IN THE COURT OF APPEAL OF NEW ZEALAND

CA250/2017
[2018] NZCA 31

BETWEEN	JORDAN HENRY WILLIAMS Appellant
AND	COLIN GRAEME CRAIG Respondent

Hearing:	21 and 22 November 2017 (further submissions received 15 and 18 December 2017)
Court:	Harrison, Miller and Gilbert JJ
Counsel:	P A McKnight and A J Romanos for Appellant S J Mills QC, JWJ Graham and T F Cleary for Respondent
Judgment:	5 March 2018 at 4.00 pm
Reissued:	8 March 2018 (effective date of judgment remains 5 March 2018)

JUDGMENT OF THE COURT

A The appeal is allowed in part. The order made in the High Court for retrial of the appellant's claims for liability and damages is set aside.

B Judgment is entered for the appellant in accordance with the jury's verdict on liability. An order is made directing a retrial of the appellant's claim for damages.

C In all other respects the appeal and cross appeal are dismissed.

D The respondent is ordered to pay the appellant 50 per cent of costs as calculated for a standard appeal on a band A basis with usual disbursements. There is no order for costs on the cross-appeal. All costs

issues arising in the High Court are to be determined in that Court in accordance with this judgment.

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] Jordan Williams is the founder and executive director of the New Zealand Taxpayers' Union. Colin Craig was the founding leader of the Conservative Party of

New Zealand. Mr Williams is a former supporter of the Conservative Party and its political philosophy of fiscal and social conservatism.

[2] Mr Williams claimed Mr Craig defamed him in statements made in two sequential publications in 2015. Mr Craig's statements were made in response to Mr Williams' publicised allegation that Mr Craig had sexually harassed his former secretary. Mr Williams sued Mr Craig for damages in the High Court. Mr Craig ran the affirmative defences of truth, honest opinion and qualified privilege. A jury found for Mr Williams following a trial of nearly four weeks. It awarded him $1.27 million. It was the largest defamation damages award in New Zealand's legal history.

[3] On Mr Craig's application, Katz J, the trial judge, declined to enter judgment for Mr Williams in accordance with the jury's verdict. She later set aside the verdict on the ground that the damages award was excessive. She ordered a new trial of Mr Williams' claim on both liability and damages,[1] but declined Mr Craig's application to enter judgment in his favour.[2]

[4] Mr Williams' appeal against the order for a retrial raises the issues of whether the Judge erred in: (a) setting aside the verdict; and (b) if not, whether the order should have been for a retrial on both liability and damages or limited to damages only, leaving the liability verdict intact.

[5] Mr Craig's cross-appeal against the Judge's dismissal of his application for judgment also raises two primary issues: (a) did the Judge materially misdirect the jury on his defence of qualified privilege; and (b) was the jury's adverse verdict on that defence unsupported by the evidence?

[6] We shall address these questions against a common factual background, bearing in mind that certain grounds of appeal must be resolved by drawing "inevitable or proper inferences from the jury's decision".[3] A degree of judicial reconstruction is both permissible and necessary where an appellate court is called upon to review a

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1 *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215 [Retrial decision] at [109].
2 At [96] and [110].
3 *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024 [*Grobbelaar*] at [8] per Lord Bingham and at [75] per Lord Scott.

decision which, of its nature, contains no reasons or elaboration. Our function is to interpret the jury's decision without intruding into the determination of specific factual issues.[4]

Facts

[7] We can summarise the relevant facts briefly, returning where necessary to address particular issues. The facts are outlined more fully in Katz J's judgment,[5] and extensively in her reasons for ruling that the statements were published on occasions of qualified privilege.[6]

[8] Rachel MacGregor was Mr Craig's secretary while he was leader of the Conservative Party. She resigned suddenly in September 2014, two days before the general election. The Conservative Party failed to secure a seat in the House.

[9] Later that year Ms MacGregor confided in Mr Williams that Mr Craig had sexually harassed her, including by: (a) sending her unsolicited letters and cards of a deeply personal nature with romantic poetry and compliments about her physical and personal attributes; (b) falling asleep on her lap once during the 2011 general election campaign, and telling her subsequently that he dreamed or imagined himself lying or sleeping on her legs which helped him sleep; and (c) stopping salary payments because of a dispute over her pay rate which she believed was attributable to her failure to reciprocate his romantic interest.

[10] Ms MacGregor alleged that the nature of Mr Craig's harassment started off as comments and shoulder touches but progressed to kissing and physical affection on the night of the 2011 election. Ms MacGregor said Mr Craig sent her inappropriate text messages; would change his clothes in front of her and say he wanted her to move into an apartment above his office; had installed a curtain in her office which he would often close when they were together; and had entered her hotel room uninvited and without knocking, leaving her uncomfortable about staying in the same building when they travelled together.

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4 At [26] per Lord Bingham.
5 Retrial decision, above n 1, at [4]–[21].
6 *Williams v Craig* [2016] NZHC 2496, [2016] NZAR 1569 [Reasons for Ruling 7] at [21]–[56].

[11] It is material that throughout Mr Craig denied any impropriety with Ms MacGregor. It was, he said at trial, an emotionally close and an intense mutual friendship but they "kept it in that purely brother/sister relationship". While denying any sexual harassment, he acknowledged that his behaviour had been inappropriate at times for a married man. He pointed out there had been no intimate or inappropriate physical contact other than on election night 2011. Materially, also, Ms MacGregor acknowledged Mr Craig did not send her any sexually explicit text ("sext") messages.

[12] Mr Williams agreed to receive Ms MacGregor's disclosures in confidence. She had filed a claim with the Human Rights Review Tribunal alleging sexual harassment by Mr Craig. The claim was settled at a mediation in May 2015 and was thus never determined. The parties reached a confidential agreement acknowledging a degree of inappropriate conduct. Mr Craig apologised to Ms MacGregor who withdrew her complaint. Mr Craig did not pay Ms MacGregor any money apart from $16,000 due on outstanding invoices for wages. He did, however, forgive her liability on a $20,000 loan. Both parties agreed not to make any media comment.

[13] Initially, Mr Williams maintained Ms MacGregor's confidence. But as time went by, after the May 2015 mediation, he started to divulge details of Mr Craig's alleged sexual harassment of Ms MacGregor to senior figures in the Conservative Party. In Mr Williams' view, Mr Craig was not fit for leadership. As the Judge found, he mounted a campaign to remove Mr Craig.[7] By then, Mr Williams and Ms MacGregor had become romantically involved. Katz J was satisfied that Mr Williams' accounts to others of Mr Craig's alleged sexual harassment of Ms MacGregor were more serious than her account given in evidence at trial.[8]

[14] Katz J outlined Mr Williams' actions in her retrial decision as follows:

> [13] … He told [senior Conservative Party figures] 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.

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7 Retrial decision, above n 1, at [12].

8 At [15].

> [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 [John] Stringer, said that Mr Williams told him that Mr Craig had sexually assaulted Ms MacGregor 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] Ms MacGregor became suspicious that Mr Williams was breaching her confidence. She requested him by email not to disclose Mr Craig's correspondence which she had given him and that he return any copies of that correspondence that he might have taken. "Do not copy them", she instructed, "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 ignored her and persisted.

[16] The Judge's retrial decision narrated subsequent events as follows:

> [18] That same morning [19 June 2015] 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.
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> [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."

[17] Mr Craig stepped down from leadership of the Conservative Party on 19 June 2015. He then went on the counter-offensive against Mr Williams and others. He called a press conference on 29 July 2015 when he read out this statement (the Remarks):

…

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.*

The italicised passages were, among others, the foundation for Mr Williams' allegations of defamation.

[18] Mr Craig made available for the press a leaflet (the Leaflet) which, about a week later, he arranged to be distributed to 1.6 million households. The Leaflet stated materially that:

> 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.
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> *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.*
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> *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.*
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> (Footnotes omitted.)

Again, the italicised passages were the foundation for Mr Williams' allegations of defamation.

[19] Mr Craig produced and distributed the Leaflet at a personal cost of over $250,000. It was 11 pages long, and printed in colour with photographs and cartoons of the various players including Messrs Williams and Craig. The page containing the table of contents recited the Ninth Commandment's edict: "Thou shalt not bear false witness." The rest of the Leaflet was divided into four distinct sections. The first has been largely set out in the previous paragraph. The second narrated 14 alleged lies attributed largely to Mr Williams. The third was described as "The Campaign of Lies." The fourth was described as an "Exclusive Interview: With Mr X."

