

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

**CIV-2010-404-005021
[2012] NZHC 887**

{Later amended to [2012] NZHC 1331}

BETWEEN JOSEPH FRANCIS KARAM
 Respondent/Plaintiff

AND FAIRFAX NEW ZEALAND LIMITED
 Applicant/Defendant

Hearing: 19 and 20 March 2012
 (Heard at Auckland)

Counsel: P A Morten and M A Karam for Respondent/Plaintiff
 R K P Stewart and S B Kellett for Applicant/Defendant

Judgment: 10 May 2012

**JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to defendant's application for determination of separate question]**

[1] Mr Karam sues Fairfax for damages. He alleges that he was defamed by Fairfax in four newspaper articles or websites.

[2] Fairfax applies for an order that the issues of whether or not Fairfax published or procured the publication of the material should be decided separately from any other question and before the trial of the proceeding.

[3] At the same time as hearing this application I heard three other interlocutory applications pursued by Mr Karam and Fairfax. Those are the subject of a separate judgment also issued today.

The application

[4] Fairfax seeks orders that the following questions be decided separately from any other question and before trial in the proceeding:

- (1) Whether the second defendant published or procured the publication of material on the Counterspin website by publication of the link to <http://davidbain.counterspin.co.nz> in the Compensation article?
- (2) Whether the second defendant published or procured the publication of material on the Facebook site by reference to that site in the Facebook article?
- (3) Whether the second defendant published or procured the publication of material on the Facebook site and/or Counterspin website by reference to those sites in:
 - (ii) The Dominion Post article; or
 - (iii) The Sunday Star-Times article?

[5] The pleaded grounds on which the orders are sought are as follows:

- (a) The plaintiff alleges that by publishing a link to the Counterspin website the second defendant has published or procured the publication of what is alleged to be defamatory material published by that website (paragraph 25 of the statement of claim).
- (b) The plaintiff further alleges that by including references to the Facebook site and the Counterspin website (“websites”) in news articles concerning the question of compensation for David Bain, the second defendant has published or procured the publication of what is alleged to be defamatory material published by those websites (paragraphs 30, 35, and 42 of the statement of claim).
- (c) Questions (1), (2), and (3) are questions of law.
- (d) Questions (1), (2) and (3) will need to be resolved at trial if they are not resolved as separate questions.

- (e) To the extent that it is determined that there has been no publication of material on the websites (or any one of them) by the second defendant, that will be determinative of the cause of action relating to the article referring to that website.
- (f) Other trial and/or pre-trial issues will be more conveniently and efficiently determined once questions (1), (2) and (3) are determined.
- (g) It is in the interests of the efficient disposal of this proceeding that the orders be made.

[6] The application is made in reliance on r 10.15 of the High Court Rules.

The publication issues

[7] The issues are defined for now by Mr Karam's statement of claim and by Fairfax's second amended statement of defence. The issue on which this judgment focuses is whether defamatory material was published by Fairfax.

[8] A brief background is necessary. Five members of the Bain family – Robin and Margaret and three of their children – died in their Dunedin home in June 1994. A son, David Bain, ("Mr Bain") was found guilty of their murder and served 13 years in prison. There were numerous challenges to the conviction. Mr Bain was eventually re-tried in June 2009. He was acquitted. Mr Bain then intended to pursue compensation from the Crown.

[9] Mr Karam's claims in this case relate to four articles published by Fairfax from August 2009 to December 2009. The articles made reference to two websites. First there was reference to a Facebook group site entitled "Justice for Robin Bain". Secondly, there was the Counterspin website, with its own Uniform Resource Locator (URL).

[10] The Facebook site was established in 2009. It was initially entitled "David Bain is Guilty" before changing its name to "Justice for Robin Bain". It includes a

forum where people can leave comments. Mr Karam alleges that 40 such comments were defamatory of him, giving rise to nine defamatory meanings.

[11] The Counterspin website was also established in 2009. It includes articles, commentary and analysis of Mr Bain's trials and their subject matter. It also includes a forum where people can leave comments. Mr Karam alleges that 111 comments on the site are defamatory of him, giving rise to 12 defamatory meanings. There is no allegation that Fairfax contributed to any content on either the Facebook site or the Counterspin website. There is no allegation that Fairfax had any control over the content of either website.

The articles

[12] Mr Karam's four causes of action relate to the four articles. I now summarise them chronologically.

The Facebook article (second cause of action)

[13] The Facebook article (second cause of action) was published on the Stuff website, www.stuff.co.nz, on 22 August 2009. It was sourced from the New Zealand Press Association (NZPA). It referred to David Bain's intended application for compensation. It referred to the Facebook site in these terms:

But Justice For Robin Bain, formed from the Facebook group David Bain Is Guilty, is lobbying to prevent this happening.

Spokesman Kent Parker said a website had been set up and a petition would be started.

The Dominion Post article (third cause of action)

[14] The Dominion Post article was published on 25 November 2009 in the Dominion Post newspaper and on the Dominion Post website, www.dompost.co.nz.

[15] A Fairfax employee, Kerry Williamson, was the author. The Dominion Post article included the following passage:

Vic Perkiss said several people wanted to place the advertisements as they stepped up their lobbying against compensation for Mr Bain.

