IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA172/2023
[2025] NZCA 233

BETWEEN		MANAIA MEDIA LIMITED First Appellant
		ROWAN DIXON Second Appellant
		JANE THOMPSON Third Appellant
AND		KRISTIN PIA CATO Respondent

Hearing:	8 May 2024 (further information received 17 May 2024)
Court:	Mallon, Cooke and Collins JJ
Counsel:	W Akel and F A King for Appellants R D Butler and E D Nilsson for Respondent
Judgment:	12 June 2025 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed. An order for a retrial is made.

B The respondent must pay the appellants costs for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

C Costs in the High Court are set aside.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] This appeal raises issues about the application of the public interest defence in defamation proceedings tried by a jury. It also raises issues concerning evidence admissibility rulings, judicial directions on meaning, what is said to be an excessive compensatory damages award, and as to whether there was a proper basis for a punitive damages award.

[2] The defamation proceeding in this case arose out of the aftermath of complaints about the conduct of a coach and a team member (a father and daughter) who were

part of a New Zealand equestrian show jumping team who toured Australia in 2017. Kristin Cato, a lawyer, acted for the complainants.[1] She brought a defamation claim in respect of an article about the matter published on 3 December 2017 on the *NZ Horse & Pony* website (the Article). She contended the Article meant that she had acted unethically, unprofessionally or otherwise improperly in relation to the resolution of the complaint in various ways, or that there were grounds to suspect that she had so acted.

[3] At trial before Robinson J and a jury, the jury found that the Article was defamatory of Ms Cato in the manner she had alleged. It awarded general and aggravated damages of $225,000 and punitive damages of $15,000 against Manaia Media Ltd as the publisher of *NZ Horse & Pony*, Rowan Dixon as the sole director and shareholder of the publisher, and Jane Thompson as the author of the Article and digital editor for *NZ Horse & Pony*.[2] The Judge dismissed their public interest defence and entered judgment for Ms Cato in accordance with the jury's verdict.[3]

[4] Manaia Media, Ms Dixon and Ms Thompson (whom we refer to collectively as Manaia) appeal. They say:

(a) As to the public interest defence:

(i) media expert evidence from William (Bill) Ralston called for Ms Cato to respond to the defence was unfairly prejudicial and should not have been before the jury, and evidence from several proposed witnesses for Manaia intended to support the public interest defence was wrongly ruled to be inadmissible; and

(ii) the Judge erred in finding that the public interest defence did not apply.

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1 Kristin Cato is also known by her married name, Kristin Manson.
2 Liability is joint and several.
3 *Cato v Manaia Media Ltd* [2023] NZHC 385 [public interest defence judgment].

(b) As to meaning, the jury's verdict that the words conveyed the alleged defamatory meanings was unsafe because:

(i) expert evidence from Paul Collins on damage to a lawyer's reputation and Mr Ralston's evidence should not have been before the jury;

(ii) this Court's pre-trial decision that the words were "capable" of bearing the alleged defamatory meanings should not have been referred to during the trial; and

(iii) the Judge's directions were inadequate.

(c) As to damages:

(i) the jury's award of $225,000 was excessive in the context of a public interest story published online for six days, even assuming the jury considered the story was not published responsibly, and when an immediate apology was made;

(ii) the jury's award for punitive damages was not justified as ill will or animosity did not suffice for an award and Manaia did not act with flagrant disregard of Ms Cato's rights; and

(iii) overall the damages awards were an unjustifiable and unreasonable limit on the right to freedom of expression affirmed in the New Zealand Bill of Rights Act 1990.

[5] Ms Cato says that none of these grounds of appeal are made out. She says the Judge's error was only in finding for the purposes of the public interest defence that there was any legitimate interest in the Article at all.

Background

The tour and the complaints

[6] In April 2017 a team of New Zealand show jumpers toured Australia. The team was coached by Jeff McVean and his daughter Katie Laurie was a member of the team. Following the tour, complaints were made to Equestrian Sports New Zealand Incorporated (ESNZ) about Mr McVean's and Ms Laurie's conduct on that tour.[4] The mothers of two of the team members were complainants. The identity of the other two complainants is subject to a confidentiality direction.[5]

[7] ESNZ has "General and Veterinary Regulations" (Regulations), published pursuant to its constitution, that govern the conduct of all equestrian events organised by affiliated organisations or by or on behalf of ESNZ. The Regulations provide for a Judicial Committee which has jurisdiction in respect of, amongst other things, allegations against an official or competitor of acting in a manner prejudicial to the interests of ESNZ and the sport of equestrian or bringing those into disrepute.[6]

[8] The Regulations allow for the parties to a complaint to agree to attend a mediation in an effort to resolve the matter by agreement.[7] If the complaint proceeds to a hearing, all parties and their witnesses have the opportunity to be heard and the Judicial Committee must comply with the principles of natural justice.[8] The Judicial Committee must make its decision in writing.[9] It may impose one or more of the following penalties or orders: a warning, a fine, disqualification or suspension of a horse or a competitor from a competition or event or for a period of time, suspension or termination of ESNZ membership, or any other penalty the Judicial Committee

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4 The ESNZ Board is the national governing body for equestrian sport in New Zealand. Under the ESNZ Board are five bodies (jumping and show hunter, dressage, eventing, endurance and para equestrian). Each of these bodies has its own board and by-laws that set out its rules of operation.

5 *Cato v Manaia Media Ltd* HC Auckland CIV-2017-404-3091, 20 August 2021 (Minute of Campbell J) at [18]. The two mothers waived their confidentiality arising from the ESNZ investigation and gave evidence at the trial.

6 Equestrian Sports New Zealand *General and Veterinary Regulations and Policies* (August 2016) [Regulations], arts 141.3.2.2 and 141.3.2.3. The Regulations have since been amended however we refer to them as they were at the relevant time.

7 Article 142.6.

8 Article 141.10.

9 Article 141.11.

thinks fit to impose in the circumstances.[10] Costs may also be ordered.[11] A right of appeal to the Sports Tribunal of New Zealand is available on various grounds.[12]

[9] The jumping discipline board (the Jumping Board) of ESNZ discussed the complaints relating to the Australian tour in a telephone conference call convened on 2 May 2017. The minutes recorded that:

> RS [Richard Sunderland, the Chair] talked to the issues of conduct of the entire team in Australia which c[a]me to a head over the weekend with board members and ESNZ fielding a large number of calls in relation to the tour and behavio[u]r of the team.

[10] The minutes also record that from the information received it appeared that art 141.3.2.3 of the Regulations applied, which refers to conduct that has "[b]rought ESNZ or the sport of equestrian into disrepute". The Jumping Board discussed that it had no power to impose any sanctions and that the best process was via the Judicial Committee if an official complaint was received. The Board resolved to wait and see if an official complaint was lodged within the required time frame and, if one was not, then the Jumping Board would do its own investigation.

[11] An official complaint was subsequently received and referred to a Judicial Committee. ESNZ issued a statement advising of this referral "[f]ollowing complaints received about some aspects of" the tour. The details of the complaints are confidential and were not disclosed to the jury or to this Court.[13] The Judicial Committee encouraged the parties to seek to resolve their dispute through mediation.

[12] Mediation between the parties to the complaints (so not including ESNZ) took place on 27 November 2017. Ms Cato, a barrister and former Crown prosecutor, was the lawyer for the complainants. Mark Hammond, a sports lawyer, was the lawyer for Mr McVean and Ms Laurie. A settlement was reached. The details of the mediation are confidential except to the extent that the parties agreed to a statement to be published about the outcome. The agreed statement (set out in more detail below) recorded that Mr McVean agreed to no longer coach show jumping in any official

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10 Article 141.13.
11 Article 141.14.
12 Articles 141.14 and 142.1.
13 Minute of Campbell J, above n 5.

capacity in New Zealand, and Ms Laurie acknowledged that her conduct had been unsatisfactory and agreed to relinquish her membership of ESNZ for a three-month period if she breached its code of conduct again at any point in the next 12 months.

[13] The evidence called at trial for Ms Cato was that the parties envisaged that the agreed statement would be published by ESNZ on its website. However, when ESNZ had not confirmed it would publish the statement in a sufficiently timely manner from the complainants' perspective, Ms Cato arranged for the statement to be released to *Show Circuit* and to *iSpyHorses*. *Show Circuit* is an equestrian magazine whose Facebook page had a following of approximately 91,000.[14] *iSpyHorses* is a publication on a website operated by Ms Cato's mother (Heather Cato). It is primarily a site where horses are advertised for sale. It had a following of around 60,000.[15]

[14] Both *Show Circuit* (under a heading "Breaking news", a warning about inappropriate comments, and the subheading "Parties have agreed over breached agreement…") and *iSpyHorses* (under a heading "Katie Laurie Apologizes for Conduct"), published the following statement in identical terms on 30 November 2017:[16]

> A number of complaints were made to Equestrian Sports NZ by the parents of team members of the 2017 ESNZ Senior Jumping Team tour of Australia. The complaints were against Jeff McVean who was the chef [d'equipe] and coach for the team and his daughter Katie Laurie who was the senior member of the team. ESNZ convened a Judicial Committee to determine the complaints and a significant amount of evidence was filed by the parties. Contrary to mistaken reporting by Horse & Pony earlier in the year, there was never any investigation or complaints relating to any other member of the team.
>
> The parties to these complaints have reached agreement following mediation, the details of which are confidential except to the extent to which the ESNZ Board and Jumping NZ has been informed.

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14 This evidence was based on screenshots of the Facebook page in 2021 (rather than 2017 when the Article was published) although Ms Cato gave evidence that the numbers were about the same at the time of the publication.

15 The above comment also applies to this number.

16 There were minor editorial differences in capitalisation, punctuation and abbreviations used. The version reproduced here appeared in *iSpyHorses*. *Show Circuit*'s editorial note also differed. It said: "The final paragraph is a statement issued by the lawyer for the complainants. The statement above that is published exactly what was agreed to be published by the parties to the mediation. It was released to the Show Circuit in this form."

> On the agreement that Mr McVean will never again hold any role with Jumping NZ or in relation to showjumping with High Performance NZ, the complainants have agreed to withdraw the complaints.
>
> Kate Laurie accepts and acknowledges that her conduct during the ESNZ Jumping 2017 Senior Showjumping Tour of Australia did not reflect the high standards expected of a senior team member. Towards the conclusion of the tour she failed to demonstrate individual responsibility by words and actions. She unreservedly apologises to the other team members, their supporters and ESNZ for the stress this has caused.
>
> SANCTIONS: If in the period of 12 months following settlement she breaches any of the ESNZ Codes of Conduct, Katie's membership with ESNZ will be suspended for 3 months, and she will be precluded from competing at any ESNZ event during that 3 month period.
>
> The lawyer for the complainants said that they are relieved Mrs Laurie has accepted responsibility and apologised for her actions, and that she and Mr McVean have agreed to the sanctions. Participants in any sport are entitled to expect fair and respectful treatment and the governing body (ESNZ) has a responsibility to enforce and uphold the codes of conduct that all riders, owners, officials and members are subject to. This has been a lengthy and stressful process for all involved. The complainants are looking forward to moving on with the season ahead. It is hoped that the equestrian community will continue to demand that the codes of conduct are enforced by ESNZ and they should speak up if they feel those standards have been breached
>
> PLEASE NOTE -
>
> The statement published is exactly what was agreed to be published by the parties to the mediation. It was released to the media in this form.
>
> The final paragraph is a statement issued by the lawyer for the complainants (as indicated).
>
> iSpyHorses has simply published the document in its exact form.

[15] Ms Cato's evidence at trial was that the first five paragraphs comprised the agreed statement drafted in conjunction with Mr Hammond from the mediation, she had added the sixth paragraph when sending the agreed statement to *Show Circuit* and *iSpyHorses*, and she had required them to undertake to publish all six paragraphs in exactly the form in which she had provided it to them and this is why the editorial note under "PLEASE NOTE" was included.[17]

[16] Ms Cato did not send the statement to *NZ Horse & Pony*. *NZ Horse and Pony*'s Facebook page had a following of around 25,000. Ms Cato's evidence at trial was that

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[17] We note that this explanation of the paragraphs was not provided to Manaia before they published the Article.

she did not do so because the complainants were concerned about the way in which *NZ Horse & Pony* had reported the matter in an article in its July 2017 edition.[18]

[17] For its part, ESNZ issued the following statement on 1 December 2017 under the heading "ESNZ statement on complaints to the Judicial Committee regarding Jeff McVean and Kate Laurie":

> Yesterday, a statement was published regarding the resolution of the complaints to the Judicial Committee against Jeff McVean and Kate Laurie.
>
> The parties to the complaint attended a private mediation on Monday, 27 November 2017. Neither ESNZ nor the Judicial Committee were involved in that process. ESNZ and the Judicial Committee were unaware of the date of the mediation.
>
> The parties agreed to resolve the complaints between themselves. Neither ESNZ nor the Judicial Committee has imposed any penalty on Mr McVean or Ms Laurie. Any penalties/sanctions were agreed by them.
>
> ESNZ congratulates the parties for resolving matters between them. ESNZ will not make any further comment until the Judicial Committee has considered the matter further.
>
> ESNZ reminds members of the need to exercise caution when commenting on social media sites at all times.

[18] *NZ Horse & Pony*'s article on the matter which was posted on 3 December 2017. This is the Article that is the subject of the defamation claim.[19]

NZ Horse & Pony's earlier articles

[19] Before publishing the Article, *NZ Horse & Pony* had published other articles about the tour. Its April 2017 edition reported on the upcoming tour by the "young all-woman New Zealand show jumping team". The article was under the heading "Aiming for the top" and described Mr McVean, the "Equestrian Sport NZ Jumping High Performance manager", as saying that the team went with "high hopes". The article went on to report on Mr McVean's comments about the challenges and aims for New Zealand's riders.

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18 See below at [21]–[23].
19 See below at [36]–[44].

[20] On 1 June 2017 Ms Thompson emailed Dana Kirkpatrick, the general manager of ESNZ, referring to the Jumping Board's 2 May 2017 minutes and ESNZ's statement that a Judicial Committee had been convened.[20] Ms Kirkpatrick replied saying that she was not at liberty to discuss the matter, noting that its website had said that "no further correspondence will be entered into on this matter until the inquiry has been completed".

[21] The July 2017 edition of *NZ Horse & Pony*, published in mid-June 2017, included an article on the matter under the heading "NZ show jumping team conduct in question". This article referred to ESNZ having "formed a judicial inquiry into the conduct of New Zealand's show jumping team on their recent trip to Australia, after a number of formal complaints were received". It quoted the ESNZ website statement which said:

> Following complaints about some aspects of the NZL show jumping tour to Australia, a Judicial Committee has been convened … That committee will consider the complaints, and report in due course.

[22] It also referred to *NZ Horse & Pony*'s approach to Ms Kirkpatrick for further comment and her response that she could not discuss the matter further. The article went on to name the team members and to discuss how the team had fared at the Australian competitions. It then said:

> In the May minutes of the show jumping board, it states there were "issues of conduct of the entire team in Australia" which resulted in "board members and ESNZ fielding a large number of calls in relation to the tour and behaviour of the team."

