IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2005-404-7195

BETWEEN	OSMOSE NEW ZEALAND Plaintiff
AND	R N WAKELING First Defendant
AND	N R SMITH Second Defendant
AND	TELEVISION NEW ZEALAND First Named Third Party
AND	RADIO NEW ZEALAND Second Named Third Party
AND	APN NEW ZEALAND LTD Third Named Third Party
AND	FAIRFAX NEW ZEALAND LTD Fourth Named Third Party

Hearing: 12-13 September and 24 November 2006

Appearances: Brian Latimour and Garry Williams for Plaintiff on 12-13 September and Ian Gault and Kevin Glover on 24 November
Philip Hall for First Defendant
Christopher McVeigh QC for Second Defendant
Willie Akel and Jania Baigent for First Named Third Party
Bruce Gray QC and Allison Ferguson for Third Named Third Party
Anthony Stevens for Fourth Named Third Party

Judgment: 19 December 2006

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 4.00 pm on 19 December 2006

SOLICITORS
Bell Gully (Auckland) for Plaintiff
McFadden McMeeken Phillips (Nelson) for First and Second Defendants
Simpson Grierson (Auckland) for First Named Third Party
Oakley Moran (Wellington) for Second Named Third Party
Wilson Harle (Auckland) for Third Named Third Party
Izard Weston (Wellington) for Fourth Named Third Party

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Introduction

[1] Osmose New Zealand Ltd manufactures and supplies timber preservative products. The company alleges that Dr Robin Wakeling and Dr Nicholas Smith made statements about one of its treatments which were false and damaging. Some of the statements were published or republished through national and local television, radio and newspaper media. Osmose claims damages of $14,737,778 from Dr Wakeling and Dr Smith for the torts of defamation and injurious falsehood and breaches of the Fair Trading Act 1986.

[2] Osmose has not sued the media publishers. However, Dr Wakeling and Dr Smith have joined four as third parties. All have applied for orders setting aside the third party notices. I heard argument on the applications on 12 and 13 September. At that stage a confusing ambiguity became apparent in Osmose's existing second amended statement of claim. Also another issue arose which was potentially determinative of the applications.

[3] I adjourned the hearing for further argument. Osmose has since filed a third amended statement of claim. The third parties have filed applications for determination of a preliminary issue. Regardless of the procedure used, I must decide the applications according to the orthodox approach of inquiring whether Dr Wakeling's and Dr Smith's statements of claim disclose arguable causes of action on the premise that they will be able to prove their allegations of fact at trial. If not, the third party proceedings must be struck out.

[4] There is no reason in principle why a defendant in a defamation proceeding should not exercise the right enjoyed by other alleged tortfeasors of joining a third party for the purpose of obtaining contribution or indemnity towards liability on a common demand in a plaintiff's favour. But in practice it is a right rarely used. That is because plaintiffs invariably sue the news medium responsible for publication on the unstated premise that it, rather than the speaker or writer, will have sufficient financial means to fund a judgment or settlement. This case is an exception, and thus requires a contextual analysis of third party principles.

Background

[5] Osmose manufactures the boron based timber preservative treatment known as TimberSaver®. Dr Wakeling was formerly a wood mycologist employed by or consulting to Primaxa Ltd. Among other things that company develops timber preservative treatments. Previously he was employed by NZ Forest Research Institute Ltd. Dr Smith is a Member of Parliament and the National Party spokesperson on building and construction issues.

[6] In brief summary, the relevant events are as follows. On 11 July 2005 Dr Wakeling published an article entitled "Declining Wood Durability Standards Threaten Home Owners & the Building Industry". He referred to his status as a wood mycologist, and gave his phone number. The thrust of the article was critical of the Building Industry Authority (the BIA), now the Department of Building and Housing (the DBH), for approving TimberSaver® for use in timber framing of houses in 2004. Dr Wakeling compared it unfavourably to an alternative product. In his opinion TimberSaver® failed to meet the penetration requirements of the New Zealand Standards designed to ensure adequate durability of framing.

[7] Later that day, at 5.13 pm, Dr Smith issued a press release critical of both the Government and BIA, appending a copy of Dr Wakeling's article together with an extended discussion by way of hypothetical statements of questions and answers. The full text of Dr Smith's press release is as follows:

> Labour fails homeowners in timber treatment scam.
>
> National's Building spokesman, Nick Smith, says Labour is allowing homes to be built of timber that does not meet its own new standard, even after the billion-dollar furore over leaking and rotten homes.
>
> 'Thousands of homeowners and builders are being duped into thinking they are using treated timber when, in fact, it has only been surface-sprayed'.
>
> 'The new standard of timber treatment NZS 3640 was adopted in 2003 after the leaky homes crisis, and requires 'complete sapwood penetration' (6.1.1.1). But in April 2004 the Building Industry Authority approved a new surface boron-treated timber, code marked as T1.2, in breach of this new standard'.

> ‘This product is risky, in that 80% of the timber is left untreated, exposure to rainfall during construction will wash it off, and there is no protection from borer’.
>
> ‘Consumers got burnt in 1985 with the AAC timber treatment debacle and are now paying again for errors over the introduction of untreated kiln dried timber in 1995’.
>
> ‘The last thing homeowners need is another unproven, non-compliant timber product that puts their most important asset at risk’.
>
> ‘Labour and the BIA seem to have learnt nothing from the leaky homes debacle. They continue to arrogantly ignore the pleas of respected timber preservation and building experts about this flawed product’.
>
> ‘This T1.2 product needs urgent and independent reappraisal. We need to take a cautious approach to timber treatment after the debacles of the past two decades’.
>
> ‘This adds another chapter of incompetence to this Government’s response to the leaky homes crisis. They had a duty to ensure future homes would be built to a decent standard but have failed’, Dr Smith says.

[8] Within an hour Dr Smith was interviewed on Radio New Zealand’s (RNZ’s) Checkpoint programme broadcast between 5 and 6 pm. The interviewer asked him four or five brief questions. The bulk of the interview comprised Dr Smith’s responses in the same critical vein as characterised his earlier press release.

[9] Dr Smith was then interviewed live on Television New Zealand’s (TVNZ’s) Close Up programme commencing at 7 pm. The programme started with a pre-recorded interview by a TVNZ journalist with Dr Wakeling and two other experts. The presenter introduced the interview by reference to what is notoriously known as the leaky homes problem which has, he said, ‘become a blight on our construction industry’. He then said this:

> So bad was the problem that the Government was forced to step in and put things right, supposedly. Tonight, though, a new revelation that some houses are being built with timber approved by the Government that may not meet its own standards.
>
> This is it. It’s called TimberSaver. Its technical name is T1.2. Let’s be fair about this. There is no problem with this product if it’s used properly but what it’s being used for might not be what it was made for. Building experts say it’s being used widely and houses are being built of timber that they say might not give full protection against rot.