“We don’t want to go down without a fight,” he said. “We don’t want it [compensation] to just sneak through.”

Mr Perkiss is a member of **Facebook site Justice for Robin Bain**, formerly called David Bain is Guilty.

The site, which has 676 members and is linked to an online petition signed by 307 people, claims the jury in Mr Bain’s second trial was wrong.

Law experts say the site, and any proposed advertisements, could be defamatory.

It is linked to another website – **David Bain: Counterspin**.

The Dominion Post decided against running the advertisement.

(passages appearing in bold as in the statement of claim)

The Compensation article (first cause of action)

[16] The Compensation article (first cause of action) was published on 4 December 2009 on the Press website, www.thepress.co.nz. It was sourced from the NZPA. It included the following passage:

A group of Robin Bain supporters has launched a petition calling on Justice Minister Simon Power to deny his son David Bain’s application for compensation.

Advertisements were placed in major papers today, calling for people to sign up to the petition at **www.davidbain.counterspin.co.nz**. By midday, just over 300 people had signed up.

(I quote from the original article which has slightly different wording to what is quoted in the statement of claim).

[17] A distinction is sometimes drawn between “shallow” and “deep” hyperlinks.¹ A “shallow” or ordinary link involves a simple hyperlink from one webpage to another. A “deep link” transports the user to some page on another website other than its home page.

¹ Matthew Collins *The Law of Defamation and the Internet* (3rd ed, Oxford University Press, Oxford, 2010) at [2.48] p 28.

[18] The hyperlink in the Compensation article was a deep hyperlink in the sense that it took the user to four of the statements alleged by Mr Karam to be defamatory.

The Sunday Star-Times article (fourth cause of action)

[19] The Sunday Star-Times article (fourth cause of action) was published on 20 December 2009 in The Sunday Star-Times newspaper and online. A Fairfax employee, Tony Wall, was the author. The article included the following:

Why Bain trial is being fought again in cyberspace

By Tony Wall

More than 1000 people have signed an online petition aimed at denying David Bain compensation for the 13 years he spent in jail. Who are the campaigners who believe the wrong decision was reached at Bain's retrial on charges of killing his family? Tony Wall investigates.

Vic Perkiss, a 57-year-old Coromandel liquor store manager, reckons he has invented a new word: Karamelise.

It is the process by which Perkiss believes David Bain supporter Joe Karam has influenced public opinion on the case. Perkiss describes himself as a "soldier" in the campaign to prevent Bain from receiving compensation.

A full six months after Bain's acquittal, the trial of the decade rages on in cyberspace. It is not prosecuted by men and women in funny gowns with plummy voices, but by anyone with a keyboard and an opinion, **and there are plenty of those joining Facebook groups such as Justice for Robin Bain and the website David Bain: Counterspin, which hosts the petition.**

Hundreds of people of all ages and from all parts of the country have got involved, including a pensioner who bought his first computer so he could join in the discussion and an 18-year-old Otago school student who set up a pro-Robin Bain group on Facebook because he wanted to make the legal point that David's acquittal does not equal Robin's guilt.

Like others who have joined the anti-David Bain cause, Perkiss directs much of his anger at Karam, whom he believes influenced public opinion to such an extent that not guilty was the only verdict that was ever going to be returned.

He is not alone. In online discussion threads Karam's actions are picked apart, from the way he ran his media campaign to his appearance as a kind of celebrity court assistant helping an expert witness physically prove the Robin Bain murder-suicide theory.

...

He and others involved in the campaign are jittery about Karam's intentions, knowing that he has a reputation for being litigious. Karam himself was sued by two police officers for allegations he made in his book David and Goliath.

...

Forrest has written a book, Muddied Waters, so far published only online on the Counterspin site, critiquing Karam's books and writings.

...

In Hastings, web developer Kent Parker, 47, is also concerned with legal issues. The creator of the Counterspin site and one of the administrators of Justice for Robin Bain, Parker, who is interested in "online democracy", is worried that he will say or write something that will open himself up to legal action.

...

Parker ... makes no apologies.

"It won't go away, and Karam is going to have to live with what he's done. Counterspin will be on the net ad infinitum. It can create a thorn."

(passages appearing in bold as in the statement of claim)

Mr Karam's case on publication by Fairfax

[20] The Compensation article published on 4 December 2009 was the article which, as published on Fairfax websites, contained the hypertext link to the Counterspin website. Mr Karam's allegation is that Fairfax, by publishing that link, also published the defamatory material which was contained on the Counterspin website and/or procured its publication by leading the readers to it.

[21] In the case of the Facebook article, the Dominion Post article and the Sunday Star-Times article, it is Mr Karam's pleading that Fairfax, by referring to the Facebook site or the Counterspin website, published or procured the publication of the defamatory material contained on those sites by leading the reader to them.