[23] The article concluded with a summary of the Judicial Committee process and the kinds of penalties that can be imposed in that process.

[24] On 28 June 2017 Ms Kirkpatrick wrote to Ms Dixon about the July 2017 article. She informed Ms Dixon that a complaint about the article had been received. She said:

> By juxtaposing the existence of a complaint, the names of the team members, and the extract from the Board Minutes (which do not relate to a judicial

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[20] Above at [9]–[11].

> inquiry, and have therefore been taken out of context), your article improperly implies that all members of the team are subject to a complaint.

[25] Ms Kirkpatrick said that "[f]or the avoidance of doubt", the three members of the team other than Ms Laurie were not the subjects of the judicial inquiry. She requested that *NZ Horse & Pony* print a correction to the story, and apologise to the Jumping Board and the members of the team "for the misrepresentation of the facts". She also said that: "We cannot stress strongly enough the need for neutral, fact based reporting that uses information in the correct context and form."

[26] After a further exchange of communications between Ms Kirkpatrick and Ms Dixon, Manaia set out its position in a letter dated 28 July 2017. It said that it had accurately quoted from the Jumping Board minutes. It suggested that ESNZ's attention should be directed to making sure Board minutes were correct. It also said that its role was not to present ESNZ affairs in the best possible light, but rather "to act as a watchdog to protect public interest against malpractice, to hold publicly-funded organisations to account, and to create public awareness". It went on to propose that ESNZ submit a statement to be published in the next issue of *NZ Horse & Pony* to clarify to whom the judicial inquiry related.

[27] Ms Kirkpatrick responded that the letter would be referred to the ESNZ Board for discussion at its August meeting. *NZ Horse & Pony* did not hear from ESNZ about that matter after this until it contacted Ms Kirkpatrick as part of its inquiries prior to publishing the Article.

Verification steps prior to publishing Article

[28] Late in the afternoon on 30 November 2017, Ms Dixon and Ms Thompson saw the statement that had been posted to the *iSpyHorses* website. They discussed writing an article about it but seeking comments before doing so.

[29] First, Ms Dixon emailed Ms Kirkpatrick with a series of questions on 1 December 2017 and a further set of follow up questions on 2 December 2017. These were essentially questions about ESNZ's knowledge or sanction of the statement, whether the statement breached mediation confidentiality, whether ESNZ would be

making its own statement, how parties could agree privately to ESNZ sanctions and whether this affected Mr McVean's position as the jumping coach for the New Zealand eventing team.

[30] Ms Kirkpatrick responded promptly to both sets of questions. She confirmed that: the statement had come from the parties involved in the complaints and ESNZ had not been involved in that; that the parties' legal counsel had advised ESNZ that it would be released; ESNZ had not held any hearing and had made a statement that day; whether the statement complied with the confidentiality of the mediation was a matter for the parties involved; Ms Kirkpatrick had not been advised how this affected Mr McVean's position as jumping coach for the New Zealand-based eventing squad riders; the reference in the agreed statement to *NZ Horse & Pony*'s article earlier in the year was written by the parties and not ESNZ; ESNZ had decided to agree to disagree about whether the Jumping Board minutes in that article required correction and noted that those minutes did not say that "the entire team was under investigation or the subject of complaints";[21] Ms Kirkpatrick understood Ms Laurie and Mr McVean had agreed to self-impose the sanctions; and the Judicial Committee would meet as soon as possible.

[31] Next, on the afternoon of 2 December 2017 and the morning of 3 December 2017, Ms Thompson sent messages to Heather Cato on Facebook Messenger asking for clarification as to who had issued the statement on the *iSpyHorses* website. The message on 3 December 2017 noted that Ms Thompson had attempted to contact Kristin Cato (discussed next), Ms Thompson was planning on publishing a story that morning, and she was happy to take a statement from Heather Cato "to ensure we have all relevant points of view covered". Heather Cato did not reply to Ms Thompson's message.

[32] Also on the afternoon of 2 December 2017, Ms Thompson sent a Facebook message to Kristin Cato advising that *NZ Horse & Pony* was writing a story for publication the next morning and had the following questions for her:

> …. Was the statement released by you? Did Katie and Jeff approve of the release before it went out? Has Katie, Jeff or their lawyer contacted you since

[21] Emphasis in original.

> the story was released to express their concern? Why was the release not sent to other media including us? Can you please explain how a private mediation can agree sanctions on behalf of ESNZ?

[33] Ms Cato's evidence was that she sent the messages to her clients who instructed her not to contact *NZ Horse & Pony* and not to provide comment and so she did not.

[34] Ms Thompson also messaged Ms Laurie on the afternoon of 2 December 2017. In this message Ms Thompson said that she understood from other sources that the release did not reflect what was agreed at the mediation and that it was not approved for release. Ms Laurie suggested she contact Ms Laurie's mother, Vicki McVean. Ms Thompson then contacted Mrs McVean, who amongst other things said "we must say no comment or they will come back to us" and asked Ms Thompson to call her. There is limited evidence about the content of the subsequent conversation except that Ms Thompson gave evidence that Mrs McVean said that Mr Hammond did not know of the connection between Ms Cato and *iSpyHorses*.

[35] Ms Thompson also sought comment from the groom on the Australian tour. However, he decided not to provide any comment.

The Article

[36] The Article was published by *NZ Horse & Pony* on its website on 3 December 2017. Its title was "What goes on tour, doesn't stay on tour", which was followed by a subtitle of "The fallout from the senior show jumping team's six-week tour to Australia takes some further turns; we endeavour to unravel the saga". The opening paragraph was as follows:

> This is a very complicated story. It is complicated because there are so many people involved, many with relationships and agendas that are not initially obvious. It involves legal processes and it potentially involves future legal action. It involves an organisation that has a rich history of relationship issues between management and members, in a sport that has passionate participants who seldom hold back on their opinions.

[37] The Article then referred to the team of show jumpers going to Australia with high hopes. It named the team. It referred to ESNZ's press release which "ironically" included a quote from Mr McVean saying that the team got on really well and that it was easier because they all trained with him. It referred to a Facebook page that had

been set up for the team, and an ESNZ press release after the first main event of the tour which, amongst other things, said the team were enjoying time at Ms Laurie's new establishment before the next event.

[38] The Article then referred to the discussion about the team at the Jumping Board meeting on 2 May 2017. It quoted in full the paragraphs from the minutes about the complaints received and the process for responding to them. It also quoted the ESNZ website announcement on 31 May 2017.[22] It described the transparency of ESNZ's process as slow, noting that only a "few" minutes had since been published (including what was described as a "cryptic note" about an "editor's note" being added to Mr McVean's report of the tour "to clear up an anomaly") when it was reasonable to infer that there would have been more discussion.

[39] Next the Article set out in full its July 2017 article saying that "we stand by the story". It referred to the formal complaint it received from ESNZ and its response reiterating that it "stood by" its article. It said it presumed ESNZ was happy with that response because it did not receive a direct complaint and nor was a direct complaint made to the Press Council.[23] It noted that ESNZ's issue with its July 2017 story was that it "improperly implies that all members of the team are subject to a complaint". It said that it was only in its 28 June letter that ESNZ clarified that the three other team members were not the subject of the judicial inquiry.

[40] It suggested that it might be thought that ESNZ would put more effort into managing its relationship with a diminishing group of key equestrian media in New Zealand or that ESNZ could be trusted to manage the process fairly. It said that was the view of *NZ Horse & Pony*. It said that, as time went by, it kept an eye out for further updates but there was no word of the Judicial Committee's process. It then said:[24]

> Out of the blue, there was progress of sorts this week, when iSpyHorses, a website-based business that specialises in advertising horses for sale, published on its Facebook page a piece with the headline: KATIE LAURIE APOLOGIZES (sic) FOR CONDUCT and a link to their website "blog" for the story. At the end of the story there was a note as follows: "*The statement*

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22 See above at [11].
23 Now called the Media Council.
24 Italics and the use of "sic" are as per the published *NZ Horse & Pony* article.

published is exactly what was agreed to be published by the parties to the mediation. It was released to the media in this form. The final paragraph is a statement issued by the lawyer for the complainants (as indicated). iSpyHorses has simply published the document in its exact form."

The statement was an unusual one for many reasons, not just for the note at the end and the fact the lawyer wasn't named, but that it was posted on the iSpyHorses' site practically exclusively despite saying it was released to the media. Being the highest-selling and most long-standing equestrian magazine in New Zealand, you would think *NZ Horse & Pony* would have been included and have been sent a copy. But no. Instead, we were mentioned in the release, which was itself unusual. We decided to take a closer look.

We are not going to reproduce the full story from the iSpyHorses website, as we believe it as the possibility to be considered defamatory, but the gist of it is that the complainants will withdraw their complaints as long as Jeff McVean never again holds any role with Jumping NZ, and that Katie "unreservedly apologises" for her conduct. It then goes on to say that for the next 12 months, if Katie breaches any of ESNZ's Codes of Conduct, she will be suspended from ESNZ for three months.

The statement concludes with a paragraph saying that both Katie and Jeff have agreed to the sanctions, and that ESNZ has a responsibility to enforce and uphold its code of conduct.

Another feature in this statement is the information about the complainants, which raises more questions. Why did the parents make the complaints and not the riders, who were, after all, on a SENIOR team? Overall, the wording gives the impression that the mediation was part of ESNZ's Judicial Committee process, and therefore it seemed most irregular that the statement hadn't been released by ESNZ itself. And that is where the plot started to thicken again.

[41] The Article then set out in full its enquiries of ESNZ and its responses and the ESNZ website statement.[25] It then said:[26]

We understand that the statement on the iSpyHorses website was released by the complainants' lawyer, Kristin Cato (aka Kristin Manson), but have not yet had this confirmed. We know that Kristin is the daughter of the iSpyHorses founder/director Heather Cato. We have approached both Heather and Kristin for confirmation and comment, but have had no response from either of them to our requests for clarification. From Kristin's Linked-In profile, we have established that she has been a crown prosecutor and is now a barrister. Her legal background is obviously extensive. …

In one of her comments on the iSpyHorses Facebook post, Kristin says about the connection between herself and her mother's business:

"*The lawyers for the McVeans have always knows* [sic] *this connection and there is no issue has been raised [sic] from their perspective. And it accords*

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25 See above at [17] and [29]–[30].

26 Italics and use of "sic" as in original.

> *with the agreement reached in mediation. ESNZ have already corrected their statement which you haven't picked up on. They will be releasing more information next week apparently. But there is no requirement for them to approve the agreement that has been reached independently by the parties. ESNZ is not a party to this agreement nor was it a party to the complaints."*

[42] The Article then asked why the Judicial Committee was formed if it was not a party to the complaints, who actually received the complaints and what was ESNZ's role in managing this sort of complaint and in protecting its reputation and the sport.

[43] It noted that the first post with the statement on *iSpyHorses*'s Facebook page was on Thursday 30 November. It then disappeared, before being reposted on Saturday 2 December and pinned to the top of the page. It noted that the post had been shared among the equestrian community, with a large number of comments made, some of them defamatory, with plenty of people quick to condemn the parties involved, and others pointing out that there must be more to the story that what was released. It noted that *NZ Horse & Pony* did not know what happened on tour because the parties involved had signed a confidentiality agreement.

[44] It expressed sadness about the rift that had developed in the team, with various parties having to employ lawyers and ESNZ having to form a Judicial Committee and spend time on this, and its effects on the various persons involved. It compared how the situation had been managed with the speed and effectiveness with which the All Blacks management would have dealt with on-tour behavioural issues. It finished with the hope that Ms Laurie would not return to ride for Australia as that would be a "loss to New Zealand's jumping prospects on the world stage" and "another example of a fall-out between ESNZ and one of their highest-performing athletes".[27]

Subsequent amendments

[45] On 6 and 8 December 2017 lawyers acting for Ms Cato wrote to Manaia alleging the Article was defamatory of her, requesting its removal and a proposal for compensation including an agreed apology and a contribution to her legal fees. On 8 December 2017 lawyers acting for Manaia responded, noting that the Article was not defamatory and, even if it conveyed a meaning akin to that alleged, the defences

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[27] This was a reference to a fallout between ESNZ and Andrew Nicholson.

of public interest (referred to as qualified privilege) or honest opinion applied, but also offering to refrain from publishing the Article in its hard copy magazine, publish a statement and an apology and make amendments to the Article. Further correspondence between the parties' lawyers ensued.

[46] At 9 am on 9 December 2017 the Article on *NZ Horse & Pony*'s website was amended. The headline was prefixed with "AMENDED" and a note added at the beginning of the Article:[28] "***PLEASE REFER TO THE FOOTNOTE AT THE END OF THE ARTICLE ***". The footnote at the end stated:[29]

> ***** AMENDMENT: To the extent that this article may have suggested criticisms of Kristin Cato, who acted as counsel for the complainant, and the way she dealt with the issues that were the subject of the article, that was not intended and *NZ Horse & Pony* sincerely apologises to Ms Cato for any harm this article has caused to her professional reputation.*****

Additionally, two passages were removed from the Article, namely: "many with relationships and agendas that are not immediately obvious" in the opening paragraph, and the later passage "We are not going to reproduce the full story from the iSpyHorses website, as we believe it has the possibility to be considered defamatory, but".[30]

[47] Later that day, because Ms Cato was unhappy with the amendments as it meant the Article remained on the website, the amended version was removed from *NZ Horse & Pony*'s website. By this time the Article had been online for a total of six days. During that time it attracted 7,500 views. Additionally, others may have read the Facebook page that had a link to the Article on the website.

ESNZ and other media reports

[48] On 6 December 2017 ESNZ published a further statement. In that statement it explained that: the dispute relating to the tour to Australia had been resolved at a mediation not involving ESNZ or the Judicial Committee; as part of the judicial process, the Judicial Committee encouraged the parties to attempt to reach an agreement amongst themselves through mediation; counsel undertook to advise the

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28 These words appeared in bold print in the Article.
29 These words also appeared in bold print in the Article.
30 This refers to the claim in the joint statement of mistaken reporting by *NZ Horse & Pony*, above at [14].

Judicial Committee if a resolution was reached and they did so; ESNZ advised the parties before the mediation that the ESNZ Board expected to endorse or enforce any agreement reached between the parties but that it could only act in accordance with its powers; the parties agreed to certain sanctions and, in accordance with the Board's earlier commitment to do so, it would publish the statement agreed at the mediation on its website and would respect the mediated outcome; and for the sake of clarity, ESNZ confirmed that Mr McVean had not relinquished his roles with ESNZ Eventing or High Performance Eventing and Mr McVean was also free to carry on coaching on a private basis. ESNZ also said it was pleased that parties had resolved the matter, it encouraged members not to comment on Facebook and reminded members of its social media policy.

[49] On 6 December 2017 and subsequently other media published articles on their websites. For example, *The New Zealand Herald* published articles on 6 December 2017 under the headlines "Showjumping coach Jeff McVean accepts life ban after alleged misconduct on tour" and "'He can still train me' – NZ Olympic showjumper defends father after life ban". And *Stuff* published an article on 6 December 2017 under the headline "New Zealand equestrian Katie Laurie set for nationality switch after misconduct dispute" and on 13 December 2017 under the headline "Showjumping elite would prefer episode of equine misbehaviour to take a water jump".

