

IN THE COURT OF APPEAL OF NEW ZEALAND

CA222/2013
[2014] NZCA 461

BETWEEN CHRISTOPHER ROBERT MURRAY
First Appellant

KERRI MAREE MURRAY
Second Appellant

AND IAN WISHART
Respondent

AND DIMENSION DATA NEW ZEALAND
LIMITED
Interested Party

Hearing: 15 May 2014 (last submission received 21 July 2014)

Court: O'Regan P, Ellen France and French JJ

Counsel: D Nilsson for Appellants
Respondent in person
H B Rennie QC and E M S Cox for Interested Party

Judgment: 19 September 2014 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The High Court decision in relation to the fifth cause of action in the amended statement of claim relating to third party statements on the Facebook page hosted by the first appellant is quashed and replaced with a ruling that this aspect of the fifth cause of action is not a tenable claim. We do not strike out the claim but order that the respondent must file in the High Court and serve an amended statement of claim within 30 days of the date of delivery of this judgment (or such other period allowed by the High Court) omitting the present claims relating to third

party statements and limiting any renewed claims in relation to any third party statement to claims that the first appellant knew of any such statement and failed to remove it within a reasonable time in circumstances that give rise to an inference that he was taking responsibility for such statement.

- C In all other respects the High Court decision stands.
- D We make no award of costs in this Court.
- E Costs in the High Court must now be determined in light of this decision.
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REASONS OF THE COURT

(Given by O'Regan P and Ellen France J)

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Introduction

[1] This is an appeal against a decision of Courtney J dealing with an application by the appellants, Mr Chris Murray and Mrs Kerri Murray, to strike out the statement of claim filed in the High Court at Auckland by the respondent, Mr Wishart, claiming damages for defamation.¹

[2] Dimension Data New Zealand Ltd (DDNZ) is the third defendant in Mr Wishart’s High Court claim. DDNZ was, at the relevant time, Mr Murray’s employer. It was not a participant in the hearing from which the present appeal arises. But it has an interest in the outcome on the issue relating to publication of third party comments. Its counsel, Mr Rennie QC, was given leave to make written and oral submissions on that issue.

¹ *Wishart v Murray* [2013] NZHC 540, [2013] 3 NZLR 246.

[3] The appellants were partly successful in the High Court, but although the Judge struck out parts of the statement of claim, much of it survived the strike-out application. The appellants appeal against the Judge's refusal to strike out those other aspects of the statement of claim and also appeal against her decisions not to order that Mr Wishart pay security for costs and not to make a costs award against Mr Wishart.

[4] It is necessary to traverse some of the background in order to provide the necessary context for a discussion of the issues raised by the appeal. So we will set out the factual background first, and then outline the issues before us.

Facts

[5] Mr Wishart is the author of a book called *Breaking Silence*, about a woman named Macsyna King. Ms King collaborated with him on the book. She did not, however, ask for or receive any money from the proceeds of the book.

[6] The background to the book is that Ms King was the mother of Chris and Cru Kahui, who were twins. They died at the age of three months in 2006 from non-accidental injuries. Their father, Chris Kahui, was charged with their murder but acquitted. During his trial, he suggested that Ms King had inflicted the fatal injuries. A subsequent coroner's report found that the twins had died while in Mr Kahui's sole care. Nevertheless, suggestions implicating Ms King retained some currency in the public arena. The trial of Chris Kahui for the murder of the twins generated considerable public interest.

[7] Mr Murray learned of the impending publication of Mr Wishart's book in June 2011. He established a Facebook page called "Boycott the Macsyna King book" (which we will refer to from now on as the "Facebook page"). He used his Twitter account to publicise the Facebook page. He posted comments on Twitter and on the Facebook page criticising both Mr Wishart and Ms King. Mrs Murray posted comments on the Facebook page, as did numerous other people. Mr Murray also made comments about both Mr Wishart and Ms King during radio interviews.

Procedural history

[8] Mr Wishart claims damages from Mr and Mrs Murray and from DDNZ as Mr Murray's employer, alleging that many of the comments made on Twitter, on Facebook, and during the radio interview defamed him. At the time of the High Court hearing he was claiming \$8 million in damages. This figure has now been reduced to \$2 million.

[9] Mr Wishart's claims are:

- (a) the first cause of action is a claim against Mr Murray and DDNZ in relation to allegedly defamatory statements made by Mr Murray on his Twitter account;
- (b) the second cause of action was a claim against Mr Murray and DDNZ in relation to statements made by Mr Murray on the Facebook page and in relation to posts by Mr Murray on his Twitter account directing readers to the Facebook page;
- (c) the third cause of action relates to allegedly defamatory statements made by Mr Murray during radio interviews on Radio Live; and
- (d) the fourth cause of action is a claim against Mrs Murray for statements she made on the Facebook page. The fourth cause of action also includes a claim against Mr Murray and DDNZ in relation to the third party statements made by persons posting comments on the Facebook page.²

[10] Mr and Mrs Murray applied to strike out the claim in its entirety. As noted above,³ they were only partially successful in the High Court. As an alternative, they sought orders that Mr Wishart give security for costs and that the proceeding be stayed until the security was given. Courtney J refused to make these orders.

² In a revised version of the statement of claim provided to us, this part of the fourth cause of action was separated and became the fifth cause of action.

³ At [3].

[11] DDNZ also sought both defendant summary judgment and an order striking out the claims against it, but decided to withdraw those claims after late disclosure of certain information. That is why it was not a party to the High Court hearing that led to the present appeal.

[12] The application for strike-out was made on the basis that the statements by Mr Murray (on his Twitter account, the Facebook page and during the Radio Live interviews) were incapable of bearing the pleaded meanings. In relation to the third party statements on the Facebook page, the strike-out application was based on the argument that Mr Murray was not a publisher of those statements. In addition it was argued that the statement of claim did not comply with the High Court Rules and/or amounted to an abuse of process.

Issues

[13] Courtney J struck out a number of the pleaded meanings either wholly or in part and also struck out significant parts of the statement of claim for non-compliance with the High Court Rules. However, she did not accept that a number of the statements in the statement of claim were incapable of bearing their pleaded meanings. The first issue is whether the Judge was correct that the statements surviving the strike-out application were capable of bearing their pleaded meanings. Addressing that issue requires us to consider each of these statements individually.

[14] The second issue is whether Courtney J was correct to find there was an arguable case that Mr Murray was the publisher of the third party statements on the Facebook page.

[15] In the event that we conclude that the statement of claim should not be struck out in its entirety, we need to address the third issue, which is whether the Judge was correct to dismiss the application for an order that Mr Wishart provide security for costs.

[16] Courtney J did not make any order for costs, though Mr and Mrs Murray had sought costs in the High Court. The fourth issue is whether an order for costs ought to have been made, given the partial success of the application to strike out.

Were the statements capable of bearing the pleaded defamatory meaning?

[17] Section 37(2) of the Defamation Act 1992 requires a plaintiff to give particulars of “every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself”. The preliminary issue of whether the words are capable of bearing the pleaded meaning is a question of law.⁴

[18] There is no dispute that in this case the words complained of must be given their natural and ordinary meaning in deciding whether they are capable of bearing the alleged defamatory meaning.⁵ Nor is there any dispute that the relevant principles are as summarised by Blanchard J in *New Zealand Magazines Ltd v Hadlee (No 2)*.⁶ Blanchard J referred, amongst other matters, to the objective nature of the test and said what matters “is the meaning which the ordinary reasonable person would as a matter of impression carry away”.⁷ There are, however, differences between the parties as to the application of these principles to the present case. We deal with the issues that arise by addressing each cause of action in turn. Mr Wishart has filed an amended statement of claim but we examine these issues on the basis of the statement of claim as it was before the Judge.

[19] Before we deal with the causes of action, we discuss briefly Mr Wishart’s submission based on *Jameel v The Wall Street Journal Europe Sprl*, that this Court must defer to the High Court’s decision not to strike out a pleaded meaning.⁸ At least since the decision of the Supreme Court in *Austin, Nichols & Co Inc v Stichting*

⁴ *Hyams v Peterson* [1991] 3 NZLR 648 (CA) at 655–656; *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 626.

⁵ As Courtney J said, this is the position unless innuendo is pleaded (which it is not in this case): *Wishart v Murray*, above n 1, at [8].

⁶ *Hadlee*, above n 4, at 625.

⁷ At 625; see also at 630 per Barker J and 635 per Henry J.

⁸ *Jameel v The Wall Street Journal Europe Sprl* [2003] EWCA Civ 1694, [2004] EMLR 6. For example, at [6] Simon Brown LJ cited Sedley LJ in *Berezovsky v Forbes Inc* [2001] EWCA Civ 1251, [2001] EMLR 45 at [16] to the effect that the appellate court will not “second-guess” the trial Judge’s decision on what meanings words were capable of bearing because the “longstop is the jury”.

Lodestar, it is plain that this submission does not reflect the law in New Zealand.⁹
On appeal, the parties are entitled to the view of the appellate court.

The first cause of action: the Twitter statements

[20] This cause of action relates to statements Mr Murray made on 28 June 2011 on his Twitter account. It is said that the statements were made to raise awareness of the existence of his Facebook page and to encourage a boycott of Mr Wishart's book. The Twitter statements had links to Mr Murray's Facebook page and, it is said, encouraged readers to go to that page.

[21] On Twitter Mr Murray said in individual tweets:

I've fired up a facebook page to drive awareness. She can't be allowed to profit from this: [deck/ly](#) ... [the reference to "deck" is to an active internet link to Mr Murray's Facebook page.]

Once again I find myself having to question Ian Wishart's motivation

Suspected child murderer and renowned "worst mother in the world" set to profit from tell-all book. ...

The most unpopular person in New Zealand: ...

[22] On the Facebook page to which the above comments linked there was a heading "Boycott the Macsyna King Book". This was followed by an Information Statement which said:

Macsyna King is about to release a book which will allow her to profit from her atrocious deeds.

Macsyna King, the mother (and I use that in a purely biological sense and not a maternal one) of Chris and Cru Kahui is about to release a tell all (and by all, I mean the bits she remembers which won't incriminate her further) book about the tragic murder of her three month old twin babies.

