

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2016-404-002915  
[2021] NZHC 3082**

BETWEEN

COLIN GRAEME CRAIG  
Plaintiff

AND

RACHEL MARGARET JOY  
MACGREGOR  
Defendant

Hearing: On the papers (submissions received 4 October, 24 October and  
1 November 2019; 21 September, 22 September, 7 October,  
8 October, 4 November and 8 November 2021)

Judgment: 16 November 2021

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**JUDGMENT OF HINTON J  
(Damages and Costs)**

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*This judgment was delivered by me on Tuesday, 16 November 2021 at 11.20 am  
pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
Dentons Kensington Swan, Wellington.

Copy to: Plaintiff.

[1] This decision in relation to damages and costs is the latest in a long and continuing series of “Colin Craig” judgments which as the Court of Appeal has said have occupied exhaustive judicial time.

[2] On 6 September 2019, I found that in certain respects Ms MacGregor had defamed Mr Craig and Mr Craig had defamed Ms MacGregor.<sup>1</sup> Further claims of defamation made by each against the other were dismissed. Mr Craig withdrew his claim for damages on the first day of the hearing (acknowledging Ms MacGregor was not in a position to pay) and sought only a declaration, which I made, insofar as he had been defamed. Ms MacGregor maintained her claim for damages and also claimed special and punitive damages. Submissions as to damages and costs were therefore invited.

[3] The September 2019 judgment was then appealed by Mr Craig. One of the grounds was clearly arguable, being whether the defence of qualified privilege (arising out of the right to reply to an attack) was available to him. A favourable outcome would have significantly affected both damages and costs. The appeal was dismissed by the Court of Appeal on 4 May 2021,<sup>2</sup> although the finding on the issue of qualified privilege was reached for different or expanded reasons. Mr Craig sought leave to appeal, which the Supreme Court dismissed on 9 September 2021, deciding that the issue turned on factual findings as to whether the statements made were protected and was not of general or public importance.<sup>3</sup>

[4] Subsequent to the Supreme Court decision, both parties have filed further comprehensive submissions on damages, arising out of the appeal and out of the various parallel “Craig” proceedings. In addition, submissions have been filed as to costs, and in reply. No costs submissions had been filed previously.

[5] In recent submissions Ms MacGregor increased her claim for punitive damages to \$150,000 and Mr Craig belatedly provided schedules of his legal expenses, each of these leading to yet further reply submissions from the other party.

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<sup>1</sup> *Craig v MacGregor* [2019] NZHC 2247.

<sup>2</sup> *Craig v MacGregor* [2021] NZCA 156.

<sup>3</sup> *Craig v MacGregor* [2021] NZSC 112.

[6] The net result is I have received six further sets of submissions from the parties since the Supreme Court decision, the last on Monday, 8 November 2021.

## **Background**

[7] Although the background is set out in detail in my September 2019 judgment, and summarised in the Court of Appeal judgment, to address the points raised by the parties it is necessary to traverse some of the facts again here.

[8] As will be well recalled, Mr Craig was once the leader of the Conservative Party and Ms MacGregor, for most of his leadership, had the dual roles of press secretary/media advisor and executive assistant to the Party. This was a position of responsibility and, as Mr Craig was new to politics, he relied heavily on Ms MacGregor for advice. During the course of this working relationship, the two developed a close personal relationship. Mr Craig's conduct later in the relationship was (subsequently) found to constitute sexual harassment of Ms MacGregor. Ms MacGregor resigned on 18 September 2014, just prior to the 2014 election, which attracted strong media interest. She was admitted to hospital immediately afterwards suffering from severe stress.

[9] Ms MacGregor filed her complaint of sexual harassment with the Human Rights Commission (HRC) and it was settled on 4 May 2015, on confidential terms. It was clearly important to both parties that the settlement be confidential. Both had legal representation. The settlement, which later ceased to be confidential, recorded that both had acted inappropriately. Mr Craig apologised for his inappropriate conduct, agreed to a \$16,000 settlement of an invoicing dispute and forgave a debt of just under \$19,000 owed by Ms MacGregor.

[10] Prior to the HRC settlement, Ms MacGregor had confided in Jordan Williams as to the nature of her working relationship with Mr Craig, and her allegations of sexual harassment. Mr Williams was closely involved with the Conservative Party and had commenced or was to commence a relationship with Ms MacGregor. She made additional statements to Mr Williams that Mr Craig had not paid her, had been cruel to and harassed other women, and had caused one young woman to commit suicide.

[11] After the HRC settlement, in breach of an undertaking to Ms MacGregor and contrary to her express instruction, Mr Williams disclosed all of these details (and made other statements of his own) to Cameron Slater, publisher of the Whale Oil blog, and to others. From 19 June 2015, Mr Slater republished the statements that Ms MacGregor had made to Mr Williams, but significantly expanded on them. The Whale Oil publications referred to a six figure settlement sum having been paid by Mr Craig to settle a sexual harassment claim, and made a number of statements that personally attacked Mr Craig including allegations that he put financial pressure on a woman to start an affair and was morally bankrupt.

[12] Mr Craig responded to these publications by holding two media conferences (the first on 22 June 2015), sending a letter to members of the Conservative Party, and publishing and delivering what became known as his “Dirty Politics” booklet. Details of Mr Craig’s publications are set out subsequently, but in essence so far as relevant here, he claimed that allegations of sexual harassment had been falsely made against him, and withdrawn.

[13] As a consequence of all of these publications, Mr Williams sued Mr Craig in defamation; Mr Craig sued Mr Slater; and Mr Craig sued Mr Stringer, a Conservative Party board member, who counter-sued.

[14] Following the publications, Ms MacGregor made a further claim against Mr Craig to the Human Rights Review Tribunal for breach of confidence arising out of the earlier HRC settlement. By decision dated 2 March 2016 she was awarded damages which included a sum of \$120,000 for humiliation, loss of dignity and injury to her feelings.<sup>4</sup>

[15] Unknown to Ms MacGregor, in November 2016 Mr Craig had filed but not served a statement of claim alleging defamation by her arising out of her statements to Mr Williams. Mr Craig had taken no steps in respect of that claim but in June 2017 Ms MacGregor became aware of it. On 20 June 2017 she filed a statement of defence and counterclaim alleging defamation by Mr Craig. Before doing so her counsel gave Mr Craig one or two days to withdraw his statement of claim. He did not respond

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<sup>4</sup> *MacGregor v Craig* [2016] NZHRRT 6.

within that time. He claimed that he was away and missed the ultimatum and that at the first case management conference he offered to withdraw. There was no record of that offer. Shortly afterwards he made various open offers that both parties withdraw their claim, including an offer to pay \$30,000 on account of costs. Those offers were not accepted. Ms MacGregor agreed, as I recorded in the judgment, that as a consequence, she in effect became the plaintiff.

### **Summary of related proceedings**

[16] As a significant issue for Ms MacGregor is the effect of the repetitive nature of the “Craig proceedings” overall, and a number of the judgments are relevant, it is necessary to briefly describe those proceedings.

#### *Williams v Craig*

[17] In the first of the related proceedings, brought by Mr Williams against Mr Craig in August 2015, the jury found Mr Craig liable in defamation and awarded damages of \$1.27 million. However, the trial Judge set aside the verdicts and ordered a new trial on both liability and damages.<sup>5</sup> Mr Williams appealed against the decision to set aside the verdicts. The Court of Appeal allowed the appeal in part, restoring the verdict on liability, and ordered that the retrial proceed on the basis of damages only.<sup>6</sup> In the process, the Court said the jury should be directed that an appropriate award for compensatory damages including aggravation, would be “up to \$250,000”. Mr Craig appealed the Court of Appeal’s decision to restore the verdict on liability, and the Supreme Court allowed the appeal, ordering a retrial on both liability and damages.<sup>7</sup> Subsequent to the jury trial, Mr Craig had himself commenced proceedings against Mr Williams based on evidence that had emerged during the trial.<sup>8</sup> Both parties’ claims were ultimately settled on the basis that Mr Williams retracted his statements about Mr Craig, apologised to him and paid a confidential settlement sum.

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<sup>5</sup> *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215.

<sup>6</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1.

<sup>7</sup> *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457.

<sup>8</sup> Referred to in *Craig v Stringer* [2020] NZCA 260, (2020) 25 PRNZ 367 at [11](a).