[50] The latter, which perhaps most closely echoes the tone of the *NZ Horse & Pony* 3 December 2017 article, said:

> OPINION: A major ruckus within equestrian showjumping has all but slipped under the barbed media fence thanks to shrewd and minimal disbursement of the facts.
>
> Now we hear after their alleged misconduct with the New Zealand team in Australia in April, yes, eight months ago, they seem lost to the sport in New Zealand.
>
> …
>
> With the specifics of misbehaviour (probably verbal) kept under wraps, McVean has accepted a life ban … A life ban from anything is a huge deal …
>
> But he can still carry on his eventing roles with Equestrian Sports NZ (ESNZ), which also seems odd because ESNZ is Jumping NZ's parent body. It's also

> strange that it was all left to private mediation via lawyers to sort out, when the pair had been representing ESNZ, which surely should have dealt with it.
>
> The confrontations with other team members must have been volcanic …
>
> Laurie, the country's top showjumper and a 2008 Olympian, accepted a three-month suspended ban … Sadly, she is now considering saddling up for Australia …
>
> At the elite level, showjumping is family sport and those families can mostly afford to take offence.
>
> ESNZ didn't publish the final statement from the complainants' lawyers, which called for the equestrian community "to continue to demand that the codes of conduct are enforced by ESNZ".
>
> With the details suppressed, many on social media were defending McVean and Laurie and, following the mediation, might have got the wrong end of the stick. To further add to the smokescreen, ESNZ also urged its members not to comment on Facebook and an article about the blow-up in a prominent equestrian magazine now can no longer be accessed; too sensitive, perhaps.

Public interest defence

Durie v Gardiner

[51] Manaia relied on the public interest defence, more fully described as a responsible communication on matters of public interest. Several appeal issues arise out of this. We start our discussion of these issues with the parameters of the defence as set by this Court in *Durie v Gardiner*.[31] In accepting that this defence existed, this Court said it required that the subject matter of the publication be of public interest and that the communication be responsible. The defendant bore the onus on both aspects. It was available to anyone who published material of public interest in any medium.[32] In a case tried by a jury, it was for the trial judge to determine whether the two elements of the defence were established based on the primary facts as found by the jury.[33]

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31 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 [*Durie v Gardiner* (CA)]. While the appellants had unsuccessfully applied for a strike out of a public interest defence on the basis it could not succeed (*Durie v Gardiner* [2017] NZHC 377, [2017] 3 NZLR 72 [*Durie v Gardiner* (HC)]), on appeal they accepted a public interest defence might exist and focused their argument on its boundaries.

32 *Durie v Gardiner* (CA), above n 31, at [59].

33 At [63].

[52] As to assessing the public interest, this Court said:[34]

> [64] In determining whether the subject matter of the publication was of public interest, the judge should step back and look at the thrust of the publication as a whole. It is not necessary to find a separate public interest justification for each item of information. As already mentioned, public interest is not confined to publications on political matters. It is also not necessary the plaintiff be a public figure.
>
> [65] Defining what is a matter of public interest in the abstract with any precision is a notoriously difficult exercise. Trial judges are however likely to find the discussion of public interest in *Torstar* of assistance. There it was said that to be of public interest the subject matter should be one inviting public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.

Grant v Torstar Corp is a judgment of the Supreme Court of Canada. We discuss this case later in this judgment.

[53] As to assessing whether the communication was responsible, this Court said:[35]

> [66] As regards determining whether the communication was responsible, that is to be determined by the judge having regard to all the relevant circumstances of the publication.
>
> [67] Relevant circumstances to be taken into account may include:
>
> (a) The seriousness of the allegation – the more serious the allegation, the greater the degree of diligence to verify it.
>
> (b) The degree of public importance.
>
> (c) The urgency of the matter – did the public's need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity.
>
> (d) The reliability of any source.
>
> (e) Whether comment was sought from the plaintiff and accurately reported – this was described in *Torstar* as a core factor because it speaks to the essential sense of fairness the defence is intended to promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens the risk of inaccuracy. The target may well be able to offer relevant information beyond bare denial.
>
> (f) The tone of the publication.

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34 Citing *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640 (footnote omitted).

35 *Durie v Gardiner* (CA), above n 31 (footnotes omitted).

(g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

> [68] The list of factors is not exhaustive and in some cases the circumstances may be such that not all factors in the list are relevant. In some cases, publishing defamatory allegations from an unidentified source may not be responsible. In other cases it may be responsible if for example the publisher had good reason to consider the source reliable and the article made it clear it was relying on a confidential source or sources. In short, the factors must be applied in a practical and flexible manner with regard to the practical realities and with some deference to the editorial judgment of the publisher, particularly in cases involving professional editors and journalists.

[54] The rationale for the recognition of the new defence was to better strike the balance between the right to protection of reputation and the right to freedom of expression.[36] The existing balance was seen as having an undesirable chilling effect in the critical role the media have in a modern democracy as the channel for exchange of news and opinions among the public as a whole.[37] As Manaia submits, this chilling effect is particularly acute for small media who risk going out of business, and their journalists risk a very high costs award if they are unsuccessful following a jury trial with serious personal financial consequences for them as was the case here.

Evidence rulings

[55] The Court was required to make several rulings as to the admissibility of evidence intended to be adduced in relation to the public interest defence. As we discuss later, it appears that these rulings were made in anticipation that the evidence would be led in front of the jury, whose task would include determining any primary facts that related to the defence, prior to the Judge's determination as to whether the defence was made out.

[56] A pre-trial ruling by Campbell J in the High Court determined that proposed evidence to be called for Ms Cato from Mr Ralston was admissible.[38] Mr Ralston had over 30 years' experience in a variety of media roles, including senior roles in

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36 At [53] and [56].

37 At [54]. See also *Durie v Gardiner* (HC), above n 31, at [39]–[42]; and *Torstar,* above n 34, at [65].

38 *Cato v Manaia Media Ltd* [2021] NZHC 2299 [evidence objections judgment]. Manaia had objected to Mr Ralston's intended evidence before trial, contending it was wholly irrelevant. It said that the defence was not confined to journalists that were subject to the standards referred to in the brief. It also objected to particular paragraphs in Mr Ralston's brief of evidence as irrelevant and unfairly prejudicial. These objections were not upheld by Campbell J: see [76]–[77].

broadcast and print media. These roles included working as political editor for TV3, editor of *Metro* magazine, and Head of News and Current Affairs at Television New Zealand. He gave expert evidence on ethical and professional standards that apply to New Zealand editors and journalists and whether the Article met those standards.

[57] Mr Ralston's evidence included:

(a) The role of public interest journalism was driven by the public interest rather than the interests of the publisher. In this case, the communications between Ms Dixon and Ms Thompson prior to publishing the Article suggested that "a primary driver here was self-interest, in terms of protecting *Horse & Pony*'s commercial position, rather than public interest".

(b) In those pre-publication communications, the focus appeared to be not so much on the result of the mediation or the substance of the complaints, but on "a primary concern that the statement was not sent to *Horse & Pony* for publication" but was instead sent to other equestrian media outlets. The "apparent 'outrage' over having been excluded from the distribution list" was apparent in the Article itself.

(c) The internal communications also suggested that the authors and editor had specific views on the parties involved. Journalists "with any form of 'skin in the game' risk allowing their own interests to affect the balance and accuracy of their reporting" and "that really does [seem] to have been the case here".

(d) In Mr Ralston's opinion, "there have been significant failures at both the journalistic and editorial level in the preparation and publication of the article":

(i) The investigation was "inadequate" for several reasons. The authors did not seek legal advice about whether the

confidentiality agreement had been breached, ESNZ had confirmed that the statement had been approved for release by Mr McVean and Ms Laurie, and the call to Mrs McVean would have been an opportunity to confirm this. The Facebook message to Ms Cato was "grossly insufficient" as an attempt to contact someone "at the centre of a serious 'investigative story'". The authors had not received a response from Ms Cato at the time of publishing and nor had they approached the complainants or members of their family when they did not receive that response.

(ii) The article included apparent inaccuracies. The authors knew that the joint statement had been sent to *Show Circuit*, *NZ Horse & Pony*'s primary direct competitor, but did not say so. Describing the release to *iSpyHorses* as "practically exclusively" was inconsistent with the principles of accuracy, balance and fairness. The apparent reason for this was to highlight the connection between *iSpyHorses* and Ms Cato. In quoting from Ms Cato's social media comment "ostensibly to provide balance", the Article omitted from the comment that "[t]he statement published is word for word what was released to *Showcircuit*". In Mr Ralston's view this was "seriously misleading", apparently to continue to avoid any reference to *Show Circuit*, an "apparently deliberate failure" involving a "significant failure to comply with the principles of accuracy, fairness and balance".

(iii) The article failed to distinguish fact from comment. That is because it was framed as an investigation (an "endeavour to unravel a saga") rather than an opinion piece but the description of the "joint statement" as "unusual" was not qualified as the writer's opinion and there were "significant issues with the accuracy of the reported underlying facts".

(e) In Mr Ralston's opinion, the authors "included what I understand is a serious criticism of the plaintiff's professional conduct without taking basic steps to confirm the underlying facts, or seek comment from legal professionals on what [they perceived] to be the 'very wrong' and potentially unlawful conduct by Ms Cato".

[58] In response to Mr Ralston's evidence, Manaia sought to call evidence from several witnesses. These briefs of evidence were filed shortly before the trial. Two of those were intended expert evidence as follows:

(a) Glenda Hughes: Ms Hughes has represented New Zealand in athletics at the Commonwealth Games and elsewhere, has extensive sports administration experience including as a member of Eventing New Zealand and the Equestrian New Zealand Boards, media experience as a producer for a TV3 current affairs programme and as the owner of a communications company representing (amongst others) high profile sporting personalities. Ms Hughes' intended expert evidence, based on her experience, was that the approach of ESNZ or its Judicial Committee was "hands off", uninformed and naïve and inconsistent with the normal approach of a national sporting organisation, and the media releases to *iSpyHorses* and *Show Circuit* were inconsistent with a properly managed media release by a sporting organisation following a formal complaint.

(b) Annie Studholme: Ms Studholme is specialist equestrian photographer and journalist and a regular contributor to equestrian and thoroughbred racing industry media, as well as a media liaison officer for top tier New Zealand equestrian events. Ms Studholme's intended expert evidence, based on her experience, was that news items involving high-profile persons in the equestrian industry would normally be sent out via a general press release due to the public interest in such items, Mr McVean in particular was regarded as one of New Zealand's leading equestrian figures and it was therefore unusual for the media statement

to be released only to *iSpyHorses* and *Show Circuit*, bypassing other media and especially *NZ Horse & Pony*.

[59] The Judge heard submissions on this evidence and gave his decision during the second week of the trial. Manaia contended that the evidence would assist the jury to make the factual determinations necessary for the Judge's determination of the two limbs of the public interest defence. The Judge considered that the evidence was not substantially helpful.[39] That was because the Judge considered there to be "sufficient (largely uncontested) evidence before the Court" such that Ms Hughes and Ms Studholme's evidence would not assist.[40] The Judge also had concerns "about the scope of the witnesses' expertise and Ms Studholme's independence".[41]

[60] In so far as it was intended that this evidence would be called before the jury, we consider this was not evidence relevant to the jury's task. Whether a publication is of public interest is solely for the Judge to determine. Whether the publication is responsible is also determined by the Judge but on the relevant primary facts as found by the jury. The proposed evidence was not relevant to any disputed primary facts (of which there were none as matters transpired). While the evidence provided potentially relevant context for the Judge's assessment of the public interest, the Judge was entitled to form the view that it was not substantially helpful if he was satisfied there was sufficient evidence of that already.

[61] Additionally, Manaia sought to call evidence from four further witnesses (their proposed briefs of evidence were also filed late). At the end of the first week of evidence, the Judge ruled that they were all inadmissible. Perhaps the most important from Manaia's perspective was proposed evidence from Richard Sunderland.

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39 *Cato v Manaia Media Ltd* HC Auckland CIV-2017-404-3091, 9 August 2022 (Ruling No 3 of Robinson J) at [19] and [24], referring to the test in s 25(1) of the Evidence Act 2006.

40 At [22].

41 At [23].

Mr Sunderland was the chair of both the Jumping Board and the ESNZ Board at the time relevant to these events.[42] Mr Sunderland's intended evidence concerned:

(a) his knowledge of growing unrest in the show jumping team on the tour to Australia (which appeared on their face to be trivial), the contact made with him by the mothers of two of the team members following the tour and their subsequent formal complaints;

(b) the Jumping Board meeting on 2 May 2017 and the minutes which were made publicly available, and the appointment of a Judicial Committee which could then investigate and make its findings and recommendations to ESNZ;

(c) the voluntary private mediation between the parties which he learned of only via the subsequent press release (not via ESNZ avenues), that ESNZ did not approve or provide any views in support of the sanctions accepted by Ms Laurie and Mr McVean before that press release, his subsequent discussion with Ms Laurie and Mr McVean advising them that ESNZ's position was that they were not bound and ESNZ had not ratified the mediated agreement and Ms Laurie and Mr McVean's response to this, and why the ESNZ ultimately decided to accept what the parties had themselves decided, leading to Ms Laurie and Mr McVean's subsequent switch of their allegiances to Australia; and

(d) his reflections on the complaint and its outcome and the changes that ESNZ has made to its processes as a result.

[62] The Judge ruled that Mr Sunderland's proposed evidence was inadmissible.[43] He considered the evidence was not relevant to the public interest defence as it was not necessary to make findings concerning the adequacy or appropriateness of ESNZ's

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42 In addition, Mr Sunderland has had lifelong involvement in the New Zealand equestrian industry with various roles including as a manager of New Zealand teams internationally, and as an international and national course designer and judge.

43 *Cato v Manaia Media Ltd* HC Auckland CIV-2017-404-3091, 5 August 2022 (Minute No 3 of Robinson J).

complaint processes in order to determine whether that was a matter of public interest. He considered the evidence was not relevant to any other issues to be determined at trial. The Judge regarded Mr Sunderland's discussions with Ms Laurie and Mr McVean about the mediation to be irrelevant, hearsay, and at risk of breaching the confidentiality orders.[44]

[63] We consider that Mr Sunderland's proposed evidence was relevant.[45] It provided relevant context to the Article on matters covered in the Article about which other witnesses for Ms Cato were critical (such as the Jumping Board's 2 May 2017 minutes) and the way he learned of the agreed sanctions and that ESNZ had not ratified them. We agree that his reference to the complaints appearing to be trivial did risk breaching the confidentiality orders because, in fairness, the complainants would wish to respond to this. That aspect of his evidence could have been removed unless it was necessary to respond to any evidence given about this by Ms Cato's witnesses — as it happened one of them did give negative evidence about "the McVeans" and described the complaints as "really serious" before the Judge intervened to halt this.