[20] The Mr X interview assumed some importance in the trial. Mr X's identity was anonymous but he was portrayed in the Leaflet as somebody closely associated with Mr Craig and others. The interviewer was quoted as asking Mr X questions of a leading nature, favourable to Mr Craig. Mr X's reported answers were extensive, and also favourable to Mr Craig. One example of the questions is in the form of a statement:

> It seems pretty clear that the allegations against Craig are false. That is to say he never harassed MacGregor, there was no sexting, he never paid her out, there is no victim, and no second victim?

Later the interviewer is reported as asking:

> Ok, but what if the allegations are false as we have laid out? Craig has always been honest in the past. If he is honest this time it means he has been defamed. What if I were to tell you that Craig is thinking of going public not only with the full story but also that he is planning legal action against Stringer, Slater and Williams?

[21] The fictional interview assumed importance at trial in this way. Mr Craig admitted that the purported interview was a fabrication. There was no Mr X. Or, to the extent that Mr X did exist, he was Mr Craig who claimed he was merely articulating "information and viewpoints" of others. As noted, Mr Craig pleaded the defence of qualified privilege; that is, his statements were protected from liability because they were made on privileged occasions.[9] Mr Williams countered by issuing a notice under s 41 of the Defamation Act 1992 (the s 41 Notice), claiming that in publishing the interview Mr Craig made representations which were knowingly dishonest and deceitful or he was reckless in that regard.[10] The s 41 notice claimed that Mr Craig was predominantly motivated by ill will, defeating his right to the protection of qualified privilege. The particulars given in the notice are prolix. However, its essence was that Mr Craig fabricated the existence and contents of the Mr X interview as part of his strategy designed to deceive the general public into believing he was a man of integrity, honesty and probity in contrast to his accusers.

[22] One other point should be noted. The Whale Oil blog published in June 2015 may have been the first public airing of allegations that Mr Craig had sexually harassed Ms MacGregor. But it emerged at trial that Conservative Party board members were concerned as early as 2012 about the nature of their relationship. These concerns well preceded publication of any of Mr Williams' allegations. The issue was the subject of rumours before and during the 2014 general election.

High Court

[23] Mr Williams' statement of claim alleged that Mr Craig had defamed him both in the Remarks and in the Leaflet. In summary, Mr Williams claimed that the words used in both the Remarks and the Leaflet meant and were understood to mean in their natural and ordinary meaning that: Mr Williams was a party to a "strategy", "agenda" and "web of deceit" to spread lies about Mr Craig for the deliberate purpose of defaming him; that Mr Williams had lied by falsely alleging Mr Craig had sexually harassed one or more people; and by making a number of other false allegations. We note that the three particular lies identified were that: (a) Mr Craig had sexually

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9 We analyse the nature of the defence later in this judgment.

10 The notice was also filed pursuant to s 39 for the purpose of countering Mr Craig's alternative defence of honest opinion but that defence does not require further consideration here.

harassed someone; (b) Mr Craig had paid victims of his harassment to silence them; and (c) he had sent sexually explicit texts or "sexts". Mr Williams also pleaded Mr Craig's words meant and were understood to mean that he is dishonest, deceitful, cannot be trusted and lacks integrity.

[24] Mr Craig filed a comprehensive defence. He stood by his statements. He pleaded the affirmative defences of truth and, as noted, honest opinion, and qualified privilege. He expanded upon the factual foundation for the allegations made in both his publications with a schedule of deceitful or dishonest steps taken by Mr Williams to fabricate stories for circulation on the Whale Oil blog site about political opponents. Mr Williams countered with the s 41 Notice. The Judge ruled at the end of the evidence that Mr Craig's statements were published on occasions of qualified privilege because he was entitled to reply to a prior attack on his character, for which she later gave reasons.[11] We shall return to this issue.

[25] As noted, the trial lasted nearly four weeks. Each side called a number of witnesses. Much of the evidence was of questionable relevance to the real issues. Indeed, some of it was plainly inadmissible. We refer to Mr Williams' gratuitous insults about Mr Craig's character, which had no place in a trial of this nature. For example, he called Mr Craig a "prick". On the other side, there was the evidence of left-wing blogger Martyn Bradbury, called by Mr Craig. During cross-examination by Mr McKnight, Mr Bradbury described Mr Williams as a "venomous spider", "political sadist" and a "hyena".

[26] While inexcusable, this evidential hyperbole reflected the apparent evolution of the trial. There is no question that Mr Craig's statements about Mr Williams were defamatory. The real issues for the jury were whether the statements were true, as Mr Craig asserted or, if not, whether Mr Craig lost his privilege because he was motivated by ill will or malice as it is popularly known. It is common ground, as the Judge found, that the allegation lying at the heart of Mr Williams' initiating attack on Mr Craig's character and reputation was that he had sexually harassed

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[11] *Williams v Craig* HC Auckland CIV-2015-404-1845, 26 September 2016 (Ruling 7); and Reasons for Ruling 7, above n 6.

Ms MacGregor.[12] The trial was in large part about its truth. Ms MacGregor gave extensive evidence in support.

[27] Mr Craig's defensive strategy at trial was based largely on proving the truth of his statements that Mr Williams was a liar by showing his bad reputation for being dishonest, deceitful, lacking in integrity and untrustworthy on issues of political interest. Mr Williams had, Mr Craig asserted, a known poor history. He was involved in initiating, coordinating and publishing derogatory, abusive and salacious information about public figures, designed to cause them embarrassment and political harm.

[28] Mr Craig's defence and counter-attack were based on these factual premises. His evidence, and his counsel's cross-examination of Mr Williams and his witnesses, was directed at proving Mr Williams' bad character and reputation, thereby disproving the allegation of sexual harassment. Mr Craig mounted a very aggressive counter-offensive against Mr Williams. He played for high stakes and lost. It is common ground that the jury's verdict reflected its wholesale rejection of Mr Craig's defences and of his credibility. It was satisfied that his statements were predominantly motivated by malice towards Mr Williams so as to deprive himself of any legal privilege. The damages award also reflects the jury's dissatisfaction with Mr Craig's use of the trial process, not only to deny Mr Williams' core allegation of sexual harassment but also to perpetuate an unrelated, and thus diversionary, attack on Mr Williams' general character and reputation.

[29] Both counsel addressed the jury at length, bringing some focus to the issues. Katz J also delivered a comprehensive and careful summing-up.[13] With counsel's agreement, she gave the jury an extensive question trail. It is notable that neither side sought specific answers to issues or special verdicts. After deliberating the jury returned its general verdict on liability and damages.

[30] Mr Craig's application to set aside the jury's verdict and for judgment was based on three grounds:

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12 Retrial decision, above n 1, at [89].

13 *Williams v Craig* HC Auckland CIV-2015-404-1845, 29 September 2016 [Summing-up].

(a) the award of damages was excessive, as the Judge found;[14]

(b) there was insufficient evidence to support the jury's findings that Mr Craig was motivated predominantly by ill will or otherwise took improper advantage of occasions of qualified privilege or, alternatively, that the jury's finding was against the weight of evidence (the Judge rejected both alternatives);[15] and

(c) the Judge misdirected the jury on qualified privilege in numerous aspects; she accepted that she misdirected in one respect but did not determine whether it was material.[16]

Damages

General principles

[31] In *John v MGM Ltd*, Sir Thomas Bingham MR summarised the principles relating to compensatory damages in defamation as follows:[17]

> The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's person or personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place.

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14 Retrial decision, above n 1, at [109].
15 At [77]–[84].
16 At [103].
17 *John v MGN Ltd* [1997] QB 586 (CA) at 607–608; discussed in *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) [*Quinn*] at 33–38 per Cooke P. See also *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [48]–[49].

[32] We add this observation: a favourable verdict on liability is the successful plaintiff's primary vindication. Its primacy is acknowledged in the introduction by s 24 of the Defamation Act 1992 of the plaintiff's right to seek only a declaration of liability with a consequential right to indemnity for an award of solicitor and client costs. The liability verdict is itself public recognition that a statement or statements made by a defendant is false and defamatory. It is that verdict which restores the plaintiff's reputation (which may explain the tradition, followed at least by politicians, of donating damages awards to charity). We emphasise that the function of general damages is solely compensatory. They must bear a "relation to the ordinary values of life [and not operate] as a road to untaxed riches".[18] Assessment of compensatory damages is by its very nature a subjective exercise. But it must be kept within reasonable bounds.