### *Craig v Slater*

[18] In the second proceeding, filed by Mr Craig against Mr Slater and his company later in August 2015, the defendants were found liable to Mr Craig in defamation. Toogood J declined to award him any damages and awarded costs against him.<sup>9</sup> Mr Craig successfully appealed.<sup>10</sup> Mr Slater was found liable by the Court of Appeal on a number of further grounds and the Court directed that damages and costs be re-assessed. Earlier this year, Edwards J awarded Mr Craig damages of \$325,000 (including “aggravated damages”) and disbursements of \$95,000, being 60 per cent of the legal expenses he had incurred although self-represented.<sup>11</sup> By the time of the hearing before Edwards J, the defendants were unrepresented and apparently insolvent. That matter has gone no further.

### *Craig v Stringer*

[19] The third defamation proceeding was filed by Mr Craig against Mr Stringer in September 2015 and it continues. Mr Stringer also filed proceedings against Mr Craig and others. Mr Craig’s proceeding was initially settled with a retraction, apology and payment made by Mr Stringer. However, the judgment was recalled and the proceeding continued in part. In June 2019, Palmer J stayed Mr Craig’s proceeding and part of Mr Stringer’s proceeding on the basis of abuse of process. The remainder of Mr Stringer’s proceeding went to trial resulting in his claims against Mr Craig and others being dismissed in April 2020.<sup>12</sup> Mr Craig appealed Palmer J’s stay judgment which was overturned by the Court of Appeal. It held that Mr Craig was not only entitled to commence his proceedings separately, there were good reasons for him to do so.<sup>13</sup> Mr Craig’s remaining proceeding therefore continues.

[20] There were two other minor related proceedings, both in the District Court, the current status of which is unknown.

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<sup>9</sup> *Craig v Slater* [2018] NZHC 2712.

<sup>10</sup> *Craig v Slater* [2020] NZCA 305 at [123].

<sup>11</sup> *Craig v Slater* [2021] NZHC 30.

<sup>12</sup> *Stringer v Craig (No 3)* [2020] NZHC 644.

<sup>13</sup> *Craig v Stringer* [2020] NZCA 260, (2020) 25 PRNZ 367 at [38].

## **Key findings in my judgment**

[21] A preliminary finding was required as to whether Mr Craig had sexually harassed Ms MacGregor. That same issue had been before Toogood J in *Craig v Slater* and Ms MacGregor had given evidence in that trial. Toogood J's judgment was reserved. Neither party sought that I adopt Toogood J's ultimate finding, although I advised at the outset of the hearing that his judgment was likely to be released shortly, and directly raised my concern over re-litigation of the issue.

[22] In the judgment given by Toogood J about a month later he found there was sexual harassment. Mr Wilson for Ms MacGregor then sought to argue, post-hearing, that it was an abuse of process for Mr Craig to attempt to re-litigate a claim previously determined by another Court, the issue I had raised at the outset. As recorded in my judgment, I allowed further submissions to be filed. The issue was complicated by the fact the parties were different in the two proceedings. In August 2019 I issued a comprehensive Minute setting out my view that it could nonetheless be an abuse of process for the issue to be revisited, noting there may be cost implications in returning to the issue so late in the proceeding. Mr Wilson ultimately declined to take the matter any further. Although a Court can make a finding of abuse of process on its own motion, I determined against that approach and proceeded to judgment. I did not read Toogood J's judgment so as not to be influenced by it beyond being obviously aware of his finding.

[23] As stated above, I made a preliminary finding that Mr Craig had sexually harassed Ms MacGregor. There was no sexual relationship. This was not physical harassment as might have been earlier understood of that expression, but rather harassment mainly in the form of extraordinary letters written by Mr Craig to Ms MacGregor. These letters contained clear sexual content and were highly inappropriate. I determined that past a certain point, Mr Craig's letters and conduct were unwelcome.

[24] Mr Craig was partially successful in his claim that Ms MacGregor had defamed him in her statements to Mr Williams. Ms MacGregor's defamatory statements were that Mr Craig had refused to negotiate rates of pay and failed to pay invoices when

due, that he was cruel, nasty or unfair towards another young woman, that he had harassed, abused or been nasty toward two or more women, and that he caused a young woman to commit suicide. No defence in relation to those statements was made out. I found Ms MacGregor did not defame Mr Craig in a press statement and a tweet made by her that suggested he sexually harassed her, because this was true. To the extent Mr Craig was successful I made the declaration sought by him that Ms MacGregor had defamed him. In terms of s 24(2) of the Defamation Act 1992, costs were reserved.

[25] Ms MacGregor was likewise partially successful, but successful on the main point. I found Mr Craig made defamatory statements about her on four occasions. First, at the media conference on 22 June 2015, among other things Mr Craig said “On some occasions our conduct was inappropriate and we have acknowledged that so we can both move on” and “I have never sexually harassed anyone and allegations to the contrary are wrong”. That implied Ms MacGregor made false claims of sexual harassment against him and that she was a liar. However, I found Mr Craig did not defame Ms MacGregor by suggesting she had acted inappropriately with him, that she had no capability to manage her finances, and that she could not pay her debts, as I found these imputations were at least substantially true.

[26] Second, in the letter to members of the Conservative Party on 25 June 2015, among other things Mr Craig wrote “You may have heard media rumours in recent days claiming that Colin sexually harassed a staff worker. We assure you that this is not the case and allegations of this nature are false and have been withdrawn”. He also wrote “While there was no harassment and no sexual relationship there were some occasions where their conduct was inappropriate which has been acknowledged from both sides so that all parties can move on” and “The rumours and false allegations have not harmed our [his and Mrs Craig’s] wonderful marriage of over 23 years”. Those statements implied Ms MacGregor made false claims of sexual harassment against him, had withdrawn those claims, had an inappropriate relationship with Mr Craig, had an inappropriate relationship with a married man and was a liar. I also found, however, that Mr Craig’s defence of truth succeeded on the imputation that Ms MacGregor had behaved inappropriately with Mr Craig as she had acknowledged doing so in the settlement agreement.

[27] Third, at the press conference on 29 July 2015, Mr Craig said: “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”. He also said “While I am grateful that many of you have chosen not to run the ‘other women’ story I do wish that the same good judgment had been exercised with earlier other false allegations”. Mr Craig’s wife, in a statement approved by him, said “It has not been fun to be victimised by those responsible for a series of false allegations”. These statements implied Ms MacGregor made false claims of sexual harassment, was a liar, had victimised Mr Craig and his wife and was the kind of person who would victimise and hurt a family.

[28] Fourth, and finally, in the booklet, Mr Craig wrote the following:

317.1 Lie #1 Sexual harassment

All attacks have to start somewhere and it was the Williams dossier with its claim that Craig had sexually harassed his press secretary that became the starting point. The fact the claim had been withdrawn by MacGregor was perfect for the Dirty Politics Brigade. If the claim had instead been heard, then there would be a result, but without a judgment Craig could now be declared guilty by them without any defence.

Even better for them, Craig had signed a confidentiality clause and was unable to respond to the false allegations now being made by Williams. MacGregor was labelled a victim and Craig ... well he was labelled many things, none of them complimentary.

[29] This statement again implied Ms MacGregor had made false claims against him, had withdrawn those claims, wrongly identified herself as a victim and was a liar.

[30] To summarise, Ms MacGregor’s defamation of Mr Craig consisted of the personal attacks set out at [24] above, namely he was a bad employer who had failed to pay her and had been cruel and harassed other women to the point of causing one to commit suicide. The gravamen of Mr Craig’s defamatory statements, as the Court of Appeal said, was that Ms MacGregor had made false claims of sexual harassment against him and was therefore a liar. This was effectively repeated in the four publications. The other meanings were in essence variations on that theme.<sup>14</sup>

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<sup>14</sup> *Craig v MacGregor* [2021] NZCA 156 at [10](a) and [11].

## **Damages claimed**

[31] The counterclaim filed by Ms MacGregor seeks:

- (a) Compensatory damages “in excess of \$300,000”;
- (b) Special damages “in excess of \$100,000”;
- (c) Punitive damages “in excess of \$100,000”.

[32] However, in submissions filed in late 2019, Ms MacGregor sought damages of \$700,000 – \$800,000, inclusive of punitive damages which were impliedly still \$100,000. In further submissions filed in September 2021, Ms MacGregor seeks materially more again: compensatory damages between \$700,000 and \$800,000 plus punitive damages of \$150,000. She also seeks interest on this amount under the Interest on Money Claims Act 2016.