Publication, reference or footnote

[22] The questions framed by Mr Stewart for separate determination focus on whether or not Fairfax can be said to have published material on the Facebook site or the Counterspin website by inclusion of a hyperlink or by narrative reference to the sites. I received relatively developed submissions from both Mr Stewart and Mr Morten as to the state of the law in relation to publication. This application is not the context for determination of what the law is; that will be for the Court which tries the entire case including, if ordered, the preliminary questions. That said, it is of relevance to the decision as to the determination of a separate question to, at least, summarise the legal issues involved so as to be able to bring them into account in weighing the arguments for and against a separate question determination.

The battle lines are drawn – narrative reference to other material

[23] Leaving aside the implications of the internet age and the hyperlink issue, counsel both recognised and referred to the body of case law concerning an author's reference to other material.

[24] In his submissions for Mr Karam (in opposition to the separate question application), Mr Morten identified what he referred to as three tiers of publication. It is Mr Karam's case that each of the four causes of action involves publication at one or more of those tiers. The tiers involve –

- (a) Tier 1 – written material which contains on its own face the defamatory statements;
- (b) Tier 2 – written material which by reference adopts the defamatory statements of others contained in other material;
- (c) Tier 3 – where the author of written material, unaware of the defamatory content of other material to which the author's written material refers, subsequently becomes aware of the defamatory

content but takes no steps to withdraw the written material containing the reference.

[25] Mr Karam's case is that Fairfax published defamatory material at either the Tier 2 or Tier 3 level.

[26] For authority on Tier 2 cases, Mr Morten referred particularly to the judgment of Master Kennedy-Grant in *International Telephone Link Pty Ltd v IDG Communications Ltd*.² The defendants sought orders striking out a cause of action in defamation. Their article had contained references and identification of a website which the plaintiff alleged contained defamatory material. Counsel for the defendants asserted that the defendants had not communicated any defamatory material by identifying where the allegedly defamatory material could be found. He further asserted that the allegation that the defamatory publication was to readers of the article who visited the identified website as a result of the defendants' article was an "impossibly wide proposition".³ Counsel for the plaintiffs put her opposition on two bases:⁴

(a) Referring readers to another, defamatory, publication may constitute publication in the later document of defamatory statements contained in the earlier document.

...

(b) The article republishes and reinforces some of the defamatory statements in the Website publication and this, combined with the giving of the Website address, constitutes a publication of the defamatory statements in the Website.

[27] Master Kennedy-Grant rejected the arguments put forward for strikeout. His Honour found that an allegation that publication was to persons who read the article and then visited the website was not an impossibly wide proposition.⁵ He continued:⁶

² *International Telephone Link Pty Ltd v IDG Communications Ltd* HC Auckland CP 344/97, 20 February 1998.

³ *Ibid*, at 4.

⁴ *Ibid*, at 4 - 5.

⁵ *Ibid*, at 5.

⁶ *Ibid*, at 6.

The crucial issue in this case is whether it is arguable that the references to the Website in the article were sufficient communication of the defamatory contents of the Website to constitute publication of those contents.

[28] His Honour reviewed four English cases, some of which were of some antiquity: *Hird v Wood*; *Lawrence v Newberry*; *Marchant v Ford*; and *Watts v Fraser*,⁷ upon which the plaintiffs relied. His Honour found that each case supported the conclusions he reached in his judgment. The flavour of those decisions is illustrated by the facts of *Lawrence v Newberry*. In that case the defendant had written a letter which was published in a newspaper which included the following words:

I refer all readers of the letters on this subject to this Primate's speech on the Clergy Discipline Act.

Denman J found (against a strikeout application) that the Primate's words could be used for making out a libel by the defendant on the plaintiff.

The Master referred also to the decision of the English Court of Appeal in *Astaire v Campling*.⁸ His Honour noted that although that case had been relied on by the defendants in support of their application, the judgment of Davies LJ⁹ recognised that a person may be found to have published where that person adopts, re-publishes, reinforces or expressly agrees with what other people have published.

In the circumstances the Master refused the application upon the basis that the question of whether there had been adoption or approval or repetition of the material (so as to amount to publication) was essentially a question of fact and as such fit for determination at trial. The application was dismissed. (I return below at [45] to the distinction between a question of fact and a question of law.

[29] In addition to the case law cited in *International Telephone Link*, Mr Morten referred to more recent litigation in *Jennings v Buchanan*¹⁰ and to a number of the

⁷ *Hird v Wood* (1894) 38 SJ 234 (CA); *Lawrence v Newberry* (1891) 64 LT 797; *Marchant v Ford* [1936] 2 All ER 1510 (CA); *Watts v Fraser* (1835) 7 C&P 369 173 ER 164.

⁸ *Astaire v Campling* [1965] 3 All ER 666.

⁹ *Ibid*, at 668e.

¹⁰ *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

“*Siemer* cases”.¹¹ As the authors of *Gatley on Libel and Slander*¹² indicate under a heading “Publication by reference” with reference to *Jennings v Buchanan*:¹³

It is clear that a defendant may be liable for publication by referring to a statement originally published on another occasion by himself or another: e.g. if A writes a defamatory publication of C and D then writes, “description of C may be found in A’s work”.

[30] In the *Siemer* cases, which involved initially injunction relief and later damages, the Court ordered the removal of a billboard which referred to a defamatory website in these terms –

Michael Stiassny, a true story www.stiassny.org.

