

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-001701
[2013] NZHC 540

BETWEEN IAN WISHART
Plaintiff

AND CHRISTOPHER ROBERT MURRAY
First Defendant

AND KERRI MAREE MURRAY
Second Defendant

AND DIMENSION DATA NEW ZEALAND
LIMITED
Third Defendant

Hearing: 25 October 2012

Appearances: Plaintiff in person
D M Salmon and D Nilsson for First and Second Defendants
H B Rennie QC for Third Defendants

Judgment: 19 March 2013

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 19 March 2013 at 4:00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

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Introduction

[1] The deaths in 2006 of three-month-old twins, Chris and Cru Kahui from non-accidental injuries generated a significant level of public interest. The babies' father, Chris Kahui, was acquitted of their murder. During the trial he suggested that the babies' mother, Macsyna King, had inflicted the fatal injuries. Although a coroner later found that the twins had died while in Mr Kahui's sole care, this suggestion retained some currency in the public arena.

[2] After the inquest, the plaintiff, Ian Wishart, wrote a book about the case called *Breaking Silence*. Ms King collaborated on it.¹ When the book's impending release became known in June 2011 the first defendant, Christopher Murray, established a Facebook page called "Boycott the Macsyna King Book". Mr Murray used Twitter to publicise the Facebook page. He posted comments on Twitter and on the Facebook page criticising Mr Wishart and Ms King. The second defendant, Kerri Murray (Christopher Murray's wife) also posted comments on the Facebook page, as did other, unidentified people. In addition, Mr Murray made comments about Mr Wishart and Ms King during a radio interview.

[3] Mr Wishart has sued Mr and Mrs Murray and Mr Murray's employer, Dimension Data NZ Ltd, alleging that many of the comments made via Twitter, on the Facebook page and during the radio interviews, defamed him. He is claiming a total of \$8m. Mr and Mrs Murray have applied to strike out the statement of claim either wholly or in part.² The approach to be taken in determining strike out applications is well settled.³ Only claims that are clearly untenable should be struck out. The fact that an application gives rise to difficult legal issues does not preclude striking out.

[4] The statements made by Mr and Mrs Murray are the subject of the first three causes of action and, in part, the fourth cause of action. The strike out application in relation to these allegations is brought on two grounds. The first is that the statements in issue are not capable of bearing the pleaded meanings. The second is

¹ It is accepted that Ms King did not ask for, nor receive, any money from the proceeds of the book.

² There is no application by Dimension Data Ltd.

³ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

that the statement of claim is prolix and oppressive and includes material that is scandalous and/or irrelevant.

[5] The fourth cause of action is also based in part on the postings of unidentified third parties. The allegations can only succeed if (among other things) Mr Murray is found to be a publisher of those postings. Mr Murray maintains that, as a mere host of a Facebook page, he cannot, at law, be the publisher of statements that he did not author. This issue falls to be decided both as part of the strike out application and also as a preliminary determination.

[6] If the statement of claim is not struck out Mr and Mrs Murray seek security for costs against Mr Wishart.

Determining whether statements are capable of bearing the pleaded meaning

[7] Section 37(2) of the Defamation Act 1992 requires a plaintiff to give particulars of “every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself”. Although it is for the fact finder (whether jury or judge alone) to determine whether the words sued on bear the defamatory meaning alleged, the preliminary issue of whether the words are capable of bearing the pleaded meaning is a question of law.⁴

[8] Unless the innuendo is pleaded (which it is not in this case) the words that are complained of must be given their natural and ordinary meaning in determining whether they are capable of bearing the alleged defamatory meaning. The relevant principles were helpfully summarised by the Court of Appeal in *New Zealand Magazines Ltd v Hadlee (No. 2)*:⁵

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

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

⁵ *New Zealand Magazines Ltd v Hadlee (No. 2)* [2005] NZAR 621 (CA) at 625.

- (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
- (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
- (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
- (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared ...

[9] In *Hadlee* the Court of Appeal also referred, with apparent approval to previous descriptions of the notional ordinary reader as being someone “not avid for scandal” and “fair-minded”⁶ and “not prone to fasten on one derogatory meaning when other innocent or at least less suspicious meanings could apply”.⁷

[10] Mr Salmon, for Mr and Mrs Murray, submitted that the “three tier” classification of pleaded meanings commonly used in the United Kingdom is useful and applicable in New Zealand. Under this approach pleaded meanings are generally regarded as falling into one of three tiers; a first tier meaning asserts actual misconduct, a second tier meaning asserts that there are grounds to suspect the plaintiff is guilty of misconduct and a third tier meaning asserts that there are grounds for investigating whether the plaintiff is guilty of misconduct.⁸ These distinctions were effectively recognised in New Zealand before the more formal articulation of them in the UK.⁹ However, the Supreme Court has made the following observation:¹⁰

[16] This tripartite classification provides a convenient description of different forms of meaning. Care must, however, be taken lest classification be allowed to dictate meaning. The crucial first step is identifying the precise meaning of the words in issue, rather than attempting to force that meaning into one of the three “tiers”.

⁶ *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL).

⁷ *Mitchell v Faber & Faber* [1998] EMLR 807 (CA).

⁸ *Chase v New Group Newspapers Ltd* [2003] EWCA CIV1772, [2003] EMLR 11.

⁹ *Hyams v Peterson*, above n 3.

¹⁰ *APN New Zealand Ltd v Simunovich Fisheries Ltd & Ors* [2009] NZSC 93, [2010] 1 NZLR 315.

Meanings in different tiers may shade into each other, rather than always falling neatly into one compartment or another ... Furthermore, it does not necessarily follow that a “tier one” meaning is always more serious than a “tier two” meaning or a “tier two” meaning is more serious than a “tier three” meaning. Everything depends on the precise words used and the context in which they are used ...¹¹

[11] Mr Wishart submitted that the “three tier” approach should not apply in the present case because it was an approach that originated in news media defamation cases involving professional journalists, whereas Mr Murray is not a trained media person and his stated reason for publishing the comments was simply to encourage people to shun the author of a book that he had not even read. In those circumstances, Mr Wishart submitted, there is no equivalence between cases where the subtleties of tiers have been applied and the present case.

[12] I do not accept that distinction. The inquiry at this point is simply an inquiry into the objectively possible meaning of the words. The three tier approach may, as the Supreme Court suggests, simply be viewed as a convenient description of different forms of meaning. The intention of the author does not form part of that inquiry. Nor, given the widespread use of Twitter and Facebook by people across the whole spectrum of media experience, should the status of the author be relevant.

First cause of action: the Twitter statements

The context of the Twitter statements

[13] On 28 June 2011 Mr Murray made statements on his Twitter account to raise awareness of the existence of the Facebook page and encourage a boycott of the book. The Twitter statements had links to the main Facebook page and acted as a headline or teaser, encouraging people to go to the Facebook page. The plaintiff asserted, without challenge, that almost everyone who viewed the Twitter statements would have linked through to the Facebook page.

¹¹ These observations were made in the context of an application to strike out particulars of truth and honest opinion defences but are equally apt to particulars given under s 37(2).

[14] Following the establishment of the Facebook page more than 30,000 people actively joined the page by clicking a “like” button and automatically subscribing to Mr and Mrs Murray’s postings on it. The page peaked at 50,000 people before being closed. It is said, however, that this figure represents only a small proportion of those who viewed the site given the likelihood that many people would simply view it but not activate the “like” button.

[15] Mr Wishart submitted that, given the connection between the two, the Twitter statements must be viewed together with the Facebook page, at least to the extent of the “Info Statement” on the Facebook page which provided a general statement about the purpose of the page. I agree.