[33] Ms MacGregor also recently clarified that she no longer seeks special damages. Such damages would require proof on the balance of probabilities of actual financial loss.<sup>15</sup> Such proof is always difficult, and there was none here.

[34] Mr Craig says damages should be fixed, in total, at \$50,000 but acknowledges in effect that an award of damages of \$170,000 would have been appropriate were it not for the award of \$120,000 previously made to Ms MacGregor by the Human Rights Review Tribunal, which he says should be offset in full.

## **Law**

[35] Damages are awarded at common law to restore a plaintiff to the position they would have been in had the defamation not occurred:<sup>16</sup>

The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused.

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<sup>15</sup> See *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [49].

<sup>16</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [31].

[36] The Court of Appeal has recognised damages can be difficult to measure in financial terms when intangibles such as reputation, dignity and peace of mind are in issue.<sup>17</sup> However, the Court has also endorsed the summary of Bingham MR in *John v MGM Ltd*, which provides a somewhat prescribed process for assessing such relief:<sup>18</sup>

In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's person or personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place.

[37] The purpose of damages is compensatory. Findings of liability establish a defendant's statements are false and defamatory and a successful verdict is the plaintiff's primary vindication. The verdict is said to "restore the plaintiff's reputation".<sup>19</sup> An assessment of compensation for the harm caused by the statements will be a subjective exercise but, as the Court of Appeal has also recently observed, "it must be kept within reasonable bounds".<sup>20</sup>

[38] General damages compensate for the ordinary harm caused by the defamation. Such damages "are an estimate, however rough, of the probable extent of actual loss a person has suffered, and will likely suffer in the future".<sup>21</sup> While damages are theoretically assessed on the basis of impairment to reputation, the common law has awarded such relief without proof by a plaintiff of any actual effect on reputation.

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<sup>17</sup> *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [48].

<sup>18</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [31], citing *John v MGN Ltd* [1997] QB 586 (CA) at 607–608.

<sup>19</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [32].

<sup>20</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [32].

<sup>21</sup> *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [48].

[39] General damages can be aggravated in defamation cases. The Court of Appeal addressed such damages in *Siemer v Stiassny* and more recently in *Williams v Craig*. In *Siemer*, Hammond J said:<sup>22</sup>

As a general proposition, aggravated damages are additional damages which are awarded to compensate for injury to the plaintiff's feelings or dignity where that sense of injury has been exacerbated by the manner in which, or the motive with which, the defendant committed the defamatory act, or by how the defamation defendant behaved towards the injured plaintiff, particularly after the tort had been committed.

[40] He went on to cite Lord Devlin in *Rookes v Barnard* on aggravated damages:<sup>23</sup>

... [i]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury [or judge] can take into account in assessing the appropriate compensation.

[41] This was characterised as a "classic statement of principle".<sup>24</sup>

[42] In *Williams v Craig*, the Court of Appeal characterised aggravated damages as including circumstances where:<sup>25</sup>

... the defendant has acted towards the plaintiff in a manner which compounds or increases the effect of the original defamation. The defendant's behaviour after the original publication, including in conducting his or her defence, can operate in this way.

[43] Aggravating factors may therefore include a defendant's motive, including the presence of malice or ill-will in making the defamatory statements, and a defendant's actions afterwards, including the way he or she defends an action.<sup>26</sup> In either event, the act must exacerbate the injury to the plaintiff.

[44] The Court of Appeal has indicated the preferred approach in quantifying damages is to arrive at a lump sum award for general damages without specifying a

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<sup>22</sup> *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [51].

<sup>23</sup> At [52], citing *Rookes v Barnard* [1964] 1 AC 1129 (HL) at 1221.

<sup>24</sup> *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [51].

<sup>25</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [33].

<sup>26</sup> *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [51].

separate sum arising from aggravating conduct.<sup>27</sup> It is the totality of the award which is significant rather than the individual components which constitute it.<sup>28</sup>

[45] Punitive damages, also known as exemplary damages, are a distinct category, provided for in s 28 of the Defamation Act:

### **28 Punitive damages**

In any proceedings for defamation, punitive damages may be awarded against a defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff.

[46] An award of punitive damages is rare and only available where the defendant's conduct is such that punishment beyond an award of general damages is required.<sup>29</sup>

### **Assessment of compensatory damages**

[47] In settling on the quantum of damages in this case, I adopt the approach approved by the Court of Appeal in *Siemer v Stiassny* of assessing five factors.<sup>30</sup> They are:

- (a) Nature of the defamatory statements;
- (b) Extent of publication;
- (c) Injury suffered by Ms MacGregor;
- (d) Damage to Ms MacGregor's reputation;
- (e) Mr Craig's conduct.

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<sup>27</sup> *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [73].

<sup>28</sup> *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [56].

<sup>29</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [34].

<sup>30</sup> *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [66]. Compare *Solomon v Prater* [2021] NZHC 481 at [103].

*Nature of the defamatory statements*

[48] Ms Clark for Ms MacGregor submits the defamatory statements that were established go to the very core of Ms MacGregor's integrity and values. They characterise Ms MacGregor as a liar who makes false accusations about serious matters and as someone who would engage in an inappropriate relationship and victimise Mr Craig's family. Ms Clark says that in making these statements, Mr Craig was well aware of the background around the sexual harassment claim and that resolution of Ms MacGregor's claim included an undertaking by him that the arrangement would be confidential. This breach of confidence exacerbates the sting of the defamation. Ms Clark submits that in claiming he had an inappropriate relationship with Ms MacGregor and that the sexual harassment claim was withdrawn because it was false, Mr Craig cast himself as the victim and Ms MacGregor as his tormentor. His statements were a form of continuing persecution of a victim of sexual harassment. Mr Craig's defamation is alleged to be at the most serious end of the scale.

[49] In response, Mr Craig acknowledges the impact of his statements on Ms MacGregor's personal integrity but adds he did not allege unlawful or criminal behaviour or question her professionalism. They were not the most serious of defamatory statements. He further submits Ms MacGregor was a peripheral target in the media statement and booklet, where the defamatory statements were collateral to his overall purpose, which was to respond to an attack by others.

[50] While I agree with Ms Clark that the breach of confidence exacerbates the sting of the defamation, Ms MacGregor has received damages for that breach and it would be double-counting to reflect that factor here.

[51] I accept the statements attacked Ms MacGregor's core values and her integrity. I also accept the background of the sexual harassment and the settlement of Ms MacGregor's sexual harassment claim made those statements particularly offensive. I agree, and stated in the judgment, that Mr Craig wrongly cast himself as blameless and Ms MacGregor as at fault. The fact that the defamatory statements were repeated, largely with the same meanings, on four separate occasions (two being high-

profile media events orchestrated by Mr Craig) is a particularly significant feature in assessing damages.

[52] However, Mr Craig did not make direct accusations against Ms MacGregor. The primary focus of the media conference and the booklet was Mr Williams, Mr Slater and others.

[53] I do not accept Ms Clark's submission that this is defamation at the most serious end of the scale or that, as in *Karam v Parker*, the defamatory statements were a "full-scale assault" on Ms MacGregor's reputation.<sup>31</sup> In *Karam*, approximately 50 defamatory statements were made about the plaintiff on a Facebook page, a website operated by the defendants and other websites (including YouTube) over a period of four years. The wide-ranging statements repeatedly used direct language to expressly attack the reputation of the plaintiff, including, for example, that he lacked integrity, was dishonest and engaged in fraud. The defamatory statements by Mr Craig were in a different, and less serious category, even given the background of sexual harassment.

[54] My overall assessment, given the language used, the imputations which arose, and the repetitive nature of the statements, is that the defamatory statements were of moderate seriousness.

#### *Extent of publication*

[55] Ms Clark submits the extent of publication of Mr Craig's statements is unprecedented. She adds that no other case comes close in scale and that this level of dissemination was intended by Mr Craig. The media conference on 22 June 2015 was widely promoted and attended by all media organisations. The statements were broadcast live and, Ms Clark says, subsequently repeated or referred to by Mr Craig in follow-up interviews. The letter of 25 June 2015 was sent to every member of the Conservative Party. The party's mailing list was estimated to contain around 8,000 people at that time. The letters were personalised and signed by Mr Craig, giving them the appearance of authority. The second media conference on 29 July 2015 was again

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<sup>31</sup> *Karam v Parker* [2014] NZHC 737 at [229].

promoted and attended by all media organisations. Finally, the booklet was distributed to 1.6 million households around New Zealand.

