IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 21/2018
[2019] NZSC 38

BETWEEN	COLIN GRAEME CRAIG Appellant
AND	JORDAN HENRY WILLIAMS Respondent

Hearing:	4 and 5 September 2018
Court:	Elias CJ, William Young, Glazebrook, Ellen France and Arnold JJ
Counsel:	S J Mills QC, J W J Graham and T F Cleary for Appellant P A McKnight and A J Romanos for Respondent
Judgment:	11 April 2019

JUDGMENT OF THE COURT

A **The appeal is allowed. The orders of the Court of Appeal entering judgment for the respondent on liability and directing a retrial of the respondent's claim for damages are set aside. An order for a general retrial on liability and damages is substituted.**

B **The cross-appeal is dismissed.**

C **The respondent must pay the appellant costs of $35,000 plus usual disbursements. We allow for second counsel.**

D **The costs award made in the Court of Appeal is set aside. If costs in that Court cannot be agreed they should be set by the Court of Appeal in light of this judgment. Any costs issues arising in the High Court shall be considered by the High Court in light of this judgment.**

REASONS

ELIAS CJ, ELLEN FRANCE AND ARNOLD JJ
(Given by Ellen France J)

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Introduction

[1] After a trial of nearly four weeks a jury found for Jordan Williams, the founder and executive director of the New Zealand Taxpayers' Union, in his claim that Colin Craig, the founder and former leader of the Conservative Party, defamed him. The jury awarded Mr Williams damages of $1.27 million. In doing so, the jury must have rejected Mr Craig's affirmative defences of truth and honest opinion and found that he had lost qualified privilege.

[2] Subsequently, the trial Judge, Katz J, set aside the jury's verdict on the basis that the damages award was excessive.[1] The Judge also said she had misdirected the jury in one respect.[2] The Judge ordered a new trial of the claim by Mr Williams on

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1 *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215 [Retrial judgment].

2 The Judge accepted that whether the statements made by Mr Craig were relevant to Mr Williams' attack on Mr Craig was a question for the Judge, not the jury: at [101]; and see below at [33]–[43].

both liability and damages. Mr Williams appealed. The Court of Appeal allowed the appeal in part.[3] The Court set aside the order made by the High Court, entered judgment in accordance with the jury's verdict on liability and ordered a retrial on the question of damages. Leave to appeal and leave to cross-appeal from the decision of the Court of Appeal to this Court was granted.[4]

[3] On the appeal, Mr Craig seeks the restoration of the order of the High Court that there be a general retrial. Accordingly, at issue on the appeal is whether the Court of Appeal was correct to conclude the trial Judge erred in setting aside the verdict and ordering a retrial on both liability and damages. That issue turns on whether the jury was misdirected on the question of qualified privilege and, if so, whether any misdirections have given rise to a miscarriage of justice. On the cross-appeal, Mr Williams seeks to have the jury's awards reinstated in full. The cross-appeal raises issues about the findings of the Courts below that the damages awards were excessive and about the factual basis for the awards. We address these questions after first considering the factual background.

Background

[4] The essential elements of the narrative of events have been well-rehearsed.[5] Drawing extensively on the judgments below, the description which follows can be brief.

[5] We begin with the sudden resignation, just before the 2014 general election, of Mr Craig's long-standing press secretary Rachel MacGregor. Ms MacGregor's resignation was in part due to what Katz J described as "her ongoing discontent regarding the level of her remuneration".[6] Ms MacGregor also subsequently filed a claim of sexual harassment by Mr Craig under the Human Rights Act 1993.

[6] The next relevant point is that in November 2014 Ms MacGregor disclosed to Mr Williams on a confidential basis that Mr Craig had sexually harassed her.

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3 *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 (Harrison, Miller and Gilbert JJ) [*Craig* (CA)].
4 *Craig v Williams* [2018] NZSC 61.
5 Retrial judgment, above n 1, at [4]–[21]; and *Craig* (CA), above n 3, at [7]–[22].
6 Retrial judgment, above n 1, at [4].

Mr Williams took notes of their discussion. He sent her a note the next day so that she could correct any mistakes but received no reply. The Court of Appeal described what was conveyed to Mr Williams by Ms MacGregor in this way:[7]

> … 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.

[7] The Court of Appeal also recorded the nature of Ms MacGregor's allegations as follows:

> [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.

[8] About a week after Ms MacGregor spoke to Mr Williams, her lawyer contacted Mr Williams. In the course of their conversation, Mr Williams undertook to keep Ms MacGregor's sexual harassment allegations confidential.

[9] Mr Craig denied any sexual harassment. His conception of the relationship with Ms MacGregor was described by Katz J as essentially "an emotionally close and intense mutual friendship".[8] He accepted that his behaviour at times had been inappropriate for a married man. His account was that apart from an incident which occurred on election night in 2011, which it is accepted was consensual, there was "no intimate or inappropriate physical contact".[9] To foreshadow an aspect which assumed some importance at trial, Ms MacGregor did not describe having received any sexually explicit text messages.

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7 At [9]. In addition to their discussion, Mr Williams read materials Ms MacGregor gave to him which included her handwritten notes of behaviours she was concerned about and letters from Mr Craig to Ms MacGregor.

8 At [7].

9 At [7].

[10] As a result of what he had been told by Ms MacGregor, Mr Williams formed the view that Mr Craig was not fit to continue as leader of the Conservative Party. Katz J said that early in 2015 Mr Williams "spoke to various leading figures associated with the Party".[10] In those conversations, he expressed his concerns about Mr Craig and began to "divulge details of Mr Craig's alleged sexual harassment of Ms MacGregor to senior figures" in the Party.[11]

[11] Ms MacGregor's claim under the Human Rights Act was settled in May 2015. The parties' confidential agreement acknowledged some inappropriate conduct on occasions on both sides. Mr Craig apologised for any inappropriate conduct on his part. Ms MacGregor withdrew her claim. Mr Craig did not pay Ms MacGregor any money apart from $16,000 due for wages.[12] But he did also forgive Ms MacGregor's liability on a $20,000 loan. The parties agreed not to make any media comment.

[12] As Katz J noted, from Ms MacGregor's perspective, the settlement was "the end of the matter".[13] Mr Williams took a different position and, as Katz J described it, "mounted a campaign in the following weeks to remove Mr Craig as Conservative Party leader on the basis of his treatment of Ms MacGregor".[14] The Judge described Mr Williams' actions over this period as follows:

> [13] Mr Williams met, sent text messages to, or spoke with, Christine Rankin (the former Chief Executive of the Conservative Party), Bob McCoskrie (a director of Family First NZ and a supporter of the Conservative Party), Mr Day, Mr Dobbs, and John Stringer (a Conservative Party board member). He told them that Mr Craig had sexually harassed Ms MacGregor, and showed some of them Mr Craig's letters to Ms MacGregor. He referred repeatedly to Mr Craig having sent sext messages to Ms MacGregor, an allegation that Mr Williams acknowledged at trial was particularly damaging. Mr Williams also indicated to people that he had copies of the sexts, which he had not. He claimed that Mr Craig had made a big payout to settle Ms MacGregor's claim in the Tribunal.
>
> [14] Witnesses at trial also claimed (but Mr Williams disputed) that he had told them that the election night incident was non-consensual. … Other

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10 At [9].

11 *Craig* (CA), above n 3, at [13].

12 Ms MacGregor's evidence was that she told Mr Williams that she had not been paid from May to September 2014. She says she had not submitted an invoice from June 2014 because she and Mr Craig had not settled their dispute about her rate of pay. Mr Craig said he did not pay Ms MacGregor during that period because he had no invoices or timesheets and so no way to reconcile what was due to her.

13 Retrial judgment, above n 1, at [12].

14 At [12].

> 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.

[13] A factor, which on Mr Williams' evidence assumed some importance in prompting his approach, was the interview Mr Craig conducted in a sauna on 8 June 2015. In the course of that interview, Mr Craig referred to Ms MacGregor's resignation and, in this way, breached the confidentiality agreement with Ms MacGregor. Mr Williams said that, as a result of the aftermath of the interview, he felt steps were necessary to protect Ms MacGregor's reputation. It appears that some of Mr Williams' disclosures pre-dated the interview in the sauna although the evidence about exactly what was disclosed over that earlier period and to whom is unclear.

[14] Mr Williams arranged to meet with Mr Day and Mr Dobbs in Hamilton and disclose the correspondence from Ms MacGregor. It seems that by this time Ms MacGregor became suspicious that Mr Williams was breaching her confidence. On the day (mid-June 2015) that Mr Williams was scheduled to meet with Messrs Dobbs and Day, Ms MacGregor asked Mr Williams by email not to disclose the correspondence from Mr Craig which she had shown to him. Mr Williams did not comply with this request and lied to Ms MacGregor about going to Hamilton to meet Messrs Dobbs and Day.

[15] On 19 June 2015, Mr Craig agreed to stand down to enable the board of the Conservative Party to undertake a full investigation of the issue. The same day, Mr Williams sent a draft blog post to blogger Cameron Slater for publication on the Whale Oil Beef Hooked website. The draft made allegations against Mr Craig of "sexual harassment, a pay-out to a former staff member, and inappropriate touching".[15] The Whale Oil website published the blog post at about the same time or just before a press conference called by Mr Craig to announce he was stepping down.

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15 At [18].

A number of further articles were published over the next three days on the Whale Oil website canvassing the allegations about Mr Craig.

[16] Mr Craig's response began with a press conference on 29 July 2015 when he read out the statement described in the proceedings as "the Remarks" in these terms:

> …
>
> 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 Brigades* [sic] *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 "SEXT's" 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.*
>
> (emphasis added)

[17] As the Court of Appeal noted, the italicised excerpts formed, among others, the basis for the allegations by Mr Williams of defamation.[16]

[18] Mr Craig also made available for the press a leaflet (the Leaflet) which, a few days later, he arranged to be delivered to 1.6 million households. The key passages are as follows:

> 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*" [emphasis in original]. He is a lawyer and currently works full time as a political lobbyist.
>
> *It was Williams who gathered the initial information and accusations against Craig. His source was Craig's former press secretary Rachel MacGregor* with whom Williams had a romantic relationship.
>
> *Using the information he had gathered, Williams built a compelling* story *of MacGregor's alleged harassment which he supported by an "attack dossier" of information.* His presentation of events was in part her story (as he says she told it to him), some personal notes by MacGregor regarding the matter, and *selected details of alleged correspondence from Craig to MacGregor.*

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16 *Craig* (CA), above n 3, at [17].

> *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.*
>
> (emphasis added, footnotes omitted)

[19] Again, the italicised passages were the foundation for Mr Williams' allegations of defamation. The Leaflet also contained a section described as an "Exclusive Interview: With Mr X". As the Court of Appeal noted, this "purported interview was a fabrication".[17]

[20] We turn now to the first issue on the appeal, that is, whether there were misdirections in the summing up. Before addressing the detail of the summing up, we briefly discuss the approach to qualified privilege and, in particular, s 19 of the Defamation Act 1992 which addresses the rebuttal of qualified privilege.

Qualified privilege – the approach to s 19 of the Defamation Act 1992

[21] At common law qualified privilege may be available as a defence to an action in defamation. The privilege "attaches to occasions when the law recognises a need for frank … communication which outweighs the need to protect reputation".[18] In issue in this case is the aspect of qualified privilege termed a reply to an attack. As

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17 At [21]. This aspect was of some importance at trial. In the notice under s 41 of the Defamation Act 1992 (the s 41 notice), the respondent claimed that in publishing the interview Mr Craig had made representations that were knowingly dishonest and deceitful or he was reckless in that respect.

18 *Lu v Mo Po* [2018] HKCFA 11, (2018) 21 HKCFAR 94 at [13] per Lord Reed NPJ.

the authors of *Gatley on Libel and Slander* note, with certain qualifications, "a person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements" about the person who made the attack will be privileged.[19]

[22] There is now no dispute in the present case that the occasion was covered by qualified privilege. Mr Williams had attacked Mr Craig's reputation and interests privately (in disclosures to members of the Conservative Party's board) and publicly (through the releases to Whale Oil). Mr Craig was entitled to respond to the attack which he said he saw as a "dirty politics" campaign against him. The issue is rather whether the jury was misdirected about how the privilege could be lost.

[23] The purpose for which the occasion was privileged was, as apparent from the reasons of Katz J on qualified privilege,[20] to respond to the allegations made to vindicate his character and reputation. As the Judge said, there is "a recognised interest" in being able to reply "forcefully" to the allegations made against him so as to "prevent the charges operating to his prejudice".[21] We accept that the purpose for which the occasion was privileged was consistent only with Mr Craig communicating to members of the public what he believed to be true in response to an attack on his reputation.[22]

[24] We add that we agree generally with the discussion of the relevant principles on qualified privilege in the reasons given by William Young J.[23] In agreement with William Young J we consider that the defendant's state of mind is not relevant to whether the occasion is one that attracts qualified privilege.[24] The judge determines the occasion that sets up the qualified privilege and the jury decides whether it has been rebutted because the defendant is shown to have been "predominantly motivated

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

20 *Williams v Craig* [2016] NZHC 2496, [2016] NZAR 1569 [Qualified privilege judgment].

21 At [15], citing *Penton v Calwell* (1945) 70 CLR 219 at 233–234 per Dixon J. See also, for example, *Adam v Ward* [1917] AC 309 (HL) at 330 (the person responding has a wide latitude) and see *Lu v Mo Po*, above n 18, at [29]–[30] and [39] per Lord Reed.

22 We agree with the reasons given by William Young J on this point: below at [127].

23 Below at [116]–[131]. See also the discussion of the development of the common law privilege in Paul Mitchell *The Making of the Modern Law of Defamation* (Hart Publishing, Portland (Oregon), 2005) at 145–163.