[31] Finally, and turning to Tier 3 of his analysis of publications, Mr Morten referred to the judgment of Morland J in *Godfrey v Demon Internet Limited*.¹⁴ The defendants were an ISP (internet service provider). An article defamatory of the plaintiff was received into and stored on their news server. The defendants did not remove it despite the plaintiff’s advice to them that the article was defamatory. Morland J considered the judgment of Green LJ in the Golf Club Noticeboard case, *Byrne v Deane*¹⁵ in which the Court of Appeal recognised that a person who refrains from removing or obliterating defamatory matter may in some circumstances not commit a publication but in other circumstances may do so.

[32] In his submissions Mr Stewart, for Fairfax, characterised the dismissal of the strikeout application in *International Telephone Link* as being derived from “the authorities then available”. He observed that the subject article in *International Telephone Link*, set out in full in the judgment, involved some element of re-publication and reinforcement of statements contained on the offending website. However, the judgment of the Master at least equally addressed (through reference to the English authorities) the defendants drawing attention to the website.

¹¹ *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-001808, 5 May 2005, Ellen France J at [1] and [82]; *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008, Cooper J at [12], [14] and [55]; and *Siemer v Stiassny* [2011] NZCA 106 at [30](b).

¹² P Milmo and W V H Rogers *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at [6.34].

¹³ *Jennings v Buchanan* [2004] UKPC 36; [2005] 2 NZLR 577.

¹⁴ *Godfrey v Demon Internet Limited* [2001] QB 201 at 207 – 209.

¹⁵ *Byrne v Deane* [1937] 1 KB 818 at 837 – 838.

[33] Mr Stewart identified the very recent judgments of the Judges of the Supreme Court of Canada in *Crookes v Newton*,¹⁶ and in particular the reasoning of the majority,¹⁷ as highly persuasive authority which ought to be adopted in New Zealand. It is not for this Court on this application to determine whether the conclusion or reasoning of the majority in *Crookes v Newton* is to be adopted in New Zealand. That is a matter for trial. It is sufficient for present purposes to identify the propositions of law which Mr Stewart intends to pursue.

[34] I am content to adopt as accurate Mr Stewart's summary of the principal findings in the judgment of Abella J which were (the references being to the relevant paragraph in her Honour's judgment):

- 43.1 In essence, hyperlinks are references: at [27].
- 43.2 Referencing other content is fundamentally different from other acts involved in publication. An author does not exercise control over referenced material: at [26].
- 43.3 Communicating something is very different from merely communicating that something exists or where it exists: at [26].
- 43.4 It is the actual author of the defamatory material who has "published" it: at [29].
- 43.5 A hyperlink, like other references, [communicates] that something exists but [does] not communicate its content: at [30].
- 43.6 To bring the use of hyperlinks within the publication rule risks impairing the whole function of the internet: at [36].
- 43.7 A defendant may attract liability for hyperlinking if the manner in which they refer to the secondary article conveys defamatory meaning. In other words the defendant must him or herself have expressed something defamatory. For example where a reference repeats defamatory content from a secondary source: at [40].

[35] McLachlan CJ and Fish J, in a single judgment, concurred with the majority but would have adopted a different test for determining when a hyperlink reference amounts to publication of the defamatory matter to which it links.¹⁸

¹⁶ *Crookes v Newton* [2011] 3 SCR 269.

¹⁷ Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ, delivered by Abella J.

¹⁸ *Crookes v Newton* [2011] 3 SCR 269 at [46].

[36] Deschamps J concurred with the result, not with the reasoning of the majority. The correct approach, in the judgment of Deschamps J, is not to treat identification by hyperlink as mere reference or footnote, but to adopt a more nuanced approach which would find that a hyperlink reference will be defamatory if it makes the defamatory information readily available to a third party in a comprehensible form.¹⁹ Her Honour would require that the defendant have performed a deliberate act in that regard.²⁰ Whether information had thus been made readily available would be a question of fact.²¹ Her Honour then considered the factual inferences available on the case, and compared the shallow nature of one hyperlink and the nature of the other hyperlink,²² before inferring that the deep link had made the defamatory article readily available whereas the shallow link had not.

[37] Mr Stewart submitted that in the light of the Supreme Court's decision in *Crookes v Newton*, the legal principles relating to publication are sufficiently clear as to enable a pre-trial determination (as to publication) to be made.

[38] Mr Morten disagreed. He described Mr Stewart's submissions as containing a rather optimistic view of the potential outcome.

Continuing uncertainty

[39] In my view, the variation in reasoning within the judgments in *Crookes v Newton* underlines the developing nature of this area of the law. In the most recent edition of his text, *The Law of Defamation and the Internet*,²³ which pre-dates the Supreme Court decision in *Crookes v Newton* (but post-dated the decision of the British Columbia Court of Appeal), Matthew Collins began his discussion of the relevance of hyperlinks to defamation law in this way:²⁴

Hyperlinks have the effect of blurring the distinction between where one publication ends, and the next begins...

¹⁹ Ibid, at [59].

²⁰ Ibid, at [93].

²¹ Ibid, at [94].

²² Ibid, at [124] – [125].