I am trying to organize a boycott of this book and until such time as it is pulled from the shelves, all other Ian Wishart books and all other books by the publisher. Somebody like this should not be allowed to profit from preaching her perverted view of the horrific events which led to the deaths of the only two children who hadn't already been taken from her by CYFs.

⁹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

[23] Courtney J in the High Court struck out some of the pleaded meanings. For this cause of action, the pleaded meanings that remain are that Mr Wishart:

15. ...
- (a) paid a baby murderer for her story to help her profit from her crime
 - (b) did not do this to get justice for the twins but for an improper ... motive
- ...
- (e) is an unethical opportunist
 - (f) is an unscrupulous journalist
 - (g) regularly publishes books with an improper ... motive

The issues arising under the first cause of action

[24] In *Hadlee*, one of the principles identified as relevant in considering whether the words were capable of bearing the pleaded meaning was the need to read the words complained of in context. Blanchard J stated that the words “must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared”.¹⁰ The main issue that arises in relation to the first cause of action is what amounts to “context” in terms of the Twitter publications. There are two aspects to the question. First, can reliance be placed on the Information Statement that appeared on Mr Murray’s Facebook page for context as to the meaning of what was said on Twitter? Secondly, can facts relating to Mr Kahui’s trial strategy provide context as to meaning?

[25] These issues arise because Courtney J accepted that paragraph 15(a) (Mr Wishart paid a baby murderer) could not in isolation bear its pleaded meaning.¹¹ That was because the Twitter statement specifically identified Ms King as a “suspected child murderer” not an actual murderer. However, Courtney J said, when read together with the Information Statement on the Facebook page, the statement was capable of bearing the meaning that Ms King was a “child murderer”. The

¹⁰ At 625; see also at 630 per Barker J and 635–636 per Henry J.

¹¹ At [23].

Judge also drew, for context, on the Kahui trial. Her Honour said that although Ms King had not been prosecuted for the murders, the defence case for Mr Kahui at trial “had pointed the finger at her”.¹² Further, when read together with the reference to Ms King’s “atrocious deeds” along with the words that “the bits she remembers which won’t incriminate her further” the statement was capable of being read as an assertion that Ms King was, in fact, the murderer.

[26] We turn first to consider whether reliance could be placed on the Information Statement on the Facebook page in considering the pleaded meanings based on the Twitter statements.

[27] In reliance on *Brown v Marron*¹³ and *McGee v Independent Newspapers Ltd*,¹⁴ the appellants say the surrounding publications must be “so interwoven with the publication complained of” that the hypothetical fair-minded reader would read them as one. The appellants accept this test may be met in situations such as the serialisation of a book or publications to the same audience via a series of articles in successive editions of the same newspaper. However Mr Nilsson for the appellants submits there is no basis to assume that, when publications on the internet are involved, the reader of (here) the Twitter publication was aware, at the time, of the Information Statement.¹⁵

[28] Mr Wishart’s response is this assumption can be made because there is no point to the Twitter statements without the hyperlinks to the Facebook page.

[29] In *Brown v Marron*, Owen J in the Supreme Court of Western Australia made the point that each case was fact dependent. Owen J continued:¹⁶

There must be an intimate connection between the primary source of the alleged defamation and the other material which is said to form part of the context. The primary and secondary sources must be so closely connected, interwoven or enmeshed that it is necessary to take them effectively as one transaction in order to arrive at the true import and meaning of what was written and said. The requisite degree of intimacy will usually (although not

¹² At [23].

¹³ *Brown v Marron* [2001] WASC 100.

¹⁴ *McGee v Independent Newspapers Ltd* [2006] NZAR 24 (HC).

¹⁵ Referring to *Al Amoudi v Brisard* [2006] EWHC 1062 (QB), [2007] 1 WLR 113.

¹⁶ At [56].

always, for example in the serialisation situation) demand contemporaneity. It will be necessary to consider all of the surrounding circumstances to decide whether the secondary materials are so intimately connected with the primary sources that they are to be taken to be a part of the context which might affect the way in which the ordinary reasonable reader would understand the words complained of.

[30] Panckhurst J in *McGee* endorsed that reasoning and made a similar observation that whether meaning could be construed by reference to the various parts of a publication depended on the circumstances.¹⁷ In that case Mr McGee argued he could be identified as the unnamed person in some publications by reference to publications the next day. Panckhurst J accepted that the defendants therefore could equally rely on both publications in relation to the alleged defamatory meanings.

[31] The particular question of the role of hyperlinks in the internet context has been the subject of litigation particularly regarding whether there has been publication of one website through a hyperlink posted on another website. For example, in *Crookes v Newton* the Supreme Court of Canada treated hyperlinks as essentially a reference rather than something communicating content.¹⁸ That was a case where the hyperlink took the reader to a website published by a third party and not, as here, to a website published by the defendant. Further, in delivering the judgment of a majority of the Court, Abella J suggested the position may be different when “a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content”.¹⁹ In their separate concurring opinion McLachlin CJ and Fish J added:²⁰

In our view, the combined text and hyperlink may amount to publication of defamatory material in the hyperlink in some circumstances. Publication of a defamatory statement via a hyperlink should be found if the text indicates *adoption or endorsement of the content of the hyperlinked text*. If the text communicates agreement with the content linked to, then the hyperlinker should be liable for the defamatory content.

¹⁷ At [50].

¹⁸ *Crookes v Newton* 2011 SCC 47, [2011] 3 SCR 269. See also for example: *Budu v British Broadcasting Corp* [2010] EWHC 616 (QB); and *Kermode v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1263.

¹⁹ At [42]; see discussion in Alastair Mullis and Richard Parkes (eds) *Gateley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [3.34]; and see Matthew Collins *The Law of Defamation and the Internet* (3rd ed, Oxford University Press, Oxford, 2010) at ch 5, F.

²⁰ At [48]; and see at [59] per Deschamps J who, in a separate judgment, said “a more nuanced approach” to internet publication was necessary.

[32] We do not consider we need to reach any more general view about the role of hyperlinking because it is clear that, on the present facts, the Twitter statements are closely connected to the Information Statement. We agree with Courtney J that meaning can be determined on the basis that the two statements would be read as one. We say that because the first of the Twitter statements encouraged the reader to go to the Facebook page. Hence, on Twitter, Mr Murray said, “I’ve fired up a facebook page to drive awareness” and the reader was then given the link to follow. Further, this tweet was followed by a corrected link two minutes later, accompanied only by the text “oops, try this link instead”. Mr Wishart says that clicking on the link on Twitter took readers directly to the Information Statement. That page, as we understand it, is separate and distinct from the page’s “wall” feed where third parties could post comments. The Information Statement was published by Mr Murray. In all these circumstances, it is artificial to say it cannot be assumed the reader would follow the link. Further, given these linkages and the existence of the Facebook page at the time of the publication of the Twitter statements, in this way the requirement for contemporaneity is met.

[33] Mr Nilsson also questions the adequacy of the pleading on this point given Courtney J struck out paragraph 19 which, amongst other matters, pleaded that the Twitter statements took readers directly to the main Facebook page. The sealed judgment records that paragraph 19 was struck out. However Mr Wishart is correct that, in the part of the judgment dealing with this paragraph, Courtney J said other parts of the paragraph were unnecessary and inappropriate but that there was “nothing objectionable about ... pleading that the Twitter statements took readers directly to the main Boycott [Facebook] page”.²¹ There are other pleadings relating to the likelihood of cross-movement between the two sets of statements. Further, in any event, the amended statement of claim contains a pleading that “Because of their integral relationship as teaser headlines”, the Twitter statements must be read “in the context of the publications on the Boycott page”.

[34] If the Information Statement is taken into account, we consider it is not then necessary to also consider knowledge of the Kahui trial as part of the context. In any event, we agree with the Judge that general knowledge of the Kahui criminal trial

²¹ At [125].

can be presumed of the reasonable reader. The relevant principles are stated in this way by Blanchard J in *Hadlee*:²²

- (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
- (b) The reasonable person ... is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.

[35] As this Court said in *Hyams v Peterson*, “[t]he effect of each publication must be considered in the light of the public mind to which each was addressed”.²³

[36] In *Leigh v Attorney-General* this Court considered the availability of pleaded meanings of words in a briefing paper prepared by the then Deputy Secretary for the Environment for the then Minister for the Environment, the Hon Trevor Mallard, to enable Mr Mallard to respond to parliamentary questions.²⁴ The Court treated as context for these purposes the fact that “there was something of a political imbroglio developing in the course of which [the plaintiff] had been critical of the government”.²⁵

[37] Mr Nilsson submits that *Leigh* can be distinguished as it involved a very limited audience and there was a basis for the inference that the relevant audience knew of the context. However, that submission does not address the general notoriety of the Kahui trial, which received considerable media attention. Further, as Mr Wishart points out, the coronial inquiry into the deaths of Chris and Cru Kahui was underway when the Facebook page was set up. Accordingly, were it necessary, we consider it was open to consider knowledge of the trial as part of the context.

[38] We need to now briefly address the availability of the pleaded meanings of other paragraphs relating to the Twitter statements, namely, paragraphs 15(b), 15(e), 15(f) and 15(g).

²² At 625; see also at 630 per Barker J and 635 per Henry J.

²³ *Hyams v Peterson*, above n 4, at 657 per Cooke P; see also *Ballantyne v Television New Zealand Ltd* [1992] 3 NZLR 455 (HC) at 460–462.

²⁴ *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148; see also Ursula Cheer and John Burrows “Defamation” in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 809 at 830.

²⁵ At [27].

[39] In terms of the statement pleaded at paragraph 15(b) (Mr Wishart did this for an improper motive) the Judge found that the words were capable of bearing the ordinary meaning of “improper”, namely, not being in accordance with the accepted standards of conduct.²⁶ Courtney J said that the statements in paragraphs 15(e) and 15(f) (Mr Wishart is an unethical opportunist and an unscrupulous journalist) were directed towards motivation which was “a stated object of the pleaded words”.²⁷ The Judge continued that:²⁸

The natural and ordinary meaning of the words is that Ms King did murder her children and that Mr Wishart was prepared to capitalise on their deaths to sell his books and thereby assist her to make money.