24 Below at [120].

by ill will towards the plaintiff, or otherwise [taken] improper advantage of the occasion of publication".[25]

[25] Turning then to how the privilege is lost, s 19(1) provides that the defence of qualified privilege fails:

> … if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.[26]

[26] The appellant submits the text of s 19(1) supports the view that being predominantly motivated by ill will is just one way in which a defendant can take improper advantage of the privileged occasion. Applying this approach, the appellant's case is that the key issue is whether the privileged occasion has been used for an improper purpose.[27] The respondent's submission is that the appellant's approach conflates the two limbs of s 19(1) which refers to both ill will and improper advantage. Counsel refers to the injunction in *Lange v Atkinson* to apply s 19 without reading it down.[28]

[27] Section 19(1) refers to a defendant being "predominantly" motivated by ill will or "otherwise" taking improper advantage. That language is a clear indication that s 19(1) is concerned with improper purpose, that is, a purpose outside the occasion of privilege. Further, s 19(2) is expressed to be subject to s 19(1) and states that "a defence of qualified privilege shall not fail because the defendant was motivated by malice". Because subs (2) is subject to subs (1), it is clear that if the defendant is not so predominantly motivated, the presence of some "malice" (to use the terminology in subs (2)) is not material. In addition to this feature of the text, the structure of s 19(1) reinforces the view that the reference to ill will is an example of using a privileged occasion for an improper purpose.[29]

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25 Defamation Act, s 19(1). See also *Lu v Mo Po*, above n 18, at [24] per Lord Reed.

26 The question trail asked the jury to consider first whether Mr Williams had proven that in publishing the Remarks or the Leaflet, "Mr Craig was predominantly motivated by ill-will towards Mr Williams" and, second, whether "Mr Craig took improper advantage of the occasion of publication".

27 Relying on the discussion on qualified privilege in *Lu v Mo Po*, above n 18, at [16]–[18] per Lord Reed.

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

29 A similar structure is used in s 41. See also the reasons given by William Young J below at [124].

[28] There is support for this interpretation in the McKay Committee Report which preceded the current legislation.[30] The McKay Committee Report recommended that the common law concept of malice in respect of the defence of qualified privilege be replaced by a statutory provision which avoided the word "malice" itself.[31] The Committee considered that "malice" was "a word which can be misunderstood" and noted that it was insufficient to prove malice "to show that animosity existed between the parties".[32] The McKay Committee did not adopt the formulation proposed by the Faulks Committee (the English equivalent) on this aspect.[33] The Faulks Committee had sought to codify common law malice by stating that the privilege was lost if the plaintiff proved that, in making the statement complained of, the defendant "took improper advantage of the occasion".[34] The McKay Committee was concerned that, although the Faulks Committee intended that the privilege would be lost by the "venting of spite or ill will towards the plaintiff", the draft formulation was not sufficiently clear on this.[35]

[29] The McKay Committee also rejected the argument that the defence of qualified privilege should not be defeated by "motives of ill will or spite on the part of the publisher".[36] That was because the Committee took the view that the use of the privilege predominantly for the purpose of venting spite or ill will was an example of the misuse of the privileged occasion. The Committee stated that "the essence of malice" in the context of qualified privilege:[37]

> … is that the defendant took improper advantage of the occasion which gave rise to the privilege by making statements which he did not believe to be true, or for the purpose of venting his spite or ill will towards the plaintiff, or for some other indirect or improper motive.

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30 Committee on Defamation *Recommendations on the Law on Defamation: Report of the Committee on Defamation* (December 1977) [McKay Committee Report].

31 At [199].

32 At [196].

33 Committee on Defamation *Report of the Committee on Defamation* (Cmnd 5909, 1975) [Faulks Committee Report].

34 McKay Committee Report, above n 30, at [197], citing cl 9(1) of the draft Defamation Bill, being appendix III to the Faulks Committee Report.

35 At [198].

36 At [200]–[201].

37 At [270]. See also *Lange v Atkinson*, above n 28, at [42] and [48]; and Mullis and Parkes, above n 19, at [17.8]. Given the latitude afforded to a defendant on an occasion of privilege where the only evidence of ill will comes from the language used in the response, some caution is required before a jury could be satisfied the predominant motivation was ill will.

[30] Applying this approach to s 19, we see the critical issue in the present case as being whether the occasion has been used for an improper purpose. The basis on which such improper purpose was available in the circumstances of the case was if Mr Craig knew that the allegations of sexual harassment made against him by Mr Williams were true and therefore had no belief in the statements he made in rebuttal of them. That was the available basis for a conclusion that he was predominantly motivated by ill will and that his response was not within the privilege. As was said in *Roberts v Bass*: "If the defendant knew the statement was untrue when he or she made it, it is almost invariably conclusive evidence of malice."[38]

[31] The respondent argues there were other matters referred to in the s 41 notice which could form the basis of a finding of ill will.[39] But, as the Court of Appeal noted, "the allegation lying at the heart of Mr Williams' initiating attack on Mr Craig's character and reputation was that he had sexually harassed Ms MacGregor".[40] In any event, the fact there were other particulars does not assist if there were material misdirections in the summing up as we say there were.

The summing up

[32] We turn now to the summing up. We deal with the parties' submissions on this aspect and with the approach of the Courts below as necessary in the discussion which follows. As we have foreshadowed, we have concluded that there were a number of respects in which the directions were not correct.[41] We discuss each of these aspects in turn. We preface our discussion on this aspect by noting in fairness to the Judge that, in the respects we discuss, the directions largely reflected the way in which counsel put their respective cases.

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38 *Roberts v Bass* [2002] HCA 57, (2002) 212 CLR 1 at [77] per Gaudron, McHugh and Gummow JJ.

39 For example, we have referred above at [19], n 17 to the reference to the "Mr X" interview. The notice also stated Mr Craig had "maintained a disingenuous and false pleading of bad reputation"; denied that the words complained of were defamatory until conceding in cross-examination that they were in fact defamatory; and in his evidence Mr Craig provided no basis for allegations (which were not pursued) that Mr Williams "was involved in a smear campaign against the former head of the Serious Fraud Office".

40 *Craig* (CA), above n 3, at [26].

41 We agree with the description of these errors in the reasons given by William Young J below at [139].

Extent of the response and relevance

[33] The appellant submits that the trial Judge misdirected the jury by directing that, in determining whether Mr Craig was predominantly motivated by ill will or some other improper purpose, the jury could consider both the extent of Mr Craig's response and its relevance to what Mr Williams had said about it.

[34] In the judgment setting out the reasons for finding the occasion was covered by qualified privilege, Katz J said Mr Craig was entitled to respond on a nationwide basis.[42] That was because Mr Williams' attack was to a nationwide audience. Katz J expressed satisfaction that Mr Craig's responses "were made to an audience with a proper interest in receiving them".[43] This approach is consistent with authority.[44]

[35] But the jury was told that the extent of the response was relevant to the question of Mr Craig's dominant motive. For example, in the context of directions about ill will, the jury was directed to consider whether Mr Craig published the response "to more people tha[n] he needed to in order to respond, or did he publish it to the right range of people?"[45] The references included a reminder as to what Mr McKnight, counsel for Mr Williams, said about this in closing. Mr McKnight described the width of the publication as "possibly the widest defamation claim in terms of audience, to have occurred in New Zealand" and asked the jury to consider whether the response "was too extreme and disproportionate". This aspect was also referred to in the s 41 notice.

[36] The Court of Appeal rejected the criticism of this part of the summing up. The Court said that although Mr Craig was "entitled to respond to the public at large" the jury could find he nonetheless went too far "in making the Remarks and then

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42 Qualified privilege judgment, above n 20, at [69]–[79].

43 At [79].

44 See, for example, *Harbour Radio Pty Ltd v Trad* [2012] HCA 44, (2012) 247 CLR 31 at [125] per Kiefel J: "an appeal by the attacker to the public gives the public a corresponding interest in the reply"; and see generally Brian Neill and others *Duncan and Neill on Defamation* (4th ed, LexisNexis, London, 2015) at [17.25]–[17.26].

45 And later, the summing up asked: "Did he publish the response to more people than he needed … " and later discussed the width of the publication and the "wide" publication.

publishing and distributing the Leaflet nationwide".[46] The Court said a "disproportionately wide distribution may suggest malice".[47]

[37] In light of the Judge's findings in relation to qualified privilege, while the scope of the publication was a matter relevant to damages if the privilege was lost, it is not clear how it could support the inference of improper purpose in this case. The fact the occasion included a nationwide response was an issue which the Judge had determined.

[38] The authorities relied on by the respondent in this respect are not on point. Mr Romanos, who argued this part of the appeal, referred to observations made by Eady J in *Hamilton v Clifford* that the defendant in that case "would be entitled to protect his reputation by a proportionate response which was appropriate both in terms of subject matter and scale of publication".[48] Eady J went on to say that for a defendant to take the benefit of qualified privilege:[49]

> … the response should not go into irrelevant matters or, in particular, cross over into an attack on the integrity of the [plaintiff] if it is not reasonably necessary for defending his own reputation.

[39] These comments were made in the context of determining whether the defence could be disposed of at the pre-trial stage or whether there were matters for the jury to consider. Eady J saw this aspect as a matter "to be taken into account in assessing malice and accordingly for the jury to decide".[50]

[40] The Supreme Court of Canada in *Botiuk v Toronto Free Press Publications Ltd*, also relied on by the respondent, accepted the appellants in that case could respond to protect their interests but considered that in attacking the report in question they had gone "well beyond what was reasonably appropriate to the occasion".[51] Neither defamatory response was "measured".[52] That observation was made against the

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46 *Craig* (CA), above n 3, at [100].
47 At [100].
48 *Hamilton v Clifford* [2004] EWHC 1542 (QB) at [66].
49 At [66].
50 At [73].
51 *Botiuk v Toronto Free Press Publications Ltd* [1995] 3 SCR 3 at [87] per Cory J, delivering the reasons of La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ.
52 At [88].

background of the Court's acceptance of the trial Judge's assessment that it was not necessary for the appellants to continue to defame the respondent so as to respond to the publication in issue.

[41] Similar points can be made about the questions posed by the Judge about relevance. In the qualified privilege judgment Katz J found that, "taken as a whole and in context", the statements by Mr Craig were relevant.[53] By contrast, in the summing up the Judge said that as a means of trying to decide what was Mr Craig's dominant motive, the jury could consider whether he said "things that were not relevant to the attack or was everything relevant".

[42] Lord Diplock discussed "relevance" in *Horrocks v Lowe* as follows:[54]

> The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest upon which the privilege is founded. Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in *Adam v Ward* [1917] AC 309 at 326–327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. *As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference*.
>
> (emphasis added)

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53 Qualified privilege judgment, above n 20, at [66]. The Judge noted further that none of the statements were "plainly and obviously" irrelevant to the attack: at [68].

54 *Horrocks v Lowe* [1975] AC 135 (HL) at 151. Lord Reed cited the latter part of this passage with approval in *Lu v Mo Po*, above n 18, at [30].

[43] Given the finding as to relevance made earlier, it is unclear why relevance was referred to in the way it was. Katz J accepted in her judgment ordering a retrial that this was an error.[55] The Court of Appeal said that the inclusion of irrelevant material "may be relevant to malice" citing the passage set out above from *Horrocks v Lowe*.[56] However, even putting to one side the conclusion in the earlier reasons for finding the occasion was privileged, the correct approach to relevance was not explained. Nor was the jury advised of the need to be slow to draw an inference of improper purpose on account of irrelevance as the passage cited from *Horrocks v Lowe* suggests would be good practice.[57]

Acting with reasonable care

[44] The jury was also directed to consider "whether Mr Craig acted with the degree of responsibility required". In a similar vein, reference was made to the submission by counsel for Mr Williams in closing that it was relevant that Mr Craig did not warn Mr Williams or write to him about the Remarks or Leaflet prior to publication. In closing Mr McKnight referred also to the need for a person speaking on an occasion of privilege to act "responsibly".

[45] The Court of Appeal accepted the submission for Mr Craig that in this respect the Judge had incorrectly brought in "an element from the extended privilege relating to free speech" recognised in *Lange v Atkinson* in the context of publication of political discussion.[58] We agree. Whatever the conditions required to invoke qualified privilege for political comment, the qualified privilege available to a defendant who responds to what that defendant believes is an unjustified attack on their reputation is not lost through lack of care in the manner suggested in the summing up. As Lord Diplock observed in *Horrocks v Lowe*, "indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a

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55 Retrial judgment, above n 1, at [101]–[103]. We note the qualified privilege judgment setting out the reasons for the decision the occasion was one of qualified privilege was delivered after the summing up.

56 *Craig* (CA), above n 3, at [93].

57 In any event, relevance was not one of the particulars in the notice produced by Mr Williams pursuant to s 41 of the Defamation Act. Such a notice must include the facts which the plaintiff wishes to rely on to argue that the defendant was motivated by ill will: s 41(2).

58 At [103]–[104].

positive belief that it is true".[59] Similarly, in *Harbour Radio Pty Ltd v Trad*, Kiefel J rejected the notion that a test of reasonableness of response, in addition to relevance, was to be applied in determining whether the occasion was privileged.[60]

[46] The Court of Appeal considered that, although incorrect, the Judge's statement in this respect was simply scene-setting.[61] However, reading the summing up as a whole we do not accept this characterisation. In the context of directions relating to Mr Craig's belief, the jury was told: "Another question you should ask yourself is whether Mr Craig acted with the degree of responsibility required in the circumstances." The direction was not just introductory in nature.

[47] The suggestion in the directions that the failure to give an attacker notice prior to responding can be evidence of ill will is contrary to the tenor of authorities such as *Horrocks v Lowe*, where the defendant was not liable because he believed the truth of what he said even though his state of mind was one of "gross and unreasoning prejudice".[62] The authors of *Gatley on Libel and Slander* state:[63]

> If the defendant honestly believed his statement to be true, he is not to be held malicious merely because such belief was not based on any reasonable grounds; or because he has done insufficient research or was hasty, credulous, or foolish in jumping to a conclusion, irrational, indiscreet, stupid, pig-headed or obstinate in his belief.