[16] On Twitter Mr Murray stated:

- (a) I’ve fired up a Facebook page to drive awareness. She can’t be allowed to profit from this;
- (b) Suspected child murderer and renowned ‘worst mother in the world’ set to profit from tell-all book;
- (c) Once again I find myself having to question Ian Wishart’s motivation;
- (d) The most unpopular person in New Zealand.

[17] The “Info Statement” on the Facebook page said:

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

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

I am trying to organise a boycott of this book and until such time as it is pulled from the shelves, all other Ian Wishart books and all other books by the publisher.

Somebody like this should not be allowed to profit from preaching her perverted view of the horrific events which led to the deaths of the only two children who hadn’t already been taken from her by CYFs.

Are the Twitter statements capable of bearing the pleaded meanings?

[18] Mr Wishart has pleaded at paragraph 13 of the statement of claim that the reference to “the most unpopular person in New Zealand” is intended to refer to both him and Ms King jointly and severally. It is, of course, an essential element of a defamation claim that the statements in question must identify the plaintiff as the object of the statement.¹¹ I accept Mr Salmon’s submission that this statement cannot be read as referring to Mr Wishart.

[19] First, the use of the singular means that the ordinary and natural meaning of the statement relates to one individual. Secondly, although many of the Twitter and Facebook statements were directed towards Mr Wishart, there can be no question that these serious assertions were made about Ms King. It was she who was described as a “suspected child murderer” and a person who had committed “atrocious deeds”. Given that only one person could be the subject of the description “the most unpopular person in New Zealand” it is not tenable to suggest that, as between Mr Wishart and Ms King, it was Mr Wishart who was the object of that description.

[20] At paragraph 15 of the statement of claim Mr Wishart has pleaded that, taken together, the other words in the pleaded Twitter statements and Info Statement meant or are understood to mean that he:

- (a) Paid a baby murderer for her story to help her profit from her crime;
- (b) Did not do this to get justice for the twins but for an improper and corrupt motive;
- (c) Is a corrupt journalist;
- (d) Did substandard work on the book that was worthless and of no merit;
- (e) Is an unethical opportunist;

¹¹ *David Syme & Co v Canavan* (1918) 25 CLR 234 at 238.

(f) Is an unscrupulous journalist;

(g) Regularly publishes books with an improper or corrupt motive.

[21] Alternatively, he pleads that the words would lead ordinary and reasonable readers to draw those inferences, which would be untrue.

[22] Mr Salmon submitted that these words are incapable of bearing the pleaded meanings because, although the pleaded meanings are all “first tier” meanings i.e. accusations of actual and serious wrongdoing, at the most, the statements only reflect Mr Murray’s personal reservations in respect of Mr Wishart’s work generally. A fair minded reader, averse to scandal and extreme conclusions would not draw an inference of allegations of actual criminal conspiracy, corruption or unethical behaviour from the pleaded words.

[23] Mr Salmon submitted that the first meaning pleaded at paragraph 15(a) of the statement of claim, namely that Mr Wishart paid a baby murderer for her story, could not stand because the Twitter statement specifically identified Ms King as a “suspected child murderer” not an actual murderer. It is true that, in isolation, this statement could not bear the pleaded meaning. However, when read together with the Info Statement, I am satisfied that the words are capable of bearing the meaning that Ms King was a “child murderer”. Ms King had not been prosecuted for the murders but the defence case for Chris Kahui had pointed the finger at her. Read together with the reference to Ms King’s “atrocious deeds” and “the bits she remembers which won’t incriminate her further” the statement is capable of being read as an assertion that Ms King was, in fact, the murderer.

[24] The pleading at paragraph 15(b) that Mr Wishart is corrupt and acted out of an improper and corrupt motive is resisted by Mr Salmon on the basis that these things were not said. Rather, Mr Murray has simply raised a question about Mr Wishart’s motive in writing the book. I agree with that submission in relation to paragraph 15(c); the ordinary meaning of “corrupt” is willing to act dishonestly for personal gain. I consider that the words used fall short of this meaning. The ordinary meaning of “improper” is not being in accordance with accepted standards

of conduct and I consider that the words used are capable of bearing this meaning. For the same reason, I consider that the pleading at paragraph 15(c), that Mr Wishart is a corrupt journalist, cannot stand.

[25] The pleaded meaning at paragraph 15(d) is also resisted on the basis that it was not said and capable of bearing those meanings. Mr Salmon submitted¹² that the asserted meanings have moved from third tier meanings of actual wrongdoing to first tier meanings of mere grounds for further investigation. I accept Mr Salmon's submission that the asserted meaning at (d) is not available on the words pleaded. The words are focused on Mr Wishart's motivation and the subject matter of the book, rather than the quality of the work.

[26] I do, however, consider that the meanings at paragraph 15(e) and (f) are available. Both are directed towards motivation, which is a stated object of the pleaded words. The natural and ordinary meaning of the words is that Ms King did murder her children and that Mr Wishart was prepared to capitalise on their deaths to sell his books and thereby assist her to make money.

[27] In relation to the pleaded meaning at paragraph 15(g), I accept that the ordinary and natural meaning of the statements is that there is reason to suspect Mr Wishart of dubious motives in relation to previous books he has written (the use of "once again"). However, only the allegation that his motive was "improper" is available on the pleaded words for the reason I have already discussed.

Second cause of action: the Facebook page

[28] The second cause of action rests on the combined effect of the "Info Statement" already set out and the individual statements by Mr Murray on the Facebook page.

¹² instead of "is not" and the words are not capable of bearing those meanings.

The Info Statement

[29] At paragraph 57 of the statement of claim Mr Wishart asserts that the references to “Ian Wishart” and “publisher” in the Info Statement are both references to him. Mr Salmon rejects that on the basis that Mr Wishart is not the publisher in his personal capacity and the phrase “Ian Wishart and the publisher” differentiates between the two. Mr Wishart is well known in New Zealand as an investigative journalist who publishes through a company he controls, Howling at the Moon Publishing Ltd. He has written and, through Howling at the Moon Publishing Ltd, published, at least two books about high profile criminal cases and other books involving highly publicised investigations, including the so-called “Winebox” case. In that context the reference to “the publisher” is capable of being read as identifying Mr Wishart.

[30] Mr Salmon’s second objection was to the pleading at paragraph 58 of the statement of claim that the natural and ordinary meaning of the words in the “Info Statement” were capable of bearing the meaning that Ms King was the murderer of her twins and that all of her other children had been taken from her by CYFs. Mr Wishart pleads that such meanings are untrue and that upon those false allegations the words in the Info Statement therefore mean or are understood to mean that he:

- (a) Is loathsome for paying a baby murderer for the rights to her story;
- (b) Is a failure as a journalist because he did not independently review the evidence;
- (c) Is merely a patsy for Ms King’s personal view;
- (d) Colluded with Ms King to help her make money and cover up her crime;
- (e) Is loathsome for helping Ms King evade conviction and cover up her atrocious deeds;

- (f) Should be shunned and reviled by all New Zealanders because he was allowing Macsyna King to earn money from the book;
- (g) Was knowingly and/or recklessly aiding and abetting a baby murderer to make money from her crime and is loathsome for doing so; and
- (h) Is an incompetent investigative journalist.

[31] Mr Salmon argued that these asserted meanings were either not available as ordinary and natural meanings of the words or were simply not said.

[32] I consider that the meaning pleaded at paragraph 59(a) of the statement of claim is available. Taken overall the references in the “Info Statement” to “atrocious deeds” and incrimination do, as I have already discussed, convey that Ms King murdered her sons. The words are certainly capable of conveying that Mr Wishart was paying Ms King for her story and is loathsome for that reason.

[33] I consider that the pleaded meaning at paragraph 59(b) is available.