²³ Matthew Collins *The Law of Defamation and the Internet* (3rd ed, Oxford University Press, Oxford, 2010).

²⁴ Ibid, at [3.12] p 40.

and then continued:

Another question for defamation law is whether website owners might potentially be liable for defamatory material on another person's website, if that material is accessible from their website by hyperlink...

[40] Publication by reference was the subject of brief discussion in the judgment of Eady J in *Ali v Associated Newspapers Limited* where his Lordship said:²⁵

One point that was briefly addressed in the course of submissions was that of the hyperlink. It was said that it is so far undecided in the authorities whether, as a matter of generality, any material to which attention is drawn in a blog by this means should be taken to be incorporated as part of the blog itself. I suspect that a general rule of thumb is unlikely to be adopted. Much will depend on the circumstances of the particular case.

[41] The authors of *Duncan & Neill on Defamation* say this in relation to publication and the internet:²⁶

The advent of electronic communication, particularly by e-mail and on the World Wide Web, has led the courts to review the common law approach to the question of publication. So far, they have analysed these new means of communication in terms of the established principles, rather than reformulating those principles or recognising technology-specific exceptions.

[42] This commentary, from a 2009 perspective, came before the reconsideration of established common law principles which is arguably evident in the majority decision of the Supreme Court of Canada in *Crookes v Newton*. The readiness of the majority to depart from traditional approaches is exemplified in the judgment of Abella J. In agreeing with the proposition that "reference to an article containing defamatory comment without repetition of the comment itself should not be found to be a republication of such defamatory comment" Abella J stated:²⁷

I agree with this approach. It avoids a formalistic application of the traditional publication rule and recognizes the importance of the communicative and expressive function in referring to other sources. Applying such a rule to hyperlinks, as the reasons of Justice Deschamps demonstrate, has the effect of creating a presumption of liability for all hyperlinkers, an untenable situation in my view.

²⁵ *Ali v Associated Newspapers Limited* [2010] EWHC 100 at 28.

²⁶ Sir Brian Neill & Ors *Duncan & Neill on Defamation* (3rd ed, Butterworths, London, 2009) at [8.02], p 71.

²⁷ *Crookes v Newton* [2011] 3 SCR 269 at [25].

and later, her Honour continued:²⁸

Interpreting the publication rule to exclude mere references not only accords with a more sophisticated appreciation of *Charter* values, but also with the dramatic transformation in the technology of communications.

[43] It was made clear in the judgment of Deschamps J that the tensions between her Honour's approach and that of the majority was in relation to the extent to which common law principles should be altered. Hence her Honour noted:²⁹

The question that remains is whether, even with these emerging limits on the common law principle, further refinements are necessary.

Overview

[44] The variation of approaches in *Crookes v Newton* and the discussion within the legal commentaries as to the difficulties of referencing websites and of hyperlinking serve to emphasise that until the highest Courts in each jurisdiction comprehensively review this area of the law, there must remain substantial uncertainties as to how the law will develop in each jurisdiction. This is particularly so when there are distinctions, some subtle and others less so, between the statutory provisions as to defamation, libel and slander.

Law and fact

[45] In the Fairfax separate question application, the questions posited for separate determination (above at [4]) were asserted to be questions of law.

[46] Mr Karam's notice of opposition responded that issues of fact need to be resolved before the Court can consider whether or not publication has occurred. The notice of opposition went on to assert that the issues around publication therefore ought not to be resolved on an interlocutory application; an apparent misunderstanding given that the determination of a separate question, such as the question of liability in a contract or tort case, can be. The Court has the ability on a

²⁸ Ibid, at [33].

²⁹ Ibid, at [92].

separate question as much as at the trial itself to determine issues both of fact and law and mixed issues.

A complication – the plaintiff’s election

[47] Section 19A of the Judicature Act 1908 permits the plaintiff in a case such as this to elect trial before a Judge and jury. Mr Karam gave the required notice at the first case management conference in October 2010.

[48] Counsel for the parties, in preparation for this hearing, apparently overlooked the jury trial election. The Court has power pursuant to s 19A(5) of the Judicature Act to order that the proceeding or any issue be tried before a Judge without a jury. Fairfax did not make an application for such an order. Mr Stewart accepted that the highest he could put the matter was that Fairfax’s application for determination of a separate question involved by implication an application under s 19A(5) also. That said, the Fairfax application and the Fairfax written submissions did not invoke s 19A(5). This position is understandable given that Mr Stewart brought the application upon the basis that the questions being proposed for determination were asserted to be “questions of law”.

[49] The settled position, as reflected in *Gatley*³⁰ and in the commentary in *Laws of New Zealand*³¹ is that whether facts constitute publication is a question of law for the Judge. The facts themselves, if disputed, are matters for the jury. Thus a Trial Judge may put to the jury certain relevant issues of fact and on their affirmative answers may then rule that there has been publication. That is precisely the approach approved by the Court of Appeal in *O’Brien v New Zealand Social Credit Political League Inc.*³²

[50] In this case, Mr Karam stands by his election to be tried by Judge and jury.

³⁰ P Milmo and W V H Rogers *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at [36.11].