[48] Counsel for the respondent submits that to characterise the directions on this point as imposing a *Reynolds v Times Newspapers Ltd* "journalism-standards" type of argument ignores the fact Mr Craig ambushed Mr Williams' reputation before a letter of demand was sent and that the jury could consider that conduct when considering Mr Craig's motives.[64] However, there was a risk arising from the directions that it may have been understood that it was imperative Mr Craig check with Mr Williams

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59 At 150; and see *Lu v Mo Po*, above n 18, at [27]–[28]. Compare *Lange v Atkinson*, above n 28, at [42]–[44].

60 *Harbour Radio Pty Ltd v Trad*, above n 44, at [108] and [112]; and see *Roberts v Bass*, above n 38, at [5] per Gleeson CJ.

61 At [104].

62 *Horrocks v Lowe*, above n 54, at 147.

63 Mullis and Parkes, above n 19, at [17.17] (footnotes omitted).

64 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

before responding.[65] In any event, there is an underlying concern that the focus on these issues was a distraction from the central question about Mr Craig's knowledge, a point to which we return shortly.

Ill will

[49] We deal next with the way in which the directions addressed ill will.

[50] In terms of the approach taken in the case, it is relevant to note first that Mr McKnight suggested to Mr Craig in cross-examination that Mr Craig felt ill will towards Mr Williams. He also asked Mr Craig whether Mr Craig wanted to "teach" Mr Williams "a bit of a lesson", suggesting some personal animosity. Mr Craig was also asked whether he had ill will towards Ms MacGregor. It was suggested in this context that Mr Craig had deliberately chosen not to use Ms MacGregor's first name in one part of the Leaflet.

[51] Further, in closing, Mr McKnight submitted that the jury could find Mr Craig lost the privilege if he was predominantly motivated by ill will towards Mr Williams. The matters relied on by counsel in this respect were, first, the fact that Mr Craig did not warn Mr Williams about the forthcoming publication. Secondly, Mr McKnight referred to what he described as the continued "assault" by Mr Craig on Mr Williams' reputation after publishing the Remarks and the Leaflet. The two other factors referred to in this context were the "inflammatory and sensationalist" words used and the suggestion Mr Williams had a bad reputation. In relation to the latter point, the submission went on to suggest it was "not surprising [Mr] Craig brought ill will towards" Mr Williams. That was said to be because Mr Williams had "exposed [Mr Craig] for who he is". The directions on this aspect also referred back to the closing submissions on the point.

[52] The closing submissions for Mr Williams also reflected the s 41 notice which set out the particulars of ill will alleged. The matters referred to in the notice included Mr Craig's use of "unnecessarily inflammatory, sensationalist and pejorative"

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[65] Compare the *Lange v Atkinson*, above n 28, type of qualified privilege: at [47]. See also the discussion of the *Lange v Atkinson* litigation in *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [36]–[40].

language. In summing up, Katz J reminded the jury of the s 41 notice and said the jury might find it helpful to look at the notice. The agreed question trail on this point reiterated s 19(1).

[53] The directions given to the jury in a number of respects appeared to treat ill will as equating to personal animosity and so failed to make it clear that the existence of personal animosity would not make publication improper if Mr Craig believed the truth of his refutation. In particular, putting the question in terms of whether Mr Craig wanted to hurt or injure Mr Williams obscured the inquiry into whether the statements made by Mr Craig were for improper purpose because he did not believe in their truth at the time he made them and therefore the inference could be drawn that he was actuated by ill will towards Mr Williams.

The question of Mr Craig's knowledge

[54] Finally we turn to the parts of the directions dealing with knowledge. This was not a matter raised by the appellant as a specific misdirection. But in our view it follows from the other issues raised in the case that there is a question about the extent to which the directions put to the jury the key questions about Mr Craig's knowledge or belief. The issue arises because the jury was not directed precisely to consider whether Mr Craig was responding to an attack which he knew to be true, as the reasons given by William Young J also set out.[66] Further, the references to issues such as whether Mr Craig's response was "appropriate or over the top" deflected the jury from consideration of whether Mr Craig believed that what he was saying was true.

[55] The latter point, that is, the reference to whether the language used was "over the top" was raised by counsel for the appellant in the Court of Appeal. The Court of Appeal considered this topic was not identified "as a stand-alone measure" but rather as a "relevant circumstance".[67] That may be so but there remains a more general concern about the resultant lack of focus on the key question about Mr Craig's belief.

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66 Below at [139](b).
67 *Craig* (CA), above n 3, at [95].

[56] In terms of the directions on Mr Craig's knowledge or belief, in agreement with the reasons delivered by William Young J, what was said at [60] of the summing up is a pointer in the right direction.[68] In that passage the Judge stated:

> If Mr Craig did not honestly believe that what he published was true, this is another factor that may well indicate ill-will. This is because Mr Craig could not be justified in responding to an attack by deliberately saying untrue things that he knew would hurt Mr Williams. Likewise, if 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.

[57] But Katz J went on to direct the jury in this way:

> 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?* … Another way of saying all this is, in the circumstances, did Mr Craig take a "cavalier" approach to the truth of his statements. 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 added)

[58] The summing up then referred to the relevant part of the question trail noting that the pertinent question referred to whether Mr Williams had proven that in publishing the Remarks and Leaflet Mr Craig took improper advantage of the occasion of publication. It was noted that:

> [62] … *Even if Mr Craig did believe what he said was true, he may still have had another dominant reason*, other than genuinely responding to the attack, for publishing the Remarks. If so, then he loses the privilege. …
>
> [63] … Like with ill-will, if Mr Craig knew what he was saying was false, or did not care or was indifferent to whether it was false, then this may well indicate that he was taking improper advantage.
>
> (emphasis added)

[59] The other critical passage of the summing up on this aspect is at [74]. Here, the jury was directed as follows:

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[68] Below at [139].

> [74] *You are also entitled to take into account whether you believe that Mr Williams' allegations about Mr Craig were substantially true and justified.* Even if he got some details wrong, for example about the sexting, was the "sting" of his allegations essentially true. If it was, then this could indicate that Mr Craig's response was motivated by ill-will or that he was taking improper advantage of the occasion. On the other hand, if you think that there were material errors in what Mr Williams told people about the relationship between Mr Craig and Ms MacGregor, and that these were highly damaging to Mr Craig, as he says, then this may support the view that Mr Craig was motivated by a genuine desire to set the record straight and restore his reputation, rather than ill will against Mr Williams.
>
> (emphasis added)

[60] In this context, the jury was directed to consider the evidence of Mr Craig and that of his wife. Finally, the Judge said:

> [76] So you need to put all of these types of issues onto the scale and reach a view as to whether Mr Craig took improper advantage of the occasion of publication or was motivated by ill-will. Was his dominant motive [sic] was to hurt Mr Williams? Or did he honestly believe the things he was saying in the Remarks and Leaflet and published them in an attempt to restore his reputation and expose what he saw as a "dirty politics" style attack on him. …

[61] Taking first the reference to "another dominant reason" in the passage cited above at [58], that does not capture the requirement that the privilege is lost only where the defendant is "predominantly" motivated by ill will. Further, the reference to "genuineness" is unhelpful in that it may introduce notions of a need for reasonableness in belief. But it is the passage from [74] of the summing up cited above that is of particular concern. The concern is that as a result it may have been thought that if Mr Craig did sexually harass Ms MacGregor that was the end of the inquiry for the jury.[69] It was, however, necessary to focus the jury's attention on the issue of Mr Craig's knowledge and to provide the jury with some direct guidance as to how that question should be approached. The directions fell short in this respect.

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[69] In closing, Mr McKnight made the submission that if Ms MacGregor "was sexually harassed and that [Mr] Craig acted with a lack of integrity in respect of her pay, then that [was] reason enough to make a finding of improper advantage".

A new trial?

[62] Having found that there were misdirections, the issue is whether what has occurred has given rise to a miscarriage of justice.[70]

[63] The appellant submits the misdirections were material. The respondent disputes that there were misdirections but in any event says there were no material misdirections. In developing that submission, the respondent says that to some extent the case resolved itself into a credibility clash between Mr Craig and Ms MacGregor. The argument is that the jury's award of punitive damages reflects a finding there has been a flagrant disregard of Mr Williams' rights and so a credibility finding against Mr Craig. And, further, that there were other bases on which such a finding could be made. The respondent emphasises in that respect a text message sent by Mr Craig to Mr Williams acknowledging Mr Williams' belief in what he had been told by Ms MacGregor. Finally, the respondent submits no general retrial should be ordered given the appellant's approach to the pleadings and the failure to object to the summing up. We address each of these matters in turn.

Were the misdirections material?

[64] On the question of materiality, the authorities support the view that an appeal need not be allowed where the errors in a summing up are incidental.[71] But what has occurred here cannot be characterised in that way. Rather, the concerns identified go to the key question of Mr Craig's knowledge and what it was the jury had to find in that respect. The high level of the damages award, which reflects punitive damages, may also suggest the jury has not approached the task correctly. There is also the concern about the misdirection on ill will. That is important given the Court of Appeal's finding the loss of qualified privilege reflected the jury's acceptance that Mr Craig was motivated by ill will.[72]

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70 See the discussion of r 11.15 of what is now the High Court Rules 2016 on the power to order a retrial in *Smallbone v London* [2015] NZCA 391, (2015) 22 PRNZ 768 at [31]–[43]. The Supreme Court can exercise this power by virtue of s 79 of the Senior Courts Act 2016.

71 *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 340; *Smith v British Phosphate Commissioners* [1967] NZLR 952 (SC) at 956; *Thompson v The King* [1949] NZLR 605 (SC) at 610; *Matheson v Schneideman* [1930] NZLR 151 (SC) at 157; and *Bray v Ford* [1896] AC 44 (HL) at 48.

72 *Craig* (CA), above n 3, at [70]. The Court reiterated that Mr Craig "must have lost qualified privilege on the ground of ill will, not of improper use of the occasion": at [75].

[65] Further, the jury was allowed to consider matters such as a requirement of reasonable care and as the proportionality of the response in the absence of sufficient warning as to the caution required. The latter is a particular concern in the present context where Mr Craig was entitled to considerable leeway in his response to Mr Williams' attack.

[66] Nor can we be confident the misdirections were not material on the basis the jury must have found there was a flagrant disregard of Mr Williams' rights. In the context of reviewing the damages award, the Court of Appeal described the case as turning primarily on "the jury's adverse assessment of Mr Craig's credibility" so the Court saw the case largely in the way characterised by the respondent.[73] There were however other evidential aspects which could have been seen as significantly colouring what Mr Craig might have believed.

[67] There were several contested matters of fact in the latter category. For present purposes we can use as an example of these matters Mr Williams' pleading that he was defamed by Mr Craig's statement that Mr Williams "lied by falsely alleging that Mr Craig had sent Ms MacGregor '*SEXT*" messages".[74] The Judge, in the context of the retrial judgment, expressed a view of the state of the evidence about this topic favourable to Mr Craig.[75] That and other factual issues remain highly contested.[76] But their relevance for present purposes is simply to demonstrate that this was not necessarily an open and shut case on the evidence as to what Mr Craig believed. Applying the same reasoning, the appellant's argument there was insufficient evidence to establish loss of qualified privilege must equally fail.[77]

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73 At [73].

74 In the pleadings and in both the Remarks and the Leaflet the parties defined the term "Sext" as "sexually explicit text messages". That deals with the definitional issues that might otherwise arise from the use of that term.

75 Retrial judgment, above n 1, at [55]–[56]. The Court of Appeal was not satisfied the Judge's findings on this and other matters were wrong: *Craig* (CA), above n 3, at [49]–[50].

76 Some of the evidential matters referred to by Katz J do not appear to have received a great deal of attention during the course of the trial. But in closing Mr Mills QC, counsel for Mr Craig, maintained some focus on matters such as what Mr Williams had said about sext messages.

77 As Katz J found in the Retrial judgment, above n 1, at [84], [92] and [95]–[96].

[68] The Court of Appeal said that to find Mr Craig acted with ill will, the jury must have found:[78]

> 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.

[69] In the circumstances, we cannot be confident that this was the line of reasoning adopted by the jury. Nor can we be satisfied that the inferences identified by the Court of Appeal were "inevitable or proper inferences" from the jury's decision.[79] The case is not one in which it is possible to look to the pattern of verdicts in concluding that what occurred was not material.[80] Against this background we do not find the "all-or-nothing" characterisation, which here would not necessarily address the totality of the evidence as to what Mr Craig believed, as helpful in considering whether there is a risk of a miscarriage. The "all-or-nothing" approach does not explain the outcome in terms of damages. For the reasons given by both Katz J and by the Court of Appeal, the award is such that it does not simply reflect the conduct that the jury must have concluded constituted sexual harassment.[81]

Other bases for finding the privilege was lost?

[70] As to the submission there were other bases on which a finding the privilege was lost, the respondent draws support for the view we can be confident there has been no miscarriage of justice from the text message Mr Craig sent to Mr Williams.[82] The message was dated 22 June 2015 (after the sexual harassment claim was settled in May that year). It read:

> Hi Jordan
>
> I know you believe Rachel but if you want to know why she withdrew her claim for $0 I would like to tell you.

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78 *Craig* (CA), above n 3, at [44] (footnote omitted).

79 At [6], citing *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 4 All ER 732 at [7] per Lord Bingham.

80 Compare the reasons given by William Young J below at [151]–[153]. The jury was asked to work through the agreed question trail but was directed to give general verdicts limited to liability and quantum. It was not directed to answer each of the (possible) 124 separate issues in open court.

81 Retrial judgment, above n 1, at [53]–[57]; and *Craig* (CA), above n 3, at [49]–[50] and [54]–[55].

82 And see the reasons given by William Young J below at [149].

> Is it possible to meet so you at least have the truth. I'd come to you if needs be.
>
> Kind regards
>
> Colin Craig.