[64] The other proposed witnesses were Mrs McVean,[46] as well as two witnesses with extensive involvement in equestrian and who were present during part of the tour.[47] The Judge ruled Mrs McVean's evidence was irrelevant to the public interest defence or any other relevant issue at trial. The Judge also noted that aspects of the evidence were hearsay and her evidence risked contravening the confidentiality

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44 *Cato v Manaia Media Ltd* HC Auckland CIV-2017-404-3091, 26 April 2023 (Minute No 8 of Robinson J) [admissibility reasons minute] at [15].

45 We have not considered whether its lateness gave rise to unfair prejudice to Ms Cato as this was not the basis of the ruling.

46 Her intended evidence covered the standing of her then-husband and daughter in the show jumping world, that both wanted the process to end as fast as possible due to the pressure and stress, why they agreed to the outcome reached at the mediation, the distress caused to Ms Laurie by the press release, and the speculation on all parties and ESNZ's role in what had transpired.

47 One of them observed of a clear divide between two of the riders (and their families and supporters) and the other members of the team, described Ms Laurie and Mr McVean as "effectively royalty in New Zealand's show jumping scene" and the unfounded speculation that arose about what may have occurred which was not helped by the complaints process and settlement being behind doors. The other learned of growing unrest in the team during the trip, was surprised to learn of the sanctions in the media, described the loss of Ms Laurie and Mr McVean as "very significant for the NZ show jumping sport as a whole" and described *NZ Horse & Pony* as a "very important news media publication in the NZ equestrian industry", which had been publishing "ever since I can remember" and was always "on the 'pulse' … publishing interesting articles about international, national, region and grass roots competitions; and a wide range of equestrian articles about anything and everything to do with horses".

orders.[48] The Judge similarly ruled that the evidence of the other two proposed witnesses was not relevant to any issues to be determined and risked breaching the confidentiality orders.[49] Further, to the extent one of them discussed the standing of *NZ Horse & Pony* in the equestrian world, that was not in dispute.[50]

[65] With the exception of Mr Sunderland's evidence, the Judge was not wrong in the reasons he gave for excluding the evidence of these witnesses. However, the end result was that the jury heard the evidence of Mr Ralston and from two of the complainants but did not hear the somewhat counterbalancing evidence of any of the witnesses that *NZ Horse & Pony* intended to call, who would have provided more context as to the circumstances in which it published the Article.

Procedure

[66] After the defence had closed its case, and before closing addresses and the Judge's summing up, the Judge heard from counsel in chambers about the order in which the issues would be determined by the Judge and the jury. It had earlier been proposed for Ms Cato that: the Judge would sum up to the jury on all relevant issues including damages; the jury would return its verdict including on any damages award; and, if the jury had found that the Article contained a defamatory meaning, judgment would not be entered before the Judge heard submissions on and delivered his judgment on the responsible communication on a matter of public interest defence.

[67] In the chambers discussion after the close of the defence case, Ms Cato's counsel proposed an alternative approach because there were matters relevant to both the defence and to damages.[51] That approach would involve the parties making their closing addresses and the Court summing up only on whether the Article had the defamatory meanings alleged;[52] if the jury determined the Article had defamatory meanings, counsel would make submissions and the Judge would issue a judgment on

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48 Admissibility reasons minute, above n 44, at [19].
49 At [24] and [29].
50 At [29].
51 For example, Ms Cato's counsel referred to the sufficiency of steps to contact Ms Cato before the Article was published as being relevant to the defence and to damages.
52 The parties were agreed that, if the Article had the meanings alleged, they were defamatory of Ms Cato.

the defence; and if the Court determined that the defence did not apply, counsel would make closing addresses and the Judge would sum up on the issue of damages.

[68] The Judge noted counsel's agreement that the primary facts on which the defence was based were not in dispute and so factual findings from the jury would not be required before he determined the public interest defence. But even if the jury and the Judge would be considering some of the same matters, the Judge noted that they would each be making their respective assessments for "very different purposes".[53] The Judge concluded that it would be "inappropriate" for his legal determination on whether the Article was a responsible communication for the purposes of the defence "to influence the jury's consideration of matters relevant to its assessment of damages".[54] The Judge therefore ruled that the procedure would be as originally proposed.[55]

[69] Counsel for Ms Cato remained concerned about the potential impact of the jury assessing damages prior to the Judge's determination of the defence. Counsel was particularly concerned at the risk of a mistrial on an application by Manaia. However, counsel for Manaia considered that the Judge's intended procedure was appropriate. The matter was resolved through mutual undertakings to the Court that:[56]

> The parties to the proceedings CIV-2017-404-3091 undertake to the Court that they will not assert or seek a mistrial arising from or in any way related to any divergence between matters the jury was entitled to take into account in determining damages and the judgment of the Court in respect of the defence known as the Durie defence.

[70] The closing addresses and the Judge's summing up therefore covered meaning and damages. The jury delivered its verdict on these matters: finding the Article conveyed the pleaded defamatory meanings, they were defamatory, Manaia had not proved that Ms Cato had suffered only minor harm; and awarded general and

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53 *Cato v Manaia Media Ltd* HC Auckland CIV-2017-404-3091, 14 August 2022 (Reasons Ruling of Robinson J) at [8].

54 At [9].

55 That is, the approach set out above at [66].

56 *Cato v Manaia Media Ltd* HC Auckland CIV-2017-404-3091, 16 August 2022 (Ruling No 5 of Robinson J) at [7]. The undertaking was signed by Ms Cato, Ms Dixon and Ms Thompson. We do not regard this undertaking to have been breached by the matters raised on this appeal.

aggravated damages of $225,000 and punitive damages of $15,000. It was then necessary for the Judge to determine the public interest defence.

Trial Judge's decision on public interest defence

[71] The Judge assessed the public interest this way:[57]

> [66] The Article covers various topics including:
>
> (a) complaints about the conduct of athletes and coaches representing New Zealand in overseas competitions;
>
> (b) the adequacy of the process by which those complaints are resolved;
>
> (c) the roles of ESNZ within that process; and
>
> (d) the outcome of the complaints process including an agreement by a high-profile national coach to cease coaching New Zealand representative teams.
>
> [67] Standing back and looking at the thrust of the Article, I accept that the subject matter of the Article, broadly and as a whole, was of public interest. The matters referred to above are of general public interest, and of particular interest to the New Zealand equestrian community.

[72] As to the circumstances relevant to whether the communication was responsible, the Judge considered that:

(a) The defamatory meanings accepted by the jury were "serious allegations" that would amount to misconduct of a kind that could lead to charges by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal and result in pecuniary penalties and/or suspension.[58] It was not less serious because the allegations were made in a "niche, equestrian magazine" (compared with, for example, a decision of the Standards Committee of the New Zealand Law Society), nor mitigated because lawyers reading the magazine would be expected to carry out their own due diligence before believing the allegations.[59]

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57 Public interest defence judgment, above n 3.
58 At [75]. The Judge said he accepted Mr Collins' evidence about this.
59 At [76]–[77] and [79].

(b) The subject matter of the Article was "at the lower end of the spectrum of public importance".[60] While "[c]omplaints about the conduct of athletes representing New Zealand offshore may warrant some public attention", they were "hardly matters of national security, political significance or otherwise affecting the overall welfare of citizens".[61]

(c) There was no urgent need to publish the Article when ESNZ had issued a statement on 1 December 2017 advising that it would make further comment once its Judicial Committee had met and Ms Kirkpatrick emailed Manaia on 2 December 2017 advising that the Judicial Committee would meet "ASAP".[62] It was likely that ESNZ's next statement would be highly relevant to any article that was seriously assessing ESNZ's regulatory performance in dealing with the complaint (as that proved to be when it issued its 6 December 2017 statement) but Manaia chose to publish the statement without waiting for it.[63]

(d) Manaia did not suggest it drew on information provided by reliable sources (with only Ms Kirkpatrick willing to go on the record) and it had "no source for the incorrect statement [Ms Thompson] told Ms Laurie and Ms McVean she was proposing to include in the article" that "we understand from other sources that the release did not reflect what was agreed at the mediation nor was it approved for release".[64]

(e) The steps Manaia took to seek Ms Cato's comment on the defamatory allegations in the Article were "grossly insufficient" in light of their seriousness.[65] Manaia did not put to Ms Cato the allegations about her that they intended to publish which would have given her a meaningful

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60 At [81]
61 At [81].
62 At [85].
63 At [85]–[86].
64 At [35] and [87]–[88].
65 At [94]. The Judge said he accepted Mr Ralston's expert evidence about this.

opportunity to respond to them and it should have given her more time to respond.[66]

(f) The tone of the Article (with its introductory invitation to the reader to look for "relationships and agendas that are not initially obvious" and its reference to potential "future legal action"), given the seriousness of the allegations the jury found the Article to have, undermined the claim to have been communicating responsibly.[67]

(g) The Article did not need to mention Ms Cato or her mother at all to comment on matters of public interest and it was "entirely unnecessary" for the Article to include the defamatory allegations that the jury found it to have.[68]

[73] The Judge concluded that the defence of responsible communication on a matter of public interest failed.[69]

Public interest

[74] Ms Cato submits the Judge erred in finding that the Article was of public interest.[70] Manaia on the other hand submits the Judge erred in his assessment that the public interest was on the low side.

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66 At [93]–[94].
67 At [98].
68 At [100]–[101].
69 At [103].
70 Notice to support the judgment on other grounds was given pursuant to r 33 of the Court of Appeal (Civil) Rules 2005.

[75] A helpful starting point for these competing positions is the words of Lord Bingham CJ in *Reynolds v Times Newspapers Ltd* from which the public interest defence originated:[71]

> … the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community. By that we mean matters relating to the public life of the community and those who take part in it, including within the expression "public life" activities such as the conduct of government and political life, elections … and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private …
>
> As it is the task of the news media to inform the public and engage in public discussion of matters of public interest, so is that to be recognised as its duty … In modern conditions what we have called the duty test should, in our view, be rather more readily held to be satisfied.
>
> … We have no doubt that the public also have an interest to receive information on matters of public interest … published in a newspaper, so satisfying what we have called the interest test. In modern conditions the interest test should also, in our view, be rather more readily held to be satisfied.

[76] Contrary to the submission for Ms Cato that the public interest defence is narrow, it can be seen from this description that what may qualify as public interest is broad. It relates "to the public life of the community and those who take part in it" embracing, for instance, "the governance of public bodies". The free flow of information of matters of public interest serves "the common convenience and welfare of a modern plural democracy".[72] A free and vigorous press acting responsibly promotes this public interest.

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[71] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (CA) at 176–177, with which Lord Nicholls, who gave the leading speech in the House of Lords, concurred: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) [*Reynolds* (HL)] at 204. See also Richard Parkes and Godwin Busuttil (eds) *Gatley on Libel and Slander* (13th ed, Sweet & Maxwell, London, 2022) at [16-001]. The "duty" and "interest" wording in *Reynolds* reflected that the public interest defence was regarded as a form of qualified privilege (which is not the case in New Zealand).

[72] Similarly, as it was put by the Supreme Court of Canada in *Torstar*, above n 34, at [65], free expression on matters of public interest advance "democratic discourse and truth-finding".

[77] In *Durie v Gardiner* this Court considered that trial judges were likely to find the discussion of public interest in *Torstar* of assistance.[73] There, the Supreme Court of Canada said this:[74]

> [101] In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation. The judge's role at this point is to determine whether the subject matter of the communication as a whole is one of public interest. …
>
> [102] How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject — say, the private lives of well-known people — is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

[78] The Supreme Court of Canada went on to say that the authorities offered no single test for public interest, nor a static list of topics.[75] The Court considered that guidance could be found in the cases on "fair comment" (the defence now known as "honest opinion") which, at least at that time, required that the comment expressed be on a matter of public interest.[76] The Court then referred to what Lord Denning MR said in *London Artists Ltd v Littler*:[77]

> There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.

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73 *Durie v Gardiner* (CA), above n 31, at [65].

74 *Torstar*, above n 34.

75 At [103], citing Patrick Milmo and WVH Rogers (eds) *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at [15.10].

76 At [103].

77 *London Artists Ltd v Littler* [1969] 2 QB 375 (CA) at 391, as quoted in *Torstar*, above n 34, at [104].

[79] The Supreme Court of Canada further explained:[78]

> [105] To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached" … The case law on fair comment "is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews" … Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.
>
> [106] Public interest is not confined to publications on government and political matters … Nor is it necessary that the plaintiff be a "public figure" … Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.

[80] Sport is not excluded from this broad reach of the public interest. For example, the allegation reported in a newspaper that a five-time champion of the Tour de France cycle race had probably taken performance enhancing drugs was accepted as being in the public interest for the purposes of the public interest defence.[79] Similarly, an allegation in newspaper articles that a celebrated Liverpool goalkeeper was dishonestly taking bribes to fix or attempt to fix football games in which he was playing was "of very substantial public concern" for the purposes of the public interest defence.[80] A proposal to move the Luton Rugby Football Club (a private club owned by its members) to a new ground was of public interest because the Club was a significant community institution; it would have a major impact on those in the vicinity of the site and those affected by the development; and, because a section of the public had a proper interest in the consequences of the Club's decision making, the propriety of the Club's decision-making was of public interest.[81]

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78 Citations omitted.

79 *Armstrong v Times Newspapers Ltd* [2005] EWCA Civ 1007, [2005] EMLR 33 at [69]. The issue on a strike-out application was whether the publisher had acted responsibly. On appeal, the defence survived strike out.

80 *Grobbelaar v News Group Newspapers Ltd* [2001] EWCA Civ 33, [2001] 2 All ER 437 at [33].

81 *Doyle v Smith* [2018] EWHC 2935 (QB) at [71]–[72].

[81] The public interest in the administration of sport has also been accepted in other contexts.[82] For example, exposing the pressures on a young, elite rugby player who had not played rugby since suffering an injury informed and educated those at grassroot level and helped to promote a culture in the public and in sport.[83] The failure of a jockey club to take or be able to take effective action to preserve the integrity of horse racing in relation to apparent corruption by participants in the industry was a matter of public interest outweighing the breach of confidence in the disclosure of the information.[84]

[82] *Torstar* also made the point that care was needed in characterising the subject matter of the article. An overly narrow characterisation could inappropriately defeat the defence at the outset, while characterising it too broadly could render the test "a mere rubber stamp" and protect unworthy material.[85] *Torstar* concerned a newspaper article critical of a proposed golf development on a developer's lakefront estate because of its environmental impact and the suspicion that the developer was exercising political influence behind the scenes to secure government approval for the new golf course. As the Court said, characterising the story as "[the developer]'s business dealings" would be too narrow whereas "Ontario politics" would be too broad.[86]

[83] As noted by this Court in *Durie v Gardener*, in determining whether the subject matter of the publication was of public interest the judge is to "step back and look at the thrust of the publication as a whole".[87] It is "not necessary to find a separate public

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82 Parkes and Busuttil, above n 71, at [16-006] give the examples in [83] as examples of public interest subject matter for the purposes of the public interest defence in the Defamation Act 2013 (UK), s 4.