[33] Compensatory damages may be aggravated where a jury is satisfied the defendant has acted towards the plaintiff in a manner which compounds or increases the effect of the original defamation.[19] The defendant's behaviour after the original publication, including in conducting his or her defence, can operate in this way.[20] That principle featured importantly in this trial, as we shall explain.

[34] Punitive damages fall into a different category. Their purpose is to punish a defendant who has "acted in flagrant disregard of the rights of the plaintiff".[21] As Katz J noted, punitive damages awards are relatively rare and are only justified where there is a need to punish the defendant beyond the award for general damages.[22]

[35] Mr Williams' claim for damages of $1.27 million had two principal components, one for each publication. He claimed compensatory damages of $400,000 and punitive damages of $90,000 for the Remarks, and compensatory damages of $650,000 and punitive damages of $130,000 for the Leaflet. The jury awarded Mr Williams the full amount of his claim.

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18 *John v MGN Ltd*, above n 17, at 611.
19 *Siemer v Stiassny*, above n 17, at [51]–[56].
20 *John v MGN Ltd*, above n 17, at 611.
21 Defamation Act 1992, s 28.
22 Retrial decision, above n 1, at [41].

[36] Katz J was satisfied that the jury's verdict should be set aside on a number of grounds. She concluded that: (a) the award significantly exceeded any previous defamation award in New Zealand history;[23] (b) the jury failed to take into account that several of Mr Craig's statements which Mr Williams alleged were false or defamatory were in fact true or at least substantially true;[24] (c) the jury failed to take into account that Mr Craig's statements were published in response to an attack on his own reputation;[25] (d) the jury double-counted for the damage to reputation caused by the Remarks and the Leaflet;[26] and (e) the jury erred in assessing punitive damages.[27]

Comparative awards

[37] In determining the boundaries of a reasonable award, courts are guided predominantly by the experience of other verdicts.[28] Katz J undertook this comparative analysis.[29] It disclosed the damages awarded by the jury to Mr Williams were considerably higher than the inflation-adjusted awards considered by this Court in three cases and by the High Court in two others.[30] The award was "outside the range of what could reasonably be regarded as appropriate to the circumstances of the case".[31] We agree with Katz J that the damages were "out of all proportion to the injury suffered" by Mr Williams.[32] It is unnecessary for us to repeat that same analytical exercise, except to refer to two cases. Both justify the Judge's conclusion.

[38] The highest damages award in New Zealand was in *Korda Mentha (formerly Ferrier Hodgson) v Siemer*.[33] Mr Stiassny, a partner in Korda Mentha, was an insolvency practitioner. He had acted as receiver for a company in which Mr Siemer was a shareholder. Mr Siemer published sustained allegations of serious criminality

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23 At [42]–[48].
24 At [49]–[57].
25 At [58]–[64].
26 At [65]–[68].
27 At [69]–[75].
28 *Quinn*, above n 17, at 45 per McKay J.
29 Retrial decision, above n 1, at [42]–[48].
30 *Korda Mentha (formerly Ferrier Hodgson) v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008; aff'd *Siemer v Stiassny*, above n 17. See also *Quinn*, above n 17; *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA) [*Holloway*]; *Columbus v Independent News Auckland Ltd* HC Auckland CP600/98, 7 April 2000; and *Karam v Parker* [2014] NZHC 737.
31 Retrial decision, above n 1, at [35] quoting *Quinn*, above n 17, at 52 per McGechan J, in turn citing *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.
32 At [34] and [57] applying *News Media Ownership v Finlay* [1970] NZLR 1089 (CA) at 1099.
33 *Korda Mentha (formerly Ferrier Hodgson) v Siemer*, above n 30.

against Mr Stiassny, comparing him to Saddam Hussein. Cooper J found that Mr Siemer knew his publications were false but he persisted with the express objective of bringing Mr Stiassny and his firm into disrepute. He published his defamatory statements on billboards and websites and undertook sticker and poster campaigns. The Judge found that Mr Siemer had deliberately and vindictively sought publicity and disregarded Court orders.[34]

[39] This Court dismissed Mr Siemer's appeal and upheld Cooper J's award of $825,000, which included punitive damages of $25,000, describing it as the worst case of defamation in the Commonwealth.[35] Mr Siemer's defamation of Mr Stiassny was unprecedented in terms of its length and severity, and the extent to which he defied the rule of law.[36] Cooper J's award of $25,000 for punitive damages was noted as demonstrating "significant restraint".[37]

[40] In *Truth (NZ) Ltd v Holloway* the Truth newspaper falsely implied that the Hon Philip Holloway, the Minister of Industries and Commerce in the Second Labour Government, was corrupt.[38] It reported an unverified statement that third parties who wanted information about import procedures should "see Phil and Phil would fix it".[39] The statement meant that a Minister of the Crown was prepared to act dishonestly in connection with issuing import licences.[40] This Court dismissed the newspaper's appeal and upheld the jury's defamation award of £11,000 — inflation-adjusted to the figure of $478,381 in today's terms.[41] There was no evidence to support an inference that Mr Holloway had "acted otherwise with complete propriety and good faith" where the newspaper ironically made no attempt to justify the truth of its allegations.[42]

[41] The circumstances of this case are much less serious than those of *Siemer v Stiassny* and *Holloway*. We acknowledge the jury's finding that Mr Craig's statements about Mr Williams were false and defamatory and would tend to lower his

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34 At [60].
35 *Siemer v Stiassny*, above n 17, at [85].
36 *Korda Mentha (formerly Ferrier Hodgson) v Siemer*, above n 30, at [31].
37 *Siemer v Stiassny*, above n 17, at [75].
38 *Holloway*, above n 30.
39 At 78.
40 At 79.
41 Retrial decision, above n 1, at [42(e)].
42 *Holloway*, above n 30, at 80.

standing in the estimation of right-thinking members of society generally. Its verdicts must be respected. We acknowledge also the gravity of Mr Craig's attack on Mr Williams' reputation, the nationwide and repetitive circulation of Mr Craig's defamatory comments, Mr Craig's persistence with his defence of truth and attack on Mr Williams' reputation, and Mr Craig's refusal to apologise. However, some perspective is necessary. We refer to two particular contextual factors.

[42] First, Mr Williams cannot point to any special harm. He is not a public figure. He is the leader of a little-known political group. Nor was he defamed in performing his professional duties as a lawyer. He was defamed in response to his actions taken with the aim of removing Mr Craig from his office as leader of a small political party. Whether Mr Williams' objective was purely personal or linked to his role as a lobbyist for fiscal conservatism is of no real moment. His tactics — such as private messaging and the use of a pseudonym — were covert so as to keep himself out of the public eye.

[43] The trial process revealed that Mr Williams had accused Mr Craig of sexual harassment against Ms MacGregor but himself harboured offensive attitudes towards women. Mr Williams' Facebook exchanges with Mr Slater, on which he was recalled for cross-examination at trial, were sexually crude and disparaging of women, particularly those of a different political leaning. In a written apology, which he read aloud at trial, Mr Williams accepted that his messages portrayed him in a poor light. It may fairly be observed that the trial process exposed serious flaws in the characters of both protagonists.

[44] Second, in order to find that Mr Craig acted with ill will in responding to Mr Williams' attack, the jury must have found: Mr Craig had in fact sexually harassed Ms MacGregor; that Mr Craig did not genuinely believe otherwise; and that, as a consequence, Mr Craig's characterisation of Mr Williams as a liar for making the allegation was false to Mr Craig's knowledge and one in which he did not have a genuine belief.[43] The jury must also have found, as noted, that in making the wider attack on Mr Williams' reputation Mr Craig was predominantly motivated by ill will. However, given the centrality that the sexual harassment issue assumed at the trial, we

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[43] Retrial decision, above n 1, at [93]–[96].

find it likely that the jury's implicit finding of sexual harassment also dominated the damages award. That being so, Mr Williams' related allegations of being defamed by being called dishonest, deceitful and untrustworthy for making the allegation, assumed secondary importance. In a sense, Mr Craig's attack on Mr Williams became a collateral issue.