[71] The first point we note is that counsel for Mr Williams did not suggest in cross-examination or in closing that the text had the significance now sought to be ascribed to it, namely, that it showed Mr Craig did not believe Mr Williams was lying.[83] Rather, that evidence was given in a different context.[84]

[72] Further, Mr Craig did provide an explanation for the text. Mr Craig described the text as an attempt to reach out to Mr Williams to give him his side of the story and stop leaks to Mr Slater. When Mr Williams did not reply, Mr Craig said he concluded Mr Williams did not care about the truth and had deliberately set out to depose him as the Conservative Party leader and prevent him from being elected to Parliament. While Mr Craig acknowledged it was his opinion that Mr Williams believed Ms MacGregor at that time, he also wanted to reiterate there was no "six-figure" settlement. He maintained his belief that Mr Williams had lied to the board a few days previously. This was because there were claims Mr Williams made to the board which Ms MacGregor had not made, including in the letter of 18 February 2015 from her lawyers to the firm acting for Mr Craig. Mr Craig's account on this aspect may or may not have resonated with the jury but, again, the matter is not so clear cut as to provide the necessary confidence in the present inquiry.

[73] Additionally, we consider the other matters relied on to support a finding of a flagrant disregard of Mr Williams' rights were peripheral. In agreement with the reasons given by William Young J we consider the argument that, even if Mr Craig

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83 Below at [153](b). Counsel for Mr Williams advanced the argument in this Court.

84 Mr Craig was asked how he knew Mr Williams believed Ms MacGregor, whether his view about that had changed, whether he considered Mr Williams had lied to the Conservative Party board at a meeting on 18 June, and finally, whether the text breached the confidentiality agreement with Ms MacGregor.

believed Mr Williams had been lying, he was predominantly motivated by a wish to harm Mr Williams was likely to have been an unnecessary distraction.[85]

Effect of counsel's election not to object

[74] Finally, we address the submission that a retrial was not appropriate given counsel for Mr Craig's election not to challenge the particulars of malice or to seek findings of truth based on alleged undisputed evidence or to object to a summing up which reflected the agreed question trail. The Court of Appeal also saw it as significant that counsel for Mr Craig did not object to the summing up.[86]

[75] The omission of counsel to identify the concerns with the summing up at the time may point to a lack of materiality but here the errors were significant.[87] The lack of challenge to the s 41 notice is potentially of more importance because the treatment in the summing up of ill will and of proportionality reflect the s 41 notice. There was more time to address any frailties with the notice.[88] However, these were ultimately questions of law for the Judge. As Lord Watson said in *Bray v Ford*:[89]

> Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal.

[76] Further, the way in which relevance was addressed in summing up is not something arising out of the s 41 notice. More importantly, the concern that the jury was not given adequate direction on what should have been the central question of Mr Craig's knowledge arises independently of the s 41 notice.

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85 Below at [143]. As Katz J put it the "most damaging particulars in the s 41 notice" were "the assertions that: (a) the allegations Mr Williams made … were substantially true, and … Mr Craig knew that; and (b) Mr Craig's response … included matters that he knew to be false": Retrial judgment, above n 1, at [87].

86 *Craig* (CA), above n 3, at [88]–[89] and [113]; see also the reasons given by William Young J below at [157].

87 Compare the reasons given by William Young J below at [157].

88 The amended notice is dated 28 September 2016 and the summing up was delivered on 29 September 2016.

89 *Bray v Ford*, above n 71, at 49.

Conclusion

[77] Accordingly, on the facts of the present case, we have reached the view that it is not possible in all of these circumstances to have confidence that the fact-finder approached the matter in the correct way. We are conscious that there has been a trial of nearly four weeks duration but we cannot conclude that as a result of the misdirections there has been no miscarriage of justice. For these reasons, we order a new trial on liability and damages.

The cross-appeal

[78] The cross-appeal relates to the decision of the Court of Appeal to uphold the finding of the High Court that the damages were excessive and to order a retrial on damages alone. As we have noted, on the cross-appeal Mr Williams says the jury's awards should be reinstated in whole. Given our conclusion a retrial on liability and damages should be ordered, it is not necessary for us to address this. We do however make two brief observations.

[79] First, we do not agree with the Court of Appeal that it was possible to sever liability and damages in this case. The Court of Appeal in reaching that view considered it important that the jury had decided Mr Craig did not believe his statements about Mr Williams such that "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".[90] As we have discussed, we do not see the case as necessarily being quite so open and shut.[91]

[80] Secondly, we endorse the view of the Court of Appeal that it would have been helpful for the Judge to have directed the jury on "the appropriate financial parameters of an award".[92] As the Court said, "a judge should feel free to indicate the appropriate boundaries of an award while exercising care not to usurp the jury's function,

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90 At [75].

91 Above at [66]–[67].

92 *Craig* (CA), above n 3, at [57]. We accordingly agree with the reasons given by William Young J on this point: at [161] below.

particularly where the judge concludes the plaintiff's counsel has been extravagant in pitching the damages claim".[93]

[81] We add that the factual matters addressed by the Judge in the retrial judgment such as what Mr Williams told other people about the sext messages could well be relevant to damages. It would be helpful for the jury to have some directions about the relevance of these matters in the context of damages as well.

Result

[82] In accordance with the view of the majority, the following orders are made:

(a) The appeal is allowed. The orders of the Court of Appeal entering judgment for the respondent on liability and directing a retrial of the respondent's claim for damages are set aside. An order for a general retrial on liability and damages is substituted.

(b) The cross-appeal is dismissed.

(c) The respondent must pay the appellant costs of $35,000 plus usual disbursements. We allow for second counsel.

(d) The costs award made in the Court of Appeal is set aside. If costs in that Court cannot be agreed they should be set by the Court of Appeal in light of this judgment. Any costs issues arising in the High Court shall be considered by the High Court in light of this judgment.

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[93] At [57], citing *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) at 46–47 per McKay J.

WILLIAM YOUNG AND GLAZEBROOK JJ
(Given by William Young J)

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Introduction

[83] Colin Craig was the founding leader of the Conservative Party of New Zealand. Jordan Williams is a former supporter of that party.

[84] In issue are defamation proceedings brought by Mr Williams against Mr Craig. Mr Williams alleged that Mr Craig had sexually harassed his press secretary, Rachel MacGregor. Mr Craig responded, at a press conference and by a widely distributed leaflet, by contending that, in alleging sexual harassment, Mr Williams had lied. Mr Craig's responses are the subject of these proceedings.

[85] Mr Craig defended the claim on the basis of defences of truth, honest opinion and qualified privilege. After a trial spanning nearly four weeks in the High Court, a jury found for Mr Williams in respect of both the press conference remarks and the

leaflet. There were separate awards of general and punitive damages totalling $1.27 million – the full amount claimed. The punitive damages were awarded on the basis that Mr Craig had acted in flagrant disregard of Mr Williams' rights.[94]

[86] Immediately after the jury was discharged, counsel for Mr Craig sought an order deferring entry of judgment; this on the basis that counsel intended to make an application to set aside the verdict of the jury and enter judgment in favour of Mr Craig or, in the alternative, an order for a retrial. The trial Judge, Katz J, acceded to counsel's request and deferred entry of judgment. Katz J later granted the application to set aside the jury's verdict.[95] She did so on the ground that the damages awarded were excessive.[96] She was also of the view that she had misdirected the jury as to qualified privilege.[97] In the result she ordered a retrial on both liability and damages.

[87] Mr Williams appealed to the Court of Appeal against the order for a retrial. Mr Craig cross-appealed against Katz J's dismissal of his application for entry of judgment in his favour. The Court of Appeal dismissed Mr Craig's cross-appeal and allowed Mr Williams' appeal in part.[98] It set aside Katz J's order for a retrial on both liability and damages and instead directed a retrial as to damages only and entered judgment for Mr Williams on liability.

[88] Mr Craig subsequently appealed to this Court. He argued that the Court of Appeal erred in confining the retrial to damages. Mr Williams cross-appealed against the judgment of the Court of Appeal. He argued that the Court of Appeal was wrong to uphold Katz J's order setting aside the jury's verdicts on damages. This Court granted leave to appeal and leave to cross-appeal from the Court of Appeal's decision.[99]

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94 Defamation Act 1992, s 28.
95 *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215 [Retrial judgment].
96 At [109].
97 At [100]–[101]. Although she did not go on to consider the materiality of the misdirection, or whether there were misdirections other than the one she identified: at [103].
98 *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 (Harrison, Miller and Gilbert JJ) [*Craig* (CA)].
99 *Craig v Williams* [2018] NZSC 61.

[89] Not in issue before us is the rejection by the jury of the defences of truth and honest opinion. The issues left for discussion are: (a) the rejection of the defence of qualified privilege; and (b) the amount awarded as damages.

The background

[90] The Conservative Party contested the general elections in 2011 and 2014 under the leadership of Mr Craig. Ms MacGregor was Mr Craig's press secretary during the 2011 campaign and she continued in this position (albeit with a change of status from employee to contractor) until she resigned suddenly in September 2014, two days before the general election. This resignation created significant media interest. On the same day as her resignation, she lodged a complaint with the Human Rights Commission alleging sexual harassment by Mr Craig. As it turned out, the Conservative Party failed to win a seat in the election.

[91] Mr Williams and Ms MacGregor had first met in late 2011 or early 2012 and subsequently became friends. In late 2014, Ms MacGregor confided in Mr Williams that Mr Craig had sexually harassed her over a prolonged period, 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) telling her that he dreamed or imagined himself lying or sleeping on her legs which helped him sleep (referred to sometimes as his "sleep trick" or "sleep technique"); and

(c) stopping payments because of a dispute over her pay rate which she believed was attributable to her not reciprocating his romantic interest.

She mentioned one consensual incident involving some intimacy (but not sexual intercourse) which occurred on election night 2011 but said that there had been no other overt sexual contact.

[92] Mr Williams agreed to receive Ms MacGregor's disclosures in confidence. He did, however, take a note of them and this note included a reference to "texts" under the heading of "Description of nature of harassments". He sent the note to her the following day so that she could correct any errors but received no response from her. Around a week after Ms MacGregor confided in Mr Williams, Ms MacGregor's lawyer contacted Mr Williams. During their conversation, Mr Williams provided an undertaking that he would keep Ms MacGregor's sexual harassment allegations confidential.

[93] Sometime later, Mr Williams and Ms MacGregor had become romantically involved. Mr Williams supported Ms MacGregor in preparing her sexual harassment claim, including by allowing Ms MacGregor to store certain documents, such as saved correspondence between her and Mr Craig, in the safe at Mr Williams' workplace. Mr Williams assured Ms MacGregor that only he had access to the safe and that the material would be secure.

[94] Ms MacGregor's claim for sexual harassment settled at a mediation in May 2015. The settlement agreement acknowledged a degree of inappropriate conduct on behalf of both parties. Mr Craig apologised to Ms MacGregor who withdrew her complaint. Mr Craig did not pay Ms MacGregor any money apart from $16,000 to resolve the dispute as to what she was owed for the work she had carried out (a figure which was less than what she had claimed). He did, however, forgive her liability for around $20,000 which she owed him for advances which he had made to her. Both parties agreed not to make any comment to the media or other third parties.

[95] Initially, Mr Williams maintained Ms MacGregor's confidence. But as time went by he started to divulge details of Mr Craig's alleged sexual harassment of Ms MacGregor. This commenced in late 2014 or early 2015. He said that he had formed the view that Mr Craig was not fit to continue to lead the Conservative Party and he began to convey this opinion to several people associated with the party. The extent to which Mr Williams disclosed the basis for this opinion varied between conversations. For example, on one occasion Mr Williams simply referred to having seen "material" that made Mr Craig "very vulnerable". On the other hand, he told

another person that he had read "explicit hand written letters" from Mr Craig to Ms MacGregor where Mr Craig talked "about his fantasies".

[96] In June 2015, Mr Craig appeared in what was referred to at trial as the "sauna interview", an interview of Mr Craig which was conducted inside of a sauna and, after the sauna, in a shower, and was broadcast on television. During this interview, Mr Craig mentioned Ms MacGregor's resignation and, in doing so, breached their confidentiality agreement. Ms MacGregor was "alarmed" by the interview and sought the help of Mr Williams to draft a letter to Mr Craig advising him that he had breached their confidentiality agreement.

[97] Mr Williams' evidence was that in the aftermath of the sauna interview he concluded that Ms MacGregor's reputation needed protecting and that this is why he began to disclose material which Ms MacGregor had given to him. These disclosures were made in two different ways:

(a) In the first place there were largely informal disclosures to senior figures in the Conservative Party. These disclosures undoubtedly referred to sexual harassment and Mr Williams showed some of the Conservative Party members poems, letters and cards which Mr Craig had sent to Ms MacGregor. There was some dispute at trial as to how much further these disclosures went, for instance there were issues whether Mr Williams had referred to text messages sent by Mr Craig to Ms MacGregor as "sexts"; whether Mr Williams described the 2011 election night incident as non-consensual; and whether Mr Williams claimed that the sexual harassment settlement included a six figure pay-out (ie one of, or over, $100,000).

(b) The second line of activity appears to have started with Mr Williams contacting Cameron Slater, operator of the Whale Oil Beef Hooked website. Mr Williams provided Mr Slater with a draft post for publication on the Whale Oil website on 19 June 2015. The draft blog post made allegations against Mr Craig of sexual harassment, a pay-out to a former staff member, and inappropriate touching. Mr Williams

attached (without Ms MacGregor's knowledge or consent) a photo of a poem Mr Craig had sent to Ms MacGregor, entitled "Two of Me", and a photograph of Mr Craig's signature at the bottom of a letter to Ms MacGregor. The post was published by Whale Oil in the same form as the draft provided by Mr Williams. Whale Oil published a number of further articles containing allegations about Mr Craig and speculating about the leadership of the Conservative Party. During this time, Mr Williams remained in contact with Mr Slater and continued to provide suggestions for blog posts prepared by Mr Slater. A number of the Whale Oil posts relied on material Mr Williams supplied to Mr Slater. These actions contributed to (but were not the sole cause of) what was described at trial as a subsequent "national media firestorm".