[40] Finally, in relation to the pleaded meaning at paragraph 15(g) (Mr Wishart regularly publishes books with an improper motive), the Judge said that the ordinary, natural meaning of the statements was that there was reason to suspect “Mr Wishart of dubious motives in relation to previous books he has written (the use of ‘once again’)”.²⁹ We agree with this reasoning and have nothing to add.

[41] Before turning to the second cause of action, we deal briefly with the submission that the Judge was wrong to make final findings as to the natural and ordinary meanings pleaded given this was a strike-out application.³⁰ But, as Mr Wishart notes in his submissions, the Judge began her discussion of the issue of whether the statements were capable of bearing the pleaded meanings by observing that it was “for the fact finder ... to determine whether the words sued on bear the defamatory meaning alleged”.³¹ In light of that observation, we do not consider she intended to make a final determination. In any event, Mr Wishart accepted that the Judge’s findings could only be seen as findings that no strike-out was appropriate, leaving the final resolution for trial. We need say no more about this aspect.

²⁶ At [24]. Both paragraphs 15(b) and 15(g) as initially pleaded referred to a corrupt motive but the Judge struck out the references to corruption.

²⁷ At [26].

²⁸ At [26].

²⁹ At [27].

³⁰ At [26]–[27].

³¹ At [7].

The second cause of action: the Facebook statements

[42] The second cause of action is based on a number of statements on Mr Murray's Facebook page. The statement of claim deals with these statements as separate matters and then there is an allegation based on joint meanings. We deal first with the pleadings relating to the Information Statement.

The Information Statement

[43] The relevant part of the statement of claim refers, amongst other matters, to statements that Ms King is about to release a book which will allow her to profit from her "atrocious deeds", the book will not include incriminating material, and Mr Murray is trying to organise a boycott of the book and "all other Ian Wishart books". The surviving meanings pleaded in relation to the Information Statement are as follows:

59. ... the Plaintiff [Mr Wishart]:
- (a) is loathsome for paying a baby murderer for the rights to her story
 - (b) is a failure as a journalist because he did not independently review the evidence
 - (c) is merely a patsy for Ms King's personal view
 - (d) colluded with Ms King to help her make money
 - ...
 - (f) should be shunned and reviled by all New Zealanders because he was allowing Macsyna King to earn money from the book

[44] In challenging the Judge's finding that these meanings are available, Mr Nilsson submits that no fair-minded reader would infer that the Information Statement included a positive allegation that Ms King was the murderer. The appellants rely on the fact that "murderer" has a specific meaning connoting not only responsibility for the death but causing death with the requisite intent. It is further submitted that lesser meanings are available, for example, Ms King failed to prevent the abuse eventually resulting in the death of the twins. Where such meanings are available, relying on *Hadlee*, the submission is that the fair-minded observer will be

deemed to have preferred those lesser meanings than the more extreme meaning pleaded.³²

[45] Finally, Mr Nilsson submits that even if the meanings pleaded as against Ms King are established the meanings pleaded as against Mr Wishart are not tenable. In this context, Mr Nilsson relies on the fact this is a “first-tier” meaning involving allegations of actual wrongdoings of a particularly specific and extreme nature none of which is expressly found in the Information Statement.³³

Our analysis

[46] We agree with the Judge, essentially for the reasons she gave.

[47] As to paragraph 59(a) (Mr Wishart is loathsome for paying a baby murderer for the rights to her story), Courtney J reasoned that when considered overall, the references in the Information Statement to “atrocious deeds” and “incriminat[ion]” could convey that Ms King murdered her sons. The Judge said that the words were “certainly capable of conveying that Mr Wishart was paying Ms King for her story and is loathsome for that reason”.³⁴

[48] In terms of paragraph 59(c) (Mr Wishart is merely a patsy for Ms King’s personal view) Courtney J considered this was an available meaning because the Information Statement was worded to convey that Ms King was exercising greater control of the book with Mr Wishart “taking a back seat in” its production.³⁵

[49] As to the pleaded meaning in paragraph 59(f) (Mr Wishart should be shunned and reviled because he was allowing Ms King to earn money from the book), the Judge said:³⁶

... the strongest and clearest criticism contained in the pleaded words is that Ms King was making money out of the book. Given that Mr Wishart was

³² *Hadlee*, above n 4.

³³ The reference to a tier is to the classification of pleaded meanings often used in the United Kingdom and also referred to as “Chase level” meanings: see *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 11 at [45].

³⁴ At [32].

³⁵ At [34].

³⁶ At [37].

the author and his company the publisher of the book, the natural and ordinary meaning of the words “I am trying to organise a boycott of this book and until such time as it is pulled from the shelves, all other Ian Wishart books and all other books by the publisher” is plainly capable of meaning that Mr Wishart was allowing Ms King to make money from her story.

[50] Courtney J did not give any specific reasons for her conclusion that the asserted meanings in paragraphs 59(b) and 59(d) (Mr Wishart is a failure as a journalist and colluded with Ms King to help her make money) were available. However, her line of reasoning in relation to the other paragraphs applies similarly to these statements.

[51] The factors we emphasise in relation to all of these pleaded meanings are the allegations that Ms King is about to release a book, she has done “atrocious” deeds but the book will omit “incriminat[ing]” material and Ms King should not be able to profit from this enterprise. As Mr Wishart says, while Ms King was one of the objects of these statements, he was the other given his book and his publishing company were in focus. This focus is apparent from the very idea that this book and other books by Mr Wishart should be boycotted. We do not consider it determinative that the pleaded meaning in issue may be classified as a first-tier meaning. As the Supreme Court in *APN New Zealand Ltd v Simunovich Fisheries Ltd* stated, while the classification “provides a convenient general description of different forms of meaning”, some care is needed.³⁷ The Court went on to say:³⁸

Everything depends on the precise words used, and the context in which they are used. The permissible scope of particulars should depend on appropriate matters of principle rather than on which tier of meaning is engaged.

The “McDonald’s” statement

[52] These statements relate to comments that it is said Mr Murray posted on or about 4 July 2011 on Facebook apparently as part of an exchange with Mr Wishart. As Courtney J said, these statements concern an assertion by Mr Murray that, instead of taking the twins directly to hospital, Ms King stopped at McDonald’s for food. The related pleadings in the statement of claim are as follows:

³⁷ *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [16].
³⁸ At [16].

62. On or about 4 July 2011 the First Defendant also published on the Boycott page that Ms King had taken her dying babies to McDonalds, instead of hospital, after being told by a doctor to go to hospital:

Boycott the Macsyna King Book commented on their Wall post.
Boycott the Macsyna King Book wrote:

Why didn't they go straight to hospital?

63. Then a few moments later he wrote:

Boycott the Macsyna King Book commented on their Wall post.
Boycott the Macsyna King Book wrote:

Here's a fact – Macsyna knew the boys had been abused because the Doctor said that they needed to be rushed to the hospital. Instead of following instructions they went and got a Big Mac.

[53] The surviving meanings are:

66. ...

- (e) The Plaintiff's professional work cannot be trusted
- (f) The Plaintiff's work is inferior to that of other journalists who had reported on the case

The appeal

[54] Mr Nilsson submits that the comments pleaded at paragraphs 62 and 63 of the statement of claim are not directed at Mr Wishart and contain no words that can be defamatory of him. Further, it is submitted that the surviving meanings are general in that they are apparently directed at Mr Wishart's whole body of work. By contrast, none of the statements complained of are of this nature, but rather concern a specific incident. The submission is that no reasonable person could extrapolate from the specific comments to Mr Wishart's work in general.

[55] Courtney J concluded that the further statements pleaded regarding the McDonald's statement – "So we should believe your version of events rather than the Court reporting of the time?" and "You have to admit that you backed the wrong horse with this one" – could reasonably lead to the inference being drawn that Mr Wishart is unreliable in his reporting of events. We agree. It is the combined

effect of the two statements that makes the pleaded meanings in paragraphs 66(e) and 66(f) available meanings.

The opportunism statement

[56] In paragraph 70 of the statement of claim, it is pleaded that on or about 28 June 2011, Mr Murray published the following statement on the Facebook page:

Boycott the Macsyna King Book commented on their Wall post.
Boycott the Macsyna King Book wrote:

The issue Ian, is that there has been plenty of opportunities for everybody with an intimate knowledge of the circumstances leading up to the events to have their say in a more formal setting. Sudden revelations made in a straight to paperback book with a smugly smiling yet tragically bereaved mother adorning the cover is at the least incredibly bad taste in opportunism. Poor circumstances and a tragic history is no excuse for the collection of individual moments which lead to the brutal murder of two malnourished infant human beings. Is pulling together the ramblings of an untrustworthy and inhumane family of serial child abusers what passes for literature these days?

[57] The related surviving pleaded meanings are as follows:

72. ...
- (b) The Plaintiff is attempting to financially benefit from Ms King's failure to cooperate with official investigations
 - (c) The Plaintiff is opportunistic and loathsome for publishing the book knowing that Ms King had not cooperated with Police
 - ...
 - (e) The Plaintiff's book is merely ramblings with no proper investigation of the case
 - (f) The Plaintiff's work on the Kahui case is so substandard it has absolutely no value of any kind to any New Zealander
 - (g) The Plaintiff, as a professional investigative journalist, is passing off fiction as fact

The appeal

[58] The first submission is that, applying *Hadlee*, the reference to opportunism or untruthworthiness would be read as concerning Ms King, not Mr Wishart.³⁹ Secondly, the statement does not contain the word “loathsome” or any synonym for that word. That meaning is specific and extreme. Finally, it is submitted that the statement does not contain any express reference to the standard of Mr Wishart’s work as a journalist or it being of “absolutely no value of any kind to any New Zealander”. Again, the submission is that these meanings are specific and extreme and not available on reading the statement in its context.