[34] I consider that the asserted meaning in paragraph 59(c) is available. The “Info Statement” is couched so as to convey that Ms King exercised considerable control over the book through the reference that it is she who “is about to release a book which will allow her to profit from her atrocious deeds” and “is about to release a tell all ... book about the tragic murder of her three-month-old twin babies” and the assertion that “somebody like this should not be allowed to profit from preaching her perverted view ...”. These quotes suggest that it is Ms King who exercised the greater control, with Mr Wishart taking a back seat in the production of the book.

[35] I consider that the first asserted meaning at paragraph 59(d), that Mr Wishart colluded with Ms King to help her make money, is available. The second asserted meaning, that he colluded with her to cover up her crime, is not.

[36] For the same reasons I do not consider that the pleaded meanings in paragraph 59(e) are available. I cannot read into these words any suggestion of collusion to cover up a crime.

[37] The pleaded meaning at paragraph 59(f) is available; the strongest and clearest criticism contained in the pleaded words is that Ms King was making money out of the book. Given that Mr Wishart was the author and his company the publisher of the book, the natural and ordinary meaning of the words “I am trying to organise a boycott of this book and until such time as it is pulled from the shelves, all other Ian Wishart books and all other books by the publisher” is plainly capable of meaning that Mr Wishart was allowing Ms King to make money from her story.

[38] I consider that the pleading at paragraph 59(h) is too confused to stand. It is unclear whether the allegation of “knowingly and/or recklessly” related to knowledge that Ms King had committed the crime or was making money. The words are, I think, capable of meaning that Mr Wishart was allowing Ms King to make money from a book about events that she had created. They are not capable of meaning that Mr Wishart knew that she had committed those acts. They are capable of meaning that he was not concerned as to whether she had or not.

[39] The natural and ordinary meaning of the words being used at paragraph 59(h) are directed towards Mr Wishart’s motivation rather than his competency and are therefore not capable of bearing the pleaded meaning.

The opportunism statement

[40] This allegation relates to a statement posted by Mr Murray on or about 28 June 2011 and pleaded at paragraph 70 of the statement of claim:

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

untrustworthy and inhumane family of serial child abusers what passes for literature these days?

[41] Mr Wishart alleges at paragraph 72 that these words in their ordinary and natural sense mean or are understood to mean or allow readers to draw inferences that:

- (a) Ms King had not co-operated with the Police or other judicial authorities;
- (b) The plaintiff is attempting to financially benefit from Ms King's failure to co-operate with official investigations;
- (c) The plaintiff is opportunistic and loathsome for publishing the book knowing that Ms King had not co-operated with the Police;
- (d) The plaintiff is a parasite for publishing a book about someone who refused to testify in a more formal setting;
- (e) The plaintiff's book is merely ramblings with no proper investigation of the case;
- (f) The plaintiff's work on the Kahui case is so substandard it has absolutely no value of any kind to any New Zealander; and
- (g) The plaintiff, as a professional investigative journalist, is passing off fiction as fact.

[42] The meaning pleaded at paragraph 72(a) cannot stand because it is directed towards Ms King, not Mr Wishart.

[43] The meanings pleaded at paragraphs 72(b) and (c) are available; it open to a reasonable person reading this statement to conclude that Mr Wishart was taking advantage of belated revelations made by Ms King for his own financial gain.

[44] I do not accept that the statement is capable of bearing the meaning pleaded at paragraph 72(d). It is not said that Mr Wishart is a parasite and nor could it be implied that Mr Wishart is a person who lives off other people, the ordinary and natural meaning of parasite.

[45] I accept that the statement is capable of bearing the meanings pleaded at paragraphs 72(e) – (g). A reasonable person reading this statement could conclude that there was no legitimate and journalistic work involved in producing the book and that Mr Wishart has merely assembled the “ramblings” of unreliable people.

The “McDonalds” statement

[46] These statements, pleaded at paragraphs 62-64 of the statement of claim relate to comments posted by Mr Murray on or about 4 July 2011, apparently as part of an exchange with Mr Wishart. They relate to an assertion by Mr Murray that, rather than taking the babies directly to hospital, Ms King had stopped at McDonald’s for food. The pleaded statements were:

- (a) “Why didn’t they go straight to the hospital?”
- (b) “Here is a fact – Macsyna knew the boys had been abused because the Doctor said that they needed to be rushed to the hospital. Instead of following instructions they went and got a Big Mac.”
- (c) ... “So we should believe your version of events rather than the Court reporting of the time ... you have to admit that you backed the wrong horse with this one.”

[47] Mr Wishart has pleaded that in their ordinary and natural meaning these words mean or are understood to mean or allow readers to draw inferences that:

- (a) Ms King had defied a doctor’s orders to go to hospital and instead gone for a feed at McDonald’s;

- (b) That this is likely evidence of Ms King's knowing participation in the crimes;
- (c) The plaintiff is a liar for suggesting otherwise;
- (d) The plaintiff is loathsome for lying to New Zealanders;
- (e) The plaintiff's professional work cannot be trusted;
- (f) The plaintiff's work is inferior to that of other journalists who have reported on the case.

[48] I accept Mr Salmon's submission that the pleaded meanings at paragraph 66 (a) and (b) are not available because they are directed towards Ms King and convey nothing about Mr Wishart.

[49] In relation to the pleaded meanings in paragraph 66(c) – (f) Mr Salmon asserts that they are not available because they were not actually said. However, I consider that the words "So we should believe your version of events rather than the Court reporting of the time" and "You have to admit that you backed the wrong horse with this one" could reasonably lead to the inference being drawn that Mr Wishart is unreliable in his reporting of events. I do not consider that the ordinary and natural meaning of the words is that Mr Wishart was lying.

The "facts" statement

[50] This allegation of the Statement of Claim relates to the following statements made by Mr and Mrs Murray on the Facebook page on or about 4 July 2011:

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

[51] Mr Wishart pleads at paragraph 78 that these words mean or are understood to mean or allow readers to draw inferences that Mr Wishart:

- (a) Has abused his position as a professional journalist and passed off fiction as fact;
- (b) Lied to the public of New Zealand by passing off fiction as fact;
- (c) Conspired with a child murderer to lie to the people of New Zealand about the case;
- (d) Fabricated part or all of his book in order to help a child murderer get away with her crime; and
- (e) Is an incompetent journalist who forgot to compare Ms King's interview testimony against her sworn testimony to check for inconsistencies.

[52] Mr Salmon submitted that none of these statements make direct reference to Mr Wishart or to his honesty but are, instead, concerned with the truth of Ms King's version of events. He suggested that all of the alleged meanings are first tier meanings, whereas less serious meanings could be pleaded. In response, Mr Wishart argued that he is clearly identifiable from the context of the Facebook page and the debate that existed at the time. He points out, correctly, that the statements do not explicitly identify Ms King either.

[53] Because the statements are directed very much towards the book itself I consider that it is open to a reasonable person reading them to infer that it is Mr Wishart, as the author, who is the object of the criticism. However, the alleged meanings are very serious. I consider that the meaning pleaded at paragraph 78(e) is available and other meanings e.g. that Mr Wishart has knowingly advanced an untrue account by Ms King as fact, the current pleading in paragraph 78(a) – (d), cannot stand.

Collective effect of "Info Statement", "McDonald's statement", "opportunism statement" and "fact statement"

[54] Mr Wishart pleads at paragraph 80 that, taken together and in addition to the meanings and inferences already alleged, the various Facebook statements would lead to the following inferences being drawn:

- (a) Macsyna King had no credibility and no value as a mother because she had ignored a doctor's orders to take the babies directly to hospital and instead went for a feed at McDonald's;
- (b) The plaintiff was either lying or incompetent for suggesting the defendant's claim was wrong;
- (c) In any credibility test against media coverage on the Kahui case, the plaintiff's journalism is clearly not trustworthy or reliable;
- (d) The McDonald's visit story is yet more evidence that the plaintiff's work on the Kahui case is substandard and worthy of ridicule;
- (e) The plaintiff's book had no journalistic value and should be shunned by all right thinking people;
- (f) The plaintiff's book contained no new evidence;
- (g) The plaintiff's book contained no facts;
- (h) The plaintiff fabricated material or fictionalised material and passed it off in the book as fact;
- (i) The plaintiff has written a tissue of lies in the book;
- (j) The plaintiff is morally bankrupt for allowing a double child murderer to make money from her crimes;
- (k) The plaintiff is repulsive for so doing;
- (l) The plaintiff's work on the book is so bad no-one could get any worthwhile information from it.