[56] Ms Clark says Mr Craig took these steps with a deliberate and calculated purpose to ensure his defamatory statements were brought to the attention of the wider public. Indeed, she says it is difficult to imagine what more Mr Craig could have done to widen his audience.<sup>32</sup>

[57] I accept the extent of publication is a particularly significant issue in assessing damages in this case. Publication was widespread, through all forms of news media and in a direct mailer to households. This is publication on at least a similar level to *Television New Zealand Ltd v Quinn* (taking account of significant changes in the media landscape since that case was decided).<sup>33</sup> The extent of Mr Craig's efforts to ensure wide publication is also a relevant consideration. The repetition of the same statements in the four publications has already been addressed in analysing the nature of the defamatory statements. If it is claimed there was repetition beyond that, Ms Clark has not pointed to the relevant evidence.

[58] I note Mr Craig's submission that delivery of the mailer to a household does not mean every mailer was read (or even opened) or that every person in a household read the mailer. I also note, particularly in response to Ms Clark's submission that Mr Craig could not have published more widely, that he did not publish the material in electronic form, which could have reached an even wider audience and enabled ready dissemination.

[59] Nonetheless, there was widespread publication of the defamatory statements whether through coverage of the media conferences and/or the booklet. The letter sent to party members was still to a large group of people, even if it was more confined. Most party members who received correspondence from the party's leader would open and read it at a time when that leader was facing adverse media coverage. Overall, the extent of publication is a significant issue in assessing damages in this case.

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<sup>32</sup> Citing Cooper J in *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008 at [60].

<sup>33</sup> *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA).

*Injury suffered by Ms MacGregor*

[60] Ms Clark submits Ms MacGregor was and remains deeply affected by Mr Craig's defamation. Her health and confidence have suffered substantially and, in particular, at the end of 2015, six months after the 22 June 2015 media conference, she resigned from her then position in a Wellington-based public relations firm. She was suffering from stress-related health conditions at that time. The effect of the defamation is described as akin to re-victimisation of a victim of sexual harassment.

[61] Ms Clark contends continuing media attention arising from Mr Craig's statements to the media, coupled with his ongoing litigation, has required Ms MacGregor to address the circumstances of her sexual harassment claim repeatedly. In support of this submission, Ms Clark cites a newspaper report from September 2021 after the Supreme Court dismissed Mr Craig's application for leave to appeal in this case. Overall, Ms MacGregor's efforts to move on from this difficult time in her life have not been possible. Ms Clark submits that the harm suffered by Ms MacGregor is of the most serious kind, again comparable to *Karam*.

[62] Mr Craig accepts, as he must, that Ms MacGregor has suffered harm but notes that certain of the statements made by him were found to be true or partially true and Ms MacGregor is not entitled to compensation for them. He also emphasises that the defamatory statements were made in the context of responding to attacks from others and that he could not be liable for all the harm Ms MacGregor suffered, especially when she attacked his reputation in her conversation with Mr Williams in the first place.

[63] In terms of Mr Craig's points, I accept that on her own pleading Ms MacGregor says the harm she has suffered was caused also by statements for which I have found Mr Craig is not liable as they were true. This relates to her pleaded imputations that she could not manage money, and that she had behaved inappropriately with him at times. But the harm she suffered from these statements would have been modest relative to the harm from the statement she falsely accused Mr Craig of sexual harassment.

[64] I also have to be mindful that, as is clear from counsel's submissions, Ms MacGregor's injury flows from more than the defamation. Ms MacGregor had suffered from a serious stress-related illness prior to the defamatory remarks.<sup>34</sup> Ms MacGregor acknowledged that arose in part from her financial difficulties. I have no doubt that it arose primarily out of the punishing role she was performing for the Conservative Party and the sexual harassment by Mr Craig. She then suffered the serious breach of confidence by Mr Williams, the extensive attack by Mr Slater, Mr Williams and others on Mr Craig (which clearly identified her and generated wide media attention) followed by Mr Craig's breach of confidence and defamation. While the effect of the defamation will have been exacerbated by preceding events and I can properly take that into account, I otherwise have to attempt to separate those events. In particular this is not a claim for damages for sexual harassment or breach of confidence by Mr Craig. Those claims have been settled and payments made, and Mr Craig is not liable for the breach of confidence by Mr Williams and the attacks by others which first generated the wide media interest.

[65] As for ongoing media attention, while Ms MacGregor will have been unable to recover as a result of the ongoing proceedings and media attention (and that is relevant), I cannot accept Ms Clark's submission that Mr Craig has repeated his defamatory statements either in the media or in the court proceedings generally. The newspaper report she relies on contains statements attributed to Mr Craig including that he was "very disappointed" in the Supreme Court's September 2021 ruling and that he considered it should hold the Court of Appeal to account. The article went on to say that Mr Craig had always rejected the claims he sexually harassed Ms MacGregor. However, the statement that Mr Craig had rejected claims of sexual harassment is not presented as a direct quote or even a paraphrase of a statement by Mr Craig and it is not a repeat of the defamation.

[66] Expressing disappointment or disagreement with the result of an appellate court decision is not repetition of the defamatory statements and nor is involvement in related litigation. As the Court of Appeal said in *Craig v Stringer*, Mr Craig had good reason to bring his proceedings in the way he had. As the Court also said, although

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<sup>34</sup> After resigning her role in the Conservative Party in 2014, nearly nine months earlier, Ms MacGregor had been admitted to hospital.

very unfortunate for Ms MacGregor in this case, citizens are entitled to have access to the courts to resolve their differences. Further, Mr Williams was the plaintiff in the first proceeding (not Mr Craig), Ms MacGregor is effectively the plaintiff in this one, and Mr Craig has overall had material success in his appeals.

[67] I accept that the continuing media attention has no doubt required Ms MacGregor to address the circumstances of her sexual harassment claim repeatedly, but that attention began not with Mr Craig's defamatory statements but with Ms MacGregor's high-profile resignation, Mr Williams' breach of confidence and Mr Slater's blog posts. I do not have evidence that Mr Craig has created or sought to exacerbate that attention since his defamatory statements. In fact my impression is such attention may have been inflamed by members of the media who form a part of Ms MacGregor's enthusiastic support group.

[68] Subject to the above, I accept Ms MacGregor's evidence of the harm caused to her by the defamatory statements. With the backdrop of sexual harassment, Mr Craig's highly publicised statements to the contrary would have caused Ms MacGregor profound distress. I consider it relevant also that she was in a vulnerable position as she was relatively young, at a comparatively early stage of her career and there was a significant imbalance between the financial resources available to her and to Mr Craig. There is no question the defamatory statements would have been very harmful.

#### *Damage to Ms MacGregor's reputation*

[69] Ms Clark submits that at the time of Mr Craig's first defamatory statement, Ms MacGregor was a private citizen living to a large degree in obscurity while developing a career in public relations. Her reputation was untarnished at that time. Counsel says the imputation that Ms MacGregor was untruthful, and that she had ever had a sexual relationship with Mr Craig, has profoundly injured her reputation. Her efforts to resolve her sexual harassment claim sensitively and away from the public gaze were fundamentally undermined by Mr Craig's statements. This change in status has caused her considerable hurt and humiliation. It is claimed the publicity led Ms MacGregor's employer to alter her working arrangements which affected her

career prospects. Ms Clark says the statements have had a significant and seriously adverse impact on Ms MacGregor's reputation.

[70] In response, Mr Craig submits that reputation is largely restored by a favourable judgment and in this case also by a media campaign on Ms MacGregor's behalf. He says any harm caused by the defamatory statements must also account for loss of reputation arising from my findings that Ms MacGregor was not always honest and made serious false allegations about him. He also points to my findings that some of his statements were true, including that Ms MacGregor was unable to manage her finances and acted inappropriately towards him, the latter based on her own acknowledgement.

[71] I accept that Ms MacGregor's reputation was not entirely untarnished. She had made serious and false allegations about Mr Craig before his statements. It is also relevant that I found it was true that Ms MacGregor and Mr Craig had at times acted inappropriately towards each other.