[59] For the reasons given by the Judge, we agree the pleaded meanings are available. In terms of paragraphs 72(b) and 72(c) (Mr Wishart is attempting to benefit financially from Ms King’s failure to cooperate and is loathsome for publishing the book in these circumstances), as the Judge said, a reasonable person could conclude Mr Wishart “was taking advantage of belated revelations” by Ms King for his financial gain.⁴⁰

[60] On paragraphs 72(e) to 72(g) (the lack of any journalistic or other merit in the book), as Courtney J said, these words were capable of supporting a conclusion that there “was no legitimate and journalistic work involved in producing the book” and that Mr Wishart had simply put together the “ramblings” of unreliable people.⁴¹

[61] Mr Wishart plainly is also a focus of the words. The inference therefore is available that in attempting to benefit financially from Ms King’s lack of cooperation, Mr Wishart is loathsome.

The facts statement

[62] The relevant pleading is that on or about 4 July 2011 the appellants published on the Facebook page a further statement:

Boycott the Macsyna King Book commented on their Wall post. Boycott the Macsyna King Book wrote:

³⁹ *Hadlee*, above n 4.

⁴⁰ At [43].

⁴¹ At [45].

Just because words are written in a book does not make them facts. Especially if those words are taken from the un-sworn testimony of somebody who has many months of contemplation and time to adjust their story to few validated “facts” of the case. We don’t need to justify ourselves to anybody, this is simply a vehicle for a group of people with a similar point of view to share their thoughts.

[63] The surviving meaning is in paragraph 78 and states that Mr Wishart:

- (e) Is an incompetent journalist who forgot to compare Ms King’s interview testimony against her sworn testimony to check for inconsistencies

The appeal

[64] Again, the submission is that the meaning is very specific, extreme and unavailable and cannot reasonably be derived from the express wording of the statements complained of. The further submission is that any *Hadlee* reader would interpret the statement as referring to Ms King’s credibility and not to Mr Wishart’s competence. Rather than suggesting that there were inconsistencies in Ms King’s evidence, it suggests that she had sufficient opportunity to ensure that any later statement she made was consistent with any proven facts of the case.

[65] Courtney J took the view that because the statements were directed “very much” towards the book itself, it was open to a reasonable person reading them to infer that it was Mr Wishart, the book’s author, who was the object of the criticism.⁴² We agree.

Joint meanings

[66] Mr Wishart pleads that, taken together and in addition to the meanings and inferences already alleged, these various Facebook statements would lead to a number of inferences being drawn. The surviving meanings are as follows:

- 80. ...
- (b) The Plaintiff was either lying or incompetent for suggesting the Defendant’s claim was wrong
- (c) In any credibility test against existing media coverage on the Kahui case, the Plaintiff’s journalism is clearly not trustworthy or reliable

⁴² At [53].

- (d) The McDonalds visit story is yet more evidence that The Plaintiff's work on the Kahui case is substandard and worthy of ridicule
- (e) The Plaintiff's book had no journalistic value and should be shunned by all right-thinking people
- (f) The Plaintiff's book contained no new evidence
- (g) The Plaintiff's book contained no facts
- (h) The Plaintiff fabricated material or fictionalised material and passed it off in the book as fact.
- (i) The Plaintiff has written a tissue of lies in the book
- (j) The Plaintiff is morally bankrupt for allowing a double child murderer to make money from her crimes
- (k) The Plaintiff is repulsive for so doing
- (l) The Plaintiff's work on the book is so bad no one could get any worthwhile information from it

[67] In addition, it is pleaded that:

- 81. Taken in the context and with the gloss of the false claims made on the Boycott Page Info statement, the Defendants' statements allow readers to draw inferences that:
 - (a) The Plaintiff is a worthless author and journalist because his version of events conflicts with previous media reports
 - (b) The Plaintiff is a figure of ridicule as he can't even get the story straight and no weight should be given to his book
 - (c) The Plaintiff conspired with Ms King to produce a badly-researched book that would make them both a lot of money.
 - (d) The Plaintiff fabricated or fictionalised material and passed it off in the book as fact.

The appeal

[68] The submission in relation to this pleading is that it cannot be sustained for four reasons. First, the pleading builds on the separate statements complained of being capable of bearing their pleaded meanings and the submission is that they are not. Secondly, all of the statements complained of apart from the Information Statement are "comments" posted on the Facebook page. Thirdly, because of the volume of comments on this particular site, it was hard for any single person to review all historic comments particularly due to the "auto update" function of the website. The submission is that there can be no presumption that any particular

visitor to the website read all of the statements complained of. Finally, it is submitted that the statements are also not alleged to have been contemporaneous and they range from between 28 June and 4 July 2011.

[69] In short, the submission is that the statements lack the “intimate connection” required for them to be read as one.

[70] The Judge does not give any particular explanation as to why in her judgment these allegations are capable of bearing the alleged meanings. However, it follows from the approach we take that the statements are sufficiently connected to be read as one. We add that, as we understand it, although some of these statements are “comments” posted on the Facebook page, the allegation is that they were made by Mr Murray.

The third cause of action – the Radio Live statements

[71] Mr Murray was interviewed on Radio Live’s evening show on the evening of 29 June 2011. It is pleaded that when asked about whether there was a legitimate argument that Mr Wishart had been able to obtain Ms King’s confidence and could in that way address the issue of child abuse, Mr Murray said:

... if that’s the case we might as well just do away with the entire criminal justice system and just get Ian Wishart to function as judge, jury and executioner for all major trials. How can he get more information out of her than a two week long coroner’s inquest, a 70 or 80 man police special task force then a three week long trial.

[72] The surviving pleaded meanings are as follows:

108. ...

- (a) The Plaintiff has no ability or experience in interviewing or investigating crimes and suspects
- (b) The Plaintiff is therefore ... grossly exaggerating when he says his book sheds new light on the Kahui case

[73] The appellants advance three reasons why these pleaded meanings are not available. First, while Mr Wishart is referred to, the statement is more general and focuses on the differences in function between journalists and judicial officers.

Secondly, the statement is not directed toward Mr Wishart's competence. Finally, there is no express allegation of any lack of credibility or experience.

[74] The Judge took the view that there was an equally available inference, namely, that the specific reference to Mr Wishart allows the inference to be drawn that Mr Murray is directing his comment specifically towards Mr Wishart "conveying that he could not obtain more worthwhile information from Ms King than the Police and coroner have obtained".⁴³ We agree. The Judge also considered that it was possible to draw the inference that Mr Wishart was exaggerating in his claim that the book sheds new light on the Kahui case.⁴⁴ Again, we agree.

The fourth cause of action – the Kerri Murray statement

[75] Mrs Murray posted a comment on the Facebook page on 28 June 2011 as follows:

If she is such a good mother why did she not pick up that one of her babies had a broken femur for three weeks, she makes me sick and is a disgrace to the human race. How she got away with it all is just unbelievable and for you to make her into a victim Ian Wishart is repulsive.

[76] The remaining pleaded meanings are as follows:

141. ...

- (d) The Plaintiff's investigative journalism on the Kahui case had no merit
- (e) Macsyna King murdered her baby twins, and The Plaintiff is "repulsive" and a person to be shunned and ridiculed for suggesting otherwise

[77] In addition, paragraph 142 avers as follows:

- (a) The Plaintiff paid a child murderer for her story solely so that he could enrich himself
- (b) The Plaintiff was a "repulsive" individual for doing this

⁴³ At [62].

⁴⁴ At [63].

The approach in the High Court

[78] The Judge took the view the pleaded meaning in paragraph 141(d) (lack of merit in Mr Wishart’s journalism) was open and the words were not to be “viewed as literary criticism” given the book had not yet been published and Mrs Murray had not read it.⁴⁵ Courtney J said of paragraph 141(e) (Mr Wishart is “repulsive” and to be ridiculed) that “a reasonable reader could infer from Mrs Murray’s statement that Mr Wishart and/or his actions in portraying Ms King in the way he did were repulsive”.⁴⁶ The Judge made no finding about paragraph 142.

The appeal

[79] Two submissions are made. First, it is said that the observation is not directed at Mr Wishart’s competence. Rather, it is focused on Ms King’s qualities as a mother regardless of her involvement in the murder. Secondly, the appellants contend there is no allegation Ms King is guilty of the twins’ murder. Nor, on the same basis as we have discussed above, can it be read to include such an allegation by reference to the Information Statement.

[80] As with a number of the other remaining available meanings, these statements focus on both Ms King and Mr Wishart. In these circumstances, we consider the inference is available that Mr Wishart’s competence (paragraph 141(d)) is in issue. We agree with the Judge for the reason she gave that the meaning in paragraph 141(e) is also available. On our approach, the statement could also be read alongside the Information Statement. Similar reasoning applies to paragraph 142.

Third party statements: is Mr Murray a publisher?

The test applied by the Judge

[81] This aspect of the appeal is focused on the finding made by Courtney J that it was arguable Mr Murray was a publisher of third party statements on the Facebook page. The key aspect of this finding was the test that Courtney J applied:

⁴⁵ At [75] and see at [67].

⁴⁶ At [76].

[117] Those who host Facebook pages or similar are not passive instruments or mere conduits of content posted on their Facebook page. They will [be] regarded as publishers of postings made by anonymous users in two circumstances. The first is if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it. A request by the person affected is not necessary. The second is where they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory.

[82] For convenience, we will call the first of these tests the “actual knowledge” test and the second the “ought to know” test.

The appellants’ case

[83] Mr Nilsson for Mr Murray, and Mr Rennie for DDNZ both argued that the ought to know test proposed by Courtney J was wrong. They argued a finding that a person is a publisher of a statement appearing on a Facebook page in circumstances where he or she did not know the statement had been posted, but ought to have known, was inconsistent with the nature of the tort of defamation as an intentional tort. They argued that, applying by analogy case law from other situations involving third party defamatory statements, the actual knowledge test should be the only test for publication in these circumstances.