[55] At paragraph 81 Mr Wishart alleges the following further inferences from the defendants' statements taken in context and with the gloss of the false claims made on the "Info Statement":

- (a) The plaintiff is a worthless author and journalist because his version of events conflicts with previous media reports.
- (b) The plaintiff is a figure of ridicule as he can't even get the story straight and no weight should be given to his book.
- (c) The plaintiff conspired with Ms King to produce a badly researched book that would make them both a lot of money.
- (d) The plaintiff fabricated or fictionalised material and passed it off in the book as fact.
- (e) The plaintiff conspired with Ms King to publish false information in an effort to help her get away with her atrocious deeds.

- (f) The plaintiff conspired with Ms King to help her get away with double murder of two helpless infants.

[56] The pleading at paragraph 80(a) cannot stand because it relates only to Ms King. However, the allegations at paragraph (b) – (l) are capable of bearing the alleged meanings.

[57] In relation to the allegations at paragraph 81, I consider that the statements are capable of bearing the meanings in paragraphs 81(a) – (d). However, they are not capable of bearing the meanings in paragraph 81(e) and (f). While there were statements that suggested that Ms King had gotten away with or might get away with “atrocious deeds” they do not support an inference that it was Mr Wishart who was assisting her to do that. Criticism of Mr Wishart seems to be directed more towards assisting Ms King to profit from her alleged actions.

[58] There is, however, a degree of repetition in these allegations which should be avoided in any amended pleadings.

Third cause of action: the Radio Live statements

[59] On the evening of 29 June 2011 Mr Murray was interviewed on Radio Live’s evening show. Mr Wishart alleges that he made defamatory comments during each of those interviews.

First Radio Live interview

[60] During this interview Mr Murray made the following comments after being asked whether there was a legitimate argument that Mr Wishart had been able to obtain Ms King’s confidence and could in that way address the issue of child abuse:

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

[61] Mr Wishart pleads at paragraph 108 that these words could allow listeners to infer that:

- (a) The plaintiff has no ability or experience in interviewing or investigating crimes and suspects;
- (b) The plaintiff is therefore lying or grossly exaggerating when he says his book sheds new light on the Kahui case;
- (c) The plaintiff has no credibility as an investigative journalist or author.

[62] In relation to paragraph 108(a) Mr Salmon argued that, although Mr Murray had referred to Mr Wishart, the statement is essentially concerned with the general concept that journalists do not have the same investigative powers as judicial officers. Whilst it is possible to infer that Mr Murray was speaking generally about the ability of journalists to investigate crime as opposed to judicial officers, the specific reference to Mr Wishart equally allows the inference to be drawn that Mr Murray is directing his comment specifically towards Mr Wishart, conveying that he could not obtain more worthwhile information from Ms King than the Police and coroner have obtained.

[63] In relation to the pleading at paragraph 108(b) Mr Salmon submitted that the pleaded statement is not directed at Mr Wishart's competence and that no fair minded listener would be left with the impression that he is "lying or grossly exaggerating" about his book shedding new light on the Kahui case. I agree that the statement could not reasonably result in an inference that Mr Wishart is lying. It is, however, possible that a reasonable listener would draw from the statement that he was exaggerating in his claim that the book sheds new light on the Kahui case.

[64] Mr Salmon also rejects any suggestion that Mr Murray's statement during the first interview could give rise to an inference that Mr Wishart has no credibility as an investigative journalist and author. I agree with that submission. In another part of the interview Mr Murray referred to Mr Wishart as a "journalist and writer". Mr Murray's statements suggesting there is no worth in the book itself does not

necessarily translate to a suggestion that Mr Wishart himself has no credibility as a journalist and author in a general sense.

Second Radio Live interview

[65] During the second Radio Live interview there was an exchange between Mr Murray and the interviewer in which the interviewer suggested to Mr Murray that Ms King may have something worth listening to. Mr Murray responded:

She may have, but if it was worth listening to and germane to the case, should she not have mentioned it at an earlier date, maybe to, I don't know, the judge?

She was either lying back then, in which case she needs to be in prison for perjury, or there's nothing new and the book is worthless now.

[66] Mr Wishart has pleaded that in the ordinary and natural sense these words either meant or would allow listeners to infer that he:

- (a) Has done a substandard job as a journalist because his book offers no new information or analysis;
- (b) Was unprofessional and his work is worthless;
- (c) His investigative work on the Kahui case is so bad his book is "worthless now".

[67] Mr Salmon argued that, to the extent the comments were directed towards Ms King only, they cannot be sued on. He made two points. First, he argued that to the extent that the comments related to the book, it was simply literary criticism and not capable of bearing a defamatory meaning. I do not accept that submission; literary criticism may of course occur in the context of a book that has been published. However, it is common ground that the book had not yet been published and Mr Murray had not read it. It is therefore not possible to regard comments about the worth of the book as literary criticism.

[68] Secondly, Mr Salmon submitted that the statement is mostly directed towards Ms King. I accept this submission. It is true that Mr Murray asserts that “the book is worthless now” but that statement was clearly made against the previous assertion that Ms King had either lied in her testimony or, if she had told the truth, there was nothing new that the book could add. None of these statements are directed towards the quality of Mr Wishart’s work or his ability as an investigative journalist.

Fourth cause of action: the Kerri Murray statement

[69] Allegations against Mrs Murray presently form part of the same cause of actions as those made in respect of comments made by non-parties. Because the issues that arise are different it would be preferable if the allegations against Mrs Murray were pleaded as a separate cause of action.

[70] On 28 June 2011 Mrs Murray posted the following comment on the Facebook page:

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

[71] Mr Wishart alleges at paragraph 141 that this statement allowed readers to infer that:

- (a) Macsyna King knew her son’s femur had been broken for three weeks;
- (b) Macsyna King must have been involved in the murder because she knew about the abuse and did not report it;
- (c) Mr Wishart is “repulsive” and a person to be shunned by decent New Zealanders for helping the murderer cover up her crime;
- (d) Mr Wishart’s investigative journalism on the Kahui case had no merit;

- (e) Macsyna King murdered her baby twins and the plaintiff is “repulsive” and a person to be shunned and ridiculed for suggesting otherwise.

[72] Mr Wishart further alleges at paragraph 142 that, in the context of the Facebook page Info Statement, Mrs Murray’s statements also allow readers to infer that:

- (a) Mr Wishart had paid a child murderer for her story so that he could enrich himself;
- (b) Mr Wishart was a repulsive individual for doing this.

[73] As I have previously held, statements that are directed solely towards Ms King’s knowledge and conduct cannot be pleaded as affecting Mr Wishart. This means that paragraphs 141(a) and (b) cannot stand.

[74] In terms of paragraph 141(c) Mr Salmon submitted that there is no reference to Mr Wishart helping Ms King cover up any crime and that pleaded inference is not available. I agree with that. I have previously noted that none of the pleaded statements could reasonably be read as meaning or allowing the inference that Mr Wishart himself helped Ms King cover up a crime. A more moderate criticism could, however, be made of the statement such as that Mr Wishart has unjustifiably portrayed Ms King as a victim and is repulsive for doing so.