> Now the Opposition is demanding answers. Nick Smith and Chris Carter head-to-head in a minute, but first this from Mark Hann. [The pre-recorded interview]

[10] Later, at about 7.11 pm, the presenter conducted a direct interview, in the nature of a studio debate, with Mr Carter, the Minister for Building Issues, and Dr Smith. The latter continued with his vigorous theme of criticism of the Government and the BIA over approval of the TimberSaver® product and its handling of the leaky homes problem generally.

Osmose's Statement of Claim

[11] Against this background, Osmose's statement of claim pleads 11 causes of action. The first five are directed at Dr Wakeling; two in defamation, two for injurious falsehood and one for breach of the Fair Trading Act. All claim damages in the same amount of $14,737,778.

[12] Osmose's first or primary cause of action against Dr Wakeling is in defamation. It pleads that during the Close Up programme Dr Wakeling said:

> This [TimberSaver®] is likely to perform better than untreated wood but it's very unlikely to perform as satisfactorily as proven preservative treated products.

[13] Osmose alleges that these words meant and were understood to mean that Osmose was and is prepared to sell in New Zealand a treatment which results in timber that is very unlikely to perform as satisfactorily as proven preservative treated products, is not adequately durable, is not fit for its purpose and has potentially serious consequences to consumers in the building industry. Innuendoes are also alleged (I shall not repeat the defamatory allegations when dealing with subsequent causes of action – the thrust is the same for each).

[14] Additionally, within this same cause of action, Osmose alleges that in the circumstances Dr Wakeling expressly or impliedly authorised or secured the repetition and republication and the sting or part thereof of the words used in the Close Up programme by 60 media outlets in New Zealand the next day; that he knew such repetition and republication would be the natural consequence of his initial

publication of the article; and that repetition and republication was the probable or reasonably foreseeable consequence. A schedule nominates each of the republishers and republications.

[15] Osmose pleads that it has suffered and will continue to suffer pecuniary loss by reason of a combination of both the original publication on Close Up and republication of the words. The claim is itemised in an appendix of lost profits estimated for each year between 2005 and 2008. Mr Brian Latimour advised from the bar that it represents the company's quantification of the destruction of its TimberSaver® market suffered immediately consequent upon the defendants' torts.

[16] Osmose's second cause of action repeats its allegation that Dr Wakeling's words were defamatory in the way pleaded in the first cause of action; that he published them by giving a copy of the article or a version of it to Dr Smith for inclusion in his press release; and that he is responsible for their republication.

[17] Osmose's third and fourth causes of action allege injurious falsehood; namely that Dr Wakeling used the words in the Close Up interview and in his article either knowing that they were false or recklessly, not caring whether they were true or false, in circumstances where the publication was likely to cause pecuniary loss to Osmose.

[18] Osmose's fifth and final cause of action is the catch-all of publishing words in the Close Up programme and article in the course of trade which were false and therefore misleading and deceptive or likely to mislead and deceive: s 9 Fair Trading Act 1986.

[19] The next six causes of action are directed at Dr Smith. They essentially replicate the allegations against Dr Wakeling, but are expanded to include the RNZ programme. There is no allegation of breach of the Fair Trading Act.

[20] Dr Smith's statements in the Close Up interview which were allegedly false and defamatory are as follows:

> Now this is leaky homes all over again… But what makes me really angry is that if there was any duty after this leaky home fiasco, it was to make sure that houses today are being built properly. And now we've got a product that's a con, that's just a surface treatment where through a cheapo solution, they are not going to the expense of getting the boron right through, and that leaves home owners exposed, and that is incompetent…
>
> You've got 10,000 houses out there, have been built of this stuff, and if there's anything this Government owed people after the trauma and the heartache of leaky homes, was to make sure that the timber was properly treated. You see, Mark, you go back to '85, there was a cock up over timber treatment then, what was called the AAC treatment process that the Government had to bail out…
>
> That's right, and what you've got is a whole lot of people out there, builders and home owners, using this orange product, known as Agent Orange in the industry, of which very few people realise, it's just superficially treated, and that 80% of that wood can go rotten, and can be eaten by borer, wrecking peoples' most important asset. And the Government must be held responsible for that incompetence.

[21] Dr Smith's statements in the Checkpoint programme which were allegedly false and defamatory are:

> What concerns me is that a new standard was adopted in 2003, it required that there be full penetration of the preservative in the timber, and yet, last year, a product that is no more than a cheapo floor wood [phon] in that it just spray paints the outside of the timber is being sold on the market as though it is treated timber. It would not be accepted anywhere else in the world and, really, builders and homeowners are being duped into thinking the timber is treated when in fact it's only a surface coat…
>
> Oh, I think it's outrageous and I think it's outrageous that fifty percent of the houses, over 10,000 homes have been built out of this product in the last year with homeowners expecting that they would have some security when they do not… It's a cheapo outcome which the homeowners are being misrepresented by.

Defences

[22] Both Dr Wakeling and Dr Smith have pleaded a number of affirmative defences. Among them are that the words were true; that the meaning or meanings were expressions of opinion being based on relevant facts; and that the words were published on occasions of qualified privilege.

[23] Osmose has given notices of particulars of ill will and improper advantage against Dr Wakeling and Dr Smith to defeat the defences of qualified privilege: s 41

Defamation Act 1992. The same notices will presumably serve as particulars of the malice necessary to constitute the alternative claims of injurious falsehood. Osmose's notice alleges that Dr Wakeling:

(a) is a biodeterioration consultant who formerly worked as a wood mycologist for Primaxa Ltd. That company has been engaged by Koppers Arch Wood Protection (NZ) Ltd to develop timber preservative treatments. Koppers is Osmose's leading competitor in the timber preservative market in New Zealand;

(b) was either employed by or provided consultancy services to a party or parties which would benefit financially from the denigration of Osmose's TimberSaver® product;

(c) published the words knowing that they were false or recklessly, not caring whether they were true or false, in order to disparage and denigrate that product;

(d) chose to ignore or downplay the evidence which he had seen prior to making the relevant publications which indicated that timber treated with TimberSaver® compared favourably with other products;

(e) encouraged Dr Smith to publicly denounce timber treated with TimberSaver® and its approval as an alternative solution for the purposes of the Building Code; and

(f) has failed to retract or apologise.

[24] Osmose's separate notice alleges that Dr Smith:

(a) is a Member of Parliament and the National Party spokesperson for building and construction;

(b) was politically motivated to publish the relevant words to criticise the Government's handling of the approval of TimberSaver® products as

an alternative solution under the Building Code in the period prior to the general election;

(c) did not at any time contact Osmose before making the statements to determine whether or not they were true;

(d) did not consider the tests and appraisals that TimberSaver® underwent prior to its approval;

(e) used words to describe timber treated with the product which were deliberately pejorative without any justification; and

(f) published the words either knowing that they were false or recklessly, not caring whether they were true or false.