[72] Ms MacGregor was also not living in obscurity at the time of Mr Craig's defamation. Her sudden pre-election resignation attracted publicity. The entire saga was heavily publicised following Mr Williams' breach of Ms MacGregor's confidence and the Whale Oil blogs. For the same reason, Mr Craig is not responsible for the HRC settlement "ceasing to be away from the public gaze" although his actions certainly focussed that gaze.

[73] It also was not pleaded by Ms MacGregor, or established, that Mr Craig suggested they "ever had a sexual relationship". In fact, in one of the four publications, he expressly denied that.

[74] As to Ms Clark's submission on Ms MacGregor's employment arrangements, it is not clear that it was the effect on her reputation which caused her then employer to alter her responsibilities. The impression from the submission is this was a consequence of the political controversy rather than because Ms MacGregor was considered untrustworthy or otherwise had a poor reputation.

[75] As is often the case, there is little evidence of loss of reputation to Ms MacGregor arising out of the defamatory statements in particular. The matters Ms Clark points to illustrate that Ms MacGregor's claim in this regard relates much more to the public exposure. Ms Clark has not provided any evidence of media statements negative to Ms MacGregor. My impression is, if anything, to the contrary. Ms MacGregor also has a judgment restoring her reputation in all material respects.

[76] I accept there was some harm caused to Ms MacGregor's reputation but the evidence of that harm appears mixed. I put relatively low weight on this factor, as compared to the injury suffered by her.

*Mr Craig's conduct*

[77] Mr Craig's conduct is relevant to whether compensatory damages should be aggravated.

[78] Ms Clark submits Mr Craig's "proud ownership of the defamation" has continued and he has persisted in repeating his statements. She compares his conduct to that of the defendant in *Korda Mentha v Siemer*.<sup>35</sup> His statements on 22 June 2015 were made after he had received a reminder from Ms MacGregor's then lawyer regarding the terms of a settlement agreement and of the requirement that certain information would remain confidential. Ms Clark also points to an email sent by Mr Craig in June 2015 where he says he and Ms MacGregor would both be "bloodied" were he to issue a statement addressing certain matters. She says this demonstrates Mr Craig was planning to make critical comments about Ms MacGregor's work and conduct several days prior to the media conference. Ms Clark submits this is evidence of ill-will and a determination to defame Ms MacGregor. There were also efforts by the lawyers to avoid or placate media interest, which Ms Clark says were ignored by Mr Craig.

[79] Ms Clark says Mr Craig had the skills and experience to avoid drawing Ms MacGregor into the fray but chose nonetheless to do so owing to his anger with her. She adds that Mr Craig exacerbated the initial defamation by writing the letter to

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<sup>35</sup> *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008 at [41].

party members, holding a further media conference and releasing the booklet. His conduct in these proceedings, in filing a statement of claim but not serving it on Ms MacGregor, is also said to be objectionable. Ms Clark submits Mr Craig has not withdrawn his statements or apologised, but rather steadfastly maintained them.

[80] As noted above, Ms Clark compares Mr Craig's conduct to that of the defendant in *Korda Mentha*. She submits the combination of malice towards Ms MacGregor, Mr Craig's calculated actions, his unwillingness to avoid drawing Ms MacGregor into the controversy, his persistence and unwillingness to back down, together with the financial means which enabled him to effect unprecedented publication, make him as determined as the defendant in *Korda Mentha*.

[81] She also points to Mr Craig's use of multiple proceedings to repeat the main statements about Ms MacGregor as evidence of his continuing commitment to his defamation.

[82] Mr Craig submits there is no evidence of ill-will and that it has been established he was entitled to respond to the attacks on his reputation. Ms MacGregor attacked his reputation in her conversation with Mr Williams and he was entitled to reply as it was an occasion of privilege. He was also entitled to respond to attacks by others. Although his actions were excessive in relation to Ms MacGregor, he submits his culpability is diminished because he was responding to an attack. Further, he says the email cited by Ms Clark demonstrates only his intention to protect his reputation and that the matters about Ms MacGregor raised in it were not subsequently referred to publicly, which indicates restraint on his part rather than malice or ill-will.

[83] Mr Craig also submits I found he had an honest belief in the truth of the defamatory statements, which is a mitigating feature of his conduct. He points to my remark in the judgment that I did not consider he lied when he published the factually incorrect statements in the 22 June 2015 press statement.<sup>36</sup>

[84] The mitigating feature on which Mr Craig seeks to rely is misleading. While I did not characterise some of his statements as a lie, in the sense of being intentionally

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<sup>36</sup> *Craig v MacGregor* [2014] NZHC 2247 at [224].

false, I was clear that he deliberately misled the media by presenting factually inaccurate information in a way which impugned Ms MacGregor. In relation to others of his defamatory statements, I found Mr Craig had no basis for honest belief in their truth, in assessing his defence of qualified privilege. It cannot be said, as Mr Craig submits, that I accepted he honestly believed in the truth of the defamatory statements.

[85] I have already rejected some of the points relied on by Ms Clark in this regard (for instance repetition through the multiple proceedings). Her point regarding the lack of apology I accept is relevant, but given s 29(a) of the Defamation Act provides that an apology is to be taken into account in mitigation of damages, I do not see the absence of an apology as an aggravating feature. Similarly, the non-service of this proceeding is not relevant.

[86] It is relevant here that Mr Craig was responding to a comprehensive attack, some justified, much clearly defamatory. He was not a sophisticated political operator. He had limited political experience and had never held public office. The extent to which he relied on his advisors, including Ms MacGregor, is clear from my findings and the evidence. Ms Clark does not point to any clear evidence he was motivated by anger to defame Ms MacGregor. I consider he was motivated by response to an attack by Mr Slater, Mr Williams and others. The June 2015 email refers to specific matters on which he was planning to make adverse public comment about Ms MacGregor, but he did not follow through on those.

[87] Malice is not established in this case. Mr Craig's conduct is not comparable to that of the defendant in *Korda Mentha v Siemer*.<sup>37</sup> In *Solomon v Prater*, Clark J was invited to draw a similar comparison in assessing the quantum of damages:<sup>38</sup>

But, of course, the conduct in *Siemer* overall was considerably worse and of a different nature in that it was both vengeful and persistent. Mr Siemer openly proclaimed defamatory comments without attempting to hide his identity, ignored court injunctions, constructed a website in order to defame the respondent even after the imposition of injunctions, failed to pay the costs orders of the High Court and Court of Appeal and was given a six weeks' term of imprisonment because he "had flaunted his offending conduct to the plaintiffs and their advisers". The Court said its attention had not been drawn

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<sup>37</sup> *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008. See also *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [10]-[18].

<sup>38</sup> *Solomon v Prater* [2021] NZHC 481 at [133]. References omitted.

“to any worse case of defamation in the British Commonwealth, and [its] own researches have not disclosed one”.

[88] Indeed, Mr Siemer was fined and eventually committed to prison on account of his repeated refusal to comply with Court orders to take down defamatory material. Such was his conduct, an order was made debarring him from defending the proceeding. A second order was subsequently made committing him to prison but it is not clear if it was enforced. Clark J’s reasoning above applies with similar force in this case. Mr Craig’s conduct goes nowhere near that of the defendant in *Korda Mentha v Siemer*, and Ms Clark does not provide any other case that would support a finding of malice here.

[89] It is, nonetheless, a clearly aggravating feature of this case that Mr Craig responded to allegations made by others by drawing Ms MacGregor further into the controversy and presenting himself as a victim when, although there had been no finding or concession made, it must have been abundantly clear even to him that the reverse applied. There can be no doubt Mr Craig did so deliberately. Although it was Ms MacGregor who provided Mr Williams with information (including false information) that materially led to the attack on Mr Craig, the fact that Mr Craig’s character was under attack from others does not mitigate his defamation of Ms MacGregor when she was not engaged in that attack.

#### *Overall assessment of general damages*

[90] Before considering relevant case law, Mr Craig recently argues that Ms MacGregor is limited to a damages claim of at most \$400,000 (in total) by virtue of r 5.32 of the High Court Rules 2016. That rule provides that a statement of claim seeking the recovery of a sum of money must state the amount as precisely as possible. Ms MacGregor’s statement of counterclaim pleads only a total of \$400,000 for compensatory and punitive damages, albeit as a minimum.