[75] That statement is capable of bearing the meaning pleaded at paragraph 141(d). I do not accept that it is to be viewed as literary criticism, for the reason discussed earlier.

[76] Finally, the reference at paragraph 141(e) in which it is alleged that Mrs Murray’s statement could carry the inference that Mr Wishart is “repulsive” and a person to be shunned and ridiculed for suggesting that Ms King had not murdered her babies, is one that Mr Salmon claims does not actually refer to Mr Wishart. He argued that “repulsive” refers to the victimisation of Ms King rather than to Mr Wishart as a person. However, I consider that a reasonable reader could infer

from Mrs Murray's statement that Mr Wishart and/or his actions in portraying Ms King in the way he did were repulsive.

Fourth cause of action: comments by third parties

Issues

[77] Many of the allegedly defamatory comments were posted on the Facebook page by anonymous users. Mr Wishart asserts that Mr Murray is liable for these statements. To succeed on this allegation Mr Wishart must prove that Mr Murray was a publisher of the statements.¹³ Mr Murray argues that, as the mere host of the Facebook page, he was not a publisher.

[78] Both the strike out application and the preliminary determination raise the same issues. These are, first, what the correct legal test is for determining whether the host of a Facebook page is the publisher of statements posted on it by other users. The second is whether, on the facts as pleaded and the non-contentious evidence before the Court in this application, Mr Wishart has a tenable case in respect of Mr Murray's liability as the publisher of comments posted by others on the Facebook page.

What role did Mr Murray play?

[79] In order to consider the test that I should apply in determining whether Mr Murray was a publisher of the comments by third parties I need to record how the Facebook page came into existence and the role that Mr Murray played.

[80] In his affidavit 11 May 2012 Mr Murray described his involvement in the Facebook page, from its establishment in late June 2011 until it was closed down on or about 13 August 2011:

4. While I created the Facebook page, the site is not mine as such. Facebook offers users the ability to create pages, but retains

¹³ *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 (CA) at 527.

ownership of the service base and ultimate control over the contents. Content on these pages is published using Facebook processes.

5. Comments can be posted on Facebook pages by other Facebook users. The creator of any individual Facebook page is unable to exercise meaningful editorial control over comments before they are posted. That is, there is no function on Facebook by which a site creator can vet comments before they are published.
6. It is correct, however, that a creator of a Facebook page has some control over comments published on the page as he/she can, once aware of comments published, retrospectively remove individual comments and block specific Facebook users to prevent them from publishing further comments.
7. It should be noted, however, that a block on a user functions only in respect of the relevant Facebook account. It cannot prevent the relevant individual from establishing a new Facebook account and post further comments.
8. Contrary to the plaintiff's allegations I did at no point encourage, invite or consent to, abusive, threatening or defamatory comments being posted on the site and I did take steps to moderate any such comments that I became aware of.
9. The information section included my Twitter account to allow people to contact me. Once it became apparent that some comments posted were abusive I posted comments on the site myself asking that viewers report such comments to me via the Twitter account so that I could block the relevant users. I received around ten reports that way and acted on all of them.
10. I also regularly visited the site, read comments published on it and blocked users who posted abusive or clearly defamatory comments. All in all, I banned 50 users from the page so as to moderate abusive comments.
11. The site attracted some 250,000 in total, which was far more than I ever expected. As a result, it was increasingly difficult to review them all and remove all potentially abusive or defamatory comments. Facebook also uses an auto-update function. This means that the site is constantly updated with new comments while you view it, which refreshes the screen in a way that makes it very time consuming and difficult to keep track of existing comments when they are so frequently being supplemented. Given the number of comments and the speed with which they were posted, this made it slow and difficult to review historic comments and block relevant users.
12. I finally took the site off line on or around 13 August 2011.

[81] Mr Murray filed a further affidavit dated 7 June 2012 in response to Mr Wishart's assertion that Mr Murray had blocked him (Mr Wishart) from

commenting on the Facebook page. Mr Murray acknowledged he had done so and explained:

However the purpose of doing this was not to prevent Mr Wishart from telling his side of the story. His comments, and those of some of his supporters generated a significant number of responses, including some abusive and inappropriate comments. Once it became apparent to me that this occurred I blocked Mr Wishart and a small number of his vocal supporters as a way to discourage misuse of the page. To keep the debate as balanced as possible I posted links to pages setting out Mr Wishart's version of events (see for example p36 of exhibit A5 to Mr Wishart's affidavit in support of his statement of claim dated 28 March 2012).

At para 24 of his 30 May 2012 affidavit Mr Wishart alleges that he alerted me to alleged inaccuracies on the Facebook page at a time when I had fewer than 200 people registered on the page.

I am uncertain as to what Mr Wishart means by "registered". I do, however, have no recollection of Mr Wishart contacting me about any inaccuracies. In any event, I do not believe that any statement of which I am the author is defamatory of Mr Wishart. I also blocked any users who posted abusive or otherwise inappropriate comments as soon as possible after becoming aware of such comments having been posted.

The test for determining whether the host of a Facebook page is the publisher of statements posted by other users

[82] A person who participates in or contributes to the publication of another person's defamatory statement is, prima facie, liable as a publisher, subject to the defence of innocent dissemination.¹⁴ Distributors such as librarians and booksellers can avoid liability, even though they are taken, prima facie, to have published the defamatory material contained in the newspapers or books that they have distributed by showing that they neither knew nor ought to have known that the published material contained defamatory statements. The general principle is stated by Lord Esher in *Emmens v Pottle*:¹⁵

I agree that the defendants are prima facie liable. They have handed to other people a newspaper in which there is a libel on the plaintiff ... The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating or not, they would have published the libel and would have been liable for doing so. But here ... the defendants did not know that the paper contained a libel. *I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel ... Taking the view of the jury to be right, that the defendants did not know that the paper was*

¹⁴ In New Zealand the defence is conferred by s 21 Defamation Act 1992

¹⁵ *Emmens v Pottle* (1885) 16 QB 170.

likely to contain a libel, and what's more, that they ought not to have known it, having used reasonable care – the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel.

(emphasis added)

[83] This statement makes it clear that the absence of actual knowledge does not prevent a person who, prima facie, publishes a defamatory statement from being liable; there must also be no reason to think it likely that the material being published contained such a statement. The issue in this case is how this general principle is to be applied to the host of a Facebook page.¹⁶

[84] Mr Salmon submitted that in cases involving a website host who plays no active part in the publication of the offending material the test ought to be one that requires actual knowledge of the offending material, failure to remove it after a reasonable time when requested to do so and in a manner that would support an inference that that the defendant had ratified or otherwise accepted responsibility for the statement. He based this submission largely on the recommendation made by the Law Commission in its 1999 report “Electronic Commerce Part 2”. The Law Commission recommended a test that required actual knowledge based on the so-called “graffiti principle” derived from a line of US cases.¹⁷ It rejected as unfair and not feasible an alternative test based on the extent of editorial control.¹⁸ Mr Salmon also submitted that a test based on actual knowledge test was consistent with subsequent United Kingdom¹⁹ and Australian decisions decided subsequent to the Law Commission’s report.²⁰

[85] A test that requires actual knowledge of the defamatory statement would be inconsistent with *Emmens v Pottle*. The most recent developments in this area of the law have resulted in a test that is consistent with *Emmens v Pottle* i.e. actual

¹⁶ In *Karam v Parker* HCAK CIV 2010-404-003038 29 July 2011 Associate Judge Sargisson declined to strike out similar allegations in part because the law in this area was still unsettled. In *A v Google* HC Auckland CIV-2011-404-2780, 12 September 2012 which concerned the liability of Google as the owner/operator of the Google search engine, Associate Judge Abbott also refused a strike out application, in part, for the same reason.