Third Parties

[25] On 7 April 2006 Dr Wakeling and Dr Smith issued statements of claim, joining TVNZ as their first named third party on the defamation claims. On the same day Dr Smith joined Radio New Zealand, APN New Zealand Ltd and Fairfax New Zealand Ltd as second, third and fourth third parties, also on the defamation claims. Dr Wakeling has also joined APN in that capacity.

[26] The bases for the claims by Dr Wakeling and Dr Smith against TVNZ are identical but singularly uninformative. Neither of the statements of claim particularises the ground for joinder. Each simply pleads:

> On or about 11 July 2005 [Dr Wakeling and Dr Smith] appeared during an item which appeared in the television programme named Close Up which aired on TV One at 7 pm on 11 July 2005. [Osmose] has issued a proceeding for defamation against [Dr Wakeling and Dr Smith] arising out of the broadcasting of that item on the Close Up programme. [Osmose] claims damages of $14,737,778 together with interest, a declaration and costs. [Dr Wakeling and Dr Smith] have denied all liability for the cause of action as pleaded.

[27] Each defendant then alleges that, if he is found liable to pay damages to Osmose, then TVNZ is:

> … liable to contribute to any such damages [pursuant to s 17(1)(c) Law Reform Act 1936] for such amount as may be found by the Court to be just and equitable, having regard to the extent of [TVNZ's] responsibility for the damage (if any) found to have been suffered by [Osmose].

[28] Dr Smith's statement of claim against RNZ is pleaded in identical terms.

[29] Neither of the other two third parties, APN and Fairfax, features in Osmose's current statement of claim. They are joined in their respective capacities as publishers of the New Zealand Herald in Auckland and the Dominion Post in Wellington on the republication causes of action. Articles published by each constitute two of the 60 republications nominated in a schedule to the current statement of claim. None of the other 58 odd republishers is joined in that capacity (TVNZ and RNZ are nominated among the republishers for programmes other than Close Up and Checkpoint).

[30] The basis pleaded by Dr Wakeling and Dr Smith for joining APN is that on 12 July 2005 the New Zealand Herald published an article under the heading "New rot fears for 10,000 homeowners" containing references from Dr Smith's press release including Dr Wakeling's article. Dr Smith's basis for joining Fairfax is that the Dominion Post published an article on the same day including extracts from his press release headed "Leak-Safe Timber not up to mark says Smith".

[31] The defendants' amended statements of claim against APN and Fairfax particularise the passages in the two newspaper articles which reproduce either verbatim or by way of summary, paraphrase or otherwise relate to passages from Dr Wakeling's article and Dr Smith's press release. Mr Bruce Gray QC advises that APN has requested the defendants to particularise the words which it published and which Osmose might claim are defamatory of it. There has been no response. Also, in common with their statements of claim against TVNZ and RNZ, the defendants' statements of claim against the two newspaper publishers do not particularise the grounds for joinder, simply seeking rights of contribution by reference to s 17(1)(c).

Issues

[32] A defendant's statutory right to join a third party is as follows: s 17 Law Reform Act 1936:

> (1) Where damage is suffered by any person **as a result of a tort** …
>
> > (c) Any tortfeasor liable in respect of that damage **may recover contribution from any other tortfeasor** who is, or would if sued in time have been, **liable in respect of the same damage**, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.
>
> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
>
> [Emphasis added]

[33] The relevant issues arising for consideration on the third party strike out applications are as follows:

(1) Would the third parties arguably be liable to Osmose as "any other tortfeasor" if the company had sued them directly for damages for publication or republication of the allegedly defamatory statements by Dr Wakeling and Dr Smith?;

(2) Were Dr Wakeling and Dr Smith arguably acting as the agents of TVNZ or RNZ when making the statements (an agency argument would not be available to them on the APN and Fairfax claims)?;

(3) Are the third parties arguably liable to Osmose "in respect of the same damage" allegedly caused by Dr Wakeling and Dr Smith?;

(4) Do Dr Wakeling and Dr Smith have arguable rights of contribution available against the third parties?

[34] I shall deal with these issues in the same order.

(1) Qualified Privilege

(a) Occasion and Subject Matter

[35] The first or threshold question is whether or not each third party would succeed on a defence of qualified privilege in answer to a claim brought directly against it by Osmose for damage caused by publication or republication; if so, they would not be 'any other tortfeasor' (s 17(1)(c)) and the defendants would have no right to a contribution from them.

[36] The question of liability to contribute under s 17(1)(c) must be determined from the notional standard of whether or not the third parties would necessarily be tortfeasors together with the defendants as against Osmose if it had sued them directly. The question is not to be determined by the different touchstone of whether the third party is independently liable to the defendant. With respect, some of Mr McVeigh's arguments failed to recognise this distinction and the burden which it imposes on a defendant resisting a third party's application to strike out.

[37] As noted, Dr Wakeling and Dr Smith have pleaded the defence of qualified privilege. For example, in answer to Osmose's first cause of action, based upon the publication of the subject words on the Close Up programme, Dr Wakeling pleads that he and those to whom the publications were directed had a common and corresponding interest in giving and receiving the material in that:

> (a) The issue known as 'leaky buildings' had been a matter of national publicity, interest or concern in New Zealand for some years prior to July 2005.
>
> (b) Whether wood used in the construction of houses in New Zealand was properly treated to prevent rot and infestation was likewise of national interest and importance.

> (c) [Osmose] had given extensive promotion to [its] product [TimberSaver®] claiming that it was in all respects the equal of or superior to rival products.
>
> (d) The matter being in the public domain, both generally and as a result of [Osmose's] publicity, responsible comment, debate and criticism concerning the product was of common and corresponding interest to [Dr Wakeling] and those to whom the publications were directed and made.

[38] It is thus unsurprising that in argument on 24 November Mr Christopher McVeigh QC for Dr Smith, with the endorsement of Mr Philip Hall for Dr Wakeling, conceded that TVNZ and RNZ published the defendants' statements on 11 July 2005 on occasions of qualified privilege. Nevertheless, as I shall discuss, Mr McVeigh submits that I should not make such a finding now in case facts later emerge which might cast doubt upon his concession. He also attempted to lure Osmose into supporting the defendants' position by suggesting that the company may not have appreciated that a preliminary ruling in the third parties' favour on qualified privilege would bind it for the purposes of trial of its primary claim.

[39] Mr Ian Gault for Osmose did not rise to Mr McVeigh's bait. He joined in Mr Gray's acknowledgement that my finding would not address the issue of whether the defendants' statements were published on occasions of qualified privilege. Any findings I make are not binding on the primary issues for trial between Osmose and Dr Wakeling and Dr Smith.