How the Facebook page worked

[84] An analysis of the positions taken by the parties requires a careful consideration of exactly what happened in relation to the Facebook page and on what basis it is pleaded that Mr Murray became the publisher of the statements made by third parties on the Facebook page. Although Courtney J described those posting messages on the Facebook page as “anonymous users”,⁴⁷ that was not correct on the evidence. In fact, most of the users who posted allegedly defamatory statements identified themselves by name, are named in the statement of claim and could be traced by Mr Wishart if he wished to take action against them.⁴⁸ So his action against Mr Murray is not the only potential avenue for redress available to him,

⁴⁷ At [77] and [121].

⁴⁸ Mr Wishart told us he had tried to trace some of the third parties who had posted comments without success. He said some appeared to use false names. As counsel for DDNZ pointed out, it may have been possible to serve proceedings on the third parties through Facebook: *Axe Market Gardens Ltd v Axe* HC Wellington CIV-2008-485-2676, 16 March 2009.

though it was obviously more practical to sue Mr Murray for all the offending comments rather than sue many of those commenting for their respective comments.

[85] It is necessary to consider some further factual detail to analyse Courtney J's key conclusion.

[86] Mr Murray described his involvement in the Facebook page in an affidavit, the relevant excerpts of which are set out in Courtney J's judgment.⁴⁹ We reproduce those excerpts here:

4. While I created the Facebook page, the site is not mine as such. Facebook offers users the ability to create pages, but retains ownership of the server space and ultimate control over the contents. Content on these pages is published using Facebook processes.
5. Comments can be posted on Facebook pages by other Facebook users. The creator of any individual Facebook page is unable to exercise meaningful editorial control over comments before they are posted. That is, there is no function on Facebook by which a site creator can vet comments before they are published.
6. It is correct, however, that a creator of a Facebook page has some control over comments published on the page as he/she can, once aware of comments published, retrospectively remove individual comments and block specific Facebook users to prevent them from publishing further comments.
7. It should be noted, however, that a block on a user functions only in respect of the relevant Facebook account. It cannot prevent the relevant individual from establishing a new Facebook account and post[ing] further comments.
8. Contrary to the plaintiff's allegations I did at no point encourage, invite or consent to, abusive, threatening or defamatory comments being posted on the site and I did take steps to moderate any such comments that I became aware of.
9. The information section included my Twitter account to allow people to contact me. Once it became apparent that some comments posted were abusive I posted comments on the site myself asking that viewers report such comments to me via the Twitter account so that I could block the relevant users. I received around ten reports that way and acted on all of them.
10. I also regularly visited the site, read comments published on it and blocked users who posted abusive or clearly defamatory comments. All in all, I banned 50 users from the page so as to moderate abusive comments.

⁴⁹ At [80].

11. The site attracted some 250,000 comments in total, which was far more than I ever expected. As a result, it was increasingly difficult to review them all and remove all potentially abusive or defamatory comments. Facebook also uses an auto-update function. This means that the site is constantly updated with new comments while you view it, which refreshes the screen in a way that makes it very time consuming and difficult to keep track of existing comments when they are so frequently being supplemented. Given the number of comments and the speed with which they were posted, this made it slow and difficult to review historic comments and block relevant users.
12. I finally took the site off line on or around 13 August 2011.

High Court approach

[87] Courtney J considered it clear that Mr Murray could exercise considerable control over whether comments remained on the page, although he could not control comments being posted initially.⁵⁰

[88] Courtney J emphasised that, on his own evidence, Mr Murray not only could, but did, take frequent and active steps to remove postings that he considered defamatory or otherwise inappropriate, and also blocked particular individuals whose views he considered unacceptable. She found that he could not, therefore, be perceived as a “passive instrument”.⁵¹ She noted that, although Mr Murray described the difficulties presented by the “auto update” function on the Facebook page, he did not suggest that it prevented him from culling abusive or inappropriate postings but merely that it made the process slower and more difficult.

[89] Courtney J also attached significance to two other factors. The first was that Mr Murray blocked Mr Wishart and his supporters from the Facebook page, which made it more difficult for Mr Wishart to identify and complain about potentially defamatory material. This was obviously relevant to the question as to whether Mr Murray ought to have known of defamatory postings. The second was Mr Wishart’s claim that he warned Mr Murray about the defamatory postings. Courtney J said this was a disputed fact, but there had been at least some dialogue between Mr Wishart and Mr Murray and possibly between Mr Wishart and some of those who posted material on the site, as Mr Murray may have known. This would

⁵⁰ At [118].

⁵¹ Ibid.

also be relevant to whether Mr Murray should have known that defamatory postings had been made.⁵²

[90] In light of all this, Courtney J found that Mr Wishart's allegation that Mr Murray was a publisher of the statements made by those posting comments on the Facebook page was tenable. She noted that Mr Murray may be able to avail himself of the innocent dissemination defence, but even if that were so it would not be appropriate to strike out the statement of claim.⁵³

[91] As can be seen from this brief summary, the finding that Mr Murray ought to have known of the third party statements was a very important part of the finding made by Courtney J that the claim Mr Murray was a publisher of the third party statements was tenable. That is why the ought to know test was such an important part of the appeal before us. If it was necessary that Mr Murray actually knew of the defamatory postings and failed to remove them within a reasonable time, then, Mr Nilsson and Mr Rennie submit, there is no tenable pleading that Mr Murray was a publisher.

[92] We will therefore evaluate the correctness or otherwise of the ought to know test, before considering the pleadings.

Emmens v Pottle

[93] In the High Court, the argument on behalf of Mr Murray was, as it was in this Court, that he could not be the publisher of third party statements on the Facebook page unless the requirements of the actual knowledge test were met.

[94] Courtney J began her analysis of this argument with reference to *Emmens v Pottle*.⁵⁴ That case concerned a claim for defamation against news vendors who had sold copies of a magazine containing a defamatory statement about the appellant. Lord Esher MR said that the defendants were prima facie liable (this appears to be a

⁵² At [120]–[121].

⁵³ At [122].

⁵⁴ *Emmens v Pottle* (1885) 16 QBD 354 (CA).

reference to the fact that, by their distribution of the paper, they had published the defamatory comment). But he added.⁵⁵

I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel.

...

But the defendants did not compose the libel on the plaintiff. They did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care – the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel.

[95] Courtney J cited this passage and made the following deduction from it:

[83] This statement makes it clear that the absence of actual knowledge does not prevent a person who, prima facie, publishes a defamatory statement from being liable; there must also be no reason to think it likely that the material being published contains such a statement. The issue in this case is how this general principle is to be applied to the host of a Facebook page.

(footnote omitted)

[96] Both Mr Nilsson and Mr Rennie argued that the Judge had misinterpreted the ratio of *Emmens v Pottle*. They argued that *Emmens v Pottle* was really a case about the defence of innocent dissemination, now contained in s 21 of the Defamation Act. Lord Esher's remarks were somewhat ambiguous as to whether he was assessing whether the news vendors were publishers or whether he was assessing the availability of the innocent dissemination defence to them on the basis that they were publishers. But we think the better view is that the case is about innocent dissemination and therefore is not authority for the proposition that a person may be

⁵⁵ At 357.

found to have published a defamatory statement on the ground that they ought to have known of its existence.

[97] It appears to have been common ground in *Emmens v Pottle* that the news vendor was a publisher. That did not depend on actual knowledge or an “ought to know” test, but on the fact that the actions of the news vendor had caused the further publication of the defamatory statement that had been published in the paper by the owner of the paper.

[98] This is an important difference between the view of Courtney J and our view, because her statement of the law at [83] of her judgment, based on *Emmens v Pottle* (and reproduced above) is a central aspect of her reasoning. In particular:

- (a) It led her to reject the analysis of the Law Commission in its 1999 report “Electronic Commerce Part 2”, in which it recommended that internet service providers (ISPs) who could be described as “mixed providers” (an ISP that provides content (such as a news service) as well as access to the internet) should be liable for defamatory comments only if they had actual knowledge of them.⁵⁶ The Law Commission’s recommendation was based on a Californian case, *Heller v Bianco*, in which the Court found that the owner of a tavern who had been informed of a defamatory statement on the wall of the bathroom of the tavern and had failed to remove it within a reasonable time should be liable for defamation on the basis that the failure to remove the defamatory statement amounted to a republication of it.⁵⁷ In other words, the Law Commission proposed that the actual knowledge test be applied in that situation. Courtney J considered that the Law Commission conclusion was incorrect because of its failure to address *Emmens v Pottle*.

⁵⁶ Law Commission *Electronic Commerce Part 2: A basic legal framework* (NZLC R58, 1999) at [252].

⁵⁷ *Heller v Bianco* 244 P 2d 757 (Cal Dist Ct App 1952).

- (b) It also led Courtney J to reject a number of cases which had been cited to her by Mr Murray's then counsel which were consistent with the actual knowledge test. We will consider these cases ourselves. However, in doing so, we emphasise the need to address the particular facts before the Court: the mere fact that a publication occurs on the internet does not provide a basis for some generalised rule as to the definition of a publisher. The position of an ISP, for example, is materially different from that of the person who creates a Facebook page, as Mr Murray did here.

Our analysis

[99] The analysis of the cases requires the Court to apply reasoning by strained analogy, because the old cases do not, of course, deal with publication on the internet. There is a question of the extent to which these analogies are helpful. However, we will consider the existing case law, bearing in mind that the old cases are concerned with starkly different facts.

Byrne v Deane

[100] *Byrne v Deane* concerned an anonymous notice posted on the wall of a golf club containing an allegedly defamatory statement against Mr Byrne.⁵⁸ The rules of the club provided that no notices should be posted without the consent of the club's secretary. The defendants, who were the proprietors and secretary of the club, had seen the notice but had not removed it. The England and Wales Court of Appeal, by a majority, found that the defendants were responsible for the publication of the notice because, having power to remove the notice, they had refrained from doing so.⁵⁹ This founded an inference that they had made themselves responsible for the continued presence of the defamatory notice on the wall.

[101] Although knowledge of the presence of the notice on the wall was not specifically referred to as part of the ratio of the decision, it is clear that the inference of publication by adoption of the defamatory statement could not be drawn unless

⁵⁸ *Byrne v Deane* [1937] 1 KB 818 (CA).
⁵⁹ At 829–830, 835 and 838.

the defendants had known that the notice was on the wall. So *Byrne v Deane* is consistent with the actual knowledge test.