[98] Mr Craig stepped down from leadership of the Conservative Party on 19 June 2015 shortly after the publication of the Whale Oil post containing the "Two of Me" poem. Mr Craig later called a press conference on 22 June at which he denied ever having sexually harassed anyone, however he did acknowledge that his and Ms MacGregor's conduct had, on some occasions, been "inappropriate".

[99] Mr Craig 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 Brigades

> [sic] 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 "SEXT's" 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.
>
> …
>
> *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.
>
> (emphasis added)

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

[100] Mr Craig made available for the press a leaflet (the Leaflet) which, about a few days later, he arranged to be distributed to 1.6 million households. The production and distribution cost was over $250,000. It was 12 pages long, and printed in colour with photographs and cartoons of the various players including Messrs Williams and Craig.

[101] On the cover page, there was this passage:

> COLIN CRAIG
>
> VS THE
>
> DIRTY POLITICS BRIGADE
>
> … AND THEIR CAMPAIGN OF LIES

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.

[102] The first was titled "Dirty Politics: The Practice of Attack Politics in NZ" and included the following remarks:

> 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.
>
> (emphasis added)

The italicised portion formed part of the alleged defamatory statements pleaded by Mr Williams.

[103] The second section was titled "The Schemers: In the Plot Against Colin Craig" and identified Mr Williams as being one of those schemers. It contained the following particularised allegations against Mr Williams:

> *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*" [(emphasis in original)]. He is a lawyer and currently works full time as a political lobbyist.
>
> It was Williams who gathered the initial information and accusations against Craig. His source was Craig's former press secretary Rachel MacGregor with whom Williams had a romantic relationship.
>
> *Using the information he had gathered, Williams built a compelling story of MacGregor's alleged harassment which he supported by an "attack dossier" of information.* His presentation of events was in part her story (as he says

> she told it to him), some personal notes by MacGregor regarding the matter, and selected details of alleged correspondence from Craig to MacGregor.
>
> *The allegations presented by Williams included claims that (a) Craig had sent MacGregor "SEXT" messages, (b) MacGregor had resigned due to harassment but was lured back by big money, and (c) Craig stopped paying MacGregor for 6 months and put sexual pressure on her with requests she stay the night.*
>
> *These are false allegations and easily proved so. Sexually explicit texts, resignations, and invoicing/payment records are by nature documented events.*
>
> (footnotes omitted, emphasis added)

Again, the italicised sections were, among others, said to be defamatory of Mr Williams.

[104] The third section, described as "The Campaign of Lies: Character Assassination of Craig", narrated four alleged lies that: (a) Mr Craig had sexually harassed Ms MacGregor; (b) there had been a "Big Payout" to Ms MacGregor; (c) Mr Craig had sent Ms MacGregor sexts; and (d) there had been another victim of Mr Craig's sexual harassment.

[105] The fourth section was described as an "Interview: Mr X: Someone Who Knows Speaks Out".

[106] 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. 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. But although an undoubtedly odd feature of the Leaflet, we see the Mr X interview as being of very limited moment in the context of the case as a whole.

The lies attributed to Mr Williams by Mr Craig

[107] The lies attributed to Mr Williams by Mr Craig in the Remarks and Leaflet are that:

(a) Mr Craig had sexually harassed Ms MacGregor.

(b) Mr Craig had made a pay-out or pay-outs to silence alleged victims.

(c) Mr Craig had sent sexts to Ms MacGregor.

(d) Ms MacGregor had resigned due to sexual harassment and had been lured back by big money.

(e) Mr Craig had stopped paying Ms MacGregor for six months and put sexual pressure on her with requests to stay the night.

General positions taken by the parties at trial

[108] Mr Williams acknowledged alleging that Mr Craig had sexually harassed Ms MacGregor.

[109] He acknowledged referring to what he had assumed was a pay-out to settle the sexual harassment claim, but, on his evidence, did not put a figure on the amount. As will have been noted, Mr Craig's denial of having made a pay-out to Ms MacGregor was arguably only true in a literal sense as the settlement he had reached with her included him forgiving a debt of $20,000 which she owed him.

[110] The dispute as to whether Mr Williams described Mr Craig's texts to Ms MacGregor as "sexts" is a frustratingly elusive aspect of the case. Although not all texts which Mr Craig sent to Ms MacGregor were in evidence, it is clear that he did not text her in a sexually explicit way. On the other hand, he did send texts which were flirtatious. One text which he wrote could be construed as referring to the "sleep

technique" or "sleep trick".[100] There may be scope for debate whether "sext" encompasses only the sexually explicit or can also extend to the sexually allusive and, consistently with this, Mr Williams' evidence suggested that he regarded the "sleep technique"/"sleep trick" text as a sext. But although a number of people associated with the Conservative Party to whom Mr Williams spoke said that he had used, or recorded in notes his use of, the word "sext", this evidence was not accepted by Mr Williams. In a context in which widespread dissemination of the communications which Mr Craig had sent to Ms MacGregor was probably practically incompatible with him continuing to serve as leader of the Conservative Party, we consider that this aspect of the case did not warrant the significance placed upon it by Mr Craig.

[111] Mr Williams acknowledged that he had told others that Ms MacGregor had resigned as a result of Mr Craig's behaviour, but had subsequently agreed to come back to work for him after Mr Craig offered her more favourable working conditions. Little attention was paid at trial to this aspect of the case.

[112] Mr Williams admitted that he had told others Mr Craig had stopped paying Ms MacGregor for six months. After being shown the record of payments made to Ms MacGregor, Mr Williams conceded in cross-examination that the record was not consistent with this allegation. That record did, however, show that Ms MacGregor had not been paid remuneration for three months – that is between June and September 2014, albeit that two payments, each of $10,000, were made to her. These advances resulted in the liability of Ms MacGregor to Mr Craig which was later forgiven.

[113] Mr Williams said that the notes which he took during his conversation with Ms MacGregor referred to Mr Craig asking Ms MacGregor to stay the night on one occasion (that is, election night in 2011) and that he had told others about this incident. Not explored in any detail at trial was whether Mr Williams had claimed that there

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[100] See above at [91](b) for a description of the "sleep technique"/"sleep trick". This text was not produced but was referred to by Ms MacGregor in her evidence and its existence was acknowledged in a letter written by Mr Craig's solicitors. Mr Williams almost certainly never saw the text but he did see the letter just referred to, albeit after the proceedings were filed. Adding to the potential for confusion is that on Ms MacGregor's evidence, Mr Craig had also told her verbally that he had dreamed or imagined himself asleep on her legs and it seems clear that she had passed this on to Mr Williams. Ms MacGregor's evidence was that she had told Mr Craig to stop saying this as it made her feel uncomfortable: see below at [114].

were other occasions on which Mr Craig had invited Ms MacGregor to "stay the night".

[114] Mr Williams' case was that Mr Craig had sexually harassed Ms MacGregor and Ms MacGregor was called to give evidence for him. Her evidence generally supported the contention that she had been sexually harassed albeit she conceded that she had not mentioned her concerns to Mr Craig about his conduct apart from: (a) the putting in place of boundaries after the incident on the 2011 election night; and (b) indicating that his references to the "sleep technique" were not appropriate. She said that this was because of her concern about the possibility of losing her job. She gave evidence of the pay dispute which had resulted in her not being paid for the last three months she worked for Mr Craig and that she resigned for two reasons: first, because Mr Craig would not engage with her over this dispute; and secondly (although she did not tell him this) because of her concerns about his conduct. In his evidence Mr Williams claimed that he had believed what he had said about Mr Craig. He also explained why he had thought it right to breach his agreement with Ms MacGregor and her lawyer to treat the information she had supplied as confidential.

[115] Mr Craig's position was that he had not sexually harassed Ms MacGregor albeit that relations between them, particularly before the 2011 election night, had been very close. He said that Ms MacGregor reciprocated his interest. He contended that she had resigned as his press secretary because he had refused a request from her for their relationship to become intimate. As part of his defence he launched a full-scale attack on the character of Mr Williams and in doing so relied on material which was extraneous to the core issues in the case.

Qualified privilege

Reply to attack privilege

[116] At common law, a person whose reputation has been the subject of a defamatory attack has qualified privilege in respect of anything properly said by way

of response to that attack. The position is succinctly summarised in *Duncan and Neill on Defamation*:[101]

> **Reply to attack**
>
> 17.25 A defamatory attack made publicly gives its victim a right to reply publicly. In doing so, the victim is entitled to make statements defamatory of his attacker, including statements impugning the attacker's credibility and motives. Provided that such statements are fairly relevant to a rebuttal of the attack and that the ambit of their dissemination does not significantly exceed that of the original attack, their publication will be the subject of qualified privilege. …
>
> 17.26 The reason for the privilege in such cases is that a person who has been the victim of a defamatory attack has a legitimate right or interest in defending himself against it and those to whom it was published a corresponding interest in knowing his response to it. …

Were Mr Craig's remarks made on occasions of qualified privilege?

[117] This was addressed by Katz J in a ruling given on 26 September 2016.[102] She saw it as a question for her and not the jury to determine, unless it turned on disputed issues of fact.[103] As it turned out, she was satisfied on the undisputed facts that the Remarks and the Leaflet were published on occasions of qualified privilege.[104] This ruling was, however, given without reasons which were later supplied, albeit after the verdict.[105]

[118] In her reasons, she concluded that:

(a) Mr Williams had attacked Mr Craig's character and reputation.[106] In reaching this conclusion, she considered that it was better to leave any question of justification to the second stage of the inquiry, that is

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101 Brian Neill and others *Duncan and Neill on Defamation* (4th ed, LexisNexis, London, 2015) at [17.25]–[17.26] (footnotes omitted).

102 *Williams v Craig* HC Auckland CIV-2015-404-1845, 26 September 2016 (Ruling No 7 of Katz J [Qualified Privilege]).

103 At [14], citing *Hebditch v MacIlwaine* [1894] 2 QB 54 (CA) at 58; and *Adam v Ward* [1917] AC 309 (HL) at 318.

104 At [17].

105 *Williams v Craig* [2016] NZHC 2496, [2016] NZAR 1569 [Qualified privilege judgment]. These reasons were delivered on 19 October 2016.

106 At [62].

whether privilege had been lost, to be determined by the jury.[107] We will revert to this point shortly.

(b) Mr Craig's responses (the Remarks and the Leaflet) were relevant to the attack and that it was open to Mr Craig to attack Mr Williams' credibility.[108]

(c) The Remarks and Leaflet were addressed to an audience which had an interest in receiving them.[109] She held that this was so primarily because of the involvement of the Whale Oil blog which Mr Williams knew would attract mainstream media interest and thus a nationwide audience.[110] It was therefore legitimate for Mr Craig to respond to the public at large.[111] She also saw it as material that both Messrs Craig and Williams operated in the political world.[112]

(d) Mr Williams' allegations were not a response to an initial attack by Mr Craig on Ms MacGregor.[113]

(e) The responses being relevant, their reasonableness or otherwise was material only to whether privilege had been lost – a matter for the jury.[114]

[119] In the course of her reasons Katz J noted the comment in *Gatley on Libel and Slander*:[115]

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

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107 At [61].
108 At [67]–[68].
109 At [79].
110 At [72]–[73].
111 At [73].
112 At [77]–[78].
113 At [82].
114 At [87].
115 At [60], citing Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [14.51] (footnotes omitted).

As will be apparent, Katz J took the view that this issue should be dealt with by the jury when deciding whether the privilege had been lost. This raises an issue of some difficulty which warrants brief discussion.

Who decides, and in what context, whether the original attack was justified?

[120] If qualified privilege is available only when the person attacked believes that the attack was not justified, it might be thought to follow that the defendant's state of mind as to justification is a factual issue which should be, or at least can be, determined as part of deciding whether the occasion was privileged.[116] But, although there is authority which favours this approach,[117] the predominance of opinion is the other way.[118] In other words, the question whether the defendant knew the attack was justified is to be dealt with in terms of whether the plaintiff has shown that the defendant acted outside of the privilege and thus with the onus of proof on the plaintiff.[119] It is the latter approach which we regard as correct.

Loss of privilege – general principles

[121] This brings into play s 19 of the Defamation Act 1992 which provides:

> **19 Rebuttal of qualified privilege**
>
> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1), a defence of qualified privilege shall not fail because the defendant was motivated by malice.

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116 In a case tried by a jury, this question may have to be determined by the jury.

117 *Fraser-Armstrong v Hadow* [1995] EMLR 140 (CA) at 143 per Simon Brown LJ.

118 See Neill, above n 101, at [17.25], n 6; *Fraser-Armstrong*, above n 117, at 143 per Staughton LJ; *Oliver v Chief Constable of Northumbria* [2003] EWHC 2417 (QB), [2004] EMLR 32 at [40]–[43]; *Lu v Mo Po* [2018] HKCFA 11, (2018) 21 HKCFAR 94 at [32] per Lord Reed NPJ; *David v David* [2005] SGCA 18, [2005] 2 SLR(R) 715; and *Kwong v Sia* [2013] SGCA 61.

119 In *Fraser-Armstrong*, above n 117, at 143 Simon Brown LJ assumed that the onus of proof would be on the plaintiff, even if justification was treated as a preliminary issue. But the general principle is that the defendant is to establish that the occasion attracted privilege, which suggests that if justification goes to whether there was an occasion of privilege, the onus of proof should be on the defendant.

[122] Section 19 is not particular to reply to attack privilege and the general principles applicable to rebuttal of qualified privilege are engaged in the present case, albeit that they fall to be applied in a very particular context.

[123] The following remarks of Lord Diplock in *Horrocks v Lowe* are instructive:[120]

> The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused.

He then went on:[121]

> For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit — the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.

[124] So the general principle is that a person taking advantage of a privileged occasion must act in good faith for the purpose for which privilege is accorded. In this context, the prominence accorded to ill will in s 19 is unfortunate. Making a defamatory statement with the predominant motive of ill will towards the plaintiff is but one way in which improper advantage can be taken of an occasion of privilege. And, in any event, ill will, in the ordinary sense, on the part of the defendant towards the plaintiff will usually be of no moment.[122] This too was explained by Lord Diplock in *Horrocks v Lowe*:[123]

> Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it.