The jury's errors

(a) Claim for increased damages

[45] Four elements of the jury's award disclose the nature of its particular errors. The first arose from Mr Williams' increase of his claim during trial by $200,000. At the conclusion of the evidence Mr Williams was granted leave to amend his existing third amended statement of claim to increase each of his claims for compensatory damages for the Remarks and the Leaflet by $100,000. He relied on a number of factors arising from Mr Craig's conduct of his defence. The two most prominent were Mr Craig's failure to provide a factual basis for alleging that Mr Williams was involved in a smear campaign against the former head of the Serious Fraud Office (the SFO) — Mr Craig's first statement of defence had included an allegation that Mr Williams was involved in the smear campaign but later versions of the defence withdrew it; and what the amended pleading described as his counsel's "offensive and embarrassing cross-examination" of Mr Williams on his sexist Facebook exchanges with Mr Slater. The aggregate amount of this increase, $200,000, was in itself a significant sum. Katz J referred to the SFO issue in the context of directions on malice. However, when directing on damages she referred only in passing to Mr Williams' cross-examination on the Facebook exchange. In our judgment, this amendment, and its consequences for damages, called for specific directions.

[46] By awarding Mr Williams the full amount of his claim, the jury must have included this additional $200,000 component. It must have decided that Mr Craig's decision to recall Mr Williams for cross-examination was ill-judged and that Mr Craig should have provided a factual basis for his allegation on the SFO issue. The jury must have decided that either or both aspects of Mr Craig's conduct aggravated the original defamation. It was open to the jury to allow for this factor.

[47] But this element of the award plainly went too far. On any objective view of the leading authorities, Mr Williams could not have expected more than $200,000 for the core element of a compensatory award before taking account of any aggravating features. Doubling that figure simply on account of decisions made by Mr Craig in conducting his defence cannot be justified. We can only infer that the jury viewed Mr Craig's conduct, particularly in raising the Facebook exchange, as an attempt to divert the trial's focus at a stage when it had formed an adverse view of Mr Craig's own character and credibility.

[48] Also, as we have noted, an award of general damages is designed to compensate for, among other things, reputational damage. The jury's award is evidence of its satisfaction that Mr Williams had suffered an injury to reputation. However, it would be artificial to ignore the Facebook exchange. Its existence and Mr Williams' attitudes towards women expressed in his messages to Mr Slater was unknown to those among whom he enjoyed a good reputation and the Facebook exchange did not constitute a specific instance of misconduct establishing that Mr Williams' "reputation is generally bad in the aspect to which the proceedings relate", as required by s 30 of the Defamation Act. But the Facebook messages were before the jury, and they reflect adversely on Mr Williams' character. A damages award should restore Mr Williams' reputation to the status it ought it to have enjoyed if this element of his character was known publicly. The law must be concerned with the reputation he deserved and compensate accordingly. The jury's award failed to recognise this factor.

(b) Truth

[49] The second error is reflected in Katz J's satisfaction that some of Mr Craig's allegations about Mr Williams had elements of truth.[44] Mr Williams' conduct relating to the defamatory statements justified imputations that he had been "dishonest, deceitful, and could not be trusted".[45] One striking example was Mr Williams' assertion to others that he had seen sext messages sent by Mr Craig to Ms MacGregor when in fact they never existed. The supporting evidence may not have been enough

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44 At [53].
45 At [56].

to establish Mr Craig's defence of truth. But the Judge was satisfied Mr Williams' conduct reflected adversely on his reputation and should have been reflected in the damages award.[46]

[50] While Mr Romanos referred us to evidence which was offered at trial to rationalise or explain away what were otherwise serious breaches of trust and dishonesty by Mr Williams, we are not satisfied that the Judge's findings were wrong. An award of the full amount of Mr Williams' damages claim without a reduction for this factor points to a material error. It suggests the jury focused solely on its underlying finding that Mr Craig lied about the sexual harassment claim when attacking Mr Williams' reputation without taking into account adverse elements of Mr Williams' conduct reflecting on his reputation.

(c) Punitive damages

[51] The jury's third error was in awarding of the full amount of Mr Williams' claim for punitive damages, totalling $220,000. To do so, the jury must have been satisfied that Mr Craig acted in flagrant disregard of Mr Williams' rights. But, on our view of the evidence, Mr Craig's breach was at the lower end of the relevant scale. It did not compare with Mr Siemer's egregious conduct — "ignoring injunctions and going to jail when found to be in contempt, and yet still carrying on" — which formed the basis for a punitive element of $25,000.[47] As Katz J pointed out, the award against Mr Craig was nine times higher than in that case.[48] It cannot possibly be upheld.

[52] Mr McKnight correctly notes that Mr Craig published the Leaflet while on notice from Mr Williams' lawyers that the Remarks were defamatory. Mr Craig's conduct may have been motivated by a belief that he would be better off politically if he followed through on his avowed intention to expose Mr Williams' poor reputation than if he did not.[49] Some allowance could justifiably be made for this aggravating factor within an award of punitive damages. But it remains the case that the award here is plainly excessive.

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46 At [57].
47 *Siemer v Stiassny*, above n 17, at [74]–[76].
48 Retrial decision, above n 1, at [48].
49 Compare *John v MGN Ltd*, above n 17, at 618–619.

(d) Double counting

[53] The fourth error is reflected by Katz J's finding that the award represented double counting.[50] She found that the initial damage to Mr Williams' reputation must have been sustained by the nationwide media coverage given to the Remarks. The jury compensated Mr Williams for this defamation by awarding $400,000. We agree with the Judge's view that "it is extremely difficult to see how *additional* damage to Mr Williams' reputation in the sum of $650,000 could be caused by what was largely a further publication [in the Leaflet] of the same defamatory imputations to a similar nationwide audience, unless there was a significant element of double counting".[51] While the national dissemination of print copies might have cemented the defamatory remarks in the minds of Mr Craig's audience, it cannot have caused separate reputational harm warranting a compensatory increase of more than 150 per cent. Again, any justifiable allowance would have to be modest.

Conclusion

[54] We agree with Mr Mills QC that the size of the award suggests the jury's particularly adverse judgment on Mr Craig's character, credibility and conduct of his defence. Mr Mills pitched it at the level of the jury's hatred for Mr Craig. Whatever epithet is used, we are satisfied that the award was highly punitive. It appears to reflect the trial's evolution, as noted, into an evidential contest about whether Mr Craig had in fact sexually harassed Ms MacGregor and whether Mr Craig did not honestly believe otherwise when he counter-attacked Mr Williams. However, the purpose of a defamation award is not to compensate Mr Williams for Mr Craig's treatment of Ms MacGregor. As Mr McKnight fairly accepted before us, the jury's award reflects its punishment of Mr Craig more than its vindication of Mr Williams' reputation.

[55] For these reasons, we are satisfied that the jury's award of both compensatory and punitive damages was excessive or wrong, and must be set aside accordingly.

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50 Retrial decision, above n 1, at [68].
51 At [68] (emphasis in original).

The Judge's directions

[56] We add some brief comments on Katz J's directions to the jury on damages, which were thorough and thoughtful. She acknowledged there was little tangible guidance she could give on the appropriate amounts of compensatory and punitive damages. She referred the jury to the standard examples about the value of money and what an award of damages might purchase. However, the Judge's only references to fixed amounts were to the maximums claimed by Mr Williams on each cause of action.

[57] In our view, the Judge should also have directed the jury on the appropriate financial parameters of an award. We appreciate this statement may run counter to the traditional restraint cautioned in earlier cases.[52] However, modern authorities allow a judge to give more specific guidance. There is an apparent recognition of the weight now given to relativity between awards and the risk of excess or aberrance. Juries deserve a compass with reference points fixed by the judge following his or her comparative analysis with other awards. There is little utility in leaving a jury free to award the maximum claim where the inevitable result will be that it is set aside. In *Television New Zealand Ltd v Quinn* McKay J observed that a Judge should feel free to indicate the appropriate boundaries of an award while exercising care not to usurp the jury's function, particularly where the Judge concludes the plaintiff's counsel has been extravagant in pitching the damages claim.[53] Awards which are wildly disproportionate to any damage possibly suffered by a plaintiff give rise to serious and justified criticisms about the relevant court's procedures. More recently, in *Grobbelaar*, Lord Bingham referred with apparent approval to the trial Judge's direction in that case about the appropriate bracket for a compensatory-damages award.[54]

[58] Mr Williams must take primary responsibility for the jury's delivery of an unsustainable award. His claim was pitched at a plainly extravagant level. There was no request for a direction about the appropriate parameters of an award. In this case

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52 See for example *Sutcliffe v Pressdram Ltd* [1991] 1 QB 152 (CA) [*Sutcliffe*] at 178–179.
53 *Quinn*, above n 17, at 46–47 endorsing the break from tradition in *John v MGN Ltd*, above n 17.
54 *Grobbelaar*, above n 3, at [4] and [23] per Lord Bingham.

an appropriate direction would have been up to $250,000 for compensatory damages including aggravation, and for punitive damages no more than $10,000.