83 *Spelman v Express Newspapers* [2012] EWHC 355 (QB) at [22]. And at [105] the Judge described "public debate about how … institutions perform their functions with regard to children" provided an incentive to such institutions to give particular attention to the distinction between their own interests and the interests of the children for whom they are responsible.

84 *Jockey Club v Buffham* [2002] EWHC 1866 (QB); [2003] QB 462 at [55]–[58].

85 *Torstar*, above n 34, at [107].

86 At [107].

87 *Durie v Gardiner* (CA), above n 31, at [64].

interest justification for each item of information".[88] But, as it was put in *Jameel (Mohammed) v Wall Street Journal Europe Sprl*:[89]

> The fact the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.

[84] Stepping back, we consider the thrust of the Article as a whole was: the fallout from an overseas tour of New Zealand representative show jumpers; that had started off with high hopes, but had ended with the risk of losing New Zealand's top ranked female show jumper to Australia, as well as severely curtailing and potentially losing its high performance trainer and coach and three-time Olympian also to Australia; and ESNZ's apparent lack of control of the process, whereby the outcome was determined at a private mediation and announced by the complainants' lawyer via a statement published in *iSpyHorses* almost exclusively.

[85] We consider the Article meets the public interest requirement of the defence. ESNZ is the governing body of equestrian sport in New Zealand. It receives public funds for its high performance arm. The fallout from the tour, the way the sanctions came about and how the outcome was communicated to the public were matters of legitimate concern for public discourse and debate. It had relevance not only for those directly involved in the fallout and its resolution, but also to aspiring equestrian representatives, managers and coaches and those involved at the administrative level.

[86] More generally, it was relevant to other sports governing bodies in relation to their complaint procedures. And, to the extent the fallout and process had the potential to impact on New Zealand equestrian success on the world stage (of which New Zealand has a proud history), it was of wider public interest and concern. It is not just that participating and success in sport at the highest level is good for those involved, nor just that watching those who do participate and succeed in sport is enjoyed by a section of the New Zealand public. It also has welfare benefits for our

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88 At [64]; and see *Torstar*, above n 34, at [101].

89 *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359 at [51].

society, contributing to our national identity, and inspiring others to participate in sport and to succeed in their own sporting endeavours or goals.

[87] That the fallout was the result of a poorly managed process is reinforced by Mr Sunderland's intended evidence. He put it this way in his proposed brief:

> 18. The whole nature of the complaints against Jeff McVean and Katie Laurie who were leading figureheads of show jumping in NZ was horrific. The end result was the loss of NZ's best coach and rider for Jumping in New Zealand — a loss that is still felt today as Katie Laurie's career has continued to progress, such as she recently represented Australia at the Tokyo Olympics.
>
> …
>
> 19. If ESNZ had any indication that such severe consequences were going to result from the complaints and private mediation, then I would have advocated much more strongly to resolve issues between the parties initially; and both the ESNZ and Jumping Boards would have communicated to the Judicial Committee about being more proactive and managing the complaints process.
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> 20. The private mediation outcome was unsatisfactory to [the] ESNZ Jumping Board and ESNZ Board at the time.
>
> 21. ESNZ and [the] Jumping Board's approach was that the complaints and issues raised were minor in nature and would blow-over with the Judicial Committee process. ESNZ were wrong in that view.
>
> 22. ESNZ Jumping and ESNZ rules did not allow [them] to intervene in the process once a formal complaint was made — it was all over [to] the Judicial Committee to determine. The lack of control that ESNZ and ESNZ Jumping [had] in ratifying any private mediation approved by the Judicial Committee was disappointing.
>
> 23. Further, the media publication of the private mediation without ESNZ being consulted or ratifying the parties' findings in the first instance by the parties was unsatisfactory.
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> 24. ESNZ subsequently set up a new process including a Complaints Review Officer, who would report on complaints made and give the ESNZ Board better recommendations as to the initial validity and substance of claims made.

[88] Mr Sunderland's evidence was relevant to the issues the Judge had to determine because it provided relevant context to the matter of public interest that was the subject of the Article. It is evidence that ESNZ was itself concerned about the process by which the complaint had been handled and has since made changes to that process. This evidence reinforced that the Article (in raising questions about how ESNZ had

allowed the sanctions to come about via a private process) was not raising matters that were of no concern to ESNZ or those involved in equestrian or more broadly. We do not agree with the submission for Ms Cato that this evidence was irrelevant because what is in the public interest is limited to the contents of the Article. The point in *Doyle v Smith* was that it must be possible to identify from the words in the article what the topics or subjects that are of public interest are.[90] The issue in *Doyle v Smith* was that the publisher sought to identify the topics or subjects of the article with reference to other topics that the article "was simply not about".[91]

[89] We agree with Manaia that the Judge understated the public interest in the subject matter of the Article. As *Torstar* discusses, care is needed when characterising the subject matter of the Article. At a broad level, matters of national security or political significance have a higher public interest than "the conduct of athletes representing New Zealand offshore" as the Judge put it.[92] But that description of the subject matter of the Article underplays the public interest in the subject matter of the Article as we have described it above to the readers of *NZ Horse & Pony*.

Responsible communication

[90] As to the factors relevant to whether the communication was responsible, we note again that these are to be applied in a practical and flexible manner with regard to the practical realities and with some deference to the editorial judgment of the publisher, particularly in cases involving professional editors and journalists.[93]

[91] We agree with the Judge that the statements about Ms Cato, as found by the jury, were serious. The jury accepted that the Article meant, or would be understood

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90 *Doyle v Smith*, above n 81, at [64].
91 At [65].
92 Public interest defence judgment, above n 3, at [81].
93 Above at [53].

to mean, that Ms Cato had, or there were grounds to suspect that she had, acted unethically, unprofessionally, or otherwise improperly because she:

(a) was responsible for releasing a statement about Mr McVean and Ms Laurie to the media that was damaging to their reputations without their consent;

(b) misused her position as a lawyer for the complainants to benefit her family by releasing the statement to *iSpyHorses*, a media outlet controlled by her mother, when the statement would have received wider and more effective publicity for the vindication of her clients if it had been released to *NZ Horse & Pony*; and

(c) hid that misuse by not identifying herself in the statement or disclosing her relationship with the founder and director of *iSpyHorses*.

[92] We consider the public interest in the subject matter warranted public attention and that, in the sector to which *NZ Horse & Pony* was directed, the public interest was reasonably high. Because of this, we consider it was legitimate for *NZ Horse & Pony* to seek to publish at a time likely to reach a wide audience amongst that sector (with the Puhinui International Three Day Event, described by Ms Cato as one of New Zealand's "biggest and most significant" eventing competitions, taking place on 7 to 10 December 2017) which in turn would promote discussion of the public interest matters raised in the Article. In other words, Manaia publishing the Article at the time that it did promoted freedom of expression amongst the audience most likely to have potential concerns about the fallout from the tour to Australia and the process by which it was handled by the sport's governing body.

[93] We acknowledge that ESNZ had informed *NZ Horse & Pony* that its Judicial Committee was meeting as soon as possible. However, we do not regard it as irresponsible of *NZ Horse & Pony* to publish the Article without waiting for any further comments from ESNZ at that time. ESNZ had already provided a response which in essence confirmed that it had not been involved in the mediation, nor the statement that was published from that mediation. This was the important public

interest point that *NZ Horse & Pony* sought to convey. While more information from ESNZ might be anticipated, it was an editorial decision for *NZ Horse & Pony* to make whether to wait for what further information might be forthcoming from the Judicial Committee's meeting "ASAP". As it turned out, the further information that the mediated outcome had been encouraged by the Judicial Committee arguably underlined the concern raised by *NZ Horse & Pony* that ESNZ had mishandled the process by failing to keep control of it.

[94] With news being a perishable commodity some deference should be allowed to *NZ Horse & Pony*, as a commercial business operating in a small market in which *Show Circuit* (its main competitor) also operated, in deciding to publish close in time to when its audience was likely to be gathered at the Puhinui event. In the Canadian case of *Level One Construction Ltd v Burnham* Sharma J put it this way:[94]

> In my respectful view, too much scrutiny of this issue or a censorious review could unduly interfere with the freedom of the press, a cherished ideal of our democracy. That freedom encompasses not only the content of what is important, but how and when.

[95] ESNZ had confirmed that the statement came from the parties and whether it breached the confidentiality of the mediation was a matter for the parties. This response was included in the Article. Further, ESNZ having said it was for the parties, *NZ Horse & Pony* did then attempt to obtain comments from Ms Cato and her mother as well as from Ms Laurie and her mother. As to those steps:

(a) The message to Heather Cato alerted her to an intended publication the next morning and sought clarification from her as to who had issued the statement that had appeared on *iSpyHorses* website. That was the relevant enquiry of Heather Cato for the purposes of clarifying the confidentiality point. She did not respond.

(b) The message to Ms Cato sought specific information about whether she had released the statement, whether Ms Laurie and Mr McVean had approved it or had expressed concern about its release, and how it was

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94 *Level One Construction Ltd v Burnham* 2018 BCSC 1354, [2018] BCJ 2974 at [215].

that a private mediation could agree sanctions on behalf of ESNZ.[95] Had Ms Cato responded to the questions posed, this was likely to have clarified that the agreed statement was not confidential. Ms Cato may also have been able to clarify that the sanctions still required ESNZ endorsement.

[96] While Mr Ralston criticised the way in which *NZ Horse & Pony* had sought to contact Ms Cato, the evidence was that the Facebook message had in fact been received by Ms Cato, who had the opportunity to obtain instructions from the complainants and who in turn instructed Ms Cato not to reply. In other words, the attempt to contact Ms Cato was effective, even though there were potentially more direct ways, for example telephoning Ms Cato. It can be inferred that if Ms Thompson had attempted to make contact with Ms Cato by telephone, email or by calling at her home or office (the ways that Mr Ralston considered contact should have been made), Ms Cato would not have responded without obtaining instructions from her clients and the outcome would have been the same as with the Facebook contact.

[97] In addition to the attempts to contact Ms Cato, *NZ Horse & Pony* did seek comment from Ms Laurie and in turn her mother, Mrs McVean. The evidence about what Mrs McVean said is limited. Ms Thompson said it was an off the record conversation. She said that Mrs McVean had told her that the Mr Hammond did not know of the connection between Ms Cato and *iSpyHorses*. What was said in the conversation with Mrs McVean was not covered in her brief of evidence either, although had Mrs McVean been permitted to give evidence before the Judge for the purposes of the public interest defence this may have been able to be explored.

[98] The Judge appears to have viewed the steps taken by *NZ Horse & Pony* as inadequate partly because they did not draw on reliable sources. We infer this relates to not having any reliable sources for the defamatory meanings accepted by the jury, particularly that Ms Cato had misused her position by releasing the statement that was damaging of Ms Laurie and Mr McVean's reputations without their consent. The Judge was critical of there being no source for an incorrect statement that was put to

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[95] See above at [32].

Ms Laurie and Mrs McVean that Ms Thompson understood from other sources that the release did not reflect what was agreed at the mediation and that it was not approved for release. In our view this is not particularly relevant because *NZ Horse & Pony* did not repeat this in the Article. What they did do, as we have discussed, is contact Ms Laurie and Mrs McVean for comment. They also accurately set out the questions asked of ESNZ and ESNZ's responses in full.

[99] The evidence as to how it was that the agreed statement came to be published on *Show Circuit* and *iSpyHorses* came from Ms Cato at trial. She explained that a joint statement was drafted with Mr Hammond and their respective clients agreed and that they would request that it be published permanently on the ESNZ website. The agreed joint statement was as per the content of the first five paragraphs quoted above.[96] She explained that, a day or so after the mediation, one of the complainants (Ms Mitchener, the mother of one of the team members on the tour to Australia), advised that *Show Circuit* would publish the joint statement if that was wanted and if ESNZ did not go ahead and publish it that week.

[100] Ms Cato explained that this led to a discussion with her clients about whether they wanted to make a comment without stepping outside the terms of the confidentiality. They confirmed that they did want to make a comment saying they were relieved it was over and hoped everyone would move on, and reiterating the Codes of Conduct and the obligation of ESNZ to enforce them. This was why the statement included the sixth paragraph quoted above, beginning "The lawyer for the complainants said that they are relieved …".[97]

[101] Ms Cato further explained that in sending it to *Show Circuit* and *iSpyHorses* she obtained undertakings from both of them that they would publish it in such a way that it would not result in them making any sort of comment or drawing anything more into it. This was why the published statement included the end note beginning "PLEASE NOTE".[98]

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96 Above at [14].
97 Above at [14].
98 Above at [14].

[102] Ms Cato did not say that Ms Laurie and Mr McVean or Mr Hammond were aware that the joint statement was going to be released to *Show Circuit* and *iSpyHorses* in advance of ESNZ. She explained that on the day after the mediation, 28 November 2017, she had been contacted by Ms Kirkpatrick who said that she was fielding enquiries from two media agencies, a number of people in the sport and Jumping Board members about a settlement having been reached. Ms Kirkpatrick said that was "great" if there had been a settlement but she would like a formal notification to be sent to ESNZ as they were not aware there was to be a mediation on 27 November 2017 and were not in a position to respond to the enquiries.

[103] Ms Cato also explained that the parties to the mediation were free to publish the joint statement at any time after the mediation in any way provided they did not breach confidentiality. She said that everyone's view was that it would be best if it came from ESNZ providing it was done promptly. On 29 November 2017, Ms Cato and Mr Hammond finalised the form of the statement for sending to ESNZ. But they were told that ESNZ would not publish it until it had a directive from the Judicial Committee. They were initially told that would happen "over the weekend" but then they were told it would be the "next week" so "there was really no speed with which ESNZ was going to publish the statement". Ms Cato explained that she took her instructions from her clients who instructed her to provide the statement to *Show Circuit* and *iSpyHorses* if ESNZ had not done so by 3 pm on 30 November 2017.

[104] In light of the steps that *NZ Horse & Pony* took to obtain comment from those directly involved in the mediation we do not agree with Mr Ralston, whose evidence the Judge accepted, that those steps were "grossly insufficient". It can be said that they could have contacted Mr Hammond to confirm whether any breach of confidentiality had occurred. But the Article did not expressly state that any such breach had occurred.

[105] In *Torstar* it was said:[99]

> [124] If the defamatory statement is capable of conveying more than one meaning, the jury should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible

[99] *Torstar*, above n 34, quoting *Bonnick v Morris* [2002] UKPC 31, [2003] 1 AC 300 at [25].

> communication has been established. This follows from the focus of the inquiry on the conduct of the defendant. The weight to be placed on the defendant's intended meaning is a matter of degree: "The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances" … Under the defence of responsible communication, it is no longer necessary that the jury settle on a single meaning as a preliminary matter. Rather, it assesses the responsibility of the communication with a view to the range of meanings the words are reasonably capable of bearing.