[91] Rule 5.32 does not apply here. This is not a case for “the recovery of a sum of money”. However, I agree a damages claim should not depart so widely from the pleading, nor be increased so late in the piece. A defendant is entitled to know the case they face.

[92] Because it is difficult to assess damage flowing from defamation, the Courts typically consider awards made in comparable cases. Ms Clark discusses damages awards in a number of cases by way of comparison to Ms MacGregor's claim. Mr Craig relies primarily on the Court of Appeal's judgment in *Williams v Craig*. As noted, in that case the jury decided against Mr Craig and awarded Mr Williams \$1.27 million in compensatory and punitive damages. This was the full amount claimed by Mr Williams. This was set aside by the trial Judge, a decision upheld on appeal. Mr Craig relies on the following statement by the Court of Appeal:<sup>39</sup>

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

[93] Mr Craig submits this is clear guidance on the quantum of damages to be awarded because that case involved two of the four publications at issue in this proceeding. He says the two cases have a similar factual matrix. Ms Clark observes the Court of Appeal took the view that the defamation in *Williams v Craig* was much less serious than in other comparable cases, that Mr Williams could not point to any special harm, and his own conduct lowered his own reputation. She says the statements did not affect Mr Williams' career whereas they did affect Ms MacGregor's. Ms Clark says that while the cases shared some of the same factual background, it was simplistic to say they are "aligned".

[94] Neither party referred to the Supreme Court judgments in *Williams*. Those judgments also addressed the issue of awards of damages. The majority agreed that a jury direction was desirable, particularly where "an extravagant sum" was claimed.<sup>40</sup> They did not comment on the direction set out by the Court of Appeal. The minority did not address whether a direction should have been made but observed they were less "troubled" by the extent of the jury award.<sup>41</sup> They considered that "[i]f 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".<sup>42</sup>

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<sup>39</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [58].

<sup>40</sup> *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457 at [80].

<sup>41</sup> At [169]. References omitted.

<sup>42</sup> At [169].

[95] The divergence in the views of the Court of Appeal and the minority in the Supreme Court emphasises the key point noted above that the assessment of damages in defamation is a challenging exercise. The Court of Appeal's direction in *Williams* is clearly not determinative here. However, I consider it the best benchmark for this case. Although questions of liability and damages were never finally resolved, the direction was binding on the trial Judge. The two cases arise out of the same fact scenario and *Williams* is the most recent appellate decision on the subject of damages in defamation.

[96] I agree with Ms Clark that there were material differences between this case and *Williams*, but there are in every case.

[97] I also agree with Ms Clark that Ms MacGregor's claim to damages ranks materially higher than that of Mr Williams. The actual statements made were not more serious but Mr Williams' conduct had lowered his reputation whereas Ms MacGregor's was only slightly blighted by her own defamatory statements. I accept that the injury to Ms MacGregor, albeit that restricted to the defamation itself, would be materially greater. Finally I note that the Court of Appeal referred to a maximum award of \$250,000 for Mr Williams, that is, the actual award could be less.

[98] Another case that provides some assistance in assessing damages is *Karam v Parker* where the plaintiff was awarded \$525,000 in general damages and \$10,000 in punitive damages.<sup>43</sup> Mr Craig's defamation of Ms MacGregor sits well below *Karam* in terms of seriousness. As I have explained, *Karam* was a case which involved a sustained attack over four years on the plaintiff's reputation via a large number of direct defamatory statements which were distributed widely. The Judge said Mr Karam described the period during which the statements were posted as the worst period of his life, and she believed him.<sup>44</sup> I assess the defamatory statements in the present case to have been materially less serious and far fewer in number but note publication was probably to a wider audience, particularly given the political element which was not present in *Karam*. While Ms MacGregor has suffered similar harm overall, particularly given her age and more limited public profile, the harm suffered

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<sup>43</sup> Inflation-adjusted the general damages would equate to approximately \$593,000.

<sup>44</sup> *Karam v Parker* [2014] NZHC 737 at [228].

by her as I have set out, does not flow just from the defamation. Also, I consider the harm to her reputation lower than in the case of Mr Karam. Materially, Mr Craig's conduct was not as aggravating as that of the defendants in *Karam*.

[99] Both parties have also referred to the recent decision of Edwards J in *Craig v Slater* where Mr Craig was awarded \$325,000. Mr Slater had made multiple defamatory statements in 12 publications in the form of posts to his blog and in one radio interview.<sup>45</sup> I referred to some of these statements earlier. This is another case where the nature of Mr Slater's defamatory statements against Mr Craig was more serious than in this case, though that should not be overstated given Mr Craig was the leader of a political party while Ms MacGregor was a private citizen with limited public profile. The extent of publication was arguably lower in *Slater*. In its earlier decision, the Court of Appeal recorded that in September 2014, the website which hosted the blog had nearly five million page views and 285,639 users.<sup>46</sup> Mr Craig's booklet was distributed to a much larger group of people and, although direct comparison with website views is challenging, my view is that publication in this case was wider and the reach considerably greater. It was certainly a situation where the harm to Mr Craig and to his reputation was, in context, lower than in the present case. Mr Slater's conduct was aggravating but I consider Mr Craig's conduct in impugning Ms MacGregor when he could have defended himself without doing so, to be more aggravating here.

[100] However, drawing a comparison with the award in *Craig v Slater* is not helpful as the defendants were unrepresented and it seems the Judge was not referred to the Court of Appeal decision in *Williams*. In my view, had she been it would have led to a materially lower award than was made.

[101] There is one further matter to address. As noted, Mr Craig submits Ms MacGregor has already received compensation following her claim for breach of confidence which was in relation to the same publications.<sup>47</sup> The issues for determination in that proceeding were the nature and extent of the confidentiality

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<sup>45</sup> See also *Craig v Slater* [2020] NZCA 305.

<sup>46</sup> *Craig v Slater* [2020] NZCA 305 at n 3.

<sup>47</sup> *MacGregor v Craig* [2016] NZHRRT 6 at [149].

obligation imposed on Ms MacGregor and Mr Craig by s 85 of the Human Rights Act 1993; whether Mr Craig breached an obligation of confidentiality and, if so, the nature and extent of those breaches; whether there was any justification for any breach; and what remedies were to be awarded, particularly for humiliation, loss of dignity and injury to feelings.

[102] The Tribunal emphasised that the issues related to the obligations of the parties under a settlement agreement arising out of the earlier sexual harassment claim, not the sexual harassment claim itself. In a detailed and thorough decision, the Tribunal concluded Mr Craig was bound by the settlement agreement and an obligation of confidentiality. Mr Craig largely accepted he breached that obligation, which the Tribunal described as “deliberate, systematic, egregious and repeated”.<sup>48</sup> The Tribunal did not consider there were any grounds to criticise Ms MacGregor’s conduct, noting that Mr Craig did not advance any, and attached little weight to points he contended mitigated his breaches. Various remedies were ordered, including \$7,000 for lost earnings and \$120,000 for humiliation, loss of dignity and injury to Ms MacGregor’s feelings.

[103] In awarding damages for defamation, this Court will not be double-counting as such. The compensation awarded by the Tribunal was for the humiliation, loss of dignity and injury to feelings caused by Mr Craig’s breach of his obligation of confidentiality under the settlement agreement. The award of damages here is for Mr Craig’s defamatory statements about Ms MacGregor and the harm caused to her and her reputation. The two remedies vindicate Ms MacGregor’s different legal rights, a contractual one arising out of the Human Rights Act, the other from common law. While Ms MacGregor is entitled to separate remedies in accordance with the principles which apply to each, there is some overlap in the loss claimed and the award made is a relevant consideration. However, it would not be appropriate, as Mr Craig contends, to deduct the first award.

[104] Taking all of these factors into account, I fix the quantum of general damages (including aggravated damages) at \$400,000. This amount fairly compensates

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<sup>48</sup> *MacGregor v Craig* [2016] NZHRRT 6 at [112].

Ms MacGregor for the harm caused by Mr Craig's defamatory statements, distinguishing as best I can from the harm caused by sexual harassment, breach of confidence by Mr Williams and Mr Craig, and the other factors already considered. The key factors in this case are the moderate seriousness of the defamatory statements, the number of occasions on which the defamatory statements were made, the widespread publication of them, the harm caused to Ms MacGregor and, to a lesser extent, her reputation, and Mr Craig's conduct in impugning her to try to save himself. I note the damages sum exceeds the amount specified in the counterclaim, which though a minimum, was \$300,000. I also note that in total Ms MacGregor will have received from Mr Craig over \$500,000 in damages flowing from the four publications made by him.