[59] It follows that we dismiss Mr Williams' appeal against the Judge's direction for a retrial. The question then is whether the Judge erred in not entering judgment on liability and directing a retrial on both liability and damages.

Liability

Principles

[60] Katz J did not give reasons for directing a retrial of Mr Williams' claims for both liability and damages. The Judge simply observed, without expressing reasons, that "[i]t 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."[55] It is unclear whether the scope of a retrial was the subject of detailed argument in the High Court. The absence of reasons suggests to the contrary.

[61] The issue now is whether the Judge was correct that a jury could not fix damages independently of its own findings on liability. Mr Mills submits that the Judge did not err in exercising her discretion. He points to a paucity of New Zealand authority on the principles to be exercised when deciding the scope of a retrial. He relies principally upon Australian authority.[56]

[62] In *Pateman v Higgin* the question was "whether the appeal court is satisfied that notwithstanding what has happened about damages the verdict on liability should be accepted as a due determination of that issue".[57] That was a claim for damages for personal injury, and Kitto J cautioned that in other contexts such as defamation "the case on liability and the case on damages are not in distinct compartments and therefore ought not to be decided by different tribunals".[58] While this observation may suggest a presumption against severance of liability from damages in the retrial of a

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55 Retrial decision, above n 1, at [109].

56 *Pateman v Higgin* (1957) 97 CLR 521; *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185; and *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50, (2003) 77 ALJR 1657.

57 *Pateman v Higgin*, above n 56, at 529.

58 At 528.

defamation claim, the English Court of Appeal approached the question from a different angle in *Sutcliffe v Pressdram Ltd*. Lord Donaldson MR there held it was "quite unacceptable" that the defamer should be allowed to reopen the liability verdict simply because the jury overstepped in setting the award of damages.[59] And in Russell LJ's opinion "the sanctity of the jury's verdict should be preserved wherever possible".[60] We return to *Sutcliffe* shortly.

[63] The Australian and English cases reflect differing approaches to the same ultimate question. That is, whether justice between parties is best served by requiring a new trial in whole or in part, the prompt resolution of civil disputes is an important role of the courts, and judicial resources should not be wasted lightly through needless retrials, but the interests of justice cannot be compromised. Two questions are important to our inquiry. The first is whether the evidence on liability and damages can be considered separately. If so, a retrial should be limited to damages; it would be unjust to order a general retrial when the liability verdict could stand alone. However, where the two inquiries cannot be separated, they must be determined by the one jury. The related question is whether the award cannot be properly explained, suggesting that the jury's view was biased or mistaken, with prejudice aroused against the defendant. In that event the justice of the case favours a complete retrial.

[64] Mr McKnight relies on three New Zealand authorities, all sanctioning severance on a retrial.[61] In *Television New Zealand Ltd v Keith*, Cooke P emphasised the absence of a valid reason for depriving a successful plaintiff of the benefit of findings on liability; to require him to relitigate liability after obtaining an unexceptional verdict in his favour would be a serious injustice.[62]

[65] *Sutcliffe*, cited by Cooke P in *Keith*, is a particularly apposite authority.[63] In that case the weekly satirical magazine "Private Eye" published articles about the wife of Peter Sutcliffe, the serial killer known as the Yorkshire Ripper. The

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59 *Sutcliffe*, above n 52, at 180.
60 At 190.
61 *Matheson v Schneideman* [1930] NZLR 151 (SC) [*Matheson*]; *Television New Zealand Ltd v Keith* [1994] 2 NZLR 84 (CA) [*Keith*]; and *Quinn v Television New Zealand Ltd* [1995] 3 NZLR 216 (HC) at 229.
62 *Keith*, above n 61, at 90.
63 *Sutcliffe*, above n 52, cited in *Keith*, above n 61, at 89.

publication alleged Mrs Sutcliffe had agreed to sell her story to a national newspaper for £250,000. In response to Mrs Sutcliffe's claim for defamation the publisher pleaded the defence of justification under English common law — now replaced by the statutory defence of truth under s 8(1) of New Zealand's Defamation Act and s 2(4) of the Defamation Act 2013 (UK). The jury found for Mrs Sutcliffe, awarding damages of £600,000, more than $2 million in today's terms. The English Court of Appeal allowed the publisher's appeal on the ground that the award was excessive. It ordered a retrial, limited to damages only, but dismissed the publisher's application for leave to adduce further evidence at the retrial.

[66] Lord Donaldson MR delivered the leading judgment in *Sutcliffe*. He described it as "prima facie quite absurd" that, if granted a retrial on liability, Private Eye could again run a defence of justification which the first jury had rejected.[64] He acknowledged, however, the difficulty which might arise for the publisher because its plea of particulars in justification was also relevant to an assessment of damages.[65] Without the affirmative defence of justification, the publisher would be unable to lead evidence of the plaintiff's misconduct or poor character in mitigation of damages.

[67] Lord Donaldson MR balanced this possible unfairness to the publisher against the unfairness to Mrs Sutcliffe of reopening the first jury's verdicts on liability. The solution, as he saw it, lay in the materials produced at the original trial, with careful judicial curation:[66]

> At the retrial either party will be at liberty to inform the jury of the course taken at the first trial, that being directly relevant to the issue which they will be considering in the context of the claim to aggravated damages. I do not suggest that the transcript should be read to them in extenso, but it should be available to them should they wish to consult it or should counsel consider that on particular aspects the jury need to be given more detailed information. Similar considerations apply to the transcript of the opening and closing speeches of counsel.
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> If Mrs. Sutcliffe is minded herself to give evidence, she may be cross-examined on any matter which goes directly to the issue of how much damages she should be awarded but, in so far as the cross-examination goes outside this field, the judge will have to ensure that it is admissible and should, in the exercise of his discretion, be allowed as going to credit. In addition, he

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64 At 179.
65 At 180.
66 At 180–181.

> will have to give the jury very careful directions that, in so far as questions are admissible only as to credit, the jury can only take account of her answers in this limited context. "Private Eye" will be free to lead fresh evidence going to the issue of damages, if such is available. For example, a full and frank apology might by then have been forthcoming. But the jury would have to be directed that the first trial is an historical fact and, if they concluded that "Private Eye's" conduct in that trial aggravated the damages, they must take that fully into account, only considering new evidence or "Private Eye's" conduct at the retrial as either increasing or decreasing the damages which they would have awarded if the effect of the new trial had been entirely neutral.

[68] In a concurring judgment, Russell LJ underscored the importance of the discretion to be exercised by the judge during retrial with the assistance of counsel:[67]

> The precise form that the retrial takes and the procedures to be adopted will be a matter for the trial judge. This court cannot forecast how the plaintiff will seek to put her case. Certainly I take the view that her counsel will be at liberty to tell the jury of what went on in the first trial, and in particular how it was conducted by the defendants. Precisely how that may be achieved will be a matter for the trial judge. The transcripts are available, and one would hope that counsel will be able to achieve agreement upon the appropriate mode of proof.
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> In this case, having ruled that the defendants should not be permitted to call evidence on the retrial along the lines indicated, any new cross-examination of the plaintiff or her witnesses directed to establishing the truth of the particulars of justification *in order to mitigate the damages* should be regarded as impermissible, if objection is taken to it. Of course, if the defendants upon the retrial choose to cross-examine along these lines, thereby re-opening old wounds and prolonging the plaintiff's ordeal, the plaintiff's advisers may prefer to make use of such a tactic on the part of the defendants as a further aggravating feature of the claim, sounding in aggravated damages. That, too, must remain a matter for the exercise of a discretion — the discretion of counsel instructed in the retrial which we shall order.

Grounds for retrial on liability

[69] Mr Mills submits that severance is not possible here for two principal reasons. First, he notes that Mr Craig's statements were published on occasions of qualified privilege. The basis on which the jury found his privilege was lost is unclear: was it malice or misuse of the occasion? As a result, it would not be possible to direct a jury on the relevant facts relating to that issue in a retrial limited to damages only.

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[67] At 193 (emphasis in original).

[70] We do not accept this submission. The jury's verdict reflects its absolute rejection of Mr Craig's defences of truth and of qualified privilege. We have no difficulty in inferring that the jury found Mr Craig lost his privilege because he was predominantly motivated by ill will. Mr McKnight's closing address focused almost entirely on that proposition. The alternative ground of taking improper advantage of the occasion of qualified privilege merited only a postscript reference. It appeared to attract relatively little attention at trial.

