



**Supreme Court of New Zealand
Te Kōti Mana Nui**

11 April 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

COLIN GRAEME CRAIG v JORDAN HENRY WILLIAMS

(SC 21/2018) [2019] NZSC 38

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Background

Mr Williams succeeded in a defamation action against Mr Craig after a jury trial in the High Court. The primary issue in the appeal is whether the jury was misdirected and, if so, whether that has given rise to a miscarriage of justice warranting an order for a new trial on liability and damages.

In June 2015, Mr Williams, the founder and executive director of the New Zealand Taxpayers’ Union, accused Mr Craig, the founder and former leader of the Conservative Party, of sexually harassing his former press secretary, Ms MacGregor. These allegations were made both to senior figures within the Conservative Party and leaked to Mr Slater, operator of the Whale Oil website, from where they were distributed to the public. Mr Williams’ allegations followed on from a conversation he had with Ms MacGregor in November 2014 where she had, on a confidential basis, told Mr Williams that Mr Craig had sexually harassed her. At the trial, which took place in the High Court at Auckland in September 2016, it was disputed whether Mr Williams’ description reflected what Ms MacGregor told him or whether it included particulars which did not reflect their conversation.

In response, Mr Craig made public remarks and then produced a leaflet which was distributed to 1.6 million households accusing Mr Williams of lying about Mr Craig having sexually harassed Ms MacGregor and of engaging in “dirty politics” (the Statements). Mr Williams sued Mr Craig, claiming Mr Craig’s response had defamed him.

The trial Judge accepted that the attacks on Mr Craig by Mr Williams gave rise to an occasion of qualified privilege in which Mr Craig was entitled to respond to the attack by Mr Williams. The effect of s 19 of the Defamation Act 1992 is that the defence of qualified privilege would be defeated if Mr Craig used the occasion for an improper purpose, for example, if he knew he had sexually harassed Ms MacGregor or did not believe that Mr Williams was lying. The jury rejected the qualified privilege defence, amongst others, finding Mr Craig liable for defamation and awarded Mr Williams \$1.27 million in damages.

The trial Judge set aside the jury’s verdict on the basis the damages awarded were excessive and ordered a retrial. The Judge also accepted that the jury had been misdirected in one respect, namely, the jury had been asked to consider whether Mr Craig’s response contained irrelevant material when she had already ruled that it did not. Mr Williams appealed. He argued that the verdict should be reinstated. Mr Craig cross-appealed. His case was that there was insufficient evidence to support the jury’s finding that the defence of qualified privilege was lost.

The Court of Appeal allowed Mr Williams’ appeal in part and dismissed Mr Craig’s cross-appeal. The Court of Appeal found that the issue of damages could be considered separately from liability, and that the jury must have decided that Mr Craig lost the defence of qualified privilege because he was predominantly motivated by ill will towards Mr Williams. The Court ordered a new trial limited to the question of damages.

The Supreme Court gave leave to Mr Craig to appeal and to Mr Williams to cross-appeal, the approved question being whether the Court of Appeal erred in allowing the appeal to that Court in part and dismissing the cross-appeal.

The Supreme Court’s decision

The Supreme Court has, by a majority, allowed Mr Craig’s appeal, ordering a retrial on liability and damages. The Court has dismissed Mr Williams’ cross-appeal.

All members of the Court accepted that there were misdirections in the trial Judge’s directions to the jury. The main question in determining whether the privilege was lost was whether Mr Craig believed the truth of his rebuttal to the allegations Mr Williams made about him – ie whether he believed that he had not sexually harassed Ms MacGregor. There was no clear direction to this effect.

Further, the jury was directed that in determining whether Mr Craig had lost the privilege the jury could consider whether Mr Craig had published

the Statements to people who had an interest in receiving them and whether it was relevant to the attack on him. The jury was also directed to take into account whether Mr Craig had failed to take reasonable care in publishing his response. These factors were not relevant to determining whether Mr Craig had used the occasion for an improper purpose.

In addition, the trial was run in such a way that the jury may have believed it could find that qualified privilege could be lost if Mr Craig, while responding honestly to Mr Williams' attacks, was motivated by feelings of personal animosity towards Mr Williams in publishing the Statements. Likewise, this factor could not cause Mr Craig to lose the privilege.

A majority comprising Elias CJ, Ellen France and Arnold JJ considered these misdirections were substantial and that a new trial should be ordered. The majority considered the misdirections went to the key question of Mr Craig's state of mind when he published the defamatory material and they therefore could not be classified as incidental errors. Further, Elias CJ, Ellen France and Arnold JJ did not see the failure of Mr Craig's counsel to object to aspects of the pleadings or to the summing up at trial as significant. The evidence was not necessarily open and shut as to what Mr Craig believed and the majority could not be confident there was no miscarriage of justice.

On their approach, it was unnecessary to consider the substance of the cross-appeal. Elias CJ, Ellen France and Arnold JJ observed, however, that it was not possible in this case to sever the liability and damages verdict. In agreement on this point with William Young and Glazebrook JJ, who took a different view as to the outcome of the appeal, Elias CJ, Ellen France and Arnold JJ also observed that more guidance should be given to juries on the appropriate parameters of damages awards in defamation claims.

In their dissenting judgment William Young and Glazebrook JJ, while accepting that there were misdirections, considered there was no risk of a miscarriage of justice. That was because there was overwhelming evidence that Mr Craig either knew he had sexually harassed Ms MacGregor or, at the least, that Mr Williams had grounds for believing that he had. This accusation was the core element of the trial and if it was accepted then Mr Craig would lose the privilege. The probability that the verdict was reached on impermissible grounds was therefore remote.

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