[106] Bearing in mind that the thrust of the Article was one critical of ESNZ's process, the inclusion of the question to ESNZ "Is the statement itself a breach of the confidentiality clause of the mediation?" and the response "That is a matter for the parties involved" were relevant to that. It went to the point that ESNZ was not sufficiently involved in the process. *NZ Horse & Pony* also included in the Article the responses in full it had received from ESNZ that "This statement was provided in its entirety by the parties involved in the complaint" and "The parties' legal counsel did advise ESNZ that it would be released". Read together, these questions and answers were capable of meaning that the parties had provided the statement and their legal counsel knew it would be released and, if there was any breach of the mediation agreement, that was a matter for the parties to that agreement. Read in this way, the statement are not defamatory because ordinarily parties to a confidentiality agreement are able to agree to waive that confidentiality. Indeed, given the parties and their lawyers had agreed to release the statement, the more likely careful reading of the Article was that there was no breach of confidentiality.

[107] The perhaps more direct criticism that is made of Ms Cato in the Article are the words "[t]he statement was an unusual one for many reasons, not just for the note at the end and the fact the lawyer wasn't named, but that it was posted on the iSpyHorses' site practically exclusively", that the statement had not been reproduced in full by *NZ Horse & Pony* because it believed the statement "has the possibility to be considered defamatory", the earlier reference to possible future legal action, and the later reference to understanding that the lawyer is the barrister Ms Cato who has extensive experience and was the daughter of the founder and owner of *iSpyHorses*.

[108] In *Torstar* the Court said:

> [118] As discussed earlier … it is for the jury to determine whether inclusion of a defamatory statement was necessary to communicating on a matter of public interest. Its view of the need to include a particular statement may be taken into account in deciding whether the communicator acted responsibly. In applying this factor, the jury should take into account that the decision to include a particular statement may involve a variety of considerations and engage editorial choice, which should be granted generous scope.

[109] That passage reflects that, under the *Torstar* approach, the Judge decides whether a communication relates to a matter of public interest and that the jury decides whether it was responsible. But that aside, it sets out the relevant question for the Judge to decide in the New Zealand context. In this case the Judge considered that the mention of Ms Cato and her mother was "entirely unnecessary".[100]

[110] We note that *NZ Horse & Pony* wished to highlight that it was an unusual process for agreed sanctions, apparently relating to ESNZ Code of Conduct breaches, to be announced via a media release to a limited number of publishers. That was a legitimate aspect of the public interest. In principle, there could be no objection to saying that it was released to two publishers, one of which was *iSpyHorses*. It would have been unobjectionable for *NZ Horse & Pony* not to have referred to *Show Circuit* if it wished to avoid referring to its principal competitor.[101] It would also have been unobjectionable to have referred to the connection between Ms Cato and her mother as the owner of the *iSpyHorses* website. It was however unnecessary to say in the opening words that many people had "agendas that are not immediately obvious" or to say that the statement Ms Cato had released was possibly defamatory. We understand that *NZ Horse & Pony* wished to respond to the reference in the statement to its earlier "mistaken reporting" about who was the subject of complaints, but the Article had addressed this topic in any event.

[111] As to tone, in *Torstar* it was said:[102]

> [123] Not all factors are of equal value in assessing responsibility in a given case. For example, the "tone" of the article (mentioned in *Reynolds*) may not

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100 Public interest defence judgment, above n 3, at [101].

101 Ms Dixon also gave evidence that she generally avoided mentioning *Show Circuit* because she viewed *Show Circuit*'s owner as being litigious and wanted to avoid threats of litigation.

102 Referring to *Roberts v Gable* [2007] EWCA Civ 721, [2008] 2 WLR 129 at [74].

> always be relevant to responsibility. While distortion or sensationalism in the manner of presentation will undercut the extent to which a defendant can plausibly claim to have been communicating responsibly in the public interest, the defence of responsible communication ought not to hold writers to a standard of stylistic blandness: see *Roberts* … Neither should the law encourage the fiction that fairness and responsibility lie in disavowing or concealing one's point of view. The best investigative reporting often takes a trenchant or adversarial position on pressing issues of the day. An otherwise responsible article should not be denied the protection of the defence simply because of its critical tone.

[112] In this case the Article's tone was set by its opening paragraph. It described the matter as a "very complicated story … [with] many [people] with relationships and agendas that are not initially obvious". The Judge considered that this, along with the reference to "future legal action", undermined what was otherwise a largely responsible communication on a matter of public interest.[103]

[113] We are mindful of allowing for editorial judgement and that journalists act "without the benefit of the clear light of hindsight".[104] The tone of this Article was somewhat colourful and therefore likely to engender more interest from *NZ Horse & Pony*'s readers. That said, the public interest information the Article sought to convey was not particularly complicated, and the "agendas that are not initially obvious" and the joint statement being "possibly defamatory" were unnecessary to convey the public interest. They were implicitly critical of Ms Cato when read with the later references to Ms Cato who had issued the joint statement "practically exclusively" to her mother's website.

[114] Balancing all of these factors, we conclude that it was unnecessary to implicitly criticise Ms Cato in the manner and tone of the Article and it fell short of being a responsible communication because of this. We therefore agree with the Judge that the public defence was not made out, albeit that we consider it was a more finely balanced case than the Judge did.

[115] We also make the point that care should be taken when relying on expert evidence about whether a publication met ethical and professional standards for the

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103 Public interest defence judgment, above n 3, at [98].

104 *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 at [54], quoting *Reynolds* (HL), above n 68, at 205.

purposes of the public interest defence. We note that this is not one of the specific relevant considerations identified in *Durie v Gardiner*. How a publisher might or should go about verifying allegations is a legitimate topic for expert evidence, but it is debatable whether Mr Ralston's evidence beyond that topic was substantially helpful in relation to the specific considerations. As we go on to discuss, because it was evidence given before the jury, it was unfairly prejudicial.

Meaning

[116] One of the key defence submissions at trial was that the Article did not mean what Ms Cato alleged. Manaia submits that Mr Ralston's evidence as well as evidence from Mr Collins was irrelevant and unfairly prejudicial in relation to meaning. Manaia also submits that the Judge's directions on meaning were inadequate in several respects.

Unfair prejudice arising from Mr Ralston's evidence?

[117] As matters transpired, we consider it was unfortunate that the jury heard the evidence of Mr Ralston at all. As we have noted, the evidence was intended to respond to the public interest defence but, in the event, the jury were not asked to make any decision in relation to that defence. Yet Mr Ralston gave evidence as an expert that was heavily critical of the Article and also strayed into how he read the Article.

[118] Specifically, the jury heard evidence from Mr Ralston that:

(a) Based on their internal communications and their briefs of evidence, Ms Dixon and Ms Thompson views showed some partiality towards Mr McVean and Ms Laurie and animosity to others. It was a case of "goodies and baddies" and the goodies in *NZ Horse & Pony*'s view were Mr McVean and Ms Laurie and the baddies became the Catos and the "Posse of Princesses".[105]

[105] A term used by Ms Dixon and Ms Thompson in private communications to refer to the complainants.

(b) With reference to Ms Dixon's brief that the "motivation behind the article was to try and shed some light on ESNZ's judicial and conflict resolution processes", "it didn't do so at all, in any way, shape or form'.

(c) With reference to Ms Dixon's brief that "[s]peculation about what Jeff McVean had done was running rampant and it seemed that nothing was being done to protect his reputation or to attempt to retain Katie Laurie as competitor for New Zealand", "I don't think it addressed that in any way, shape or form as well … it just patently failed".

(d) With reference to the standards of "accuracy, balance and fairness – investigation", "there have been significant failures at both the journalistic and editorial level in the preparation and publication of the article".

(e) The Facebook message to Ms Cato "appears grossly insufficient as an attempt to contact a person at the centre of a serious 'investigative story'".

(f) Altering the quoted Facebook comment (left by Ms Cato) that was intended to provide balance by removing the reference to *Show Circuit* and not using "…" to show that something had been removed from the quote was "seriously misleading" and this "manipulation" together with the "apparently deliberate failure" to mention that the agreed statement had also been released to *Show Circuit* involved a "significant failure" to comply with the principles of accuracy, fairness and balance.

(g) Having re-read everything in preparation for trial, "the article is basically flawed in that it did not ascertain the facts it set out to ascertain" being "what went on in Australia" and "having failed to do so" the Article then "vented" and "the substance of the article

concentrated on their missing out on a press release, denigration of the Catos and denigration of the complainants to ESNZ".

(h) As to including the photograph of Heather Cato, this did not fit with the Article and it seemed "rather strange" to have a very large photo of her.

[119] We consider the jury cannot have been left with anything other than a negative view of *NZ Horse & Pony* from this evidence. Yet to the extent it related to whether it was a "responsible" article, the evidence did not bear upon their task. We note that the closing address for Ms Cato linked Mr Ralston's "goodies" and "baddies" description in a way that closely linked how the jury should read the Article:[106]

> I want to just say now a little more about "goodies and baddies". Now, you've all heard how, in private, the defendants, Ms Dixon and Ms Thompson, referred to Ms Cato, her mother Heather Cato, the young ride[r]s who went on the tour to Australia, and even to Dana [Kirkpatrick] … Each of them get a new name that's bestowed on them, and they're not flattering. So, my client becomes "that Manson woman", … "[who] deserved no respect". … And then, of course, we've got "fat Heather". Then we've got "the Cato clan", and we've got the "posse of princesses". …
>
> And then, "Dame Dana" … at one stage … gets referred to as "a moron". …
>
> … "Fat Heather" was a nasty description, and the photo bears that out.
>
> So, given the kind of background that I've just really touched on, but which I think you will remember, and I hope you will, I say to you that it's not any great wonder that when the article comes to be written, *that those attitudes flow through, as I think they do, and that the article reflects badly on the people that were in the "baddie" camp*.
>
> …
>
> From the outset, the approach was shaped by the fact that they were concerned about losing their beloved Ms Laurie and Mr McVean from the ESNZ equestrian scene. …
>
> So, if you start with that kind of approach, as Mr Ralston said, you are not writing an unbiased article searching out the facts and letting the facts go wherever they go. You are coming at it with a pre-set view about at least one aspect of what you're trying to do.
>
> …
>
> And I put that [Ms Mitchener was distressed when giving evidence] to Ms Dixon and said that she listened and watched Ms Mitchener giving

[106] Emphasis added.

> evidence. Did she notice how affected by that she was? … And again, the same cold, dismissive response, that she saw a lot of tears …
>
> *So, this kind of "goodies", "baddies", if it's a "baddie" we don't care too much: I think we see that approach in the article*.
>
> …
>
> Now, why would you do that, first of all, display that very unflattering photograph [of Heather Cato] with such prominence? But secondly, really, why would you feature it at all, if the article is about the ESNZ's investigative processes? The only thing that she's got to do with this whole issue is she published the joint statement on *iSpyHorses*. *Why would you bother to deal with her at all, if you're not trying to line up these "goodies" and "baddies"?*

[120] We acknowledge that the Judge's directions on meaning were orthodox and correct. He emphasised that it was for jury to decide what the words meant on an objective basis and that the parties' submissions as to meaning were not relevant. The Judge also gave correct directions as to the characteristics of the ordinary reader. He also gave the usual direction that "what you make of the experts' evidence is ultimately a matter for you" and that "[i]t remains for you [to determine] how much weight or importance to give to any expert's opinion".

[121] In this case, however, we consider that more was required. That is because, to the extent Mr Ralston's evidence bore directly on meaning, it carried with it the risk that this evidence would colour the jury's perception of whether the Article conveyed the alleged defamatory meanings. The evidence that Mr Ralston read the Article as venting and denigrating was inadmissible evidence in relation to meaning. The "goodies" and "baddies" was a perception he took from reading the Article. Again, that was inadmissible evidence in relation to meaning.

[122] To avoid the risk of unfair prejudice in the jury's assessment of meanings that arose from this evidence, we consider the trial Judge ought to have directed the jury that Mr Ralston's evidence on these matters had no relevance at all in assessing whether the Article gave rise to the alleged meanings, as it was a matter for the jury and not Mr Ralston as to how the Article would be read.

[123] This was not a case where the jury could have only come to the conclusion that the Article bore all eight pleaded defamatory meanings. As we next discuss, before the trial Hinton J in the High Court had struck out some of those pleaded meanings on

the basis that the Article was not capable of bearing them.[107] Although this Court reinstated those pleaded meanings,[108] the fact that an experienced Judge formed the view that a reasonable reader could not take some of the meanings pleaded provides cogent evidence that a jury might not have done so either untainted by Mr Ralston's views.

[124] We note that, in a later defamation jury trial where the public interest defence was relied upon, the Judge directed the jury that the editor's reference to adherence to its code of ethics was not a matter for them.[109] We also note that a two-staged approach was adopted by the Court, a "jury phase" and the "supplementary trial phase". The supplementary trial phase commenced after the jury had delivered their verdicts.[110] During this phase witnesses relevant to the public interest defence were called or recalled and submissions were made. During this phase the Judge ruled that evidence relating to journalistic standards was not substantially helpful.[111] An article by the junior counsel for the publisher in that case described the two-staged approach as an "effective mechanism adopted by the Court in attempt to enforce the boundaries between evidence properly before the trial and for the Judge alone".[112] We agree with those views where the defamation claim is to be heard by a jury and the public interest defence has not been determined in advance of the trial.

[125] We also note that in the United Kingdom, prior to the Defamation Act 2013 (UK) under which Judge-alone trials became the presumption, it had become common practice for the public interest defence to be determined as a preliminary issue in defamation cases. Because it was necessary to balance the desirability that the public receive the information and the potential harm caused if a person were defamed, it first was necessary to determine the meaning of the statement complained of. It was therefore desirable for the parties to agree to a trial by judge alone in cases where the public interest was pleaded.[113]

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107 *Cato v Manaia Media Ltd* [2019] NZHC 440.
108 *Cato v Manaia Media Ltd* [2019] NZCA 661.
109 *Cao v Stuff Ltd* [2023] NZHC 3703 at [19].
110 *Cao v Stuff Ltd* [2024] NZHC 44 at [49].
111 At [73].
112 Pita Roycroft "Trial by *Durie*" [2024] NZLJ 129 at 130.
113 Matthew Collins *Collins on Defamation* (Oxford University Press, Oxford, 2014) at [12.126]–[12.127].

[126] Initially the present case was to be heard by Judge alone. However, Manaia changed its election to a jury trial.[114] We emphasise that if a jury trial is elected, it is important that, although it may not be straightforward to do so, the evidence led before the jury should be kept to its proper bounds.

Unfair prejudice from Mr Collins' evidence?