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120 *Horrocks v Lowe* [1975] AC 135 (HL) at 149 (emphasis added).
121 At 149.
122 See also the reasons given by Ellen France J above at [27]–[28].
123 *Horrocks*, above n 120, at 151.

Accordingly, in a case where a person has published what he or she believes to be true:[124]

> It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives … that 'express malice' can properly be found.

Therefore, it would have been better if s 19 had been drafted in terms of a primary rule – that taking improper advantage of the occasion defeats the privilege – with a predominant motivation of ill will towards the plaintiff being expressly provided for, if at all, simply as an example of what might constitute such improper advantage.

[125] While there may be other factors which would justify a jury concluding that the defendant misused an occasion of reply to attack privilege – such as the extravagance of the language used[125] – the most plausible challenge in a response to an attack case will be to the honesty of the response. And if such honesty cannot be successfully impugned, a defence of qualified privilege is likely to succeed. This is also apparent from Lord Diplock's speech in in *Horrocks v Lowe*:[126]

> … the judge was left with no other material on which to found an inference of malice except the contents of the speech itself, the circumstances in which it was made and, of course, the defendant's own evidence in the witness box. Where such is the case the test of malice is very simple. It was laid down by Lord Esher himself, as Brett LJ, in *Clark v Molyneux* … . It is: has it been proved that the defendant did not honestly believe that what he said was true, *that is, was he either aware that it was not true or indifferent to its truth or falsity?*

To the same effect is the judgment of Lord Reed NPJ in *Lu v Mo Po*.[127] As he noted:

> 24. In cases where the purpose for which the privilege is accorded is consistent only with the communication of a matter which is believed to be true, the parties may therefore focus on the question whether the defendant knew of the matter's falsity, or did not care whether it was true or false. …

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124 At 151.

125 However, this is a high threshold to meet. The comments of Lord Atkinson in *Adam v Ward*, above n 103, at 339 are apposite: "a person making a communication on a privileged occasion … will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote was true and necessary for the purpose of his vindication, though in fact it was not so."

126 *Horrocks*, above n 120, at 152 (emphasis added).

127 *Lu v Mo Po*, above n 118.

The reason for this general rule was explained by Lord Diplock as follows:[128]

> If it be proved that [the defendant] did not believe that what he [or she] published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a [person] in telling deliberate and injurious falsehoods about another … .

As this last passage suggests, the traditional view is that lack of belief is only evidence (albeit usually conclusive) from which malice can be inferred.[129] Given the structure of s 19, we consider that where the purpose of the privilege is to communicate information believed to be true, the communication of information which is not believed to be true amounts to taking an improper advantage of the occasion.

[126] While we regard the passages which we have cited as applicable in the present case, they do not express a rule of general application in all cases of qualified privilege. As envisaged by Lord Reed, there are occasions in which the purpose for which privilege is provided is not confined to communications believed to be true.[130] For example, a police officer required to record and pass on complaints is entitled to qualified privilege when passing on a complaint irrespective of whether they believe it. Conversely, even where the defendant did believe the words to be true, he or she may lose the privilege if the publication was made for a reason unconnected with the duty or interest for which the privilege was accorded.[131] As well, there can be subtleties which in some circumstances may be material between on the one hand, not having a belief that something is true and, on the other, having an actual or imputed knowledge (based on wilful blindness or recklessness) that something is false, as is explored in *Roberts v Bass*.[132]

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128 *Horrocks*, above n 120, at 149–150. See also *Roberts v Bass* [2002] HCA 57, (2002) 212 CLR 1 at [77] per Gaudron, McHugh and Gummow JJ: "If the defendant knew the statement was untrue when he or she made it, it is almost invariably conclusive evidence of malice."

129 See the elaborate discussion in Mullis and Parkes, above n 115, at [17.4].

130 *Lu v Mo Po*, above n 118, at [21].

131 At [21]. Although the authors of *Duncan and Neill on Defamation*, above n 101, at [19.06(e)] note that "where the defendant believed the words to be true, judges and juries should be very slow to draw the inference that the sole or dominant motive for publication was the improper motive".

132 *Roberts v Bass*, above n 128.

What was the proper purpose for which Mr Craig was entitled to use his privilege?

[127] Mr Craig was responding to an attack on his reputation which had achieved national currency. If Mr Craig truly believed that he was a victim of a campaign of lies he was entitled to respond vigorously. But the purpose for which the occasion was privileged was consistent only with Mr Craig communicating to members of the public honestly.

What did Mr Williams have to prove to show that Mr Craig had not acted honestly?

[128] Mr Craig's fundamental position was that the allegations against him were untrue. In his exercise of reply to attack privilege he was entitled to a reasonable measure of latitude. In this context, it might be arguable that his description of the allegations against him as lies was merely an emphatic way of denying them and thus not an assertion that Mr Williams had himself acted dishonestly in making allegations he did not believe to be true. If this is the right way of looking at the case, Mr Craig was entitled to succeed on his defence of qualified privilege unless Mr Williams could prove that Mr Craig knew that the allegations were true. To put this another way, this approach would require Mr Williams to show that Mr Craig knew that the attack made on him was justified.

[129] If it had been the case that Mr Craig's response to the allegations had gone no further than a vigorous denial, we would regard such an approach just outlined as appropriate. We are, however, of the view that Mr Craig's response went well beyond a vigorous denial.

[130] The Remarks and Leaflet contain strong language which is directed at Mr Williams, including: "Dirty Politics Brigade"; "a campaign of defamatory lies"; holding Mr Williams and others "to account for the lies they have told"; "serious, deliberate and repetitive nature of the defamatory statements"; "Is Colin Craig telling the truth or is it the Dirty Politics Brigade"; "This is about who is honest"; "honesty is one of our core values"; "corruption of public debate"; and "corrupt people". Given this language, we think it inescapable that Mr Craig went well beyond a vigorous denial of the allegations against him to the point of mounting a counter-attack

premised on the contention that Mr Williams had acted dishonestly by making allegations which he did not believe to be true.

[131] It follows that Mr Craig acted outside of his qualified privilege if it could be shown he did not believe that Mr Williams had acted dishonestly. If Mr Craig did not believe that, his attack on Mr Williams was itself dishonest.

Was the issue of honesty to be determined on an all-or-nothing basis or alternatively on an allegation-by-allegation basis?

[132] A reply to an attack may contain a number of discrete allegations against the plaintiff and it may be necessary for the defence of qualified privilege to be assessed separately in respect of each allegation, with the court entering judgment for the defendant in respect of those for which the defence of qualified privilege succeeds and for the plaintiff in respect of the others. An example of this is provided in *Harbour Radio Pty Ltd v Trad*.[133] This was in the context where the allegations made by the defendant were assessed in terms of whether they were sufficiently connected to the subject matter of the original complaint to be covered by the privilege.

[133] If the allegation-by-allegation approach in *Harbour Radio Pty Ltd* had been applied in this case, the defence of qualified privilege would have been assessed on an allegation-by-allegation basis. Thus if Mr Craig had been shown not to have believed that Mr Williams had dishonestly alleged sexual harassment but had believed that he had told lies about the sexts, the defence would have failed in respect of the first allegation but succeeded on the second.

[134] It is, however, also open to a court to adopt an all-or-nothing approach, on the basis that the inclusion of material which is not protected by privilege takes away the defence completely.[134] This may be a sensible approach where the contention is that the defendant did not believe in the truth of a substantial part of the response. As noted, the gravamen of the allegations made against Mr Craig were of sexual harassment. That was the primary allegation to which he was responding and the other

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133 *Harbour Radio Pty Ltd v Trad* [2012] HCA 44, (2012) 247 CLR 31.

134 See *Bellino v Australia Broadcasting Corp* (1996) 185 CLR 183 at 228; and *Adam v Ward*, above n 103, at 318 per Lord Finlay LC.

allegations were, in a sense, just particulars of that allegation.[135] And most importantly of all, the defence of qualified privilege was presented on an all-or-nothing basis.

[135] On this basis, it seems to us that the defence of qualified privilege in this case was available unless the jury was satisfied that Mr Craig did not believe Mr Williams was lying in relation to the sexual harassment allegations.

The way the issue was put to the jury by counsel

[136] Mr McKnight, counsel for Mr Williams, presented his argument on qualified privilege primarily on the bases that: (a) Mr Craig's predominant motive was not to defend himself but to harm Mr Williams; this because he blamed Mr Williams for his political downfall; and (b) Mr Craig generally took improper advantage of the occasion. In relation to the second argument, he said that if the jury considered that Mr Williams' allegations about Mr Craig were substantially justified, it would follow that Mr Craig's attack on Mr Williams was an improper use of the privilege. This point was not made with great precision in terms of Mr Craig's state of mind, that is whether he appreciated that his conduct amounted to sexual harassment.

[137] In his address, Mr Mills QC for Mr Craig first urged on the jury the view that Mr Craig's predominant motive was to set the record straight and that he honestly believed the allegations he made against Mr Williams. Mr Mills acknowledged that it was a question for the jury whether Mr Craig was "predominantly motivated by ill will towards Mr Williams". If so, this "could be a reason for finding that the privilege is lost". He said:

> But, it's over to you, of course, but you heard [Mr Craig] give evidence. Certainly it seemed to me clear that he, and also his wife, … honestly believed the things that they were saying when they wrote that leaflet and when they held that press conference and whether they were ultimately right or wrong is not the test … But you've heard them, you heard them give evidence and you've heard the allegations that were made about Mr Craig to which he was responding – but, if he was predominantly motivated by ill will then that's a way of losing the privilege. You may recall that counsel for Mr Williams put it directly to Mr Craig – "You were motivated by ill will, weren't you?" And

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[135] See *Craig* (CA), above n 98, at [26] where the Court said "the allegation lying at the heart of Mr Williams' initiating attack on Mr Craig's character and reputation was that he had sexually harassed Ms MacGregor".

> the answer was a very firm, "No". Now you can still evaluate that of course but that was the question and that was the answer.

The Judge's summing up

[138] In the part of the question trail addressed to the issue of qualified privilege, the issues were framed by reference to s 19. Question 3 was:

> Has Mr Williams proven that in publishing the Remarks Mr Craig was predominantly motivated by ill-will towards Mr Williams?

And Question 4 was:

> Has Mr Williams proven that in publishing the Remarks Mr Craig took improper advantage of the occasion of publication?

The questions on this aspect of the case in respect of the Leaflet were in the same terms.

[139] Aspects of what Katz J said in her summing up were reasonably on point. She observed:

> [60] If Mr Craig did not honestly believe that what he published was true, this is another factor that may well indicate ill-will. This is because Mr Craig could not be justified in responding to an attack by deliberately saying untrue things that he knew would hurt Mr Williams. Likewise, if 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.

There were, however, many respects in which the directions were not helpful, albeit, in fairness to Katz J, she was largely responding to the way the case had been presented by counsel:

(a) There was far too much focus on "ill will". Of course Mr Craig would have felt ill will, in the ordinary sense of the phrase, towards Mr Williams but this was of no practical moment if he was making an honest response to the allegations made against him. If the jury was of the view that Mr Craig believed that what he published was true, it would have been quite extraordinary for it to conclude that his predominant motive for the publications was ill will rather than to set the record straight.

(b) Although she at least implied that the privilege would be lost if Mr Williams' attack on Mr Craig had been justified, she did not put to the jury in precise terms the question whether Mr Craig was responding to an attack which he knew to be true; this despite the way this point was addressed in the reasons later given as to qualified privilege.[136]

(c) She left to the jury subjective and open-textured issues as to whether Mr Craig's response was "appropriate or over the top" when the answers to these questions necessarily came back to whether Mr Craig believed that what he was saying was true.

(d) Despite having ruled, correctly, that the occasion was one of privilege, she left it to the jury to form a view as to whether Mr Craig's responses went to "the right range of people". This was also the case with respect to whether the statements made by Mr Craig were "relevant" to the occasion.[137]

(e) She invited the jury to take into account whether Mr Craig acted "with the degree of responsibility required in the circumstances" and, contrary to authority, treated the question whether he took "reasonable care" as at least material to the issue the jury was required to decide.[138]

The approach of the Court of Appeal

[140] The Court of Appeal saw the directions as "substantially correct".[139] As will be apparent, we have a different view. Perhaps the main difference between the approach of the Court of Appeal and the one we adopt is contextual. The considerations which Katz J left to the jury were, at least in the main, of a kind which can legitimately be addressed in determining whether qualified privilege has been lost. Indeed, for much of what she said, it is possible to find supporting authority. Our primary concern is that the summing up was not tailored to the very particular issues

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136 Qualified privilege judgment, above n 105, at [79].
137 At [68].
138 See *Horrocks v Lowe*, above n 120, at 150; and *Roberts v Bass*, above n 128, at [5].
139 *Craig* (CA), above n 98, at [109].

which the case raised and did not sufficiently highlight the fundamental issues – whether Mr Craig had replied to an attack which he knew to be justified and whether he believed that Mr Williams lied when alleging sexual harassment. In this context, the focus of the question trail on the language of s 19, in particular the references to ill will, was apt to confuse rather than assist.

[141] That said, the Court of Appeal, when dealing with the question whether Katz J should have entered judgment for Mr Craig, observed:

> [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.

This rather suggests that the Court saw the critical issue on this aspect of the case in very much the same way as we do.

The responses of counsel to the summing up

[142] Immediately following the summing up, Katz J asked counsel if they took issue with any aspects of the summing up. Neither raised any of the issues discussed.

What was required

[143] As will be apparent, we consider the actual issues which the jury had to decide on this aspect of the case to be reasonably straightforward – that is, whether Mr Williams had proved either that Mr Craig knew that the allegation of sexual harassment was true or that Mr Craig did not believe that Mr Williams had lied in alleging sexual harassment. In saying this, we recognise that Katz J may have also felt obliged to direct on the argument that even if Mr Craig believed that Mr Williams had been lying, his predominant motive in publishing the Remarks and the Leaflet was not to respond to the earlier attacks, but rather to harm Mr Williams. Given the implausibility of this argument and its distracting tendency, we incline to the view that

it would have been open to Katz J to take the robust approach of not leaving this aspect of the case to the jury.