¹⁷ *Hellar v Bianco* 111 Cal App 2d 424 (1952); *Scott v Hull* 259 NE 2d 160 (Ohio CT App 1970); *Tacket v General Motors Corp* 836 F 2d 1042 (7th Civ 1987).

¹⁸ *Stratton Oakmont Inc v Prodigy Services Co* 1995 WL 323710 (NY Sup Ct 1995).

¹⁹ *Bunt v Tilley* [2006] EWHC 407 (QB), [2007] 1 WLR 1243.

²⁰ *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 69,190.

knowledge is not required. However, the development of the law to this point has not been straightforward. In deference to Mr Salmon's submissions I intend to trace that path as briefly as I can.

[86] The starting point is the decision of the United Kingdom Court of Appeal in *Byrne v Deane*, which was followed by the Supreme Court of New South Wales in *Urbanchich v Drummoyne Municipal Council & Anor*.²¹ *Byrne v Deane* concerned an anonymous notice posted on the notice board of a golf club. The Court of Appeal held that those with control over the notice board were publishers of material posted on it if it could be inferred that they had taken responsibility for it.²² The club rules prohibited notices being posted without the secretary's consent. The defendants had seen the notice but did not remove it. The majority of the Court considered that the defendants were responsible for publication because, having the power to remove the notice and failing to do so, it could be inferred that they had taken responsibility for it. Greer LJ said:²³

In my judgment the two proprietors of this establishment by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge that they must have had that by not removing it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.

Slessor LJ said:²⁴

I think having read it, and having dominion over the rules of the club as far as the pasting of notices was concerned, it could properly be said that there was some evidence that [the female defendant] did promote and associate herself with the continuance of the publication, in the circumstances, after the date when she knew that the publication had been made.

Greene LJ said:²⁵

It is said that as a general proposition where the act of the person alleged to have published a libel has not been any positive act, but has merely been the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that in some circumstances a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other

²¹ *Urbanchich v Drummoyne Municipal Council & Anor*, above n 21.

²² *Byrne v Deane* [1937] 1 KB 818 (CA).

²³ At 830.

²⁴ At 835.

²⁵ At 837-838.

circumstances he may be doing so. The test it appears to me to be this: having regard to all of the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it has been put?

[87] Although proof of actual knowledge by the defendants of the publication was not part of the ratio of the decision (the focus of the Court was control over the notice board not knowledge), it is obvious that assumption of responsibility could not have been inferred in that case without showing that the defendants knew of the defamatory statement. Similarly, in *Urbanchich v Drummoyne Municipal Council & Anor*, which concerned defamatory posters glued to bus shelters under the defendants' control, the defendant had actual knowledge of the posters and had been requested to remove them.²⁶ Hunt J said:

In a case where the plaintiff seeks to make the defendant responsible for the publication of someone else's defamatory statement which is physically attached to the defendant's property he must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to, or approved or, or adopted, or promoted, or in some way ratified, the continued presence of that statement on his property so that persons other than the plaintiff may continue to read it – in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.

Such conduct on the part of the defendant may of course be established by inference. Indeed, in most cases there will be no evidence of any such acceptance by the defendant expressly, and it can only be established by inference. In *Byrne v Deane* the inference of consent by the defendants to the continued publication of the verse was drawn from the defendant's knowledge of the existence of the defamatory statement, their right to remove it and their failure to do so.

After considering the authorities Hunt J concluded that:

It is clear from all of those authorities that the facts upon which the plaintiff relies here- notice of the existence of the defamatory statement, an ability to remove it and the failure to comply within a reasonable period with a request to do so – may, if accepted by the jury (in particular, whether the period given was reasonable in the circumstances), give rise to the required inference that the defendant had in fact accepted a responsibility for the continued publication of the statements made on the posters. But it is important to emphasise that the jury must accept such an inference from the defendant's conduct before it can find that the defendant had published the matter complained. The conduct which may give rise to that inference is not

²⁶ *Urbanchich v Drummoyne Municipal Council & Anor*, above n 21.

in itself sufficient to prove publication unless the jury also draws the required inference that the defendant had accepted such a responsibility.

[88] Mr Salmon submitted that Hunt J had formulated a specific test that included actual knowledge of the defamatory statement and a request by the plaintiff to remove the statement. I consider that that would be putting the effect of *Urbanchich* too high. What it required was proof of facts from which the fact-finder could infer that the defendant had taken responsibility for, or ratified, the continued publication of the statements. The defendant in *Urbanchich* did have actual knowledge and was asked to remove the material but treating these facts as pre-requisites for the defendant to be treated as a publisher does not accurately reflect the ratio of the decision.

[89] Both *Byrne v Deane* and *Urbanchich* were followed in New Zealand in *Sadiq v Baycorp (New Zealand) Ltd*, in which the plaintiff complained of defamatory statements regarding his creditworthiness on a debt collector's website. The material had been placed on the website by the previous owner of the website. Associate Judge Doogue considered that the defendant in that case had to know of the material for the inference to be drawn that it had taken responsibility.²⁷

The key to whether *Byrne* can be extrapolated to this case, essentially depends on whether inferences can possibly be drawn that the first defendant possessed knowledge of the defamatory statement and the ability to bring about its cessation, leading to a final inference that failure to do so indicates that the first defendant in some way allies itself with the statement ...

... it would not seem to be logically possible to conclude that a defendant was complicit in the publication, in the absence of knowledge that the publication had actually occurred. Where the facts are simple – the defendants could see with their own eyes that the offending notice has been attached to the wall as in *Byrne* – the inference may readily arise. The position, however, may be different in a case where, as here, the defendants' actual knowledge that there had been a publication is moot.

Publication in this case would have occurred when subscribers to the website accessed Mr Sadiq's file ... It is not sufficient for the plaintiff to invoke a vague concept such as that the defendant took over the debt collection files of its predecessor, which predecessor had been responsible for actual publication. *There would need to be evidence that some human agent of the defendant adverted to the presence of the statement on the website and nonetheless took no steps for its removal.*

²⁷ *Sadiq v Baycorp (NZ) Ltd* HC Auckland CIV-2007-404-6421, 31 March 2008 at [52] – [54].

(emphasis added)

[90] This view was consistent with the outcome in *Byrne v Deane* and *Urbanchich* but, as discussed, those were cases that (unlike *Sadiq*) involved actual knowledge, as the Associate Judge recognised. However, limiting the circumstances in which a defendant is to be viewed as a publisher of other's statements to those in which the defendant has actual knowledge is not consistent with *Emmens v Pottle*; under the general principle I respectfully think that the defendant in *Sadiq* ought to have been viewed, prima facie, as a publisher, with the real issue being whether it either knew or ought to have known that the publication contained a defamatory statement for the purposes of the innocent dissemination defence.

[91] I digress at this point to briefly review the US cases decided between *Byrne v Deane* and *Urbanchich* which produced the graffiti principle and also the two later cases that specifically considered involving postings on websites. These were the cases that the Law Commission considered in reaching its recommendation.

[92] In *Hellar v Bianco* the District Court of Appeal of California held that the proprietors of a tavern were liable for the publication of a defamatory statement inscribed on the men's bathroom wall after the bar-tender was told of it and failed to remove it.²⁸ However, care is required in considering *Hellar* because it apparent from a close reading of the decision that liability was, in fact, determined on the basis of breach of duty, an approach not permitted in New Zealand.²⁹ Further, the knowledge that was regarded as sufficient was the knowledge of the bar-man, attributed to the proprietors.

[93] In *Scott v Hull* in which a building owner and agent responsible for maintenance were held not to be liable for defamatory graffiti inscribed on the exterior of the building.³⁰ The Court held that, although liability could be founded on the defendant's ratification of a publication by another, failure to remove the material, even when asked, was not actionable because the viewing of it by the public was not the result of any positive act by the defendant. *Hellar* was

²⁸ *Hellar v Bianco*, above n 18.