[40] Mr McVeigh declined to extend his concession on qualified privilege to APN and Fairfax. He immediately exposed an inconsistency in the defendants' position. For example, Mr McVeigh accepts the factors identified by Mr Gray and by Mr Anthony Stevens for Fairfax as giving rise to the newspaper's duty to publish and the New Zealand public's corresponding interest in receiving information contained in the Herald article (in view of recent New Zealand authority, the submission could be couched in terms of shared interests). Among those factors are that:

> (1) A large section of the New Zealand population is affected by the regulation of building products either by virtue of being a home

owner, a future owner, or having some proprietary or beneficial interest or future interest in commercial property;

(2) Osmose's TimberSaver® product was being sold nationally;

(3) Publication to the New Zealand public was necessary as no persons or body had a duty to investigate the issue and take appropriate action (following the Court of Appeal's decision in *Attorney-General v Body Corporate 200200* [2005] 6 NZCPR 841); and

(4) The Minister of Building Issues is responsible for monitoring the performance of the Department of Building and Housing.

[41] The Court of Appeal's two decisions in *Lange v Atkinson* have settled the legal principles governing the defence of qualified privilege in New Zealand: *Lange v Atkinson* [1998] 3 NZLR 424 (*Lange No.1*) and *Lange v Atkinson* [2000] 3 NZLR 385 (*Lange No.2*). Our law differs in material respects from the law of England: see *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127 (HL); *Jameel v Wall Street Journal Europe Sprl* [2006] 3 WLR 642 (HL). In particular, New Zealand law maintains a distinction between the respective roles of Judge and jury when deciding the discrete questions of, first, whether publication was on an occasion of qualified privilege and, second, if so, whether the privilege has been misused; that is, whether the publisher was acting maliciously: *Lange No.2* at [5], [6] and [37]-[41].

[42] The correct approach in New Zealand is this: *Lange No.2* at [5]:

> … While there is potential for factual overlap, it is of first importance to keep conceptually separate the questions whether the occasion is privileged and, if so, whether the occasion has been misused… The dichotomy between occasion and misuse is mirrored by the roles of Judge and jury in this field. Subject to the resolution of any dispute about primary facts, which is for the jury, the Judge decides whether the occasion is privileged. The jury decides whether a privileged occasion has been misused.

[43] In *Lange No.2* the Court developed its movement away from the strict requirement of a reciprocity of interest or duty between the maker and recipient of a statement, signalled in *Lange No.1* at pp 438-442. This trend reflects the flexibility

of the defence of qualified privilege and the broad tests of social morality, public utility or common convenience and welfare of society which provide its rationale. In *Lange No.2* the Court adopted the shared interest test: at [20]-[21]. The inquiry encompasses both a qualifying occasion and qualifying subject matter: at [22]. In this respect the Court noted:

> [23] … Lord Hope of Craighead [in *Reynolds*] then observed that the occasion had to be identified because it is the occasion which attracts the qualified privilege. That point is important. He said that to make this identification it is necessary to examine 'the nature of the material, the persons by whom and to whom it was published and in what circumstances.' This in present circumstances represents an inquiry into … whether the maker and recipients of the communication have the necessary shared interest on the occasion of publication – they usually will in relation to the defined subject-matter but not always…

[44] Mr Gray seeks support for APN's application by reliance on *Jameel*. He focused upon the inquiry conducted by some of the Judges into the tenor of the subject article and whether the report indicated responsible journalism. He drew favourable comparisons with the Herald article.

[45] With respect, it is unnecessary for me to follow that path here. What are of relevance, though, are Lord Scott's observations in *Jameel* at [129]-[138]. In common with our Court of Appeal in both *Lange No.1* and *Lange No.2* (but without referring to them), he eschewed the requirement of reciprocity of duty and interest which Lord Atkinson had said was essential to the defence: *Adam v Ward* [1917] AC 309 at 334. Lord Scott approved Lord Nicholls' formulation in *Reynolds* at 197, 204 and 205 of a more elastic test of an entitlement to know where publication of information was to the public as a whole rather than specific individuals. Both *Lange* decisions similarly relax the traditional limits of the defence, even where material is disseminated to the public at large, especially where the subject matter may loosely be defined as of a political nature.

[46] In my judgment there can be no doubt that the articles published in both newspapers would be protected by the defence of qualified privilege if Osmose had sued. A brief examination of the three factors articulated by Lord Hope in *Reynolds* is decisive.

[47] First, the nature of the material published in the two articles was of public concern. I agree with Mr Gray's summary of the subject matter as including the treatment of timber in New Zealand to prevent rot and infestation in homes; confusion within the building industry regarding two different methods of treating timber; the steps taken by the BIA to prevent a further occurrence of leaking buildings in New Zealand homes and, in particular, its role in approving the use of building products; whether the DBH had undertaken a review of the products earlier approved by the BIA and the certification process; the adequacy of steps taken by the responsible Minister for monitoring the DBH's maintenance and effectiveness of New Zealand Standards; and the availability and quality of Osmose's TimberSaver® as an effective timber preservative product.

[48] Second, the Herald and the Dominion Post are the principal daily newspapers in the major cities of Auckland and Wellington. Most new homes are being built in those two metropolitan areas. Among the readers of both publications are people contemplating building or buying a new home. Others are also affected, such as financiers, suppliers, tradesmen and family. The pool is wide and a local newspaper is the appropriate means of communicating relevant information on the topic.

[49] Both newspapers published articles in circumstances where questions or concerns were raised, by two apparently responsible and reputable individuals, about the risk of a recurrence or continuation of further financial and emotional harm despite steps taken by Parliament to eliminate the problem.

[50] Third, the circumstances of publication are very material. Dr Wakeling and Dr Smith's defences acknowledge as much. Our Court of Appeal has recognised that the national incidence of leaky homes is "so high as to suggest systemic failure within the building industry": *Attorney-General v Body Corporate 200200* at [31]. The wider social and economic context cannot be ignored. Home ownership is a central feature of New Zealand society. A residential property is the principal asset of many New Zealanders. Leakage problems over the past decade or so have significantly eroded values and placed severe strains on financial resources.

[51] The Government has introduced new legislation designed to deal with the problem and its financial consequences: Weathertight Homes Resolution Services Act 2002 and Building Act 2004. In recent years this Court has been inundated, on an unprecedented scale, with claims by disaffected home owners, frequently in apartment blocks, against vendors, developers, builders, material suppliers, professionals and local authorities. Cabinet has appointed a Minister for Building Issues whose responsibilities include ensuring that the functions and duties of the DHB are properly performed, including accreditation of new products.

[52] Mr McVeigh seeks to answer the overwhelming weight of material in favour of a finding of publication on occasions of qualified privilege by raising the prospect of Dr Wakeling and Dr Smith calling evidence to rebut the factual foundation for the newspapers' argument. He suggests a possibility that proper pleadings, discovery, interrogatories or evidence may render a preliminary finding unsound. He refers generally to the availability of the defence where the subject matter did not involve political statements but did not attempt to develop the proposition further. He also characterises the factors which I have recited as 'assertions'.