Urbanchich v Drummoyne Municipal Council

[102] In *Urbanchich v Drummoyne Municipal Council*, the claim for defamation related to posters containing defamatory material that were glued to bus shelters under the control of the defendants.⁶⁰ The defendant was told about the posters and asked to remove them, but delayed in doing so.

[103] Hunt J considered that in order for the defendant to be responsible for the publication of the defamatory statements contained on the posters, it must be established that the defendant had more than mere knowledge of the existence of the defamatory statements and had the opportunity to remove the posters. Rather it must be shown that the defendant consented to, approved of, adopted, promoted, or in some way ratified, the continued presence of the statements on its property. Put another way, the plaintiff must establish an acceptance by the defendant of a responsibility for the continued publication of the statements.

[104] Hunt J considered that proof the defendant knew of the defamatory statements, had the ability to remove them and failed to do so within a reasonable period after the request to remove it was made could found an inference that the defendant had accepted responsibility for the continued publication of the statements. That was a matter for the jury.

Sadiq v Baycorp (NZ) Ltd

[105] In *Sadiq v Baycorp (NZ) Ltd*, the allegedly defamatory statements appeared on the website of a debt collection firm, and related to the alleged lack of credit worthiness of the plaintiff.⁶¹ The material had been placed on the website by the previous owner of the debt collection business. Associate Judge Doogue considered that the plaintiff would need to prove that the defendant had actual knowledge of the presence of the material on the website in order for an inference to be drawn that it

⁶⁰ *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports ¶81-127 (NSWSC).

⁶¹ *Sadiq v Baycorp (NZ) Ltd* HC Auckland CIV-2007-404-6421, 31 March 2008.

had taken responsibility.⁶² On the facts of the case he thought this would involve evidence that some human agent of the defendant was aware of the presence of the statement on the website and nonetheless took no steps to remove it.⁶³

[106] Courtney J considered that this approach was inconsistent with *Emmens v Pottle* and that the website owner should have been viewed as a publisher, with liability then depending on its ability to rely on the innocent dissemination defence.⁶⁴

[107] This is another illustration of the significance of the analysis of *Emmens v Pottle* on the High Court Judge's decision in the present case. We see *Sadiq* as being consistent with both *Byrne v Deane* and *Urbanchich*.

[108] *Sadiq* was followed by Associate Judge Abbott in *A v Google New Zealand Ltd*.⁶⁵

United States cases

[109] Courtney J also considered a number of United States cases. The first was *Heller v Bianco* to which we have already referred.⁶⁶

[110] In *Scott v Hull*, a building owner and agent responsible for maintenance were held not to be liable for defamatory graffiti inscribed on the exterior of a building.⁶⁷ The Court held that, although liability could be founded on the defendant's ratification of a publication by another, failure to remove the material, even when asked, was not actionable because the viewing of it by the public was not the result of any positive act. *Heller* was distinguished on the basis that, in that case, the public had been invited into the tavern, which constituted a positive act on which liability might be founded. There was no such positive act in *Scott v Hull*.

[111] Later United States cases took a different approach, focusing on the degree of editorial control over the content appearing on an internet service. In *Cubby Inc v*

⁶² At [49].

⁶³ At [54].

⁶⁴ At [90].

⁶⁵ *A v Google New Zealand Ltd* [2012] NZHC 2352.

⁶⁶ Above at [98](a); *Heller v Bianco*, above n 57.

⁶⁷ *Scott v Hull* 259 NE 2d 160 (Ohio Ct App 1970).

Compuserve Inc, the defamation action related to a statement made in an online newsletter.⁶⁸ In that case Compuserve provided an online information service which allowed subscribers to access bulletin boards, interactive online conferences and topical databases. It contracted out the management of the site to a third party, and that third party had the power to review, delete, edit and generally control content. The third party engaged an independent contractor to provide the newsletter in which the allegedly defamatory statement appeared.

[112] The Court found that as the defendant had no greater editorial control over what was published in the newsletter than a public library or a bookstore and was the “functional” equivalent of a traditional news vendor, it was not a publisher.⁶⁹

[113] As Courtney J pointed out, this can be contrasted with *Emmens v Pottle*, under which a library, bookstore or news vendor would be a publisher, but with recourse to the innocent dissemination defence.⁷⁰ A similar approach was taken in *Stratton Oakmont Inc v Prodigy Services Co*, but in that case the defendant was found to be a publisher because Prodigy had content guidelines and removed material that it considered to not meet its policy that content should reflect family values.⁷¹

[114] As the Law Commission identified in its report, this had the rather odd outcome that a party attempting to exercise some control over the content on its site was more likely to be a publisher than a party that did not exercise such control. The Law Commission rejected the “degree of editorial control” approach for that reason.⁷²

English cases

[115] Courtney J also traversed a number of cases from England and Wales, in addition to those discussed above.

⁶⁸ *Cubby Inc v Compuserve Inc* 776 F Supp 135 (SD NY 1991) at 137–144.

⁶⁹ At 140–141.

⁷⁰ At [97].

⁷¹ *Stratton Oakmont Inc v Prodigy Services Co* 23 Media L Rep (BNA) 1794 (NY Sup Ct May 24, 1995).

⁷² Law Commission, above n 56, at [250].

[116] *Bunt v Tilley* dealt with the position of ISPs, in circumstances where the ISP was considered to be a “passive medium”.⁷³ We agree with Courtney J that the same cannot be said for the Facebook page in this case.

[117] *Metropolitan International Schools Ltd v Designtecnica Corporation* concerned a defamatory statement appearing as a snippet as a result of a Google search.⁷⁴ The Court found that Google, as operator of the search engine was not a publisher as there was no human input into the selection of search results. This was so, even after Google was notified of the availability of the statement when a certain search was undertaken.

[118] *Godfrey v Demon Internet Ltd* concerned an allegedly defamatory statement in a posting on an online bulletin board provided by a news provider that could be accessed by subscribers to Demon’s internet service.⁷⁵ Demon was asked to remove the statement and did not do so, which meant it remained accessible for a further 10 days. Demon’s argument that it was not a publisher in terms of the relevant United Kingdom statute failed, but it should be noted the claim concerned only the period after Demon had been notified of the statement and failed to remove it. However, the Judge equated Demon’s position to that of a bookseller or library at common law.⁷⁶

[119] *Davison v Habeeb* involved an allegedly defamatory statement in a blog hosted by Blogger.com, a service provided by Google.⁷⁷ The Judge equated Blogger.com to a giant notice board and suggested that it would not be regarded as a publisher of a statement posted on the site:⁷⁸

... until (at the earliest) it has been notified that it is carrying defamatory material so that, by not taking it down, it can fairly be taken to have consented to and participated in publication by the primary publisher.

[120] He acknowledged the wider approach in *Godfrey v Demon Internet Ltd* as an alternative view. However, he rejected the wider approach and concluded that,

⁷³ *Bunt v Tilley* [2007] 1 WLR 1243 (QB).

⁷⁴ *Metropolitan International Schools Ltd v Designtecnica Corp* [2011] 1 WLR 1743 (QB).

⁷⁵ *Godfrey v Demon Internet Ltd* [2001] QB 201 (QB).

⁷⁶ At 209.

⁷⁷ *Davison v Habeeb* [2011] EWHC 3031 (QB).

⁷⁸ At [38].

whether Google was a publisher or mere facilitator, its potential liability depended on a “mental element”.⁷⁹ Notification was, the Judge said, “plainly of cardinal importance”.⁸⁰ Mr Rennie urged us to adopt the same approach in the present case.

[121] The notice board analogy was also adopted in *Tamiz v Google Inc*, a recent decision of the England and Wales Court of Appeal.⁸¹ That case also concerned allegedly defamatory comments on a blog hosted by Google’s Blogger.com service. The Court of Appeal considered that Google was not a publisher. It referred to a long line of authority that a person involved only in dissemination is not treated as a publisher “unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory”, citing, among other cases, *Emmens v Pottle*.⁸² It found Google was not a publisher under this test for the period before it was notified of the claimant’s complaint. After notification, if Google allowed the defamatory material to remain on the site after a reasonable time to remove it had elapsed it was arguable that it could be inferred it had associated itself with or made itself responsible for the material and thereby become a publisher of it.⁸³

[122] Not surprisingly, the appellant and DDNZ emphasised the post-notification analysis, while Mr Wishart emphasised the test applied in the pre-notification situation which includes the ought to know test.

Trkulja v Google Inc LLC (No 5)

[123] We were also referred to a recent decision of the Supreme Court of Victoria involving defamatory material relating to the plaintiff emerging from a Google search: *Trkulja v Google Inc LLC (No 5)*.⁸⁴ In that case, a jury had found Google was a publisher of the material and Google challenged this under leave reserved by the trial Judge. Beach J found it was open to the jury to find Google was a publisher in the period before it was notified of the offending material. This was because the jury could conclude Google intended to publish the material that its automated

⁷⁹ At [42].

⁸⁰ Ibid.

⁸¹ *Tamiz v Google Inc* [2013] EWCA Civ 68, [2013] 1 WLR 2151.

⁸² Ibid, at [26].

⁸³ At [34].

⁸⁴ *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533.

search engine produced because that is what the search engine was designed to do.⁸⁵ He said Google was like a newsagent that sells a newspaper containing a defamatory article (which is, of course, the fact situation of *Emmens v Pottle*).

Oriental Press Group Ltd v Fevaworks Solutions Ltd

[124] The Court of Final Appeal of Hong Kong has, since the date of the decision under appeal, considered whether a host of an internet discussion forum is a publisher of defamatory statements posted by users of the forum.⁸⁶ The main focus of the decision was on the availability of the innocent dissemination defence, but the Court also considered whether the forum host was a publisher. It rejected the analogy with the notice board or graffiti cases, because in those cases the person posting or writing the defamatory comment was a trespasser.⁸⁷ Since the forum host played an active role in encouraging and facilitating the postings on its forum, they were participants in the publication of postings by forum users and thus publishers.⁸⁸

Application to the present facts

[125] As already noted above, we see the authorities evaluated by Courtney J and cited to us as providing limited guidance because we think it is important to focus on the particular factual situation before the Court.⁸⁹ Our analysis of the authorities shows how sensitive the outcome can be to the particular circumstances of the publication. The fact that many of the authorities relate to publication in one form or another on the internet does not provide any form of common theme, because of the different roles taken by the alleged publisher in each case.