²⁹ *Bell-Booth Group v Attorney-General* [1989] 3 NZLR 148.

³⁰ *Scott v Hull*, above n 18.

distinguished on the basis that in that case the public must have been invited into the tavern, such invitation constituting a positive act on which liability might be founded.

[94] The third case, *Tacket v General Motors*, concerned a sign affixed inside a motor vehicle plant.³¹ The Judge cited from both *Hellar* and *Scott v Hull*, distinguishing *Hellar* on the basis of the “steep discount” that readers tend to apply to statements on restroom walls and the cost of frequent re-paintings. He went on:³²

A person is responsible for statements he makes or adopts, so the question is whether a reader may infer adoption from the presence of the statement. That inference may be unreasonable for a bathroom wall or the interior of a subway car in New York City but appropriate for the interior walls of a manufacturing plant over which supervisory personnel exercise greater supervision and control. The costs of vigilance are small (most will be incurred anyway) and the benefits potentially large (because employees may attribute the statements to the employer more readily than patrons attribute graffiti to barkeeps).

[95] In both *Scott v Hull* and *Tacket v General Motors* the defendants had actual knowledge of the statement and it seems unlikely that liability based on assumption of responsibility could have been established without it. In their 1996 article “Libel in cyberspace: a framework for addressing liability in jurisdiction issues in this new frontier”³³ authors Cynthia Counts and Amanda Martin considered that applying these cases by analogy to the internet context, knowledge of defamatory postings on a website would be a prerequisite for liability as a publisher:

In *Hellar* and *Tackett* courts considered knowledge by the defendants and the defendants’ allowance of the statement to remain, to be critical. In *Scott* the Court added the requirement that for imposition of liability to be proper, the defendant must somehow invite the public to read the allegedly libellous statement.

Applying these principles to cyberspace publishing would result in potential liability if the sysop [systems operator] were aware of an allegedly libellous posting and undertook some action to ratify the communication. Conversely, these principles show that a sysop’s cyberspace activity would not result in potential liability if he does not know of the posting or did not take any action to ratify the communication.

³¹ *Tacket v General Motors*, above n 18.

³² *Tacket* at 1046-1047.

³³ (1996) 50 Alb L Review 1083.

[96] However, rather than adopting this approach as a means of identifying the appropriate test for liability, US courts began to turn to the concept of editorial control over content, such as that exercised by newspaper proprietors, as being a closer analogy. Two of these cases involved bulletin-board style publications similar to Facebook pages.

[97] In *Cubby Inc v Compuserve Inc* the defendant provided an online information service which allowed subscribers access to electronic bulletin boards, interactive online conferences and topical databases.³⁴ Management of these fora was contracted out to a third party which had the power to review, delete, edit and generally control content in accordance with editorial standards established by the defendant. The manager had, in turn, engaged an independent contractor to provide a daily newsletter. The defendant successfully resisted a defamation action based on statements made in the newsletter on the basis that it had no knowledge of the statements and was a distributor only, rather than a publisher. The Court accepted that the defendant had no greater editorial control over what was published in the newsletter than any public library or bookstore and was the “functional equivalent” of a traditional news vendor. This approach is, of course, inconsistent with *Emmens v Pottle*, under which a library or bookstore would be a publisher, but with recourse to the innocent dissemination defence. However, the Court’s reasoning was based on the constitutional guarantees of freedom of speech and the press as precluding strict liability for publication. This decision does not, therefore, assist in identifying a test that might fit into the existing parameters of UK and New Zealand common law.

[98] The subsequent decision in *Stratton Oakmont Inc v Prodigy Services & Co*, which also involved a bulletin board service, produced an entirely different result, explicable by the different extent of control the defendant exercised over the content posted on its website.³⁵ Prodigy, the defendant maintained a bulletin board service and had a company policy that the general content of the bulletin board would reflect family values. It developed content guidelines and removed material that it considered unacceptable. These controls were found to put Prodigy in a significantly

³⁴ *Cubby Inc v Compuserve Inc* 776 F Supp 135 (SD NY 1991) at 137-144.

³⁵ *Stratton Oakmont Inc v Prodigy Services & Co*, above n 19.

different situation from the defendant in *Cubby* and resulted in Prodigy being a publisher.

[99] Interestingly the issue of knowledge appeared not to play any part in the ratio of the decision. The Court recorded Prodigy's position that it had changed a previous policy of manually reviewing all messages and that the volume of postings (60,000 messages a day) meant that a manual review of postings was not feasible. I infer from these facts that the case proceeded on the basis that Prodigy did not have actual knowledge of the postings that were the subject of the action. It was its decision to assume a degree of editorial control that was critical:

By actively utilising technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste", for example, PRODIGY is clearly making decisions as to content ... And such decisions constitute editorial control. If such control is not complete and is enforced both as early as the notes arrive and as late as the complaint is made, does not minimise or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role in determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor ...

It is PRODIGY's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher. *PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.*

(emphasis added)

[100] An obvious consequence of the reasoning in *Stratton Oakmont v Prodigy* was that a website operator or host would be better off not making any effort to control the content. The Court rejected this as a serious risk on the basis that it "incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure". Nevertheless, the difficulties faced by website hosts controlling huge volumes of postings, led to legislation in the US which protects interactive computer services in relation to the publication of information by third parties.³⁶

³⁶ Section 230 Communications Decency Act 1996.

[101] In New Zealand the Law Commission referred to the decisions in *Cubby*, *Stratton Oakmont v Prodigy* and *Hellar* but drew heavily on the Counts/Martin article. In considering the appropriate basis for determining liability of “mixed service providers”³⁷ concluded that a test based on actual knowledge was to be preferred. It was significantly influenced by the risks that flowed from the approach taken in *Stratton Oakmont v Prodigy* and considered that the “degree of editorial control approach” was undesirable because it would discourage screening for offensive material and such a test was not sufficiently precise to provide a predictable criteria on which ISPs could base their practices:

It is not feasible nor fair to require ISPs to monitor content and remove material that is offensive or would give rise to a legal claim. Distributors do not have the resources or expertise to review all of the material they receive ...

It is however extremely important that mixed service providers can be certain of when their actions attract liability and can encourage practices that remove and discourage the publication of illegal and offensive material on the internet. Hence we recommend liability be founded on actual knowledge. Counts and Martin have dubbed such a test “the graffiti principle” using the case of *Hellar v Bianco* to illustrate that principle.

[102] Although the concerns that the Law Commission identified were, and are, valid, the law in the UK has since developed to culminate in a position that is consistent with *Emmens v Pottle* (not referred to in the Law Commission report) and rests on the level of editorial control exercised. I therefore turn to consider those cases, which provide a more certain basis for articulating an appropriate test in New Zealand.

[103] The first of these cases, *Godfrey v Demon Internet Ltd*³⁸ and *Bunt v Tilley & Ors*,³⁹ concerned the liability of internet service providers; although the position of an internet service provider is very different from that of a Facebook page host, these decisions are significant in the development of the law as it currently stands in relation to website hosts.

³⁷ This term, taken from the Counts/Martin paper, refers to those which provide both internet access and also control content to some extent. Mr Salmon argued, correctly in my view, that Mr Murray fell within this description.

³⁸ *Godfrey v Demon Internet Ltd* [2001] QB 201.

³⁹ *Bunt v Tilley & Ors* [2006] EWHC 407 (QB).