³¹ *Laws of New Zealand Defamation* (online ed) at [215].

³² *O’Brien v New Zealand Social Credit Political League Inc.* [1984] 1 NZLR 63 (CA) per Casey J at 65.

Submissions as to the separate questions

[51] For Fairfax, Mr Stewart commenced with the developed proposition that the decision of the Supreme Court of Canada in *Crookes v Newton* made the legal principles in relation to publications of the present kind sufficiently clear to enable a separate question to be determined. The trial, if needed, would not be delayed because a trial has at this point not been allocated. In his written submissions he suggested that the separate questions could be heard in the space of one or two days (revised in oral submissions to two to three days) whereas a trial would require two weeks (revised in oral submissions to “many weeks”).

[52] If Fairfax is wholly successful in obtaining negative answers to the questions, the litigation would be at an end. Even if Fairfax is unsuccessful, the trial would then involve other defences to the exclusion of the “no publication” defence and the trial would be more efficiently conducted. The Court and the parties are likely to benefit from time savings and from reduced preparation time for trial.

[53] Rule 10.12 of the High Court Rules anticipates that questions of fact and law may be determined at the pre-trial. It is therefore not an answer to the application to suggest that the questions involved mixed questions of fact and law. The possibility of multiple appeals, rather than militating against the application for separate questions, suggests that there ought to be separate questions. A determinative ruling on the law would assist the ultimate trial Court.

[54] Mr Morten adopted a five point analysis formulated by Kós J in *Haden v Attorney-General*.³³ Mr Morten submitted that Mr Stewart’s focus on the hyperlink considerations in the judgments of the Supreme Court of Canada in *Crookes v Newton* lost focus on the majority of the causes of action which do not involve the hyperlink issue. Even if the hyperlink issue is ultimately one of pure law, the remaining publications will require evidence or determination of underlying factual issues. Discovery is not complete, and indeed the Court heard competing discovery applications at the same time as this application. Upon the completion of discovery

³³ *Haden v Attorney-General* HC Wellington CIV-2010-485-2380, 4 November 2011.

the plaintiff intends to administer interrogatories. The Court should not countenance a separate question determination upon the basis of a limited subset of facts.

[55] While answers on the separate questions favourable to Fairfax would bring the proceedings to an end, the failure by Fairfax to obtain favourable determinations would mean little saving in time as the full ambit of evidence at trial would remain. The time needed for the hearing of a separate question determination would need to allow for evidence and legal submission and would take longer than the initial one to two day estimate. In the event any aspect of the application is unsuccessful the preliminary hearing time is likely to have been completely wasted. The final resolution of the whole case, if it proceeds, will be substantially delayed both through the separate question determination itself and the likelihood of appeals on matters of significant importance to the Press and to the development of this particular part of the law of defamation.

[56] The fragmentation of the case is likely to create difficulties and overlaps with the subsequent trial. There will also be duplication of time for the Court and counsel in not only the overlap of issues at a hearing but in the preparation and consideration before and afterwards. There is at least a moderate presumption against the splitting of a trial. Fairfax has not discharged the onus of establishing that separate questions should be determined.

Analysis

[57] Rule 10.15 provides:

10.15 Orders for decision

The court may, whether or not the decision will dispose of the proceeding, make orders for—

- (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
- (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[58] The general principles which I adopt in relation to the application are these –

- (a) The jurisdiction is discretionary;
- (b) Each case is to be considered on its own facts;
- (c) There is an assumption that it is usually preferable to determine all matters in issue at one trial;
- (d) There is some onus on an applicant to establish a preponderant balance of factors in favour of the determination of a separate question – the onus has been variously described as “not insignificant”, “moderate”, and “heavy”. An appropriate approach is to consider whether the applicant has established good, preponderant reasons in favour of a separate question determination.

[59] Considerations relevant to the exercise of the discretion will vary with the facts of each case. Sets of considerations, gathered from the case law, are assembled in *McGechan on Procedure*³⁴ and in *Sim's Court Practice*.³⁵ In recent years, further examples can be found in the judgments in *Turners & Growers Ltd v Zespri Group Ltd*³⁶ and *Haden v Attorney-General*.³⁷ Such lists are helpful but do not obviate the need for the consideration of the individual circumstances of the case. In relation to this application counsel addressed the considerations with reference to the formulated criteria in *Haden v Attorney-General*, which I adopt as a suitable basis for analysis.

³⁴ *McGechan on Procedure* HR 10.15.06.

³⁵ *Sim's Court Practice* HCR 10.15.4.

³⁶ *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-004392, 5 May 2010, per White J at [11].

³⁷ *Haden v Attorney-General* HC Wellington CIV-2010-485-2380, 4 November 2011 per Kós J at [50].

Question 1: Will there be difficult demarcation questions between those issues to be addressed at the first trial and those left for the second?

[60] As observed by Kós J in *Haden v Attorney-General*:³⁸

The interaction between issues in split trials is said to be the single most important question for consideration by a Court considering a Rule 10.15 application... issues in the two hearings desirably should be discreet [sic].