[71] Second, Mr Mills opposes severance on a separate ground. He says the jury's verdict on damages must necessarily have vitiated its underlying verdict on liability. We should thus entertain a real doubt about the safety of both. Mr Mills asks rhetorically whether it is the result of inflamed prejudice against Mr Craig. The damages award is, he submits, inexplicable on any other basis.

[72] Absent a misdirection from the trial Judge, the orthodox ground for setting aside a liability verdict is that it is perverse, defies rational explanation or is against the weight of evidence.[68] Mr Mills does not rely on this ground. He relies solely on the amount of the verdict to establish its irrationality.[69]

[73] We do not accept Mr Mills' submission. In *Grobbelaar*, the House of Lords rejected a similar argument. It affirmed that an error in interpreting the Judge's damages directions does not equate with perversity on liability;[70] and an appellate court should not find a liability verdict is perverse unless there is no other rational explanation for it.[71] As Mr Mills himself submits, the jury's adverse assessment of Mr Craig's credibility was likely to have been the predominant factor in its verdict on liability, and its evaluation of all his affirmative defences. We do not see any basis in the amount of the award which might call that fundamental assessment into question. We agree with Mr Romanos that the liability verdict is capable of a rational explanation.

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68 *Black v MacKenzie (No 2)* [1918] NZLR 235 (CA) at 240, 242 and 243.

69 Mr Mills' argument in support of Mr Craig's cross-appeal of an insufficiency of evidence for the jury to have found that Mr Craig lost qualified privilege in the statements, will be considered later.

70 *Grobbelaar*, above n 3, at [26] per Lord Bingham and at [57]–[61] per Lord Hobhouse.

71 At [66] per Lord Millett.

[74] We add that, about a month after the hearing of the substantive appeal, counsel filed additional submissions about the process of a retrial on damages only. Following the non-exhaustive factors identified by Katz J,[72] Mr Mills submits the jury would need to consider Mr Williams' conduct; Mr Williams' credibility, position and standing; the subjective impact on Mr Williams due to the defamation; the gravity, mode and extent of publication; the absence or refusal of a retraction or apology; and Mr Craig's conduct from the time of publication. Mr Mills submits the jury would also have to hear evidence on a broader range of issues, including the grounds on which the qualified privilege might have been set aside — whether Mr Craig honestly believed what he said about Mr Williams was true is likely to be relevant to quantum. He estimates that a retrial on damages only would require two to three weeks.

[75] This submission would have us revisit unequivocal findings of liability. We have already pointed out that Mr Craig must have lost qualified privilege on the ground of ill will, not of improper use of the occasion. The honesty of Mr Craig's belief in his statements about Mr Williams has already been determined: Mr Craig's characterisation of Mr Williams as a liar for making the sexual harassment allegation was one in which he did not have a genuine belief. In our judgment, a damages retrial should take a matter of days, not weeks, if conducted with the necessary degree of judicial control and within fair and reasonable parameters.

Conclusion

[76] We are satisfied that Katz J erred in ordering a general retrial. The issues of liability and damages are severable in our judgment. The scope of a retrial is to be limited to damages only, subject to our determination of Mr Craig's argument that the jury's verdict must be vitiated by the Judge's material misdirections on qualified privilege.

[77] In our judgment, a retrial on damages alone will meet the ends of justice. It would be wrong to allow Mr Craig to re-litigate issues which have been exhaustively traversed in evidence and argument and decisively determined. His objective of using

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[72] Retrial decision, above n 1, at [39] citing Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [9.5].

a retrial on liability to secure a different verdict on the same facts would call the proper administration of justice into question. We add that the proceeding has already exhausted a substantial amount of judicial resources. While the jury on a retrial will be without the flavour of the liability evidence, they will be directed that Mr Williams' entitlement to damages falls within a modest band. The only issue for a jury will be to determine where within that band a proper award might lie.

[78] It will be for the retrial Judge to decide procedure for a damages claim. The process should be analogous to trial of a claim on admitted facts, or admitted pleadings, and be relatively straightforward. The Judge could properly direct the jury to this effect:

(a) Mr Craig defamed Mr Williams in two separate publications, the Remarks and the Leaflet, at least a week apart, by stating that Mr Williams had acted dishonestly, untruthfully and deceitfully for making the allegation that Mr Craig had sexually harassed Ms MacGregor, which was necessarily rejected by the first jury;

(b) Mr Williams is entitled to a compensatory award, which should be anywhere up to a maximum of $250,000 for damage to his reputation, including aggravating factors, taking into account that:

- any damage was caused primarily by the Remarks and compounded marginally by republication in the Leaflet;

- some of the allegations made by Mr Craig about Mr Williams' conduct relating to the defamatory statements had elements of truth in that some aspects of his conduct had been dishonest, deceitful and untrustworthy, but not in making the allegation of sexual harassment;

- Mr Craig's statements were made in a political context and in a counter-attack to criticisms made by a man whose own attitude to women was questionable;

– elements of Mr Craig's conduct of his defence may have compounded the original damage; and

(c) an award of punitive damages was also available but should not be more than $10,000.

[79] The Judge's approach will ultimately be influenced by the parties' decisions. For example, at a damages retrial Mr Williams will have to decide whether he wishes to claim aggravated damages for Mr Craig's conduct of his defence and plea of truth; and Mr Craig will have to determine whether he wishes to rely on those same particulars in mitigation of damages. Both courses have their risks for each party, as highlighted by Russell LJ in *Sutcliffe*.[73] Otherwise the evidence at the retrial can be restricted to evidence from the parties themselves, shorn of the liability issues which dominated the trial — and one or two other witnesses where relevant in assessing damages. The trial Judge will provide extracts from the evidential transcript. Mr Craig may also wish to mitigate damages by tendering an unequivocal apology to Mr Williams.

[80] There is of course a more pragmatic and sensible solution. The parties can simply agree that Katz J should determine damages.[74] The Judge alluded to this option in her retrial decision.[75] She invited counsel for the parties to submit memoranda. Both sides have since shadowboxed on this proposal, which remains in limbo. It is the most obvious path to resolution if the parties are genuinely seeking finality. Katz J is fully familiar with all the evidence and would only require focused submissions from counsel to complete the exercise.

Occasions of qualified privilege

[81] Mr Romanos contests Katz J's ruling that Mr Craig's statements were published on occasions of qualified privilege.[76] He submits that the Judge usurped the jury's function by: (a) ruling that Mr Williams attacked Mr Craig;

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73 *Sutcliffe*, above n 52.
74 Defamation Act, s 33.
75 Retrial decision, above n 1, at [112].
76 Ruling 7, above n 11.

(b) compartmentalising the relevance of Mr Craig's response and ruling on it as a question of law; and (c) ruling that the defence applied without the jury's findings on disputed factual issues.

[82] The nature of the privilege is well settled. The Judge correctly set it out when revisiting the question in her retrial decision.[77] It is often called the "defence to an attack" form of qualified privilege. It entitles a person whose character or conduct has been attacked to a privilege against liability in his or her answer, provided the statements are made bona fide and are relevant to the allegations made in the originating attack.[78] It is also described as "the right to reply to an attack" privilege. In this sense the response can be either strictly defensive or by way of counter-attack, enabling the person to speak freely and answer to the same public audience which received the original attack.[79] A certain freedom or latitude is appropriate to allow the degree of vindication which is fairly warranted by the occasion.

[83] We do not accept that the Judge was wrong in any of the respects submitted by Mr Romanos. His arguments simply repeat those advanced and rejected in the High Court. The question of whether the occasions were privileged is solely one of law.[80] Its answer was dictated by the undisputed fact that Mr Williams attacked Mr Craig. It was appropriate for Katz J to rule on the issue in advance of the jury's verdict. Its ultimate findings would have no effect on whether the occasions of publication were privileged.

[84] We agree with Mr Mills that Mr Romanos' argument conflates issues going to whether the occasion was privileged with issues relevant to its loss. As Mr Romanos himself observes, the former inquiry is of an objective nature while the latter is of a subjective nature for the jury. In fairness, as we shall explain, Mr Mills' challenges to the Judge's directions to the jury on the same subject are open to the same criticism.

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77 Retrial decision, above n 1, at [58]–[61].
78 Mullis and Parkes, above n 72, at [14.51].
79 *Penton v Calwell* (1945) 70 CLR 219 at 233–234 per Dixon J; and *Alexander v Clegg* [2004] 3 NZLR 586 (CA) at [61]–[63].
80 *Adam v Ward* [1917] AC 309 (HL) at 318.

[85] As we have said, the jury must have found that Mr Craig overstepped the acceptable mark when publishing in self-defence. His counterpunches were excessive. He was overborne by ill will towards Mr Williams.