### **Punitive damages**

[105] As recorded above, in her statement of counterclaim Ms MacGregor sought punitive damages "in excess of \$100,000". In her September 2021 submissions she increased that claim to \$150,000. Ms Clark says the features of the case which justify such damages are:

- (a) Mr Craig's aggravating conduct;
- (b) The calculation and motive of his attack on Ms MacGregor, without regard to the injury it would cause her;
- (c) His deliberate and persistent characterisation of himself as the victim, causing Ms MacGregor, who was the victim of his sexual harassment to be repeatedly victimised;
- (d) Repetition of the statements, which "shows no sign of abating even now".

[106] These points have all been considered. While accepting that some aspects of Mr Craig's conduct do properly aggravate damages, this is not a case where punitive damages are available and I decline to award them. It is not one of the relatively rare cases where the conduct in issue is flagrant and needs to be punished. As already

noted, the nature of the defamation and the conduct of the defendants in *Karam* and *Siemer* (two cases where punitive damages were awarded) was far more serious than this case. Indeed, *Siemer* is a very different case in terms of seriousness.

[107] Finally, in the very egregious circumstances of *Karam* and *Siemer*, punitive damages were fixed at \$10,000 and \$25,000 respectively. Even allowing for effluxion of time, the claim of \$100,000, let alone the increased claim of \$150,000, was clearly unjustifiable.

### **Interest**

[108] I do not consider it appropriate to award interest from September 2019.<sup>49</sup> Rather, I have assessed damages as at the current date, taking into account the dates of the judgments in the cases relied upon. I note in any event that the amount of interest would be minimal given interest rates during the relevant period.

### **Costs**

[109] In civil proceedings, costs are usually governed by the High Court Rules. However, the Defamation Act also contains costs provisions which are independent of the Rules and, indeed, contradict some of the fundamental principles which guide the exercise of the discretion to award costs. While difficult to follow, it appears by virtue of r 14.1(3), the provisions of the Act override rr 14.1 to 14.10 which I take to mean they prevail.

[110] Rule 14.16 is not referred to in r 14.1 and is the starting point for consideration here. It provides:

#### **14.16 Claim and counterclaim both established**

The court must award costs as if each party had succeeded in an independent proceeding, unless, in the court's opinion, the justice of the case otherwise requires, if—

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<sup>49</sup> Contrary to submissions filed for Ms MacGregor, as this proceeding was commenced prior to 1 January 2018, s 87 of the Judicature Act 1908 applies to any award of interest in this case. See s 7 of the Interest on Money Claims Act 2016.

- (a) the plaintiff succeeds in his or her proceeding; and
- (b) the defendant succeeds in a counterclaim.

[111] Neither party has referred to r 14.16. Mr Craig first submits that both parties have achieved a level of success and costs should lie where they fall. In the alternative, he relies on ss 24 and 43(2) of the Defamation Act to claim solicitor-client costs for the proceedings as a whole. Ms MacGregor says she is the substantially successful party overall and that she should be the only party entitled to costs. She then seeks 3C scale costs on the basis the proceedings were complex and required special skill and experience.

[112] I do not accept either party's primary argument that costs should be approached by assessing the case overall. In terms of r 14.16, each party has succeeded in their claim or counterclaim at least in material part. It is well-established that a party who is only partially successful is still successful for the purposes of costs.<sup>50</sup> Each party having succeeded, at least in material part, costs are to be determined in terms of r 14.16, there being no good reason to do otherwise.<sup>51</sup> In fact, given the application of s 24 of the Defamation Act, which I address subsequently, there seems to be good reason to apply r 14.16.

#### *Costs on Mr Craig's claim*

[113] First, I address Mr Craig's submissions as to s 43(2) of the Defamation Act. That section provides:

#### **43 Claims for damages**

...

- (2) In any proceedings for defamation, where—
  - (a) judgment is given in favour of the plaintiff; and
  - (b) the amount of damages awarded to the plaintiff is less than the amount claimed; and

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<sup>50</sup> *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [26].

<sup>51</sup> See for example *Wilson v Parua Bay Farms Ltd* [2019] NZHC 1355 at [6]. See also *Newbrook v Marshall* HC Rotorua CP 26/94, 11 September 2001 and *Sanford Ltd v Chief Executive of the Ministry of Fisheries* HC Wellington CIV-2009-485-379, 18 February 2010.

(c) in the opinion of the Judge, the damages claimed are grossly excessive,—

the court shall award the defendant by whom the damages are payable the solicitor and client costs of the defendant in the proceedings.

[114] Mr Craig submits that Ms MacGregor’s claim for damages is grossly inflated to achieve a higher-end result. He says s 43(2) is designed to prevent such mischief by providing for solicitor-client costs against a successful party. If the conditions are met, there is no discretion.

[115] The provisions of s 43(2)(a) and (b) are met in that Ms MacGregor has been partially successful in her counterclaim, and judgment has been given in her favour. She claimed up to \$950,000 in damages and I have awarded her \$400,000, well under half of the amount she claimed. The issue to be resolved is whether the damages claimed were grossly excessive.

[116] The quantum of the claim was clearly excessive, given the award. But the claim must be “grossly excessive” for the purposes of s 43(2). This raises the threshold considerably. I agree with John Hansen J’s comment in *Court v Aitken* that the damages claimed would need to be flagrant, striking or monstrous.<sup>52</sup> That is not the situation here. Section 43(2) is therefore not engaged.

[117] I turn next to s 24 which provides:

#### **24 Declarations**

- (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
- (2) Where, in any proceedings for defamation,—
  - (a) the plaintiff seeks only a declaration and costs; and
  - (b) the court makes the declaration sought,—

the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the court orders otherwise.

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<sup>52</sup> *Court v Aitken* HC Dunedin CIV-2005-412-519, 2 May 2006.

[118] Mr Craig sought only a declaration and costs against Ms MacGregor (at least as from when the hearing commenced). I have made the declaration sought in part. In terms of s 24 Mr Craig is entitled to solicitor-client costs against Ms MacGregor from commencement of the hearing unless I order otherwise, noting the discretion that is available.

[119] Mr Craig was self-represented. However, he incurred solicitor's costs relating to legal advice received. Such expenses can be awarded as disbursements to a lay litigant provided they are reasonably incurred.<sup>53</sup> I consider in any event that those expenses can be awarded under s 24.

[120] I note here Ms Clark's submission that it is contrary to public policy for a party who is self-represented to be able to recover solicitor-client costs for legal assistance provided to them when those costs, had that party been represented by counsel, would fall to be determined according to the scale. While I see considerable merit in this argument, there is authority in support of Mr Craig's submission and the costs still have to be reasonably incurred. Further, in this case, insofar as Mr Craig is entitled to indemnification under s 24, costs are not determined under the Rules and the public policy concerns do not arise.

[121] In any event, the reasonableness of Mr Craig's disbursements for legal expenses can be assessed with reference to the scale costs claimed by Ms MacGregor and his claim for those disbursements overall is less than the scale costs claimed by her. His claim for disbursements is reasonable in consequence.

[122] Mr Craig has only in the last week or so provided the amount of his disbursements for legal expenses which, excluding GST, is \$118,210. I am satisfied this relates only to legal advice he received for this proceeding, noting that he was

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<sup>53</sup> *Knight v Veterinary Council of New Zealand* HC Wellington CIV-2007-485-1300, 31 July 2009 at [6], citing *Malloch v Aberdeen Corp (No 2)* [1973] 1 WLR 71 (HL) and *Stringer v Craig* [2020] NZHC 1021, (2020) 25 PRNZ 2263. In *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55], the Supreme Court noted disbursements in *Knight* were held to include expenses incurred by a McKenzie friend but expressed no opinion about the disbursements allowed in that case.

awarded disbursements of \$95,000 for legal advice by Edwards J in *Craig v Slater* and it is important he not recover here for the same advice.<sup>54</sup>

[123] Ms Clark does not address s 24. As noted, she relies on the contention that Ms MacGregor is the substantially successful party and is therefore entitled to costs.<sup>55</sup> Ms Clark undertakes a fine-grained analysis of my findings in support of her submission that Ms MacGregor is the substantially successful party. I agree that while neither party succeeded in full on their claim, viewed overall Ms MacGregor was the more successful. However, as I have said, the starting point here is not overall success but r 14.16.