[127] Prior to trial, Manaia sought a ruling that proposed evidence from Mr Collins, a barrister with extensive experience and expertise in matters relating to lawyers' ethics and professional conduct, was inadmissible. The brief of evidence as originally drafted expressed his opinion about the consequences for Ms Cato, in her capacity as a lawyer, if the pleaded meanings of the Article "were found by a professional authority to be true".[115] This proposed brief of evidence was initially ruled inadmissible.[116]

[128] A replacement brief of evidence was subsequently prepared. This addressed whether the pleaded meanings would constitute breaches of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Mr Collins also gave his opinion as to how a professional disciplinary body would deal with a lawyer charged with conduct of the kind alleged by the pleaded meanings. This brief was regarded as relevant to the gravity of the harm that the publication caused to Ms Cato and was determined to be admissible.[117] Campbell J considered that the risk of unfair prejudice was low because Mr Collins made it clear that it was not being put forward to determine the meaning of the Article. Further jury directions would reinforce this.[118] The Judge did, however, rule inadmissible aspects of Mr Collins' proposed evidence that strayed into his understanding of the meaning of pleaded meanings or of the effect of the "professional misconduct allegations".[119]

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114 See *Cato v Manaia Media Ltd* [2021] NZCA 226.
115 Evidence objections judgment, above n 38, at [88].
116 At [93]. The Judge considered at [92] that the evidence did not address the gravity of the damage but rather the impact of the pleaded meanings being found to be true. This would be relevant if a professional authority had found that Ms Cato had engaged in the impugned conduct, but that was not what was pleaded.
117 *Cato v Manaia Media Ltd* [2022] NZHC 644 at [33].
118 At [36].
119 At [39]–[44].

[129] The gist of Mr Collins' evidence at trial was that the pleaded meanings were "very serious" or "extremely serious" allegations to be made of a lawyer. That evidence was admissible as relevant to the gravity of the harm if the pleaded meanings were found by the jury to be the natural and ordinary meaning of the Article. The Judge directed the jury on the relevance of Mr Collins' evidence under the heading of whether the pleaded meanings were defamatory. The jury would have only got to this point if they had already determined the pleaded meanings were established. The Judge also made the point that it was not a trial by expert and ultimately it was for the jury to decide if reasonable, fair-minded people in the community would think less of Ms Cato if they read the allegations in the Article.

[130] We see no error in the ruling that Mr Collins' evidence was admissible, nor in how the Judge addressed it at trial.

Direction to ignore irrelevant evidence

[131] Manaia submits that the Judge ought to have directed the jury to exclude evidence that did not bear upon meaning. As well as Mr Ralston's and Mr Collins' evidence discussed above, Manaia submits that the Judge ought to have directed the jury to exclude from their consideration that Ms Thompson had altered emails (provided as evidence in the trial) when determining whether the Article conveyed the alleged defamatory meanings.

[132] The altered emails related to Ms Thompson's communications with Libby Law (an equestrian photographer who did work for *NZ Horse & Pony*) on the evening of 9 December 2017 as follows:

(a) The communications began with Ms Law advising Ms Thompson that she had been dealing with a threat of legal action for taking photos in the VIP tent. Ms Law asked if Ms Thompson knew "Kristen Mason" and that she could not help "thinking it is the Cato Clan" even though she had not pointed her cameras anywhere near them.

(b) Ms Thompson replied saying that Kristin Manson was Heather Cato's daughter, who acted for the complainants in the McVean case and who

had threatened them with defamation as well. Ms Thompson's reply went on to say:

> Don't worry about the respect, she doesn't deserve any. And if you do find out what she looks like, let me know, I need to have a sneaky photo of her just up my sleeve somewhere, when she is in a public place.

It was these quoted words that Ms Thompson deleted from the email when she provided it to her solicitors for discovery in July 2021.

(c) The exchange went on with Ms Law describing Ms Cato as a "FUCKING BITCH" and a "stupid cow" and saying "what the hell is she on about", to which Ms Thompson replied:

> She's lost the plot Libby, and now you can join our exclusive club which has yet to have a formal name. 'Sued by Catos' is about all I can think of so far, but there is a growing list of members, so welcome! Wear it as a badge of honour.

The underlined words in this quote were also deleted by Ms Thompson when she provided a copy of this email for discovery.

[133] We understand that the altered versions of these two emails were included in the bundle for the proceeding. However, counsel for Ms Cato discovered that these deletions had been made and put to Ms Thompson in cross-examination that she had "tampered" with the evidence on which the jury would be making its decision. Ms Thompson accepted that she had.

[134] This was evidence that reflected very poorly on Ms Thompson. Mr Mills KC, for Ms Cato, was entitled to and did make much of this evidence in closing to the jury. For example, it was said that the fact that Ms Thompson "was not only tampering with the evidence" but also "hoping" that the jury "would go into the deliberations" with "that tampered evidence" which told the jury "all [they] need[ed] to know about the pervasive culture" within *NZ Horse & Pony* when the Article was written.

[135] Mr King's closing address for Manaia acknowledged there was no way of "sugar-coating" this and it had "blindsided" the defence and Ms Dixon. Counsel went

on to submit that these communications were after Manaia had received the lawyer's letter alleging that the Article defamed Ms Cato and reflected a frustration about that. Mr King submitted that the communications had only been tendered to show that Ms Cato had threatened Ms Law. Counsel went on to say that he "[could not] emphasise to [the jury] enough that actually all of this is irrelevant when [the jury was] thinking about what does this article mean".

[136] We accept that the Judge could have reiterated counsel's submission that Ms Thompson's conduct in altering the emails did not assist the jury with determining meaning. However, the question is whether the absence of that reiteration gave rise to a substantial miscarriage of justice arising because of the risk of the jury letting this evidence colour their assessment of the meanings conveyed by the Article.

[137] In our view it did not because:

(a) Mr Mills did not rely on it to support his submissions in relation to the meanings conveyed by the Article;

(b) Mr King emphasised it had no relevance to meaning; and

(c) the Judge gave a general direction about not deciding the case on sympathy or prejudice including if they liked one party more than other. The Judge also correctly directed the jury on how they were to determine meaning.[120]

[138] In these circumstances it would have been clear to the jury that they were to concentrate on the words in the Article, not the conduct of Ms Thompson and her views of Ms Cato as expressed after the event.

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[120] This included that it was an objective test, that the jury were the sole judges on what the words meant, the test was the meaning "the ordinary, reasonable person would take from the article if he or she had read it in the course of his or her everyday life", and the ordinary reasonable person was "sensible", "fair-minded" and "not unduly suspicious or prone to latching on to particularly nasty meanings".

Reference to Court of Appeal's decision

[139] At trial, the jury heard that this Court had determined the Article was capable of bearing the defamatory meaning. Manaia submits that this was irrelevant and unfairly prejudicial.

[140] This was a matter Mr King raised with the trial judge before Mr Mills opened the case for Ms Cato. Mr Mills had provided Mr King with an advance copy of his proposed opening which referred to the Court of Appeal having held that the Article was "capable of bearing all of the meanings".[121] Mr King submitted that that the meanings were now before the jury and how that came to be was irrelevant, lacking in probative force and unfairly prejudicial in that it could inappropriately influence the jury. The Judge considered that Mr Mills could cover the role of judge and jury in relation to meaning but proposed that he do so without reference to the Court of Appeal. Mr Mills was content with that proposal but noted the possibility that this issue might arise in cross-examination of one of the witnesses. This possibility was not explained further.

[141] Following this discussion with the Judge, in opening to the jury Mr Mills said this:

> I want now to just say very quickly something about your job in finding meanings, and I touched on it a moment ago. So in a defamation case there are two levels in dealing with the question of meanings, and the first one is an issue that the Judge deals with. The Judge is like a gatekeeper, and the Judge asks: "Are the meanings that the plaintiff and her lawyers say are taken from this article, are those words capable, are those meanings capable of being taken from the article?" If the answer's no, the case stops right there. Now here, a court [has] already [said]. All of the meanings that I've just taken you to, they can all be conveyed by the article. So we're on to the next step, which is you. It's your job now to make the final decision on that and your decision does not need to be the one that the Court made. Your decision is does it really carry those meanings to you as jurors. It is entirely your job to read that article, and of course I will try to persuade you and I have help to try and do that, but in the end you have to decide that for yourselves. Does it carry any or all of the meanings?

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[121] The draft opening referred to the role of judge and jury in ascertaining meaning and that, the Court of Appeal having held that the Article was "capable of bearing all of the meanings", the Judge's job was done, and it was for the jury to decide if the Article in fact carried all or some of the meanings.

[142] Mr Mills also went on to say that the Judge would give the jury more guidance about this in closing.

[143] The matter came up again in the evidence. It arose first in Mr King's cross-examination of Ms Cato.[122] The cross-examination included the following:

> Q. There were – an interlocutory application that went to the Court of Appeal about [meanings] in this case?
>
> A. Yes and the Court of Appeal agreed with me in respect of those and reinstated all of the meanings that appear in front of the jury –
>
> Q. And that was – sorry –
>
> A. – and determine that those meanings were available.
>
> Q. That was done to attempt to achieve early resolution, that's right?
>
> A. Well hopefully that happens …

[144] Additionally Mr Collins, the expert witness called by Ms Cato to give an opinion on the effect on Ms Cato's professional reputation of the pleaded defamatory meanings, began his evidence with reference to what he had had read. In doing so, he said he had read:

> The Court of Appeal's judgment in *Cato v Manaia Media Media Ltd* [2019] NZCA 661, where the Court considered and reversed some of Justice Hinton's conclusions about meanings and held that the Article is capable of carrying all of the meanings set out in paragraph 11 of the Claim.

[145] And, in Mr Mills' cross-examination of Ms Dixon the following exchange took place:

> Q. … Now, is your position that the article did not carry any of those meanings?
>
> A. Yes.
>
> Q. And it couldn't carry any of those meanings?

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[122] It appears that Mr King was endeavouring to put to Ms Cato that she had acted unreasonably following Manaia having made the clarification to the Article and then having removed the Article from the website (see above at [46]–[47]). The quoted cross-examination followed on from an objection to a question about a conference hearing in the High Court to determine whether the Article was capable of bearing the defamatory meanings. This hearing was on Ms Cato's application for a recommendation for a correction under ss 26 and 27 of the Defamation Act 1992 which Ms Cato then withdrew.

A. I don't believe that it does carry any of those meanings to a regular reading it?

Q. And it wasn't intended to carry any of those meanings?

…

A. No.

Q. And you had no idea that it could, if it does?

A. It didn't carry any of those meanings, as clear as I can be.

…

Q. So I assume then it must have come as an awful shock to you when the Court of Appeal said that it is capable of carrying all of those meanings?

A. Being capable of carrying meanings, from what I understand from Mr King –

Q. Yeah.

A. – who says, he wants to say something to the judge, I believe –

[146] At this point Mr King objected although not because of the reference to the Court of Appeal's decision. The objection was discussed in the absence of the jury. Mr King was concerned that evidence as to meaning was irrelevant. Mr Mills contended that his questions were directed to Manaia's intention and deliberateness in defaming Ms Cato and this was relevant to aggravated and punitive damages. Mr King withdrew his objection on the basis that the questions would be carefully put, and the Judge said he would emphasise to the jury that it was up to them to decide what the words meant.

[147] The cross-examination then resumed:

Q. Ms Dixon, just before lunch I had asked you a series of questions about the pleadings and then I asked you, and I'm not sure we got a clear answer on this, but in light of the answers you had given [to me] … it must have been quite a shock surely to have the Court of Appeal say that all those meanings were at least open?

A. From my understanding, the Court of Appeal said it was possible that the meanings could be there but it didn't mean that they were.

Q. Yes, so I'm [asking] about your reaction to learning that those meanings were capable of being carried by the article where you had such a firm position that nothing could be?

A. Well, obviously it wasn't good to hear that that was the view taken. …

[148] Mr Mills returned to this topic in closing, saying:[123]

> Now, and this has been said to you may times, and it doesn't do any harm to say it again, of course, the meaning of the article is for you. You know that it *can* carry the meanings, because the courts have said that. So, the defendants' initial position in the Bell Gully correspondence that you've got, is that it can't carry any defamatory meaning. That's – clearly, that's no longer tenable. Whether it was tenable back then is a good question, but it's certainly not tenable now, because the courts have said that it can carry all of these meanings. But beyond that, it's for you: you have to decide whether it *actually* does. What the court says doesn't matter now to the decision you make. It just means we're through the gatekeeper role, and it's now for you to decide.

[149] The trial Judge addressed this in summing up. It was the last of the matters he covered in relation to the meaning of the Article. He said:

> [49] Just one final point on this before I move on to the next question. You've previously heard that the court has determined that the article is capable of meaning what Ms Cato alleges it to mean. That was a relevant question earlier in this proceeding, but it's not relevant to you now. The important question for you is not what the article is capable of meaning, but what the article in fact means. And it is of course quite possible for words to be capable of meaning something that actually they do not.

[150] In our view, Mr King was correct when he submitted to the Judge at the start of the trial that the Court's determination that the Article was capable of bearing the pleaded meanings was not relevant to the jury task. The purpose of a court determining whether a publication has the capacity to have the meanings alleged by a plaintiff is to provide "a 'judicial filter', sifting out meanings that should not be put before the jury".[124] Or, putting it another way, the judge's function is to "delimit the range of meanings" to those "which a properly directed jury could therefore find them to bear" and to "rule out any meanings falling outside that range".[125] This has been referred to as a question of law "but in truth that means simply that it is a question reserved to the Judge".[126]

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123 Emphasis in original.

124 David Rolph *Rolph on Defamation* (2nd ed, Thomson Reuters, Sydney, 2024) at [6.60].

125 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [34.6]; and see Parkes and Busuttil, above n 71, at [32-005] n 28.

126 Mullis and Parkes, above n 125, at [34.5], citing *Jones v Skelton* [1963] 1 WLR 1362 at 1371. See also *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (CA) at 174; and *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (HL) at 1243.

[151] Once the judge has performed that filtering out function, it is for the jury to determine whether a reasonable reader would take the meaning that the plaintiff says the words convey. No relevant purpose is served by the jury being told that the court has found them capable of bearing the alleged meanings.[127] We agree with Mr King that there is a real risk of unfair prejudice arising from this.

[152] Support for this view is found in the *Report of the Committee on Defamation* published in December 1977 (the McKay report) as follows:[128]

> **The Functions of Judge and Jury**
>
> 85. In New Zealand it is usual for the judge in a defamation action to give his ruling as to whether the words which form the subject of the action are capable of bearing a defamatory meaning, in the presence of the jury. Although the judge may, if he wishes, inform counsel only of his ruling, in practice he tells the jury what his function is and his ruling in the instant case.
>
> 86. We feel that this practice may lead to confusion in the minds of jurors. The division in functions between judge and jury are clear and should be retained, *but a juror who is asked to decide whether certain words are in fact defamatory, having just been advised by the judge that they are capable of so being, may feel that the judge has already taken a view*.
>
> 87. Any suggestion of prejudgment by the judge should be avoided. Whether the words are capable of bearing a defamatory meaning should be argued and ruled upon in the absence of the jury and this should be made mandatory by statute. We so recommend. We note that the Faulks Committee in its report recommended a similar change for similar reasons.

[153] This recommendation led to s 36 of the Defamation Act 1992 which provides:

> **36 Functions of Judge and jury in relation to meaning of matter**
>
> Where any proceedings for defamation are tried before a Judge and jury,—
>
> (a) the submissions of the parties on whether the matter that is the subject of the proceedings is capable of a defamatory meaning; and
>
> (b) the ruling of the Judge on that issue—
>
> shall be made or given in the absence of the jury.