[53] This line of argument also suffers from a fatal degree of inconsistency. Both Dr Wakeling and Dr Smith have relied upon virtually the same factors as constituting the particulars, in slightly truncated form, of their defences of qualified privilege. Moreover, in his press release, Dr Smith expressly referred to "the billion-dollar furore over leaking and rotten homes", the "thousands of home owners and builders" who were affected and "the leaky homes crisis". He criticised the Government and the BIA for failing to carry out their "duty to ensure future homes would be built to a decent standard". And, in the Close Up programme, he referred to "10,000 houses out there … built of this stuff …" and, in the Checkpoint interview, to governmental and departmental failures in this respect.

[54] Furthermore, Mr McVeigh's submission misconstrues the nature and extent of the inquiry necessary to determine the legal question of the availability of the defence of qualified privilege. In deciding whether or not the defence would be available to a third party against Osmose, I am required to determine whether or not the factual conditions necessary to qualify for a shared interest in publication exist. I

have already undertaken that exercise by reference and limited to the subject matter of the two articles within the framework of the circumstances of publication and those factors of which I am entitled to take notice. That was the approach followed by the Court of Appeal in both *Lange v Atkinson* cases. It is a self-contained inquiry. To the extent to which Cooke J's observations at first instance in *Isbey v New Zealand Broadcasting Corporation* [1975] 1 NZLR 721 at 723 suggest otherwise, I respectfully disagree.

[55] Evidence is not required where facts are so notorious that the Court is entitled to take judicial notice, such as of the leaky building syndrome: *R v Wood* [1982] 2 NZLR 233 (CA); Halsbury's Laws of England, Vol.17(1), para 573. This was the approach adopted by the Court of Appeal in a related context: *Attorney-General v Body Corporate 200200* at [26]-[31]. And in England the practice is well settled of deciding the legal question of the availability of the qualified privilege defence as a preliminary issue: *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 2 All ER 931; *Loutchansky v Times Newspapers (No 2)* [2002] 1 All ER 652 (CA). The same practice has been invoked in this Court: *Hodge v Carter* HC Christchurch CP152/95 17 November 1998, Chisholm J.

[56] I note two other points. First, Mr McVeigh was unable to identify what further facts might later emerge to call into question a finding on a preliminary issue that the occasions of publication were privileged, and plainly there are none. Second, it is inconceivable that the defendants, who carry the burden, might attempt to lead evidence at trial for the purpose of negating or undermining the availability of the defence of qualified privilege for either newspaper to Osmose's claim when the only certain consequence would be destruction of their own defences based upon the same privilege and in similar circumstances.

[57] Accordingly, I am satisfied that the newspaper articles were published on occasions of qualified privilege and that the publishers, like TVNZ and RNZ, would be able to rely successfully upon this defence if sued by Osmose in defamation for the statements which they published by Dr Wakeling and Dr Smith.

(b) Malice

[58] Messrs McVeigh and Hall submit that a final finding would be premature on an alternative ground. They raise the prospect that at trial a jury might find a third party was predominantly motivated by ill-will towards Osmose or otherwise took improper advantage of the occasion of publication. In support Mr McVeigh again suggests the possibility of the interlocutory processes of discovery or interrogatories yielding relevant material.

[59] As I have noted, the question of malice is normally for the jury to decide. But the question of whether or not there is any evidential basis for such a finding is for the Judge. The defendants carry the burden at trial of proving that one or more of the third parties was guilty of malice. Dr Smith and Dr Wakeling must have some evidence to this effect to justify joining a third party. It is not enough to proceed from the wellspring of hope or expectation that something might materialise later.

[60] Messrs Gray and Stevens and Ms Jania Baigent for TVNZ emphasise the content and tenor of the publications by APN, Fairfax and TVNZ. All incorporated a range of views other than those expressed by Dr Wakeling or Dr Smith. This factor, coupled with the factors relevant to a finding of a privileged occasion, extinguishes any prospect for arguing malice in the sense of misuse of the occasion. Mr McVeigh does not attempt to suggest otherwise. An argument of misuse against the third parties would inevitably condemn the defendants.

[61] Instead Mr McVeigh inquires rhetorically whether the Court can be sure at this stage that an individual third party was not aware of the factual foundation for Osmose's allegations of falsity against the defendants. He is referring to the company's notice of particulars of malice. He gives as examples Osmose's allegations, first, of Dr Wakeling's previous engagement by its leading competitor in New Zealand to develop timber preservative treatments and, second, that Dr Smith was politically motivated to make his statements.

[62] With respect, this submission defies credibility. Dr Wakeling and Dr Smith could only succeed on this argument against the third parties at trial by endorsing Osmose's allegations of their own malice. Not only would this approach ensure the end of their defences of qualified privilege. It would also guarantee Osmose's success on its discrete claims of malicious falsehood.

[63] Mr Hall follows a different path. He submits that the defendants could prove malice by leading evidence at trial that a third party published the information supplied by Dr Wakeling and Dr Smith without taking reasonable steps to verify its accuracy; that the media should not have accepted the press release and article at face value but were under an obligation to check; and that evidence which might emerge after discovery or interrogatories of failure to take any or proper steps to inquire would shade into recklessness and equate with malice.

[64] Mr John Tizard is prepared to concede for the purposes of argument that RNZ failed to make any inquiries. Indeed, its programme was aired in almost immediate response to Dr Smith's press release. It provided a forum for Dr Smith's repetition of his views, punctuated by an occasional leading question. But Mr Tizard submits that RNZ's omission could not arguably constitute evidence of an absence of honest belief that Dr Smith's complaints were not genuine and properly held, especially where he appended a copy of Dr Wakeling's article to his press release.

[65] This subject was discussed extensively in *Lange No.2*: at [42]-[49]. The Court accepted that a publisher's reckless indifference to truth is almost as culpable as deliberately stating a falsehood. The question is whether the publisher has exercised the degree of responsibility required by the occasion. The Court said this:

> [48] No consideration and insufficient consideration are equally capable of leading to an inference of misuse of the occasion. The rationale for loss of the privilege in such circumstances is that the privilege is granted on the basis that it will be responsibly used. There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression. What amounts to a reckless statement must depend significantly on what is said and to whom and by whom. It must be accepted that to require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination, may in some circumstances come close to a need for the taking of reasonable care. In others a genuine belief in truth after relatively hasty and incomplete

> consideration may be sufficient to satisfy the dictates of the occasion and to avoid any inference of taking improper advantage of the occasion.