[144] On this basis, the summing up could have been along these lines:

> The Remarks and the Leaflet were responses by Mr Craig to attacks on his reputation. When responding in this way, Mr Craig had qualified privilege. This means that unless he acted outside the privilege, he is not liable to Mr Williams for what he said.
>
> The burden of proof on this question rests with Mr Williams; in other words, it is for Mr Williams to show that Mr Craig acted outside the privilege. Please bear this in mind in relation to what I am about to say.
>
> I will now explain what this means in the context of this case.
>
> Mr Craig was responding to an allegation that he had sexually harassed Ms MacGregor. If he knew that the allegation was true, that is, he had sexually harassed Ms MacGregor and he knew it, then he is not entitled to rely on qualified privilege. So if you are satisfied that Mr Craig did sexually harass Ms MacGregor and appreciated that he had done so, you will reject the defence of qualified privilege.
>
> Mr Craig's response to the allegation of sexual harassment went beyond a simple denial that he had sexually harassed Ms MacGregor. Instead he launched a counter-attack on Mr Williams, asserting that Mr Williams had lied when making his allegations of sexual harassment.
>
> If Mr Craig believed that his response was substantially true and in particular that Mr Williams had lied as to sexual harassment, it would follow that what he said was a proportionate response to Mr Williams' attack on his reputation. That attack had, after all, reached a national audience and Mr Craig was entitled to respond on the same basis. So if you conclude that Mr Craig believed the substance of what he said in the Remarks and Leaflet – and, in particular, that Mr Williams had dishonestly alleged sexual harassment – you will find that the defence of qualified privilege is made out.
>
> If, however, on the other hand you are satisfied that Mr Craig did not believe that Mr Williams had acted dishonestly in alleging sexual harassment, it would follow he was not acting in good faith when he published the Remarks and Leaflet and that he was therefore acting outside of the privilege. So if you conclude that Mr Craig did not believe that Mr Williams had dishonestly alleged sexual harassment, you will find that the defence of qualified privilege fails.

Must a new trial be directed?

[145] As will be apparent, we are satisfied that Katz J misdirected the jury on qualified privilege. The general rule is that such a misdirection warrants a new trial if it led to a substantial wrong or miscarriage of justice.[140]

[146] The leading authority is the House of Lords' decision in the defamation case *Bray v Ford*.[141] In that case, each of their Lordships delivered a speech discussing the meaning of "substantial wrong or miscarriage of justice". The essence of the decision is that it was enough if the jury's decision might have been influenced by the misdirection. For example, Lord Halsbury LC declined "to speculate what might have been the result if the judge had rightly directed the jury".[142] But, despite the opinion of the Court of Appeal in that case to the contrary, the problem in *Bray v Ford* was significant in that: (a) the Judge had effectively taken away the defendant's defence; and (b) the damages awarded were based on the incorrect view that the plaintiff's conduct had been lawful.

[147] Since *Bray v Ford* was decided, there have been a number of decisions in which courts have adopted approaches broadly equivalent to that adopted in criminal cases with respect to the proviso to s 385(1) of the Crimes Act 1961. It is thus well established that a new trial will be refused "if the Court believes that on the evidence at trial a properly directed jury could not reasonably have come to a different verdict".[143] For these purposes, the court must assess the evidence that was before the jury to assess the materiality of the misdirection. Most of the cases in which a new trial has not been ordered involve the application of this approach.[144]

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140 See the discussion in *Smallbone v London* [2015] NZCA 391, (2015) 22 PRNZ 768 [*Smallbone* (CA)] at [31]–[42]; and Retrial judgment, above n 95, at [27]. In *Smallbone*, the Court of Appeal held that a trial judge has the power to set aside the jury's verdict and order a new trial where to do so is in the interests of justice and the judgment has not been sealed: at [41]. The Supreme Court has the same power to order a new trial by virtue of s 79 of the Senior Courts Act 2016.

141 *Bray v Ford* [1896] AC 44 (HL).

142 At 48.

143 *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 340. Although *Garrett* is the first case to adopt this specific wording, other cases adopted the same approach although expressed it differently: see *Brierly v Want* [1960] NZLR 1088 (CA) at 1095; *Smith v British Phosphate Commissioners* [1967] NZLR 952 (SC) at 956; *Thompson v The King* [1949] NZLR 605 (SC) at 610; and *Matheson v Schneideman* [1930] NZLR 151 (SC) at 157.

144 Or a materially similar process.

[148] This approach is available here. There were significant problems for Mr Craig with his claim that he believed that Mr Williams had lied in alleging sexual harassment:

(a) The solid evidential foundation on which the allegations of sexual harassment were based (including much material which Mr Craig had written).

(b) Mr Craig's knowledge that Ms MacGregor had alleged sexual harassment against him, a claim which she had withdrawn on a basis connected to him forgiving a debt from her of $20,000.

(c) What might be thought to be the practical reality that he was well aware that however he had rationalised his own conduct, it was open to others to consider that he had sexually harassed Ms MacGregor.

(d) A text he sent to Mr Williams on 22 June 2015. This text warrants brief discussion.

[149] The text read:

> Hi Jordan
>
> I know you believe Rachel but if you want to know why she withdrew her claim for $0 I would like to tell you.
>
> Is it possible to meet so you at least have the truth. I'd come to you if needs be.
>
> Kind regards
>
> Colin Craig.

Mr Williams did not respond to this text. He said that this was because he did not accept that the harassment claim had been settled for "$0".

[150] By 22 June 2015, Mr Craig had resigned as leader of the Conservative Party and Mr Williams' campaign against him had run its course. As far as we are aware, Mr Williams made no further significant allegations against Mr Craig after this time.

In his evidence, Mr Craig said that the text was an attempt to reach out to Mr Williams to stop him leaking more material to Mr Slater. He acknowledged that it was his "very firm opinion" that Mr Williams believed Ms MacGregor, but maintained that he believed that Mr Williams was lying in respect of allegations which went beyond what Ms MacGregor had told him (which we take to include remarks said to have been made by Mr Williams as to pay-outs and sexts).

[151] There is also a line of cases in which courts have had regard to the general pattern of the verdicts in order to determine whether the misdirection caused a miscarriage of justice. *Floyd v Gibson* concerned an action brought by the plaintiffs, a father and his infant son, for damages for personal injuries alleged to have been caused by the defendant's negligent driving.[145] The infant plaintiff was seriously injured as a result of the accident, suffering considerable damage to his eyesight and hearing. At trial, the jury found for the plaintiffs. It awarded damages of £250. The complaint on appeal was that the Judge had not made it clear in summing up that the injuries suffered were unlikely to be permanent. The complaint was unsuccessful because the modest size of the award meant that the jury must have appreciated that the injuries were not permanent. There are other cases in which similar reasoning was adopted, such as *Nanno v Hedde*[146] and *Poliakoff v News Chronicle Ltd*.[147] And more generally, there is high authority for the proposition that in dealing with a challenge to a jury verdict in a civil case, it is open to a court to draw sensible inferences from the damages awarded as to the basis of that verdict.[148]

[152] In the present case, the risk of a miscarriage of justice arises because Katz J's directions left it open to the jury to reject the defence of qualified privilege even though it was of the view that Mr Craig genuinely believed Mr Williams had been lying when

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145 *Floyd v Gibson* (1909) 100 LT 761 (CA).

146 *Nanno v Hedde* [1961] 78 WN (NSW) 1174 (SC).

147 *Poliakoff v News Chronicle Ltd* [1939] 1 All ER 390 (CA).

148 See *Coyne v Citizen Finance Ltd* (1990) 172 CLR 211 at 239 per Toohey J; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 68 per Brennan J; and *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 4 All ER 732 at [7] and [26] per Lord Bingham and [57] per Lord Hobhouse. The approach in *Coyne* and *Carson* was approved by Anderson J in *Quinn v Television New Zealand Ltd* [1995] 3 NZLR 216 (HC) at 226. Although cited by the Court of Appeal, this aspect of *Coyne* and *Carson* was not the subject of discussion by that Court, albeit the reasoning adopted is consistent with those cases: see *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) [*Quinn* (CA)] at 44 per McKay J and 52–53 per McGechan J.

he made the sexual harassment allegations. It is theoretically possible that the jury found against Mr Craig because, for instance:

(a) it may have accepted Ms MacGregor's narrative of events and concluded on that basis that the attack on him was justified without necessarily concluding that he had realised that his conduct amounted to sexual harassment or had been dishonest in accusing Mr Williams of lying; or

(b) it may have concluded that he published his response to too many people, his language was over the top, he had not used reasonable care, or his predominant motive was just to harm Mr Williams (a conclusion which we think would have been close to irrational).

[153] A number of points can be made:

(a) The theoretical possibilities just alluded to are not very likely. If of the view that Mr Craig genuinely believed what he said in the Remarks and Leaflet, it would have been odd, to say the least, for the jury to have rejected the defence. If the jury had reasoned in this way, Mr Craig would have lost his case by a hair's breadth. The amount of damages awarded and the finding of a flagrant disregard of Mr Williams' rights are not consistent with so narrow a loss.

(b) It was, in any event, practically inevitable that the jury would conclude that Mr Craig did not believe that Mr Williams was lying when he alleged sexual harassment. Mr Craig had acted in a way which provided a basis for the belief that he had sexually harassed Ms MacGregor and he must have known that. He knew that Ms MacGregor had told Mr Williams that she had been sexually harassed. He had settled her claim for sexual harassment. Mr Craig had texted Mr Williams confirmation that he knew that Mr Williams believed Ms MacGregor. At trial he accepted that this text represented

his opinion at the time – a time which came after the attack on him by Mr Williams.

(c) The pattern of the verdicts, including the rejections of the defences of truth and honest opinion and, in particular, the damages awarded (the full amount claimed including aggravated and punitive damages) and the associated finding that Mr Craig had acted in flagrant disregard of Mr Williams' rights are practically consistent only with a wholesale rejection of Mr Craig's case by the jury. It must have found that he had sexually harassed Ms MacGregor, appreciated that he had done so, and therefore knew full well that Mr Williams had not been lying when alleging sexual harassment. These verdicts as a whole are not sensibly consistent with the jury being of the view that Mr Craig had acted honestly.

[154] As is the case with a criminal jury trial, the primary responsibility for the law in a civil jury trial rests with the Judge. And there is no absolute rule that a failure to object to the course taken by the Judge at a civil trial precludes later complaint. On the other hand, courts have sometimes been unsympathetic where points are taken after verdict which could have been, but were not, taken at the time.[149] The leading New Zealand case is *Jamieson v Green* where the trial Judge had wrongly told the jury that, in assessing the widow's pecuniary loss for the purposes of the Deaths By Accident Compensation Act 1952, it could make a deduction for the wages she was earning at the point of death.[150] Counsel for the plaintiff had not objected to this direction but was allowed to pursue the point on appeal. TA Gresson J explained:[151]

> We recognize that in certain circumstances a party may lose his right to complain of misdirection by the view of the case which his counsel takes at the trial. This has been rightly described as "a most salutary rule" (*Clifford v Parker* (1886) 5 NZLR SC 79) and is applied, as the cases show, with strictness in regard to nondirection amounting to misdirection: *Seaton v Burnand* [1900] AC 135, 145; *Begg & Co Ltd v Naujoks* (1903) 6 GLR 191; *Morris v Union Steamship Co of New Zealand Ltd* [1949] GLR 421, 423; *Frank M Winstone (Merchants) Ltd v Petrie* [1949] NZLR 886; [1949] GLR

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149 For example, *Baxter v Halliday* [1959] NZLR 961 (CA); *General Motors-Holden's Pty Ltd v Moularas* (1964) 111 CLR 234 at 244–245 per Taylor J; and *Caswell v Toronto Railway Co* (1911) 24 OLR 339 (ONCA) at 350–351.

150 *Jamieson v Green* [1957] NZLR 1154 (CA).

151 At 1165.

> 210. Nevertheless, it was stated by Williams J in *Connor v McKay* (1883) 1 NZLR CA 169, 193: 'On the ground of misdirection, it now seems to me that the question was not put before the jury as it should have been, and if that be so I hardly think the duty lay on the defendant's counsel to point out to the learned Judge in what respect it was not sufficient' (ibid, 193).
>
> We are satisfied that to refuse a new trial here on the ground of counsel's failure to object to the misdirection, would be to risk injustice.

[155] A similar approach had been taken in England and Wales but with some practical weight being placed on what might be implicit in counsel not raising an objection at trial. This latter point is illustrated by *Kiam v Neill (No 2)*.[152] The notice of appeal referred to 15 aspects of the Judge's summing up which were said to be erroneous as to the proper guidance to be given to the jury on the issue of damages. The Judge's attention was not drawn to those errors at the close of the summing up, despite the defendant being represented by experienced leading counsel.

[156] Beldam LJ noted:[153]

> This, of course, does not preclude the arguments now advanced but if at the time the errors or omissions made so little impact on experienced counsel that he did not invite their correction it may be inferred that he was content to allow the jury to consider the question of damages with such errors or omissions uncorrected.

He said that, in civil proceedings, the court is not obliged to order a new trial on the ground of a misdirection unless of the opinion that some substantial wrong or miscarriage of justice occurred. On that basis, Beldam LJ thought it "difficult to accept" that the misdirections in the case (either singly or cumulatively) could be so significant that a substantial wrong or miscarriage of justice occurred "if counsel experienced in this branch of the law failed to draw the judge's attention to the mistakes or omissions".[154] He therefore proposed to approach the plaintiff's case on misdirection "with some caution".[155]

[157] In this case the failure by Mr Mills to object to the summing up cannot sensibly be taken to have bound Mr Craig to the determination of the defence of qualified

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152 *Kiam v Neill (No 2)* [1996] EMLR 493 (CA).
153 At 500.
154 At 501.
155 At 501.

privilege on an erroneous basis. It does, however, seem to us to be of practical significance. It suggests that he was content to have the questions for the jury in the question trail expressed solely by reference to the statutory language and then to be fleshed out discursively rather than put in concrete language of the kind we have postulated. It must have been obvious to him that there had not been an unequivocal direction that the defence was made out unless Mr Williams had shown that Mr Craig's attack on him was dishonest. But equally obvious must have been the absence of an unequivocal direction that the defence failed if that had been shown. In a situation in which the evidence strongly suggested Mr Craig could not have believed that Mr Williams had lied in alleging sexual harassment and in light of the pattern of the verdicts, it would be a very strong thing to allow Mr Craig a retrial on the basis of an argument which could, and should, have been taken at the time.