Directions on qualified privilege

Context

[86] Mr Mills submits that Katz J materially misdirected the jury on malice in seven ways when summing up on qualified privilege. He mounts a sustained attack on this aspect of her summing-up.

[87] Before addressing the substance of this argument, we must record that Mr Mills did not raise any one of these alleged errors with the Judge when the opportunity arose at the end of her summing-up. Katz J expressed the same misgivings in her retrial decision.[81] To the contrary, Mr Mills complimented the Judge in open court. He now says that he did not appreciate the nature and extent of the Judge's misdirections until receipt of her reasons for ruling that the occasions of publication were privileged.[82] The reasons were published about three weeks after the verdicts. It then became apparent to him that the Judge's directions conflicted with her ruling, and were thus wrong.

[88] We do not accept that rationalisation. Mr Mills' silence following the summing-up signified his contemporaneous satisfaction that the Judge had not materially erred. He is a senior counsel with expertise in the law of defamation. He was a member of the same audience as the jury. He was listening to hear whether the Judge's directions accurately and adequately captured the essence of Mr Craig's defence. He and junior counsel were attuned to error. By the end he was satisfied with the substantial accuracy of the Judge's directions.

[89] In our view, the Judge's directions were orthodox, and that likely explains what is now presented as a failure of experienced counsel to take issue with them at the time. She directed the jury in considerable detail on Mr Williams' defence of

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81 Retrial decision, above n 1, at [99].
82 Reasons for Ruling 7, above n 6.

qualified privilege. Her directions occupy nine pages of the transcript. Even now Mr Mills makes no challenge to the Judge's summary of the general principles or their specific application to this case. Instead, he focuses on a handful of sentences chosen from different passages in the summing-up. We shall address each of his submissions against that background.

[90] Mr Mills does not challenge the Judge's primary statement of principle as to loss of privilege as follows:[83]

> [58] Mr Craig will not be protected by qualified privilege if he was predominantly motivated by ill-will towards Mr Williams when he responded to the attack. Ill-will essentially means that the main reason for Mr Craig's response was not because he wanted to set the record straight, or vindicate his own reputation, but because he wanted to hurt or injure Mr Williams. A person is not entitled to the privilege if they use the opportunity to respond simply to hurt or injure the attacker. That is abusing the privilege. But in order for the privilege to be taken away, hurting or injuring the attacker must be the dominant motive. If Mr Craig's main motivation was simply to respond to the attack or to defend himself, that that will not be ill will, even if he knew that his response would be likely to hurt Mr Williams. Injuring or hurting Mr Williams must have been the main reason or motivation for the Remarks or the Leaflet, not just the consequence of having made the Remarks or issuing the Leaflet. Because of course responding to an attack is always likely to hurt your attacker. So you need to focus on what Mr Craig's motives were, not what the end result was.

Specific errors

(a) Relevance

[91] Mr Mills challenges three of the italicised questions in this subsequent passage:

> [59] 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. *[1] Was Mr Craig's response appropriate or over the top?* What kind of language did he use? *[2] Did he say things that were not relevant to the attack or was everything relevant? [3] Did he publish the response to more people that 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 and numerals added).

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[83] Summing-up, above n 13.

[92] First, we deal with question two. Katz J accepted Mr Mills' submission that she erred in directing the jury on relevance.[84] That was because she had earlier found, when ruling on the threshold question, that whether Mr Craig's statements were relevant to Mr Williams' attack on him was ultimately a question of law for the Court, not one of fact for the jury. But she did not determine whether the error was material.[85]

[93] However, we are not satisfied that the Judge's statement represented an error at all. The Judge had ruled that Mr Craig's statements were published on occasions of qualified privilege. The inclusion of irrelevant subject matter within the statements will not be actionable outside the privilege. But it may be relevant to malice.[86] It follows that if the jury was satisfied Mr Craig did say things which were not relevant to Mr Williams' attack, it may take that factor into account in deciding on whether his dominant motive was to hurt or injure Mr Williams.[87] The materiality of a factor to the legal inquiry does not exclude its materiality to the subsequent factual inquiry.

(b) Appropriateness of language

[94] Second, Mr Mills criticises the Judge's direction to the jury to consider whether "Mr Craig's response [was] appropriate or over the top" (question one). He says the Judge's reference to the appropriateness of Mr Craig's response could have been construed as an invitation to set aside the privilege for other reasons. He also says that the Judge should not have used the phrase "over the top" without cautioning the jury that as a matter of law an inference will and could only be drawn if the language was "so much too violent for the occasion and circumstances".[88] "Violent and excessively strong" language cannot of itself give rise to an inference of ill will or improper advantage. Thus, Mr Mills submits, the direction set an improper standard for the jury.

[95] We do not accept this submission. Again, the Judge was referring to one among a number of factors which the jury could take into account in determining Mr Craig's motive. She was not proposing the "over the top" description as a stand-alone measure. She was simply identifying it as a relevant circumstance.

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84 Retrial decision, above n 1, at [100].
85 At [103].
86 *Horrocks v Lowe* [1975] AC 135 (HL) at 151.
87 *Adam v Ward*, above n 80, at 326–327; and *Horrocks v Lowe*, above n 86, at 151.
88 *Spill v Maule* (1869) 4 LR Ex 232 (Exch Ch) at 235; and Mullis and Parkes, above n 72, at [32.40].

[96] It is apposite that in this passage the Judge was directing the jury to consider the actual words used by Mr Craig for the purpose of assessing his motive. The jury had no way of knowing what Mr Craig was actually thinking. So it was entitled to look at external markers. Conduct was the most obvious. A suggestion that among the circumstances the jury considers whether Mr Craig's language was over the top is not in error simply because it is not accompanied with a caution that the same language must be violent or excessively strong to lose the privilege.

[97] It is also relevant that in his closing address to the jury Mr Mills said this:

> [You will] hear that it is said that the allegations that Mr Craig made in the leaflet, the strong language he used, words like "schemers" and "hidden agendas" that they indicate and can support a conclusion that there was a predominant motivation of ill-will. But of course [you will] no doubt remember that the attacks that were made on Mr Craig, the language was very strong, and so there's a balance in here that you may want to think about in relation to this. *What was said about him, does the response to that really balance with what was said?*
>
> (Emphasis added).

[98] Also, Mr Mills did not challenge before us the Judge's expansion on her "over the top" comment later in her direction to the jury:

> [68] You should also carefully consider the nature of the words used in the Remarks and the Leaflet. They may give you some clue as to what Mr Craig's motives were. Are they totally "over the top" and therefore perhaps consistent with a dominant motive of hurting Mr Williams, or do they suggest a man who is trying to restore his own reputation and address allegations made about him that he believed to be unfounded.

(c) Range of audience

[99] Third, Mr Mills criticises the Judge's direction to the jury to consider whether Mr Craig published his response to "more people than he needed to in order to respond" or whether his response was "to the right range of people" (question three). Mr Mills reverts to his primary argument that this inquiry was determined by the Judge's qualified privilege ruling. He says the Judge's invitation contradicts her satisfaction, expressed in her later reasons, that Mr Craig's statements in reply "were made to an audience with a proper interest in receiving them".[89] Mr Williams' pursuit

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[89] Reason for Ruling 7, above n 11, at [79].

of his attack publicly through the media meant that the general public had an interest in receiving Mr Craig's response.

[100] We are not satisfied that the Judge erred. She had found when making her threshold ruling that the general public had an interest in receiving Mr Craig's response. The Whale Oil blog was posted publicly. Mr Craig was entitled to respond to the public at large. However, it was open to the jury to find that, while Mr Craig was entitled to respond to the same public, he went too far in making the Remarks and then publishing and distributing the Leaflet nation wide. A disproportionately wide distribution may suggest malice. Katz J expanded on this very point in a later passage of her summing-up with which Mr Mills takes no issue before us:

> [71] The width of the publication is another factor you should consider. Mr McKnight noted that the Leaflet was delivered to over 1.6 million households and the Remarks were made at a press conference that was reported nationwide. He suggested that this was out of all proportion to what Mr Williams had done and the limited number of people he had spoken to or provided information to. Further, most of those people, such as members of the Conservative Party Board, were exactly the type of people who had a legitimate interest in hearing about very serious allegations about their Party leader.

[101] The Judge followed with a careful summary of Mr Mills' counter submission before the jury, and then repeated that it was for the jury to consider whether Mr Craig's wide distribution of the Remarks and Leaflet was a disproportionate response to Mr Williams' statements. She was careful to emphasise that this was simply another factor the jury could take into account when considering whether Mr Craig was primarily motivated by ill will.