[66] Mr Hall's argument meets the same credibility barrier as Mr McVeigh's. I am prepared to assume at the lowest end of the spectrum that none of the third parties conducted inquiries. Dr Wakeling and Dr Smith could only succeed against them on malice by establishing at trial that the media were reckless in taking their own publications at face value. Their counsel would have to argue that the contents of the material produced by each defendant were plainly and substantially wrong. Mr McVeigh would have to persuade a jury that responsible and reputable members of the media should not accept and republish statements by his own client, a senior politician acting in the capacity of Opposition spokesman on building issues, endorsing an article by an apparently well qualified scientist to provide an honest and credible foundation for his views. Instead, counsel would have to say, further inquiry was plainly required in these circumstances.

[67] Again the only certain consequence of this approach would be to guarantee the success of Osmose's claim against the defendants.

[68] The question of whether or not there is an arguable evidential or legal foundation for the defendants to raise malice against the third parties can be determined in the unusual circumstances of this case on a strike out application. Dr Wakeling and Dr Smith have failed to raise any basis for arguing that a third party was guilty of malice. The media must succeed at trial on the defence of qualified privilege if sued by Osmose and could not arguably be held liable as tortfeasors jointly with the defendants. This ground is decisive in striking out the third party notices.

[69] Mr McVeigh concluded by submitting that it would be manifestly unfair to reach this preliminary conclusion and release the third parties now. He relies on a range of factors. One is Osmose's deliberate decision to sue individuals. Another is the company's claim for "eye wateringly, crippling damages" from the defendants but not against the publishers. Another is that it is entirely just for Dr Wakeling and Dr Smith to "join those who disseminated their statements for their own ends". The irony inherent in this last point does not require emphasis. In any event, I am

required to determine the relevant issues by applying legal principles rather than general notions of fairness.

(2) Agency

[70] Mr McVeigh gave late notice of a new unpleaded argument for Dr Wakeling and Dr Smith. The defendants now intend to plead that at all material times they were acting as the third parties' agents. Its apparent purpose is to pre-empt the absolute effect of a favourable finding on qualified privilege.

[71] Mr McVeigh accepts that Dr Wakeling and Dr Smith must prove at trial that when speaking they were authorised to speak on behalf of a particular third party. His argument is directed primarily towards TVNZ and RNZ. It could never be said that the relationship of principal and agent arose between the newspapers and the defendants where the former did no more than publish words or statements supplied by the latter without any direct contact between them. Mr McVeigh says that if the question was decided in the defendants' favour then the particular third party would be vicariously fixed with the consequences of any adverse finding of malice against either Dr Wakeling or Dr Smith.

[72] An agent is usually engaged for a particular purpose and on a particular occasion, normally to change the principal's legal relationship with a third party by binding or committing it to a certain course. Except in rare cases the engagement is effected pursuant to contract and for financial consideration. The agent's authority is to do whatever is necessary for the agreed purpose: *Heatons Transport v Transport and General Workers Union* [1973] AC 15 at 99.

[73] The rule of vicarious liability imposes a financial burden on the principal for a tort committed by the agent in the course of carrying out his duties: *Brooks v New Zealand Guardian Trust Co Ltd* [1994] 2 NZLR 134 (CA), approved on appeal [1995] 1 WLR 96 (PC). The Defamation Act preserves a principal's liability at common law for the tort of a defamatory statement made by its employee or agent: s 20(4). In the defamation context, those to whom the rule most readily applies are journalists, company directors or solicitors.

[74] Accordingly two questions arise for determination at this stage. The first is whether or not there is any evidence that the relationship of principal and agent existed. If so, the second is whether the agent was acting within the scope of his engagement when speaking.

[75] Mr McVeigh simply submits that TVNZ and RNZ appointed Dr Wakeling and Dr Smith as their agents 'to talk about this product and say whatever you like'. Consequently, he says, Osmose could sue TVNZ or RNZ on the grounds of vicarious liability for its agent's torts additional or alternatively to liability as publisher: *Gatley on Libel and Slander* (10th ed. 2004) at para 8.29.

[76] This submission fails on a number of discrete grounds. First, an agency can only arise, as Mr Tizard submits, either by way of contract or operation of law. Mr McVeigh did not address this point. Neither Dr Smith nor Dr Wakeling have sworn affidavits. Mr McVeigh does not refer to any evidence or circumstances that may support a finding that the relationship existed. He does not identify the purpose of TVNZ's alleged engagement of either defendant or the terms on which it was to be discharged.

[77] Second, even accepting Mr McVeigh's account of what took place between the parties, it does not come near constituting the relationship of principal and agent. An agreement between A and B for B to speak on A's television programme about a particular topic in whatever terms he chooses could not constitute B as A's agent. It cannot be converted into an authority of itself from A to B to speak for and on behalf of A. Dr Smith's statements made in the Close Up and Checkpoint interviews do not suggest that his views represent those of the publisher. And I agree with Mr Tizard; there would be a level of absurdity in Dr Smith asserting, in his capacity as Opposition spokesman on building issues, that he was speaking as TVNZ's or RNZ's mouthpiece.

[78] If anything, the relationship was in the reverse. Dr Smith circulated his press release to the media. His purpose was plain. He was requesting or inviting publication of his statements critical of Osmose's product. He wanted a public forum for his views. The third parties responded, in varying degrees. In these

circumstances, in the loose or general sense in which the word is used, the media were acting as the defendants' agents or conduit rather than the other way around: *Parkes v Prescott* (1869) LR 4 Exch. 169.

[79] Third, as Mr Tizard and Ms Baigent emphasise, Mr McVeigh's argument is an attempt to negate if not emasculate the joint publishers rule. Where one of more parties are jointly responsible for a publication, a finding of malice against one does not necessarily defeat a defence of qualified privilege raised by the other: s 20(2). Mr McVeigh's proposition is designed to circumvent the statutory protection which codifies the position at common law: *Egger v Viscount Chelmsford* [1965] 1 QB 248 (CA); *McLeod v Jones* [1977] 1 NZLR 441.

[80] Fourth, there is no evidence to suggest that either TVNZ or RNZ had any degree of control over what Dr Wakeling or Dr Smith said. They were truly independent spokesmen for their causes. They had prepared the article and press release from their own resources. Their views were their own.

[81] Fifth, even if a relationship of principal and agent did exist, the proviso to s 17(1)(c) is decisive. It bars a person from recovery of a contribution from 'any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought'. A is entitled to an indemnity from B where A's liability to C is vicarious in nature and where the act or omission giving rise to it is B's breach of duty. In this context A and B are joint tortfeasors: *Lister v Romford Ice Co Ltd* [1957] AC 555; applied in *Richardson v O'Neill* [1959] NZLR 540. Here, TVNZ or RNZ's liability could only arise vicariously for the defamatory statements by either Dr Smith or Dr Wakeling. Commission of those torts would constitute a breach of an agent's implied duty to perform his duties with reasonable care. Accordingly, the media would be entitled to full recovery and the s 17(1)(c) proviso would operate absolutely.

[82] I am not satisfied there is an evidential or legal basis for the defendants to prove at trial that they were the agents for TVNZ or RNZ when speaking on the subject of leaky homes.

