and Bradbrook’s lawyers told the court they could not have known of the involvement of Graham, Rich and the Food and Grocery Council until the publication of *Dirty Politics*.

All the defendants also tried to strike out the case as an abuse of court process which would be a disproportionate waste of resources.

Rich’s lawyer, Willie Akel, said the costs of the proceedings to the parties and to the Court were disproportionate to any benefit gained.He argued the plaintiffs’ receipt of public funding called for public scrutiny of people with a high profile who had used emotive and pejorative language in public debates themselves.

But the judge found: “The right of a person or a group to access the courts in order to vindicate their legal rights has a high constitutional value in New Zealand, against however powerful or popular a defendant.”

Justice Palmer believed there should be, in the common law of defamation, a minimum threshold of seriousness of damage to reputation. While it might not have to be serious harm, it had to be more than minor harm. “I consider a threshold of more than minor harm to reputation should be required to found an action for defamation in New Zealand.”

He said there was no difference in the legal test applied to blogs and other media, and that “the tendency of political debate on the internet often to be expressed in hyperbolic and sarcastic terms does not lower the legal threshold for what is capable of being defamatory”.

He found some of the terms used by Slater’s blogs about the three plaintiffs would be considered by a reasonable person to mean more than just that they were being funded publicly, as claimed by defence lawyers. “For each, a derogatory meaning is part and parcel of the ordinary meaning of these terms in New Zealand. That seems likely to be why they were used. The reader is likely to think worse of their subject in a more than minor way.”

Of the 161 pleaded defamatory meanings, Justice Palmer struck out just 21.

He declined to strike out a cause of action against Rich as “speculative and a misuse of process”. And he would not strike out action against Rich because it was not capable of “founding legal liability against her.”

“If the pleadings are sustained, Rich and the FGC may have assisted Slater and or Graham, pursuant to a common design with them, to do an act which turns out to be defamatory.”

He concluded: “Because this proceeding could be the subject of a jury trial, and it is important the jury’s minds not be prejudiced, as the parties requested, the contents of the allegations in pleadings should not be publicly reported.”