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127 Rather, the filtering function can assist parties to an early resolution of the proceeding or at least to narrow the issues including in relation to defences: see Parkes and Busuttil, above n 71, at [32-002].

128 *Report of the Committee on Defamation* (Government Printer, Wellington, December 1977) (footnote omitted and emphasis added).

[154] Neither the McKay report, nor s 36, say whether the jury can subsequently be informed of the ruling. However, the implication appears to be that they would not be told because the risk that the McKay report refers to in the italicised words above would still arise. This is the view taken by Ursula Cheer in *Todd on Torts*, where she refers to s 36 and says:[129]

> This is for the obvious reason that if a jury hears the judge rule that the words are capable of being defamatory, they may take this to mean that they are, in fact, defamatory, and decide accordingly.

[155] Ms Cato relies on this Court's decision in *New Zealand Magazines Ltd v Hadlee (No 1)* to submit there was no error.[130] That case was primarily about whether a pre-trial appeal to this Court on whether the words alleged to be defamatory were capable of bearing the alleged meanings should be heard "in camera" and whether an order prohibiting publication of the decision beyond the parties to the proceeding and their advisers should be made.[131] This Court considered that neither order was appropriate. A hearing "in camera" did not meet the test of "strict necessity for the attainment of justice",[132] and publication of the judgment would not infringe "the letter or the spirit of s 36".[133] As to s 36, this Court explained that:[134]

> We are satisfied no prejudice can result to the appellant. The possibility that a jury at a trial which will be held next year and will take place in Auckland would be improperly influenced as a result of such publication is, in our view, without substance. *If the appeal does not succeed the jury will necessarily be directed that the words are capable of bearing the defamatory meaning, but that it will be for them to determine whether in fact they do carry any such meaning*. This Court's reasons for holding that they are so capable, given months in advance of trial, will be of little if any significance.

[156] We agree that the italicised words support Ms Cato's position. The judgment was, however, given nearly 30 years ago at time when, we think it is fair to say, the Judge had more latitude when summing up to a jury to express views on the facts while

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129 Ursula Cheer "Defamation" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 935 at [15.3.2]. Similarly, in Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (8th ed, LexisNexis, Wellington, 2021) at [2.2.1] she says the purpose of s 36 is to "ensure that [the jury's] members are not influenced in any way".

130 *New Zealand Magazines Ltd v Hadlee (No 1)* [2005] NZAR 618 (CA). We note the judgment was given in 1996 but not reported until 2005.

131 Earlier orders to this effect had been made on the papers on a consent application. An "in camera" hearing is a term used for a private hearing.

132 At 619.

133 At 620.

134 At 620 (emphasis added).

also making it clear that factual matters were for the jury. The practice today, at least in a criminal jury trial, is to largely to refrain from expressing such views to ensure that it is the jury who makes the decision without unnecessary and potentially prejudicial influence from the Judge. In our view that practice is also appropriate in a civil jury defamation trial.

[157] In line with today's practice, we consider the better approach is to avoid any reference to the Court's ("filtering") decision that the publication before the jury is capable of bearing the pleaded meanings.[135] However, it does not follow than any reference to the Court's decision necessarily gives rise to a substantial miscarriage of justice. That will depend at least in part by the prominence the Court's finding has in the trial and the Judge's direction.

[158] In this case we consider it was unfortunate that Ms Cato referred to the Court of Appeal's finding in answer to a question in cross examination (although the question put to her was perhaps unwise and risked the response she gave). We also consider it was unnecessary for the Court of Appeal's findings to be put to Ms Dixon in cross-examination as part of a challenge to whether Manaia's motives or intention when the Article was published. Mr King was right to be concerned about this at the start of the trial. The Judge's proposal that no reference should be made to the Court of Appeal in the opening address was undermined by the subsequent references to the Court of Appeal. While the Judge correctly directed in summing up that the Court's findings that the Article was capable of having the pleaded meanings was now irrelevant, this direction was undermined by those references.

[159] As we have said, this was not a case where it was obvious that the Article bore all of the pleaded meanings. The High Court had struck out some of those meanings on the basis that the Article was not capable of those meanings albeit the Court of Appeal formed a different view. We consider the jury's verdict finding all the pleaded meanings proven was potentially tainted because of the way the Court of Appeal's decision was used.

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[135] Where the ruling is made in the course of trial (rather than pre-trial as in the present case) the jury will already have before them the meanings alleged by the plaintiff. The jury can simply be informed that the Judge has determined that they no longer need to consider any meanings that have been struck out.

Other matters

[160] Manaia submits that the Judge ought to have directed the jury that they should put aside the two and a half weeks that had focussed on the Article and approach it as best they could as if they were reading it afresh. We do not accept that it was necessary for the Judge to say this. It would not have added anything material to the correct direction the Judge gave to "bear in mind that we've been considering the contents of the article for over two weeks", that an "ordinary, reasonable person would not look at the words in as much detail as we have" and that "[i]nstead, it's the kind of meaning that the ordinary reasonable person would take from the article if he or she had read it in the course of his or her everyday life".

[161] Manaia submits that the Judge was required to direct the jury that they should not infer that, because Ms Cato alleged the Article carried eight defamatory meanings, it was likely that the Article had one or more of those meanings. The failure to give any such direction cannot have caused prejudice in this case because the jury found the Article carried all eight defamatory meanings. It is apparent, therefore, that the jury cannot have been influenced to find that the Article carried at least one or two of the meanings because of the sheer number of pleaded meanings.

Summary

[162] In summary, we consider the jury's verdicts on whether the pleaded meanings were established must be set aside. In reaching those verdicts, the jury heard evidence from Mr Ralston that was irrelevant to their task and unfairly prejudicial. Defence evidence that might have provided some balance to Mr Ralston's evidence was ruled inadmissible. And the jury was not directed to ignore Mr Ralston's evidence because it was irrelevant to their task. Additionally, the jury heard repeatedly that this Court had ruled that the Article was capable of bearing the pleaded meanings. This gave rise to the risk that the jury's verdicts on the pleaded meanings were tainted by hearing the Court's views on meaning. The risk of a substantial miscarriage arose as this was not a case where it was obvious that the Article bore all the pleaded meanings.

Damages

General and aggravated damages

[163] It is well established that damages awards can be set aside if they are excessive.[136] This is a high threshold. As it was put by Lord Cooke in *Television New Zealand Ltd v Quinn*:[137]

> The question is not what the trial Judge or a Court of Appeal would themselves have awarded, but whether the jury have gone beyond reasonable bounds.

[164] Manaia submits that the award of $225,000 was excessive in the context of a small niche media outlet and its editor and writer inadvertently defaming someone in a story focused on a high-profile rider and coach, coupled with a sincere apology and removal of the online article when put on notice of Ms Cato's concerns.

[165] While recognising that defamation awards are not a precise science and other awards are not determinative, Manaia makes comparisons with two recent awards, namely:

(a) *Blomfield v Slater*:[138] Johnstone J awarded $475,000 for a series of blog posts on the *Whaleoil* blog site, which had over 317,000 visitors per month, which were designed to destroy Mr Blomfield's reputation, both professionally and personally, and which made sweeping allegations of dishonesty, corruption, fraud and other forms of criminality.

(b) *Craig v Slater*:[139] Edwards J awarded $325,000 for 13 online publications on the *Whaleoil* blog site in which repeated allegations of sexual harassment, dishonesty and vindictiveness were made.

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136 See, for example, *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA); *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457; Mullis and Parkes, above n 125, at [36.25]–[36.31]; and Richard Rampton and others *Duncan and Neill on Defamation and other media and communications claims* (5th ed, LexisNexis, London, 2020) at [33.04].

137 *Television New Zealand Ltd v Quinn*, above n 136, at 38.

138 *Blomfield v Slater* [2024] NZHC 228.

139 *Craig v Slater* [2021] NZHC 30.

[166] Manaia notes that Ms Cato proposed an award of $300,000 (plus $50,000 for punitive damages) and Manaia had proposed an award of no more than $25,000. Manaia refers also to the examples that the Judge gave in summing up where the defamations were more direct and serious than in this case, namely:

(a) *Reeves & Ors v Mace*:[140] where the award was $95,000 ($165,000 inflation adjusted)[141] where the defendant had deliberately sent letters to other law firms making explicit allegations of dishonesty against a lawyer; and

(b) *Hallett v Williams*:[142] where the award was $125,000 ($166,000 inflation adjusted) and $15,000 punitive damages for a grossly defamatory passage in a book alleging that a prominent criminal barrister was complicit in a drug syndicate.

[167] Ms Cato emphasises the care that is necessary in any comparative exercise and that *Blomfield v Slater* is of limited assistance because the Judge was influenced by the award being pyrrhic due to the defendant's insolvency. Ms Cato further says that her reputation was unblemished at the time of the defamation and other factors, including Manaia's conduct throughout the proceeding likely influenced the jury's award.

[168] As to that last point, in closing to the jury on damages Mr Mills invited the jury to conclude that Ms Dixon's evidence — that "[w]e're really straight-forward people … [w]e don't have agendas and hidden … things that we do" — could not be further from the truth. He referred to Ms Thompson having "doctored" what was "important evidence" in a way that was "intended to mislead" the jury. He submitted that the same sort of attitude could be seen throughout the Article itself in which there a "series of half-truths". Mr Mills referred to the "nastiness" in the messages between Ms Dixon and Ms Thompson, the internal communications while the Article was online, and including with the Article a large and unflattering photograph of

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

141 The inflation adjusted figures were provided in submissions by Manaia.

142 *Williams v Hallett* DC Auckland CIV-2008-004-2897, 18 October 2010, upheld on appeal in *Hallett v Williams* HC Auckland CIV-2010-404-7064, 26 July 2011.

Heather Cato, which he said demonstrated a culture and hidden agendas at *NZ Horse & Pony*.

[169] Mr Mills also referred to the evidence from Mr Collins and others that the defamatory meanings in the Article "were incredibly serious as an allegation about a lawyer who has spent years trying to build a high-quality professional reputation". Mr Mills also made the point that 7,500 people over a short time in a community where Ms Cato felt particularly sensitive was a lot of readers and focus. He described Ms Dixon as being "cold" and "dismissive" in her response when questioned about whether she noticed how affected Ms Mitchener was when giving evidence. Mr Mills also made the point that the correction did not assist because it was accompanied by the original story which remained online (until both were taken down) and said there had never been a proper apology.

[170] These were all submissions available to be made. It is apparent from the jury's award that they had taken a dim view of aspects of Ms Dixon's and/or Ms Thompson's conduct and accepted that evidence of Mr Collins as to the seriousness of the defamation. That said, we consider the award was significantly out of kilter with the examples referred to above. Damages for defamation are awarded as a vindication of Ms Cato's reputation to the public and a consolation for the wrong that has been done. In this case, the Article was online for a short period, was a legitimate public interest article that was not (principally) about Ms Cato but rather about ESNZ's processes which allowed private parties to resolve a complaint which led to the possible loss of Ms Laurie and Mr McVean to the sport, and Manaia had taken steps to verify the statements in the Article. It failed as a responsible communication because, in its lengthy article, it had incorporated some words critical of Ms Cato that were unnecessary to convey the public interest story. Manaia did publish an amendment and an apology with the Article which was a legitimate way of making the point that the Article was not about Ms Cato while also keeping its public interest article online. Moreover a lawyer acting for a client in relation to matters that have a public dimension has a professional responsibility to act notwithstanding potential criticism arising from the association with their client. A degree of professional robustness is necessary. While a wide margin is allowed to the jury, an award of this size has a

chilling effect on publishers, particularly a niche one as here with a relatively small readership, that is disproportionate to the harm caused.[143]

[171] Had we rejected all other grounds of appeal we would nevertheless have set aside the award. The parties advised that they consented to this Court substituting an award, after the opportunity for submissions, if that was the view we reached. It is not necessary to seek those submissions given our conclusion that the verdicts must be set aside. With the caveat that we have not had the benefit of submissions but in case it is of assistance to the parties as to the way forward from here, we can indicate that an award of something in the order of $75,000 would not be unreasonable.

Punitive damages

[172] The purpose of punitive damages is to punish and deter a defendant. They are exceptional. They require the defendant to have "acted in flagrant disregard of the rights of the plaintiff".[144]

[173] In this case Mr Mills closed to the jury on the basis that they were justified because the Article was "motivated" by Ms Dixon and Ms Thompson's outrage at being criticised in the joint statement, there was "manipulat[ion]" of the joint statement to remove any reference to *Show Circuit* from the Article and Ms Cato's own statement, it was "dishonest reporting" to say that the last communication from ESNZ was on 28 June 2017 and that they could assume ESNZ were happy with their response to the reporting of the Jumping Board's minutes, and because *NZ Horse & Pony* had "deliberately" avoided "making it clear that the defamatory potential they were pointing to related to them".

[174] We note that none of this required expert evidence from Mr Ralston but, because the jury heard Mr Ralston's views, there was a real risk that it coloured the jury's assessment of whether Manaia had acted in flagrant disregard of Ms Cato's rights. Some of Mr Ralston's comments may have been viewed by the jury as

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143 The damages award was on top of a costs award in the High Court of $268,556 (which included a 25 per cent uplift for Manaia's conduct): see *Cato v Manaia Media Ltd* [2024] NZHC 539 at [56]. We understand that *NZ Horse & Pony* stopped publishing in May 2024. We do not have evidence as to why that was.

144 Defamation Act, s 28.

supporting Ms Cato's claim for punitive damages when the matters relied in closing to the jury were factual assessments for the jury that did not require Mr Ralston's expertise or opinion.

[175] As to the submission that the Article was motivated by outrage at the criticism of *NZ Horse & Pony* in the joint statement, we note that the Article was a public interest article principally directed at ESNZ. The Article referred to Ms Cato in three places across a 65-paragraph article the thrust of which was directed to ESNZ's handling of the complaints. The Jumping Board's minutes were correctly quoted and the fact that ESNZ had concerns about *NZ Horse & Pony*'s articles was stated in the Article. The article correctly explained that they did not hear further about the matter from ESNZ after *NZ Horse & Pony* had pointed out that it had correctly recorded the matter. In any event, this part of the Article had nothing to do with Ms Cato's conduct and did not disregard her rights, let alone flagrantly.

[176] We consider the jury's affirmative response to the jury question trial which asked them to be sure that the defendants had acted in flagrant disregard for Ms Cato's rights was, in our view, unreasonable. We accept that the punitive damages award was relatively restrained in amount. In this case, because of the "nasty" internal communications and Ms Thompson saying to Ms Law to "[w]ear it as a badge of honour" that she had had a falling out with the Catos, which were relied on for aggravated damages, there was a danger that these matters carried over into the punitive damages award. We acknowledge that the Judge correctly directed the jury to avoid doubling up and accurately summarised the factors relied on by Mr Mills for a punitive damages award. However, those matters did not make this an exceptional case above and beyond whatever the amount that was properly allowed for aggravated damages.

[177] We therefore would have set aside the punitive damages award had we dismissed the other grounds of appeal.

Result

[178] The appeal is allowed. An order for a retrial is made.

[179] The respondent must pay the appellants costs for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

[180] The costs order in the High Court is set aside.

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