(3) Same Damage

[83] My conclusions on qualified privilege and agency are determinative in favour of the third parties. However, in recognition of the constant of first instance fallibility and in deference to the careful arguments advanced by counsel, I shall consider the separate ground upon which APN and Fairfax rely to set aside the notices. They say that the defendants and third parties would not be "liable [to Osmose] in respect of the same damage".

[84] In determining this point I must proceed on the premises, as Mr Stevens acknowledges, that Osmose suffered damage as a result of a tort; the defendants are tortfeasors liable in respect of that damage, both in publishing defamatory statements and causing their republication: *McManus v Beckham* [2002] 1 WLR 2982 (CA); and the third parties are also tortfeasors as against Osmose for republication.

[85] As noted, Dr Wakeling and Dr Smith have joined the newspaper publishers on Osmose's combined publication and republication causes of action. Mr McVeigh does not dispute Mr Gray's and Mr Stevens' submission that the defendants are not and could not be joint tortfeasors with the newspapers. The act giving rise to the tort of which Osmose complains was not one for which both parties are responsible. Nor was it a joint act. There was no concerted action towards a common end: *Eyre v New Zealand Press Association* [1968] NZLR 736 at 745.

[86] Messrs Gray and Stevens submit that each republication of a defamatory statement is a separate tort from the originating publications and each will give rise to a separate cause of action. Thus, liability could only arise on the basis that the parties are concurrent tortfeasors. Accordingly, it is necessary to isolate the damage caused by each publication by confining it to that which is attributable to the words published in each publication: *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA). They submit that the Law Reform Act does not apply to tortfeasors who commit independent torts causing separate damage. In this situation each tortfeasor is severally liable for the damage he or she causes, and not for the damage caused by another. And as both emphasise, concurrent liability requires some concurrence in acts.

[87] In answer Mr McVeigh submits that there can be an overlap in damage or harm. In that case the parties are concurrent tortfeasors. He relies upon Lord Bingham's speech in *Royal Brompton MHS Trust v Hammond* [2002] 1 WLR 1397 at [6] onwards. He submits that the damage does not have to be precisely the same to invoke s 17(1)(c). In this case the damage was caused by the repetition of the sting of the article or press release in the newspaper. The damage does not have to be the whole of the damage; a small part will be sufficient. The extent of its contribution to that damage will have to be assessed by the Court having heard all the evidence.

[88] The leading authorities provide guidance in deciding this issue but none are directly on point. The principles are well settled. At common law parties which are jointly or concurrently liable on a common demand to a plaintiff, whether in tort or otherwise, are accountable for their respective shares of damage. The common demand is predicated upon the direct and independent liability of each for the same amount of the plaintiff's claim. An order for contribution inter se is the medium for apportioning responsibility.

[89] However, before the Law Reform Act was enacted one such wrongdoer was able to escape liability entirely where the plaintiff elected to sue only the other, regardless of relative causative potency or moral blameworthiness. S17(1)(c) was a remedial measure designed to cure the resulting injustice. The provision allows a defendant to join and seek contribution from another wrongdoer but contingent upon the existence of liability "in respect of the same damage" suffered by the plaintiff. The harm caused by their concurrent wrongdoing must be indivisible – a synonym for "the same damage". The section is invoked where there is no rational or logical basis for separating out the harm caused by one tortfeasor from another.

[90] I accept Mr McVeigh's submission that s 17(1)(c) can apply where "the same damage" is part or some only of the total harm caused by the defendant tortfeasor: *Royal Brompton* per Lord Bingham at [6]. But this begs the question of what is the same damage, whether it is a part or the whole of the plaintiff's claim. Whatever it is, the same damage or indivisible harm must be capable of isolation or discrete identification.

[91] Damage is distinct from damages: *Royal Brompton* per Lord Bingham at [6], Lord Steyn at [27] and Lord Hope at [48]. Damage is harm or injury; damages represent the amount of money recoverable by way of compensation for the damage suffered. However, the latter concept is directly relevant in illustrating the type of harm and provides the measure for fixing the nature and extent of a contribution. The common liability is to pay compensation for the harm caused.

[92] What is the harm or damage for which Osmose sues? It is the loss of all its sales of TimberSaver®. On its case, that damage was substantially, materially or operatively caused by a concurrence or combination of published and republished defamatory statements. Each concurrent tortfeasor is liable to Osmose for the separate consequences of its separate wrongdoing. So each publisher and republisher must compensate the company accordingly.

[93] However, Osmose has not attempted to attribute particular damage to a particular tort. Its problems of discharging its burden of proving causation of damage and of loss of profits consequential upon any or all republished statements would be insurmountable. Without the benefit of Osmose's analysis, the defendants would have to complete two successive and complex exercises to invoke s 17(1)(c). First, at trial they would have to identify which damage was attributable to the publications and which to the republications. In reality, as Mr Gray submits, assuming all statements were defamatory, the destruction of Osmose's market would have been substantially complete as a result of publication of the defendants' statements on Close Up; its audience penetration was about 900,000, compared with about 100,000 readership of the New Zealand Herald. That programme would have been the substantial material or operative cause of Osmose's damage.

[94] Second, the defendants would then have to attribute separate damage among all the republishers, including APN and Fairfax. Common sense suggests that it would be impossible for Dr Wakeling and Dr Smith to single out, for example, the APN republication and establish that on its own that article adversely effected Osmose's profits: see *Newmans Coach Lines Ltd v Robertshawe* [1984] 1 NZLR 53 (CA) per Richardson J at 56. Osmose must discharge a strict burden of proving pecuniary loss or special damages. By contrast, general damages for lost reputation

are matters of impression and common sense: *Dingle v Associated Newspapers Ltd* [1964] AC 371 per Lord Radcliffe at 393. The difference in approach at this stage is shown by the principle that, in a claim for general damages, the Court is not concerned with isolating out the consequences of other publications: *Ah Koy* per Tipping J at [30].

[95] This conclusion can be illustrated by considering two situations. First, assuming joinder and judgment for Osmose, a Judge could not apportion liability on a contribution notice issued by a defendant against a republisher. The power is to order such contribution as may 'be just and equitable having regard to the extent of that person's responsibility for the damage': s 17(2). The 'just and equitable' criterion is an appropriate tool for fixing contribution in a claim for general damages. For the reasons I have given, the Judge would have no reliable basis for fixing contributions. There would be no proper foundation for a compensation award between concurrent tortfeasors.

[96] Second, assuming that the newspapers are concurrent tortfeasors, and either or both conclude that they have republished a defamatory statement, there is no objective basis or measure upon which they could make a payment into Court in advance of trial in pro tanto reduction of a defendant's liability to Osmose.