[61] Fairfax's proposed questions, expressed as questions of whether Fairfax published the defamatory material, appear as issues relatively distinct from the remaining issues for trial. The manner in which the plaintiff pleads each publication reinforces the relative distinctness of the issue of publication. The focus is specifically upon the conduct said to amount to publication.

[62] Demarcation issues, however, arise frequently in relation to the evidence which will be relevant both at the separate question hearing and at trial. Damages claims, where there may on the facts be a significant overlap between the evidence going to liability and the evidence going to quantum, is the classic example of that.

[63] In relation to the issues which might be required to be determined in relation to the separate question, (particularly in relation to Mr Morten's Tier 2 and Tier 3 publication arguments), demarcation difficulties do not particularly arise. The impact of those matters is primarily on how to respond to that situation when a plaintiff has elected trial by Judge and jury.

[64] Mr Morten's sole written submission in relation to overlap of factual issues related to what he referred to as the defendant's "innocent dissemination" defence. That defence, as enunciated in s 21 of the Defamation Act 1992, involves determination of lack of knowledge of the defamatory nature of the material against a background of reasonable care. The defence of innocent dissemination which Fairfax had pleaded in its initial statement of defence was abandoned in its amended statement of defence. Mr Morten's submission in this regard had therefore

³⁸ Ibid, at [50](a), citing *Clear Communications v Telecom Corporation of New Zealand Ltd* (1998) 12 PRNZ 333 at 335.

proceeded on a misunderstanding. Any overlap which might have occurred on account of an innocent dissemination to be determined at trial is not going to happen.

[65] Fairfax maintains an alternative defence of neutral reportage which would fall for consideration at the trial if the separate questions are not answered in favour of Fairfax.

[66] The defence of neutral reportage, unlike the defence of innocent dissemination, does not involve any assessment of the defendant's state of knowledge in relation to the defamatory content. Understandably, Mr Morten did not focus any submissions upon it. It is capable of demarcation from the proposed separate questions.

Question 2: Will the proceedings be brought to an end?

[67] The entire proceeding will be brought to an end if the proposed questions are answered in favour of Fairfax.

[68] If, on a separate question determination, it is found against Fairfax that there was a publication under one or more of the causes of action, then those causes of action will remain for trial. That is a possibility in this case given both the distinction between the Compensation article (carrying the hyperlink) and the others, and given the differing content of the various articles.

[69] With the remaining possibility that all publication questions are answered in favour of Fairfax, the answer to Question 2 is definitely in favour of granting the application.

Question 3: Timesaving

[70] The only likely saving of time in this proceeding would flow from Fairfax's full success on the preliminary questions. That is part and parcel of the proceedings being brought to an end.

[71] In the event that there has been no publication of the defamatory material in one or more of the articles (but not all), any time saving is uncertain. It appears likely that some of the evidence to be called for Mr Karam on the separate questions would also be called at the trial. That would arise particularly in relation to any questions of knowledge which arguably touch both Mr Morten's Tier 3 publication analysis and the aggravated damages which Mr Karam pursues. To this extent there is the possibility of a duplication of evidence at the two stages of the proceeding rather than a saving of time.

[72] Counsel's estimate of time in relation to hearings has not greatly assisted the Court. In their written submissions both proceeded on an assumption of a two-week trial as compared with a pre-trial determination which might take one to two days. By the end of oral submissions the pre-trial estimate had been reassessed to be more likely to be two to three days. The original trial estimate in the submissions of Mr Stewart is well out.

[73] Mr Stewart refers in particular to the time that will be taken at trial to deal with allegations of fact (referred to in the statement of defence as the "Schedule A" facts). These are facts which Fairfax asserts go to support the defence of honest opinion. (Mr Karam's application to strike out that defence, and the detail relating to it, is the subject of a separate judgment being issued at the same time as this). The Schedule A facts deal with a great many aspects of the 1994 murders, and of subsequent legal proceedings and of Mr Karam's standing and involvement. Mr Karam denies 51 of a total of 59 Schedule A facts asserted by Fairfax. On this basis Mr Stewart revised his estimate of trial. He suggested that the trial would potentially take several weeks longer than the two weeks estimated.

[74] While the uncertainty as to trial length is unsatisfactory for other reasons, it does not significantly affect the consideration of time saving through the proposed separate questions.

[75] This is a case where the significant timesaving will arise only if Fairfax is wholly successful on its separate questions. In the event that Fairfax is only partly

successful, there is a risk of some duplication of evidence and some extension of the time taken cumulatively by the separate questions and the trial.

[76] To the extent that Question 3 has its greatest relevance where one assumes that a trial proceeds, the answer to Question 3 tends against the granting of the application.

Question 4: Appeals

[77] The legal argument, divisions and course of the litigation in *Crookes v Newton* in Canada indicates a likely course for this litigation. The issues involved in publication through reference or repetition are of significant importance. The issues surrounding publication through a hyperlink are novel and unsettled in this jurisdiction. The substance of the plaintiff's concerns as to his reputation are of fundamental importance to Mr Karam. For Fairfax there are issues of fundamental importance as a member of the fourth estate asserting Press freedom in an electronic age of increasing sophistication.

[78] The nature of the issues lends itself to appeal as of right to the Court of Appeal and further appeal by leave.