[126] Many of the decisions show an effort by the relevant Court to reach a conclusion by reference to an analogy in a non-internet circumstance. We agree that is a helpful form of reasoning, but it must be acknowledged that the analogies are

⁸⁵ At [18].

⁸⁶ *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKCFA 47.

⁸⁷ At [50]–[54].

⁸⁸ The Court determined the host was a subordinate publisher and could invoke the innocent dissemination defence.

⁸⁹ A point also made by Beach J of the Supreme Court of Victoria in *Trkulja v Google Inc LLC*, above n 84, at [87], echoing similar comments in *Bunt v Tilley*, above n 73; *Metropolitan International Schools Ltd v Designtecnica Corp*, above n 74, and *Tamiz v Google Inc*, above n 81.

only analogies, and there is room for debate about their appropriateness in particular cases. In the present case we were asked to treat the publication of the third party statements on Facebook as analogous with:

- (a) the posting of a notice on a notice board (or a wall on which notices can be affixed) without the knowledge of the owner of the notice board/wall;
- (b) the writing of a defamatory statement on a wall of a building without the knowledge of the building owner; and/or
- (c) a defamatory comment made at a public meeting without the prior knowledge or subsequent endorsement or adoption by the organiser of the meeting.

[127] As we have already noted, Courtney J placed particular weight on the decision in *Emmens v Pottle* as establishing that a party can be a publisher even if they did not know of the defamatory material. We accept the submission made by the appellants and DDNZ that the aspect of the judgment on which Courtney J relied was an analysis of the availability of the innocent dissemination defence.⁹⁰ Nevertheless, *Emmens v Pottle* is authority for the proposition that a news vendor who does not know of the defamatory statement in a paper he or she sells is a publisher, and must rely on the innocent dissemination defence to avoid liability. So a decision that the host of a Facebook page could be liable for statements appearing on the page of which he or she is not aware would not necessarily be an unprecedented situation.

[128] We do not see the situation of the news vendor in *Emmens v Pottle* as a particularly apposite analogy with the host of the Facebook page in the present case, however. The news vendor is a publisher only because of the role taken in distributing the primary vehicle of publication, the newspaper itself. This contrasts with the host of a Facebook page which is providing the actual medium of publication, and whose role in the publication is completed before publication

⁹⁰ Reproduced above at [94].

occurs. This is because the action of the host allegedly amounting to infringement is the setting up of the Facebook page, an act which occurs before third party comments are posted.

[129] We see that as more closely analogous to the notice on the wall situation described in *Byrne v Deane*. We acknowledge that this analogy is not perfect either. The Court of Final Appeal of Hong Kong rejected it in *Oriental Press Group Ltd* on the ground that posting a notice on the wall in *Byrne v Deane* was a breach of the rules of the club and therefore amounted to a trespass.⁹¹ In contrast to that, posting a message on a Facebook page in response to an invitation to do so is a lawful activity and, indeed, solicited by the host. We do not consider the fact that the posting of a notice on the wall in *Byrne v Deane* was a breach of the club's rules was a factor affecting the outcome in that case. The decisive factor was that the club and its owners had not posted the defamatory notice and, until they became aware of it, were in no position to prevent or bring to an end the publication of the defamatory message. If a case arose where the defamatory message was posted on a community notice board on which postings were welcomed from anyone, the same analysis would apply.

[130] Another difference between *Byrne v Deane* and the present case is that there was no way of identifying the person who posted the notice in *Byrne v Deane*: it was truly an anonymous post. That is not the case here: as noted above at [84] many posters identified themselves by name (and are identified by name in the statement of claim). Presumably, they could be sued separately with some effort to track them down. So this is not a case where the Facebook page host (the analogue of the notice board provider) is the only potential defendant.

[131] We do not see the graffiti analogy as particularly helpful. The same trespass point, referred to at [129] above, can be made about a person who writes a defamatory message on a wall as graffiti. The owner of the wall on which the graffiti is written is not intending that the wall be used for posting messages, as the owner of the golf club wall in *Byrne v Deane* was (the rules specifically provided for this, subject to conditions) and a Facebook page host is.

⁹¹ *Byrne v Deane*, above n 58, at 837.

[132] Mr Rennie argued that the most appropriate analogy in the present case is that of a public meeting. If Mr Murray had convened a public meeting on the subject of Mr Wishart's book, Mr Murray would have been liable for his own statements at the meeting but not for those of others who spoke at the meeting, unless he adopted others' statements himself. We agree that this is a useful analogy because it incorporates a factor in the present case that neither of the other two analogies do: the fact that Mr Murray solicited third party comments about Mr Wishart's book. Speakers at a public meeting could be identified (and sued) if they made defamatory statements just as many contributors to the Facebook page could be. That is another common factor.

[133] We acknowledge there are obvious differences between the present case and a public meeting. For example, statements at a meeting would be oral and therefore ephemeral unlike the written comments on the Facebook page.

[134] The public meeting analogy does illustrate a situation where even if a person incites defamation, he or she will not necessarily be liable for defamatory statements made by others. That is the case even if he or she ought to have known that defamatory comments could be made by those present at the meeting.

[135] It is clear from the pleadings in the present case that Mr Murray's incitement of the comments on the Facebook page is a major bone of contention for Mr Wishart. It may be that any reform of the law in this area should include consideration of whether inciting defamation should be a separate test. But that is not an issue before us.

Our concerns about the ought to know test

[136] Having determined that there is no precedent requiring us to adopt the ought to know test, we now turn our attention to the desirability of doing so. We have a number of concerns about applying the ought to know test to the host of a Facebook page.

[137] The first concern is that, as Mr Rennie submitted, the ought to know test puts a Facebook page host who does not know of a defamatory comment on the page in a

worse position than a host who actually does know. The latter will not be a publisher of the comment until a reasonable time for its removal has elapsed (and will not be a publisher at all if he or she removes it in that time). The former will be a publisher from the moment the comment is posted and unable to avoid that consequence by removing the comment from the Facebook page.

[138] The situation will be more complicated when a Facebook page host who ought to know of a defamatory comment on the page actually becomes aware of the comment. On the actual knowledge test, he or she can avoid being a publisher by removing the comment in a reasonable time. But removal of the comment in a reasonable time after becoming aware of it will not avail him or her if, before becoming aware of the comment, he or she ought to have known about it, because on the ought to know test he or she is a publisher as soon as the comment is posted. This seems to us to make the test very difficult to apply.

[139] The second concern is that the ought to know test makes the Facebook page host liable on a strict liability basis, solely on the basis of the existence of a defamatory comment. Once the comment exists, he or she cannot do anything to avoid being treated as its publisher.

[140] It can be argued that the ought to know test is not entirely a strict liability one, because it applies only where the circumstances are such that the host should reasonably anticipate the posting of a defamatory statement. That is akin to making the host liable for the defamatory comment because he or she has been negligent in not taking steps to prevent the defamatory comment being made. Imposing liability for damage to someone's reputation on the basis of negligence rather than an intentional act is contrary to the well-understood nature of the tort of defamation as an intentional tort.⁹²

[141] The third concern arises from s 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights). Defining the boundaries in this area of the law must be done with proper regard to the need to balance the right of freedom of expression affirmed in s 14 against the interests of a person whose reputation is damaged by another. In

⁹² *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA) at 155–156.

our view the imposition of the ought to know test in relation to a Facebook page host gives undue preference to the latter over the former.

[142] The fourth concern is that the ought to know test is uncertain in its application. Given the widespread use of Facebook, it is desirable that the law defines the boundaries with clarity and in a manner that Facebook page hosts can regulate their activities to avoid unanticipated risk.

[143] The fifth concern is that the innocent dissemination defence provided for in s 21 of the Defamation Act would be difficult to apply to a Facebook page host, because the language of the section and the defined terms used in it are all aimed at old media and appear to be inapplicable to internet publishers. This problem was highlighted by the Law Commission, which recommended that the defence be extended to ISPs.⁹³ That has not been done and, in any event, a Facebook page host is not an ISP and so would not benefit from such a change even if it were made. This can be contrasted with the law of Hong Kong, as described in the *Oriental Press Group Ltd* case.⁹⁴ There, the host of the internet discussion forum was found to be a publisher, but was able to invoke the common law innocent dissemination defence. The unavailability of the defence is a factor in favour of limiting the scope of the concept of “publisher” in the present factual context.

[144] These concerns lead us to conclude that the actual knowledge test should be the only test to determine whether a Facebook page host is a publisher. That is consistent with at least some of the authorities to which we have referred, (*Sadiq v Baycorp (NZ) Ltd*,⁹⁵ *A v Google New Zealand Ltd*⁹⁶ and *Davison v Habeeb*⁹⁷) and with the Law Commission’s analysis.⁹⁸ It conforms with the approach in *Byrne v Deane*, which is, we believe, the most appropriate analogy and with the decision in *Urbanchich v Drummoyne Municipal Council*. It makes the liability risk of a Facebook page host no greater than that of an organiser of a public meeting – another appropriate analogy, in our view. It is consistent with the right of freedom

⁹³ Law Commission, above n 56, at [269]–[270].

⁹⁴ *Oriental Press Group Ltd*, above n 86.

⁹⁵ *Sadiq v Baycorp (NZ) Ltd*, above n 61.

⁹⁶ *A v Google New Zealand Ltd*, above n 65.

⁹⁷ *Davison v Habeeb*, above n 77.

⁹⁸ Law Commission, above n 56.

expression in the Bill of Rights, bearing in mind the unavailability of the innocent dissemination defence. And it provides a situation where liability for defamation is not imposed on the basis of negligence.