(d) Responsibility

[102] Fourth, Mr Mills challenges the Judge's directions in this passage:

> [61] *[4] Another question you should ask yourself is whether Mr Craig acted with the degree of responsibility required in the circumstances. Even if he thought what he said was true, did he fail to give as much consideration to the truth or falsity as should have been given in all the circumstances?* What the circumstances might require comes down to the same kind of questions I have already mentioned. What was the nature of Mr Craig's response? What was it about? Were the allegations against Mr Williams serious or minor? How widespread was publication of the response? Another way of saying all this is, in the circumstances, did Mr Craig take a

> "cavalier" approach to the truth of his statements. *[5] While carelessness does not in itself prove ill will, it may be evidence suggesting that, in reality, Mr Craig did not care about what the truth was*. That could indicate actual ill-will. On the other hand, if you think that Mr Craig did take reasonable care and honestly believed the truth of what he is saying, that would weigh against a finding that he was primarily motivated by ill-will.
>
> (Emphasis and numerals added).

[103] In Mr Mills' submission the Judge wrongly imported an element from the extended privilege relating to free speech by directing the jury to consider whether Mr Craig had acted with the requisite "degree of responsibility" (question four).[90] In the free-speech context in *Lange v Atkinson* this Court emphasised that the then new privilege had to be "responsibly used" — if not, it would be lost.[91] In Mr Mills' submission that exception has no place within the pre-existing and well-settled principles governing the privilege to respond to an attack.

[104] Mr Mills' submission about the responsibility element of the *Lange v Atkinson* defence is correct. But we are satisfied that the Judge was not referring to it in that context as a standalone criterion but in the context of a direction about care and associated states of mind. Her statement was of an introductory nature to what followed. It simply set the scene. It cannot be elevated to the status of a discrete error of such materiality as to vitiate the verdict. Had it been understood in the manner now contended for, we would have expected counsel to take issue with it at the time.

(e) Carelessness

[105] Fifth, Mr Mills submits that the Judge erred by directing that carelessness may be evidence to suggest that in reality Mr Craig did not care about what the truth was, possibly indicating actual ill will (question 5). He says the summing-up as a whole is likely to have left the jury with an understanding that it could properly infer ill will if it was satisfied Mr Craig had acted carelessly or even without reasonable care.

[106] It is settled law that carelessness does not of itself provide a ground of inferring malice from a statement; it is normally only relevant if it is of such a degree as to

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90 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at [42].
91 At [42].

amount to recklessness or wilful blindness, suggesting that the speaker did not care whether what was said was true or false.[92] However, we do not accept that the Judge fell into error. It must be remembered that she had emphasised at [58] of her summing-up that, to lose that privilege, the jury must be satisfied Mr Craig was predominantly motivated by a desire to hurt or injure Mr Williams; if his main reason was simply to respond to the attack or defend himself, then there was no ill will. All the Judge's subsequent directions followed logically from that general statement. And in the passage about which Mr Mills complains, the Judge stressed the same point as the leading authorities emphasise "carelessness does not in itself prove ill will".[93] Its direct relevance is to whether Mr Craig cared about the truth of what he was saying, which might "indicate actual ill-will".[94] This passage followed and reinforced the Judge's preceding direction, to the same effect, that:[95]

> [i]f you think Mr Craig responded, without even considering or caring about whether what he said was true or not, this may be another factor that could indicate ill will.

(f) Comments

[107] Sixth, Mr Mills says the Judge erred in directing the jury that it could consider whether Mr Craig "should have made more effort to contact Mr Williams and seek his comment" on both the Remarks and the Leaflet.[96] However, the Judge was simply reciting a submission by Mr McKnight, which she immediately followed by reciting Mr Craig's explanation for his inability to open a dialogue with Mr Williams. We do not accept Mr Mills' submission that it is likely to have left the jury with an understanding that it could draw an inference of ill will if it was satisfied that Mr Craig did not make sufficient efforts for this purpose.

(g) Caution

[108] Seventh, and finally, Mr Mills submits the Judge erred in failing to caution the jury against inferring an improper advantage if honest belief exists. He says she erred

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92 *Horrocks v Lowe*, above n 86, at 150; and *Roberts v Bass* [2002] HCA 57, [2002] 212 CLR 1 at [103].
93 Summing-up, above n 13, at [61].
94 At [61].
95 At [60].
96 At [66].

in this respect when directing on the improper advantage alternative. It is unnecessary to address this submission further given our satisfaction that the jury's verdicts were not based on the loss of qualified privilege on this ground.

Conclusion

[109] Our analysis of Mr Mills' submissions served to confirm the reason why he did not raise an objection with the Judge at trial about her directions on qualified privilege. We are satisfied that they were substantially correct, and that she did not misdirect the jury in any of the respects alleged. The directions were not substantially wrong or likely to have caused a miscarriage of justice.[97] This argument must fail.

Mr Craig's application for judgment

[110] Mr Mills submits that Katz J erred in declining Mr Craig's application for judgment. Its foundation is that the jury had insufficient evidence to find Mr Craig lost qualified privilege in his defamatory statements. Mr Mills' extensive submissions largely repeat what was argued and rejected in the High Court. We agree with Katz J but it is unnecessary to revisit her reasons.

[111] In summary, Mr Mills' primary argument is that, apart from questions of credibility, there was insufficient extrinsic evidence to support an inference that Mr Craig knew he had sexually harassed Ms MacGregor. Mr Mills says that Ms MacGregor was unable to point to any texts or letters where she explicitly asked Mr Craig to stop texting or writing to her. The only other extrinsic evidence in this respect, he says, is Ms MacGregor's sexual harassment allegation and the subsequent mediation and settlement. He refers to Mr Craig's adamance in evidence that he had not sexually harassed Ms MacGregor.

[112] Additionally, Mr Mills says there was no evidence Mr Craig knew that the other statements which he made about Mr Williams were false. To the contrary, Mr Mills points to the demonstrable truth of many statements, such as found by Katz J

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97 *Matheson*, above n 61, at 157 per Myers CJ.

in her retrial decision. It follows, Mr Mills says, that the jury had no basis on which it might infer that Mr Craig was predominantly motivated by ill will.

[113] If this submission were indeed correct, then logically it should have been advanced to the Judge immediately upon her threshold ruling that the statements were published on privileged occasions. Mr Craig would have been entitled to judgment at that stage. But no application was made and, equally significantly, when addressing the jury Mr Mills expressly acknowledged that determination of the factual question of loss or malice fell solely within its compass.

[114] Mr Mills then identified and answered a number of factors on which he said Mr Williams relied to show loss of privilege or malice. He referred, for example, to the Mr X interview. He emphasised and commended to the jury the evidence given by Mr and Mrs Craig in response.

[115] Katz J then summed up on malice in detail. No issue is taken with her directions. She listed the various factors on which Mr McKnight relied. There was indisputably an evidential basis for each. Mr Mills did not suggest otherwise when invited to comment on her summing-up.

[116] The jury's role was quintessentially that of a fact-finder, as Mr Mills reminded us. Its function was to draw inferences from certain facts in the face of Mr Craig's denial. In the course of doing so, as Mr Mills had acknowledged, the jury must have rejected the credibility of Mr Craig's response. In particular, the jury must have accepted Ms MacGregor's evidence that Mr Craig did sexually harass her, and inferred that he knew that was what he was doing. It must also have been satisfied that Mr Craig's statement that Mr Williams lied in making the initiating allegation was itself a deliberate falsehood. The evidential foundation for these findings is beyond question.

[117] Mr Mills' submission reduces to a proposition that the jury should have interpreted the facts differently. He asks us to construe them in a different light. It is well settled that that is not the province of this Court on appeal. Mr Craig's cross-appeal must fail.

Result

[118] The appeal is allowed in part. The order made in the High Court for a retrial of the appellant's claim for liability and damages is set aside.

[119] Judgment is entered for the appellant in accordance with the jury's verdict on liability. An order is made directing a retrial of the appellant's claim for damages.

[120] In all other respects the appeal and cross-appeal are dismissed.

[121] The respondent is ordered to pay the appellant 50 per cent of costs as calculated for a standard appeal on a band A basis with usual disbursements. This reduction reflects the fact that the appeal was only partially successful. There is no order for costs on the cross-appeal. All costs issues arising in the High Court are to be determined in that Court in accordance with this judgment.

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