[79] The answer to Question 4 tends against granting the application.

[80] The likelihood of appeals immediately following the determination of the preliminary questions is closely related to the novelty of the areas of the law involved.

Question 5: Are there any other practical considerations tending one way or the other?

[81] To ask this question is in essence to re-frame the basic question in relation to r 10.5, which is whether the proposed preliminary hearing is likely to expedite a proceeding, saving inconvenience and expense without any countervailing injustice.

[82] In practice, the r 10.15 procedure has proved successful in defamation cases. The most common example is the determination of whether the words complained of are reasonably capable of referring to the plaintiff. Such an issue is a question of law for the Judge. The situation is different to that in the present where one element is for the Judge (whether the facts constitute publication) but there are questions of fact underlying that, which are for the jury (unless the Court orders a trial of that issue by Judge alone). The combination of the need for exploration of some factual material and the novelty of the hyperlink issue in particular in this case puts it in the category of cases which are usually better resolved within their full factual setting rather than in a separate subset of facts.³⁹

[83] Counsel did not suggest that, in relation to the issues of publication, there are likely to be resulting difficulties of issue estoppel or inadvertent findings at the first trial upon matters which are for full evidence and argument at the second trial. Given however that evidence would be required at a separate question hearing and that some witnesses may be called at both hearings, there must be some risk of findings, such as in relation to credibility, which could create a tension for the second trial.

[84] At a practical level, I must also take into account the availability and rostering of the Judge for the second trial should there be a lengthy period of intervening appeals.

Bringing the considerations together

[85] When one paraphrases the questions for determination as being whether publication occurred, they appear to have the quality of a discrete issue suitable for separate determination. That is undoubtedly what caused Master Hansen, on the facts of the case in *Fay Richwhite Company Ltd v Examiner Papers Ltd*,⁴⁰ to suggest and then make an order that the question of republication be determined as a preliminary point. The course adopted in that case had the substantial, additional

³⁹ *Haden v Attorney-General* HC Wellington CIV-2010-485-2380, 4 November 2011 per Kós J at [50](e).

⁴⁰ *Fay Richwhite and Co Ltd v Examiner Newspapers Ltd* HC Auckland CP 1091/91, CP 1937/91, 15 September 1992.

advantage of enabling the Court and the parties to move quickly through that point to the more difficult issues around consolidation of two proceedings. The question was to be determined in that case by a Judge.⁴¹

[86] The resolution of the proposed separate questions in this case is more complicated than it first appears. Contrary to an initial premise of the Fairfax application, publication is not in this case a question of law only. In a trial before Judge and jury, all questions of underlying fact would be submitted to the jury. While on the information available in this application there is no reason to anticipate that a lengthy examination of facts would be required at the separate question hearing, it remains the right of the parties to explore and determine those facts before the Judge determines whether they constitute publication as a question of law. Mr Stewart, for Fairfax, does not invite the Court to make a separate question direction which would require a preliminary hearing involving both Judge and jury. On the other hand, Fairfax made no application under s 19A(5) of the Judicature Act 1908 for trial of these issues (or any others) by a Judge without a jury.

[87] The assumption is in favour of a single trial. Fairfax can point to an expedited outcome in one eventuality, namely a favourable decision on the separate question in regard to all four causes of action.

[88] Very significant uncertainty surrounds the legal approach which New Zealand Courts will ultimately adopt in relation to the issues of publication with which the Supreme Court of Canada has recently dealt, with varying approaches. The Court must balance the countervailing factors which tend against the determination of a separate question. When that is done the possibility that the entire proceeding will fall away is insufficient to displace the inconvenience and expense which would likely flow from separate trials.

[89] I take into account also the fact that there is no application before the Court from Fairfax for a trial by Judge alone. The Court of Appeal, in emphasising that the right to a jury trial is not to be undervalued, has specifically related its importance to the significance of the jury influence on standards of behaviour and of vindicating in

⁴¹ Ibid, at 10.

an appropriate way those who have been wronged.⁴² The considerations which inform the exercise of the discretion under s 19A(5) of the Judicature Act 1908, while very similar to those in relation to a separate question determination, are not identical. Having not heard developed submissions in relation to the exercise of the discretion under s 19A, it is another consideration in the assessment of the justice of this case that Mr Karam has at the outset of this case exercised his s 19A election, and that that election has not been directly challenged.

Conclusion

[90] Fairfax has not discharged the onus of establishing that it is appropriate to order that its proposed questions be decided separately.

Order

[91] I order –

- (a) The application for determination of separate questions is dismissed.
- (b) Costs are reserved for determination in the light of the outcome of the four applications which were heard together.



Associate Judge Osborne

Solicitors:

Duncan Cotterill, PO Box 5326, Auckland – Email: d.mcgill@duncancotterill.com

Counsel: Mr P A Morten – Email: pmorten@missionchambers.com

Mr M Karam – Email: mattkaram@clear.net.nz

Izard Weston, PO Box 5348, Wellington – Email: robert.stewart@izardweston.co.nz /

simon.kellett@izardweston.co.nz

⁴² *McInroe v Leeks* [2000] 2 NZLR 721 (CA) per Henry J at [21].