[145] Mr Rennie drew our attention to a Bill now before Parliament, the Harmful Digital Communications Bill 2013, dealing with the problem of cyber-bullying.⁹⁹ If passed in its current form, the Bill would impose liability on an online context host for the context of a digital communication posted by another person, but only if the host has been notified and fails to remove or disable access to the communication within a reasonable time.¹⁰⁰ He argued that the actual knowledge test would be consistent with this approach. We agree. But we also accept Mr Wishart's submission that the content of a Bill cannot have a decisive influence on the test to be applied in the present case.

[146] Mr Rennie also highlighted legislation in the United Kingdom,¹⁰¹ United States¹⁰² and South Australia¹⁰³ that would, he said, protect a person in Mr Murray's shoes from liability in the present context. We note this for completeness but we do not see it as assisting the analysis of what the law of New Zealand is in the absence of similar legislative reform.

Mr Wishart's statement of claim

[147] The appellant seeks an order striking out the claims relating to third party statements in their entirety. These formed part of the fourth cause of action in the statement of claim before the High Court, and are now contained in the fifth cause of action in the amended statement of claim presented to this Court.

[148] Given our conclusions as to the appropriate test for determining whether Mr Murray was a publisher of the third party statements, the question we must now address is whether the claim relating to third party statements is tenable, in light of our findings. That requires that there be a tenable claim that Mr Murray knew of the

⁹⁹ Harmful Digital Communications Bill 2013 (168-2).

¹⁰⁰ Clauses 20 and 20A.

¹⁰¹ Defamation Act 2013 (UK), s 5.

¹⁰² Communications Decency Act 47 USC § 230.

¹⁰³ Defamation Act 2005 (SA), s 30.

third party comments listed in the statement of claim and failed to remove them within a reasonable time in circumstances that give rise to an inference that he was taking responsibility for them.

[149] The further particulars of third party statements in the statement of claim simply record the statement and the name or pseudonym of the person who posted it. There is no pleading that Mr Murray knew of the statement and failed to remove it within a reasonable period of time after becoming aware of it.

[150] There is, however, some introductory material in the pleading relating to the third party statements to the effect that Mr Murray “not only permitted defamatory comments ... to remain, but he encouraged others to leave more such messages”. However, this is not referenced to any point in time at which Mr Murray became aware of the third party statements which are particularised.

[151] The general tenor of the claim is that Mr Murray incited the third party comments through the Information Statement and in his Twitter postings. This does not, however, meet the requirements of the test for publication as we have found it to be.

[152] The statement of claim before the High Court included a paragraph in which it was alleged that Mr Murray had left the Facebook page live and “gathering defamatory momentum” despite having the ability to close it down. However that statement is not in the amended pleading provided to this Court. In any event, it does not address the test that we have identified, in that it does not plead knowledge of the particular third party comments on which the claim is based and a failure to remove them within a reasonable time of becoming aware of them.

[153] There is another paragraph in the statement of claim before the High Court but not in the statement of claim presented to this Court that refers to Mr Murray choosing not to delete defamatory comments, which was within his power to do. However, this is again not referenced to the third party statements in respect of which the claim is made.

[154] We conclude that the pleading in respect of the third party comments does not plead a claim that meets the requirements of the actual knowledge test.

[155] That requires us to consider whether we should strike out the claim in its entirety or give Mr Wishart a chance to replead it. In his oral submissions in this Court, Mr Wishart asked that if the Court believed the claim did not disclose a tenable cause of action, he be permitted to replead it in a manner which did. We consider it is fair to allow this, but we make it clear that Mr Wishart should not seek to pursue the claims in relation to third party comments unless he can properly plead that Mr Murray knew those comments were on the Facebook page and failed to remove them within a reasonable time.

Security for costs

[156] We now turn to security for costs.

[157] In the High Court, the appellants sought an order requiring Mr Wishart to give security for costs under r 5.45 of the High Court Rules. That rule provides:

5.45 Order for security of costs

(1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—

...

(b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

(2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.

...

[158] Courtney J cited the leading authority, *A S McLachlan Ltd v MEL Network Ltd* as follows:¹⁰⁴

[15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect,

¹⁰⁴ *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.

[16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[159] Courtney J considered the financial information provided by Mr Wishart and concluded that she was not satisfied that he would be unable to pay an award of costs if required.¹⁰⁵ She added that, even if she had been so satisfied, she would have exercised her discretion against making an order requiring the giving of security because the case was novel, the claim was tenable and she did not expect the trial to be excessively long.¹⁰⁶ The appellants argue the Judge was wrong on both counts.

[160] In relation to inability to pay, the key issue is the Judge's consideration of assets held in a family trust associated with Mr Wishart (he is settlor and also beneficiary). The information provided by Mr Wishart was that the trust was a shareholder in two companies from which income is derived. He said the income was distributed as shareholders' salaries or retained by the company concerned and not distributed as a dividend. His evidence did not make it clear whether the shareholder salary was received by him personally and seemed to assume that the assets of the trust would be available to him if needed to pay costs. The trust deed was not in evidence and there was no indication as to the identity of the trustees or their preparedness to apply the assets held in trust towards the payment of any costs award made against Mr Wishart.

[161] The Judge did not comment on the fact that the assets of the trust (properties said to be worth \$1.4 million, with \$560,000 debt associated with them) were not Mr Wishart's property. She just noted that Mr Wishart was "not in a significantly different position from many professional or business people".¹⁰⁷ That may be true but it does not, in itself, indicate an ability to pay costs. She was satisfied Mr Wishart had an income stream thorough shareholder salaries, which may be true, but it is unclear from Mr Wishart's affidavit as he is not a shareholder and so would

¹⁰⁵ *Wishart v Murray*, above n 1, at [138].

¹⁰⁶ At [139].

¹⁰⁷ At [138].

not in the ordinary course receive a shareholder salary. It may be that Mr Wishart used the term shareholder salary loosely and meant that he was the recipient of the salary personally, which would be consistent with his description of his personal work for the companies concerned.

[162] We accept Mr Nilsson’s submission that it cannot be assumed that assets held in trust would be available to Mr Wishart to meet a costs award, in the absence of any commitment by the trustees. But it is not clear to us that the Judge thought the assets would be available. We think it is more likely that she considered Mr Wishart had an ability to meet a costs award despite the trust assets not being available to him, as her conclusion is primarily based on the availability to Mr Wishart of shareholder salaries from the companies.¹⁰⁸

[163] Mr Wishart emphasised that he would not wish to face bankruptcy given the extent and nature of the work in progress of the companies requiring his personal work, and the disastrous effect bankruptcy would have on his reputation in business and journalism. We accept that, but it does not address his ability to pay but rather his willingness to pay if able to do so. While his evidence as to the financial prospects of the companies is positive, there is nothing to indicate that the companies have an obligation to pay shareholder salaries that could be enforced by Mr Wishart.

[164] Mr Nilsson argued that the Judge did not take into account the possibility of an award of indemnity costs under s 43(2) of the Defamation Act. That provision applies where the plaintiff in a defamation case succeeds but is awarded less by way of damages than claimed and the Judge considers the amount of damages claimed was “grossly excessive”. We agree that, given the very high level of the damages claimed by Mr Wishart (\$2 million), there is a genuine possibility that this provision could come into play in the present case.

[165] We have some reservations about the Judge’s acceptance of Mr Wishart’s ability to meet any costs award against him in these circumstances. Having said that, we do not see any error in the Judge’s assessment that the case is both novel and tenable. It may be that the effect of the present decision is to truncate the scope of

¹⁰⁸ At [138].

the trial and therefore strengthen the Judge's view that it will not be an excessively long or difficult case to defend at trial. Mr Wishart told us that he would not be seeking a jury trial.

[166] We are not brought to the point where we consider that the appeal on this aspect of the case should be allowed. But we are conscious that, once Mr Wishart has repleaded, the matter will need further case management in the High Court. We consider the best course is to express our reservations on the basis that they can be taken into account after the statement of claim has been amended if a further application for security is made. In that event the High Court can consider any further evidence from Mr Wishart as to any commitment by the trustees to make the assets of the trust available to meet a costs award and any commitment by the companies to pay salaries to Mr Wishart. The repleaded claim may limit the scope of the proceeding further and the Judge will be able to assess whether the repleaded claim is in conformity with this judgment. Mr Wishart may be prepared to make a further reduction in the amount claimed, particularly if there are no (or fewer) claims in respect of third party statements in the amended statement of claim. If he did so, the prospect of an indemnity costs award under s 43(2) would diminish.

Costs in the High Court

[167] The High Court Judge did not make any ruling on costs. The appellants say they were materially successful in the High Court and they claimed costs. They said the Judge erred in failing to deal with their claim for costs.

[168] In the event that a Judge overlooks a claim, the appropriate first step is to ask the Judge to do so, either by recalling or reissuing the judgment or, in the current circumstances, by issuing a separate costs judgment. That is preferable to bringing the matter to this Court in circumstances where we have no indication of the Judge's view on the issue.

[169] In the present case, the appellants have made further inroads into the claim in this Court and that would have made it appropriate for this Court to order a reconsideration of costs in the High Court even if an award had been made in that Court. In those circumstances, we do not engage further with this aspect of the

appeal, but make an order that costs now be determined in the High Court in the light of this judgment.

Result

[170] The High Court decision in relation to the fifth cause of action in the amended statement of claim relating to third party statements on the Facebook page hosted by the first appellant is quashed and replaced with a ruling that this aspect of the fifth cause of action is not a tenable claim. We do not strike out the claim but order that the respondent must file in the High Court and serve an amended statement of claim within 30 days of the date of delivery of this judgment (or such other period allowed by the High Court) omitting the present claims relating to third party statements and limiting any renewed claims in relation to any third party statement to claims that the first appellant knew of any such statement and failed to remove it within a reasonable time in circumstances that give rise to an inference that he was taking responsibility for such statement.

[171] In all other respects, the High Court decision stands.

Costs in this Court

[172] Each party has had a measure of success in this Court and we therefore direct that costs in this Court lie where they fall.

Solicitors:
Lee Salmon Long, Auckland for Appellants
Gibson Sheat, Wellington for Interested Party