[158] We would therefore uphold the jury's decisions on liability.

The awards of damages

[159] If our view that the verdicts as to liability should be upheld had prevailed, we would have wished to explore, as an alternative to upholding or setting aside all awards, the possibility of upholding one or more of the awards made by the jury and directing a retrial in respect of the remaining issue (or issues) of damages. This was the course of action taken by the Court of Appeal in *Television New Zealand Ltd v Quinn*.[156] This exercise would have required a further hearing in this Court. Our views not having prevailed, and thus there not having been a further hearing, there is no point in addressing the damages issues in any depth. Some comments, however, are appropriate.

[160] There being comparatively few defamation trials which proceed to verdict, there is not a pattern of awards from which jurors (or judges for that matter) can readily discern going rates for damage to reputation.[157] Challenges to the level of defamation

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156 *Quinn* (CA), above n 148.

157 Since the Court of Appeal's decision in *Quinn* in 1996, we have identified 23 awards made by judges sitting alone in defamation trials and only five awards made by juries (with one of those being set aside). A summary of the awards is attached as a schedule. Awards in cases brought by body corporates have been excluded given the requirement to prove that the publication caused, or was likely to cause, pecuniary loss: see s 6 of the Defamation Act 1992.

damages awards thus have an impressionistic quality and are not easily susceptible to determination otherwise than on the basis of conclusory reasons.[158]

[161] Given the difficulty of resolving such challenges after the verdict, it might be thought sensible for judges to advise juries of awards which have been upheld or, in perhaps some other way, give guidance as to what would represent the upper (and perhaps lower) level of damages which would be acceptable, in the sense of not inviting post-verdict judicial interference.[159] All of this was discussed, but not definitively resolved, by the Court of Appeal in *Quinn*.

[162] The arguments in relation to the amount of the awards must be addressed on the assumption that the jury found in favour of Mr Williams on all relevant issues in respect of which favourable findings were possible.[160] We think it follows that the awards of damages must be assessed on the basis of findings that:

(a) Mr Craig had sexually harassed Ms MacGregor and knew it, so that the Remarks and Leaflet were dishonest.

(b) The respects, if any, in which Mr Williams had been incorrect in his assertions were immaterial.

(c) Mr Craig aggravated the damage suffered by Mr Williams by using the trial to blackguard him in respects not relevant to the substance of the case.

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158 See *Quinn* (CA), above n 148, at 38 per Lord Cooke who said, "an objective standard does not exist" for assessing an award of damages, rather it will be a matter of "reaction and impression". McKay J added that an award of damages will be "excessive" when it goes "beyond any figure which a jury could properly award" and that making such a determination "is essentially a matter of impression and not addition": at 43. Further, McGechan J confirmed that the "traditional approach" is to assess whether the amount is "irrational" or "so excessive as to shock conscience": at 52, citing *Carson v John Fairfax & Sons Ltd*, above n 148; and *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 at 175.

159 See, for example, *Quinn* (CA), above n 148, at 35 per Lord Cooke where he noted that, in some cases, "selecting the range" of damages "would be a delicate exercise inviting challenge on appeal". The issue can be problematic. In *Carson*, above n 148, the High Court of Australia ordered a retrial on the basis that awards of damages of $600,000 were excessive. At the retrial, the jury awarded $1.3m: see *Carson v John Fairfax and Sons Ltd* (Unreported, Supreme Court of New South Wales, Levine J, 6 May 1994). Presumably the Judge at the second trial did not tell the jury that $600,000 was beyond what was acceptable.

160 *Coyne*, above n 148, at 239 per Toohey J; and *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) at 1122 per Lord Diplock.

[163] We consider that such findings were open to the jury.

[164] We recognise that, in her retrial judgment, Katz J made a series of adverse findings of fact about Mr Williams, in terms of what she described as "undisputed" evidence.[161] These included: (a) Mr Williams lying in respect of having (or having seen) copies of sexts; (b) a large six figure pay-out (or pay-outs) having been made by Mr Craig; and (c) a finding to the effect that Mr Williams was "dishonest, deceitful, and could not be trusted".[162] These findings warrant brief comment.

[165] On our understanding, Mr Williams did not accept that he had used the word "sexts" in describing the texts which Mr Craig had sent to Ms MacGregor. So the evidence as to this was not undisputed. And in summing up, the Judge did not suggest to the contrary. As well, assuming that Mr Williams did use that word, we are not persuaded that: (a) "sexts" has an accepted meaning which excludes texts of a sexually allusive nature of the kind which were sent; and (b) the issue is of significant materiality given the nature of the written material for which Mr Craig was responsible.

[166] Mr Williams did not accept that he had referred to pay-outs in the terms attributed to him. And, in any case, although it is true that Mr Craig did not make a "pay-out" to Ms MacGregor, he did forgive a debt of $20,000. Given this, it was open to the jury to conclude that Mr Craig's flat denial of having made a pay-out was disingenuous.

[167] The reference to Mr Williams as a person who "could not be trusted" is based on his breaching the undertaking of confidentiality he gave to Ms MacGregor in relation to what she had told and given to him. He explained this to the jury and his explanation was one which Ms MacGregor herself accepted. Presumably the jury did too. As well, and perhaps more importantly, this incident is at best only marginally germane to what was at the heart of the case – namely the belief as to the truth or otherwise of Messrs Craig and Williams in respect of Mr Williams' allegations and Mr Craig's responses.

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161 Retrial judgment, above n 95, at [53] and [56].
162 At [53]–[56].

[168] The respects in which Katz J considered that Mr Williams had been "dishonest and deceitful" had nothing to do with the substance of the case. In appropriate circumstances, a jury is entitled to reflect in the award of damages their opinion as to the way in which a defendant has conducted the case.[163] In this case, we think it was well open to the jury to take the view that Mr Craig had taken advantage of the forum provided by the defamation trial to launch an attack on Mr Williams' reputation which was largely – and in parts completely – collateral to what was properly in issue in the case and that such conduct should sound in damages.

[169] If the jury was satisfied that Mr Craig had appreciated that he had sexually harassed Ms MacGregor (as we think it must have been), his conduct in respect of both the Remarks and Leaflet was extraordinary. By distributing the Leaflet as he did, he posted defamatory assertions which he knew to be untrue to 1.6 million households.[164] And large though the awards were, they were, in inflation adjusted terms, less than awards (actual or potential) which Lord Cooke regarded as unexceptionable in *Quinn*.[165] For this reason, we are not as troubled by the awards as were Katz J and the Court of Appeal.

Solicitors:
Chapman Tripp, Auckland for Appellant
Langford Law, Wellington for Respondent

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163 See *Greenlands Ltd v Wilmshurst and the London Assoc for Protection of Trade* [1913] 3 KB 507 (CA); and *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015 at [32]–[33].

164 In *John v MGN Ltd* [1997] QB 586 (CA) at 607 the Court said "a libel published to millions has a greater potential to cause damage than a libel published to a handful of people". See also *Cairns*, above n 163, at [24].

165 In *Quinn* (CA), above n 148, at 39, Lord Cooke said that, in respect of two defamatory television programmes, awards of $400,000 and $500,000 would not have been disturbed on appeal. Adjustments for inflation bring those amounts to $623,523.87 and $779,404.83 equating to a total of $1,402,928.70 which, as will be apparent, is larger than the award of damages in this case. The two programmes in *Quinn* covered different ground; so there was not the same doubling up risk. On the other hand, rather more people would have been exposed to the defamatory comments in the present case.

Schedule: Defamation awards since *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA)

Year	Award	Case
2019	$10,000	*Wiremu v Ashby* (Judge)[166]
2018	$150,000	*Lee v Lee* (Judge)[167]
2018	$84,000 ($50,000 awarded to the first plaintiff and $34,000 to the second plaintiff)	*Ross v Hunter* (Judge)[168]
2017	$100,000	*Low Volume Vehicle Technical Assoc Inc v Brett* (Judge)[169]
2017	Written apology (but if not complied with $100,000 in damages)	*Newton v Dunn* (Judge)[170]
2016	$100.00	*Memelink v Grindlay* (Judge)[171]
2016	$100,000	*Kim v Cho* (Judge)[172]
2014	$535,000 (apportioned $350,500 to the first defendant and $184,500 to the second defendant)	*Karam v Parker* (Judge)[173]
2013	$270,000	*Smallbone v London* (jury – set aside)[174]
2010	$104,000	*Jones v Lee* (jury)[175]
2010	$140,000	*Hallett v Williams* (Judge)[176]
2010	$250,000	*Lee v The New Korea Herald Ltd* (Judge)[177]

166 *Wiremu v Ashby* [2019] NZHC 558.

167 *Lee v Lee* [2018] NZHC 3136.

168 *Ross v Hunter* [2017] NZDC 22579, [2018] DCR 770.

169 *Low Volume Vehicle Technical Assoc Inc v Brett* [2017] NZHC 2846, [2018] 2 NZLR 587. The Court of Appeal recently allowed an appeal against the decision of the High Court and the case has been remitted back to the High Court, but it made no comment on the appropriateness of the award of damages: see *Low Volume Vehicle Technical Assoc Inc v Brett* [2019] NZCA 67.

170 *Newton v Dunn* [2017] NZHC 2083, (2017) 14 NZELR 621.

171 *Memelink v Grindlay* [2016] NZHC 2589. Although the High Court's decision was overturned on appeal, the defamation award was not challenged on appeal: see *Grindlay v Memelink* [2017] NZCA 520.

172 *Kim v Cho* [2016] NZHC 1771, [2016] NZAR 1134.

173 *Karam v Parker* [2014] NZHC 737.

174 See *Smallbone v London* [2014] NZHC 832 where the High Court set aside the verdict; and *Smallbone* (CA), above n 140, in which the Court of Appeal dismissed an appeal against the High Court's decision.

175 See *Jones v Lee* HC Wellington CIV-2007-485-1510, 3 September 2010.

176 See *Hallett v Williams* HC Auckland CIV-2010-404-7064, 26 July 2011. Judgment was delivered on 18 October 2010.

177 *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010.

Year	Award	Case
2008	$900,000 ($75,000 awarded to the first plaintiff and $825,000 to the second plaintiff)	*Korda Mentha v Siemer* (Judge)[178]
2008	$85,000	*Ahn v Lee* (Judge)[179]
2008	$57,500	*Wells v Haden* (Judge)[180]
2006	$40,000	*Court v Aitken* (Judge)[181]
2004	$780,000 (awarded to three plaintiffs)	*Idour v INL Publications Ltd* (jury)[182]
2004	$150,000 ($125,000 awarded to second plaintiff and $25,000 to third plaintiff)	*Chinese Herald Ltd v New Times [Media] Ltd* (Judge)[183]
2002	$25,000	*Heptinstall v Francken* (Judge)[184]
2001	$42,000	*O'Brien v Brown* (Judge)[185]
2001	$163,500 ($95,000 to the first plaintiff, $65,000 to the second plaintiff and $3,500 to the third plaintiff)	*Reeves v Mace* (Judge)[186]
2000	$675,000 ($500,000 in compensatory, aggravated and punitive damages and $175,000 in special damages)	*Columbus v Independent News Auckland Ltd* (jury)[187]
1999	$7,500	*Christison v Harrison* (Judge)[188]

178 *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008. This award was upheld on appeal: *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361.

179 *Ahn v Lee* [2009] DCR 298. Judgment in this case was delivered on 25 November 2008.

180 *Wells v Haden* [2008] DCR 859.

181 *Court v Aitken* [2006] NZAR 619 (HC). Originally, damages of $20,000 were awarded in the District Court. However, these were increased on appeal.

182 *Idour v INL Publications Ltd* HC Wellington CIV-2003-485-968, 2 August 2004, cited in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [16.6.01(1)], n 302.

183 *Chinese Herald Ltd v New Times [Media] Ltd* [2004] 2 NZLR 749 (HC).

184 *Heptinstall v Francken* HC Dunedin CP62/00, 15 February 2002.

185 *O'Brien v Brown* [2001] DCR 1065.

186 *Reeves v Mace* HC Tauranga CP22/00, 15 June 2001.

187 *Columbus v Independent News Auckland Ltd* HC Auckland CP600/98, 7 April 2000.

188 See *Christison v Harrison* HC Napier AP55/98, 11 March 1999.

Year	Award	Case
1997	$20,000	*Penn v Ansley* (Judge)[189]
1997	$138,000	*Weepu v Greymouth Evening Star* (jury)[190]
1997	$40,000 (apportioned $30,000 to the first defendant and $10,000 to the second defendant)	*Montgomerie v Pauanui Publishing Ltd* (Judge)[191]
1997	$50,000	*Shadbolt v Independent News Media (Auckland) Ltd* (Judge)[192]

189 *Penn v Ansley* DC Christchurch NP1628/95, 1 October 1997. The award was upheld on appeal: see *Ansley v Penn* HC Christchurch A36/98, 28 August 1998.

190 *Weepu v Greymouth Evening Star* HC Greymouth CP4/91, 24 March 1997, cited in Todd, above n 182, at [16.6.01(1)], n 321.

191 *Montgomerie v Pauanui Publishing Ltd* HC Auckland CP71/95, 3 March 1997. The award was upheld on appeal: see *Pauanui Publishing Ltd v Montgomerie* [2004] NZAR 702 (CA).

192 *Shadbolt v Independent News Media (Auckland) Ltd* CP207/95, 7 February 1997.