[124] In this case the application of s 24 reinforces the appropriateness of applying r 14.16. Even if he had incurred no legal expenses, it is clear from the policy and purpose of s 24, which increases the costs award of a party seeking a declaration only, that at the least Ms MacGregor would *not* be eligible for costs on Mr Craig's claim. Both ss 43 and 24 of the Defamation Act are designed to encourage defamation proceedings to focus on vindication rather than financial gain. A party who seeks only a declaration therefore has a prima facie entitlement to have all of their reasonable costs indemnified by an unsuccessful defendant.

[125] I turn finally to the issue of Mr Craig's disbursements prior to trial, when he still claimed damages and s 24 does not apply. Mr Craig, reflecting his limited success, is entitled to recover disbursements incurred during this period under the High Court Rules. In *Craig v Slater*, Mr Craig was partly successful. Edwards J considered his legal expenses to be reasonable and discounted them, as foreshadowed by the Court of Appeal,<sup>56</sup> by 40 per cent for reduced success to reach the award of \$95,000. That was not a case where s 24 applied as Mr Craig also sought and was awarded damages. Owing to the particular circumstances of this case, the discount for disbursements prior to trial will be the same as the adjustment under s 24 for disbursements afterwards.

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<sup>54</sup> *Craig v Slater* [2021] NZHC 30 at [79].

<sup>55</sup> *Tower Insurance Ltd v Kilduff and Veritas (2012) Ltd* [2019] NZCA 82.

<sup>56</sup> *Craig v Slater* [2020] NZCA 305 at [128].

[126] I am fixing costs for Mr Craig only on his claim, not on the counterclaim. On the assumption that approximately half of his legal expenses would relate to his claim (and half to the counterclaim) and to reflect his partial success on his claim, I have decided to award him 25 per cent of the total legal fees he has claimed by way of disbursements. This comes to \$29,552 excluding GST.

[127] Mr Craig also incurred other disbursements (primarily the hearing fee of \$32,000) totalling \$35,815. He should receive 25 per cent of that sum also, but excluding GST, being \$7,785.

[128] I therefore fix as total disbursements payable to Mr Craig the sum of \$37,337.

*Costs on Ms MacGregor's counterclaim*

[129] As a preliminary point Mr Craig submits that in terms of r 14.2(1)(f) costs have to be actually incurred to be recovered. He refers to Ms MacGregor's appeals for financial support for her legal expenses in this proceeding and says none of this has been disclosed to the Court. Mr Craig says it can be assumed that Ms MacGregor has not herself incurred legal costs and that she has had financial assistance from her public appeals. He provides no authority for his argument and I consider it to be incorrect. Rule 14.2(1)(f) provides that an award of costs should not exceed the costs incurred by the party claiming costs. Whatever Ms MacGregor's arrangements for funding the proceedings, she is presumably the person who has incurred the costs. How she pays those costs is not a relevant consideration, at least in the present context.

[130] Ms MacGregor is entitled to costs as the successful party on her counterclaim. She was not entirely successful but she succeeded in material part and to a greater degree than Mr Craig succeeded in his claim.

[131] Ms Clark submits this is a category 3 proceeding and scale 3B costs should be awarded, with allowance for second counsel. It does not appear that this proceeding was previously categorised for costs under r 14.3(2). Under r 14.3(1) a proceeding that because of its complexity or significance requires counsel to have special skill and experience in the High Court is a category 3 proceeding. Although the rule creates the

impression that special skills and experience have to be established, that is not required. The key is complexity or significance.

[132] Ms Clark says that the causes of action in Mr Craig's claim and Ms MacGregor's counterclaim were all complex and required a high level of skill. Ms Clark also submits defamation is a complex area of law which requires specialist skills. A further consideration is said to be the extent to which the pleadings were amended. Ms Clark observes both parties amended their pleadings on three occasions and Mr Craig further amended his pleadings in the course of oral submissions. Finally, Ms Clark points to the decision of Toogood J in *Craig v Slater*, where category 3 costs were awarded.<sup>57</sup>

[133] Dealing with the last point first, though not acknowledged by counsel in her submissions, the decision of Toogood J was set aside by the Court of Appeal. The costs award to Mr Slater was set aside and Edwards J subsequently fixed costs in favour of Mr Craig which, because in the form of disbursements, was not based on the scale. It is clearly not appropriate in those circumstances to rely on Toogood J's earlier decision as to costs. Further I note there have been a number of defamation cases where costs have been awarded on a category 2 basis.<sup>58</sup>

[134] I do not accept that amended pleadings add to complexity per se, or did here. It is a common feature of the interlocutory stage in many proceedings. Mr Craig did make oral application to amend his pleadings at the start of trial to add a defence of "truth". Although a significant error, it was an obvious one as Mr Craig's opening addressed the argument.

[135] I accept defamation is a complex area of law. But this was not a particularly complex proceeding. Unlike many defamation proceedings, this one did not require the evidence of other witnesses to establish whether statements had been made and while there were the usual wide-ranging defences, these also did not require evidence much beyond the parties themselves.

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<sup>57</sup> *Craig v Slater* [2019] NZHC 1269 at [80].

<sup>58</sup> See, for example, *Staples v Freeman* [2021] NZHC 1308 at [169], *Sellman v Slater* [2021] NZHC 762 at [2], *Solomon v Prater* [2021] NZHC 481, *Lee v Lee* [2020] NZHC 612 at [2], and *Opai v Attorney-General* [2019] NZHC 1915 at [4].

[136] This proceeding has occupied considerable time but is of average complexity and significance. It did not require special skill and experience. This is borne out by the fact Mr Craig represented himself, albeit he clearly had legal assistance behind the scenes. It is properly a category 2 proceeding and Ms MacGregor is entitled to scale 2B costs.

[137] I am prepared however to allow for second counsel. A proceeding of this kind where a plaintiff is self-represented justifies the assistance of second counsel in preparing for hearing and presenting the case at trial.

[138] Ms MacGregor calculates 2B scale costs in the sum of \$164,432 and claims disbursements of \$955.76. However, these costs are again for the proceeding as a whole. I have already found Ms MacGregor is not entitled to costs on Mr Craig's claim. Again as an approximation, I attribute 50 per cent of the costs as relating to the counterclaim. I note Ms MacGregor's success on the preliminary argument as to whether Mr Craig sexually harassed her, and also that some of the items in her costs schedule relate only to her counterclaim (for example submissions on damages) or exceed the corresponding entry for attendances regarding Mr Craig's claim. However, it may well have been possible to avoid the preliminary argument and I have already said the claim for damages was excessive. In particular the claim for punitive damages was not justified, let alone the very recent increase to \$150,000.

[139] Also, I do not consider any reduction in Ms MacGregor's costs is appropriate in terms of r 14.7(d). While she was unsuccessful on some issues, I do not consider they significantly increased Mr Craig's costs and I note again her success on the preliminary point. All of the issues advanced in the claim and counterclaim related to the same series of events. While Mr Craig may have incurred some additional cost in dealing with the claims on which Ms MacGregor did not succeed, it was not significant.

[140] Ms MacGregor is entitled therefore to 50 per cent of 2B scale costs, inclusive of second counsel. It appears the daily rate used for her calculations is the current rate of \$2,390. The rate applicable from 1 July 2015 to 31 July 2019 was \$2,230. That applies to all of the steps prior to judgment and to one memorandum afterwards. The

adjusted figure is \$155,099. Scale costs to which Ms MacGregor is entitled are therefore \$77,550 (rounded) along with her disbursements of \$955.76, which I allow in full as they are modest.

### **Result**

[141] Ms MacGregor is awarded damages in the sum of \$400,000 (comprising general and aggravated damages).

[142] No award is made for punitive damages.

[143] Ms MacGregor is to pay disbursements to Mr Craig in the sum of \$37,337. Mr Craig is to pay costs in the sum of \$77,550 and disbursements of \$955.76 to Ms MacGregor. Deducting the award made to Mr Craig from that to Ms MacGregor in terms of r 14.17, I make a final award of costs in favour of Ms MacGregor of \$40,213 and disbursements of \$955.76.

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Hinton J