[97] This result is not unfair or contrary to the spirit of s 17(1)(c). A result that required a publisher to contribute towards a liability which it does not owe would be unfair: *Royal Brompton* at [6]. Dismissal of the defendants' claim on this ground is an appropriate response to an arbitrary decision to join just two of the 60 odd republishers. Mr McVeigh did not explain the grounds for Dr Wakeling's and Dr Smith's selection of APN and Fairfax to the exclusion of others which may have committed a similar tort.

[98] The defendants might have avoided this result by a principled application of s 17(1)(c), first, by seeking s 37 particulars from Osmose, then by identifying what republications arguably carried a defamatory sting, and joining them. By this means they would have aggregated those who may be concurrently liable for the republication damage, thereby allowing the Court to undertake a fair and measured

exercise in apportionment. I would add, though, that, even by joining all republishers, the defendants would still face the difficulty of proving that Osmose's damage was the same given the causative effect of the original publications.

[99] Mr McVeigh relies particularly on *Brown v Cole* (1995) 14 BCLR (3d) 53. The plaintiff sued two fellow insurance adjusters for slander for making allegations that he was under investigation for fraud. The allegations spread throughout the insurance industry. In upholding the validity of a third party notice seeking contribution from another who was allegedly responsible in spreading the allegation, Hollinrake JA in the Court of Appeal of British Columbia said this at 58-59:

> On the facts as we must take them, that is accepting the truth of the assertion in … the amended statement of claim, it is clear that as between the defendants and third party, some part of the damages are the same. As I see it, the defendants alone are responsible for those damages caused by the publication of the slander before any republication and are liable, along with the third party, for the damages caused by her republication of the slander… I should say at the outset that while the damages as between the defendants and the third party are not necessarily identical in amount it is clear, in my opinion, that the damage to the plaintiff has in part 'been caused by the fault of two or more persons' within s 4 of the Negligence Act… It is enough if the defendants seek contribution for some portion of the damages recovered by the plaintiff.

[100] I think that the decision in *Brown v Cole* is distinguishable on a number of grounds. The report suggests that the defendants in that case followed the principled route of joining as third parties all republishers known to them. Also it was a claim for general, not special, damages. And the Court referred continually to the concept of damages, not damage. The terms of the relevant statutory provision also appear to be different.

[101] Accordingly, for the reasons given, I am satisfied that it is not arguable that the defendants and APN and Fairfax are liable to Osmose for "the same damage" and a claim against those parties should be struck out on this independent ground.

(4) TVNZ

[102] Mr Willie Akel for TVNZ relied on these three additional grounds to support an application for strike out:

(1) It is just and equitable to decide the third party notices at this stage rather than commit TVNZ to incurring the cost of participating in the litigation. This is because Messrs Wakeling and Smith willingly agreed to appear on the Close Up programme, must have consented to the broadcast of their statements and in fact fostered and encouraged the broadcast: s 22 Defamation Act. As a matter of principle, those who voluntarily speak to or appear in the media should not be entitled to claim a contribution from that media for broadcasting their remarks where there is no suggestion of misrepresentation;

(2) Osmose has not chosen to sue TVNZ. Messrs Wakeling and Smith have no separate or independent cause of action against TVNZ. Instead they sue it as the broadcaster of their own voluntary statements. A policy decision should be made, consistent with s 14 New Zealand Bill of Rights Act 1990, that the broadcaster should not be liable in the present circumstances, particularly where it is not blameworthy or its contribution towards damage is negligible. Both Messrs Wakeling and Smith earlier on the day of publication issued an article and press release respectively, containing in substance the statements sued upon in the broadcast;

(3) The third party claim is an abuse of process. There is no right to contribution. Instead it is a matter in the exercise of the Court's discretion.

[103] Mr Akel's point is, as a matter of principle, that those who voluntarily speak to or appear in the media should not be able to claim a contribution from the media where there is no suggestion of misrepresentation. They have consented to or given authority to publication. Mr Akel cites *Sheffield Corporation v Barclay* [1905] AC 392 per the Earl of Halsbury, LC, at 397:

> In *Dugdale v Lovering* [LR 10 CP 196] Mr Cave, arguing for the plaintiff, put the position thus: 'It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an

> indemnity from him who requested that it should be done'. This though only the argument of counsel was adopted and acted upon by the Court, and I believe it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of the principle in question erroneous. One qualification is that there is no right of contribution between tortfeasors; and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood.

[104] The reference to the absence of a right of contribution between tortfeasors correctly represented the law before the passage of the Law Reform Act 1936. More importantly, the passage cited with approval from the argument of counsel appears to be the foundation for the proviso to s 17(1)(c); namely, that:

> … no person shall be entitled to recover contribution under this section from any person **entitled to be indemnified by him** in respect of the liability in respect of which the contribution is sought.
>
> [Emphasis added]

The highlighted words are almost identical to those used by counsel and approved by the Earl of Halsbury. On this basis alone TVNZ arguably has a right of indemnity from Dr Wakeling and Dr Smith, effectively excluding a right of recovery under s 17(1)(c).

[105] Without meaning any disrespect to Mr Akel, I can deal with these arguments shortly. As I have endeavoured to explain, questions of contribution fall for determination on the basis that both the defendants and third parties share a common liability to the plaintiff. Contribution is apportioned according to the settled criteria of causative potency and moral blameworthiness for the plaintiff's damage. It is not a question of determining liability by reference to the third parties' contribution towards the defendants' primary wrongdoing.

[106] I appreciate the force of Mr Akel's submission based upon *Sheffield Corporation*. The circumstances suggest, as I have explained, that TVNZ published at Dr Smith's request. If it is able to establish at trial that the statements by Dr Smith and Dr Wakeling were not 'manifestly tortious' to its knowledge, then TVNZ would be entitled to an indemnity from them. The proviso to s 17(1)(c) would apply as a

bar to a right of contribution by either defendant. If I had not decided the application on other grounds, I would have reserved leave to determine this potentially decisive issue before trial.

Conclusion

[107] I make an order striking out the third party notices and statements of claim issued by the defendants against each third party.

[108] There is no reason why costs should not follow the event. In my provisional view, each third party must be entitled to one set of costs against the defendants jointly. In my provisional view also, costs should be fixed according to category 2C for one counsel. I invite the parties to confer and to attempt to reach agreement according to these parameters.

[109] Mr Gray advised that APN at least would wish to reserve its position on costs in the event of success. He may have in mind an application for increased or indemnity costs. I would need compelling argument if I was to deviate from my provisional view. Also the primary ground on which all third parties succeeded did not feature in their original applications but emerged in argument. Nevertheless, I cannot preclude an application for costs greater than scale.

[110] In the event that any third party intends to apply for costs at a greater level than category 2C, memoranda of no more than five pages are to be filed on or before 1 February 2007. Memoranda in answer, also limited to five pages, are to be filed by 15 February 2007.

[111] I record my appreciation for the assistance given by counsel in this difficult area.

Rhys Harrison J