[104] In *Godfrey v Demon Internet*, the defendant internet service provider offered a “Usenet” facility which allowed subscribers to access bulletin boards from the internet service provider’s news server. Demon was notified of a defamatory posting and asked to remove it. It could have done so immediately but did not and the posting remained on the news server for a further 10 days or so until it expired. Moreland J rejected Demon’s argument that it was merely the owner of an electronic device through which postings were transmitted and not to be regarded as a publisher. Allowing the plaintiff’s application to strike out the statutory defence based on the defendant not being the publisher, the Judge, citing *Byrne v Deane*, said:⁴⁰

I do not accept [the] argument that the defendant was merely the owner of an electronic device through which postings were transmitted. The defendants chose to store “soc.culture.thai” postings within its computers. Such postings could be accessed on that news group. The defendant could obliterate and indeed did so about a fortnight after the receipt.

[105] The claim in *Godfrey v Demon* was brought only in relation to the period after which Demon had actual knowledge of the defamatory statement. However, Moreland J’s general statement of the common law position regarding publication suggests that Demon would have been a publisher even if it had not had knowledge of the defamatory statement. Citing *Day v Bream*⁴¹ and *Emmens v Pottle* the Judge observed that:⁴²

At common law liability for the publication of defamatory material was strict. *There was still publication if the publisher was ignorant of the defamatory material within the document.* Once publication was established the publisher was guilty of publishing the libel unless he could establish, and the onus was upon him, that he was an innocent disseminator.

(emphasis added)

[106] *Bunt v Tilley* took a very different approach, accepting that internet service providers which did not actually hold any information or host a website were not publishers of defamatory material posted on sites. The defendant internet service providers were sued on the basis that the defamatory statements were communicated

⁴⁰ *Godfrey v Demon Internet*, above n 39, at 209.

⁴¹ (1837) 2 Mood & R 54, in which the porter of a coach office was considered to have published a libellous handbill when delivering of parcels, though was not liable because he was ignorant of their contents.

⁴² *Godfrey v Demon Internet Ltd*, above n 39, at 207, citing *Emmens v Pottle* and others.

by way of the internet service they provided but Eady J considered that because they played only a passive instrumental role in the publishing process they were not publishers.⁴³

Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of the *relevant words*. It is not enough that a person merely plays a passive instrumental role in the process. (See also in this context *Emmens v Pottle* (1885) 16 QBD 354,357, per Lord Esher MR).

I would not, in the absence of any binding authority, attribute liability at common law to a telephone company or other passive medium of communication, such as an ISP. It is not analogous to someone in the position of a distributor, who might at common law need to prove the absence of negligence ... There a defence is needed because the person is regarded as having “published”. By contrast, persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers: thus they do not need a defence.

(emphasis in original)

[107] Eady J applied this approach in two subsequent cases. *Metropolitan International Schools Ltd v Designtecnica Corporation* concerned Google’s liability for the automatic function of its search engine in throwing up “snippets” from various websites in response to searches conducted by internet users.⁴⁴ Reaffirming the position he had taken in *Bunt v Tilley* the Judge held that Google’s function as a search engine, with no human input into the selection of snippets shown, meant that it could not be regarded as a publisher of them. However, Eady J then went further, holding that, even after notification of defamatory material, Google was still not a publisher because of its lack of control over future searches that might continue to throw up offending material.

[108] In *Tamiz v Google Inc* Eady J applied the same approach in a slightly different context.⁴⁵ Google was sued in respect of an internet service it provided called Blogger. This service was a platform that allowed any internet user to create an independent blog, including the use of Uniform Resource Locators (URLs),

⁴³ *Bunt v Tilley*, above n 40, at paragraphs 23 and 27.

⁴⁴ *Metropolitan International Schools Ltd v Designtecnica Corporation* [2009] ewhc 1765 (QB), [2011] 1 WLR 1743.

⁴⁵ *Tamiz v Google Inc* [2012] EWHC 449 (QB).

which are web addresses, to host their blogs. It would appear to be similar to the service offered by Facebook under which people can establish and control their own Facebook page. Eady J held that in its role as a platform provider Google was entirely passive. It had a policy of not removing offending material even when notified, but merely passing the complaint onto the blogger concerned. Although Eady J made no reference to the graffiti principle established in the US, he nevertheless likened Google's position to that of the owner of a wall that had been graffitied in that, although the owner could have it painted over, its failure to do so did not necessarily make it a publisher.

[109] However, the reasoning in *Bunt v Tilley*, subsequently applied in *Designtecnica* and *Tamiz*, was criticised as being both irreconcilable with *Godfrey v Demon Internet* and an unwarranted departure from the orthodox approach of treating those who either intentionally or negligently participate in the communication of defamatory material as being publishers who might then be able to avoid liability by relying on the defence of innocent dissemination.⁴⁶ *Bunt v Tilley* reverses the onus of proof, so that instead of an intermediary being a publisher who must establish a defence, the intermediary is not a publisher until the claimant establishes that the intermediary has become one through knowledge of and failure to act on defamatory material.⁴⁷

[110] The most recent decisions in this area make it clear that, while the reasoning in *Bunt v Tilley* is valid in relation to internet service providers whose role truly is entirely passive and who have not been notified of the presence of defamatory material, it does not represent the correct position either for those who play a role that is more than a mere conduit or for those who have received notification of the offending content.

[111] *Bunt v Tilley* was distinguished in *Davison v Habeeb*, in which Google was sued in respect of defamatory statements posted on a blog hosted by Google itself. HHJ Parkes QC, sitting as a deputy judge, likened the blog to a notice board,

⁴⁶ See e.g. Matthew Collins *The Law of Defamation and the Internet* (3rd ed, Oxford University Press, New York, 2010) at 6.48.

⁴⁷ At 6.49.

invoking the *Byrne v Deane* approach to find that Google was properly regarded as a publisher.⁴⁸ Distinguishing *Bunt v Tilley* the Deputy Judge said:⁴⁹

Blogger.com, by contrast, is not simply a facilitator, or at least not in the same way as the ISPs. It might be seen as analogous to a giant noticeboard which is in the fifth defendant's control, in the sense that the fifth defendant provides the noticeboard for users to post their notices on, and it can take the notices down (like the club secretary in *Byrne v Deane*) if they are pointed out to it. However, pending notification it cannot have the slightest familiarity with the notices posted, because the noticeboard contains such a vast and constantly growing volume of material. On that analogy, it ought not to be viewed as a publisher until (at the earliest) it has been notified that it is carrying defamatory material so that, by not taking it down, it can fairly be taken to have consented to and participated in publication by the primary publisher. The alternative is to say that, like in *Demon Internet* in the *Godfrey* case, it chose to host material which turned out to be defamatory and which it was open to anyone to download so that at common law it was prima facie liable for publication of the material, subject to proof that it lacked the necessary mental state.

[112] The “noticeboard” analogy was approved by the England and Wales Court of Appeal in *Tamiz v Google Inc*, on appeal from Eady J's first instance decision.⁵⁰ The Court held that, although Eady J's conclusion in *Bunt v Tilley* that Google was not a publisher was correct in the circumstances of that case, Google could not be regarded as a purely passive communicator of information in the case before it:

[23] ... I respectfully differ from Eady J's view that the present case is so closely analogous to *Bunt v Tilley* as to call for the same conclusion. *In my view the Judge was wrong to regard Google Inc's role in respect of Blogger blogs as a purely passive one and to attach the significance he did to the absence of any positive steps by Google in relation to continued publication of the comments in issue.*

[24] By the Blogger service Google Inc provides a platform for blogs, together with the design tools and, if required, a URL; it also provides a related service to enable the display of remunerative advertisements on a blog. It makes the Blogger service available on terms of its choice and it can readily remove or block access to any blog that does not comply with those terms ... As a matter of corporate policy and no doubt also for reasons of practicality, it does not seek to exercise prior control over the content of blogs or comments posted on them but it defines the limits of permitted content and it has the power and capability to remove or block access to offending material to which its attention is drawn.

[25] *By the provision of that service Google Inc plainly facilitates publication of the blogs (including the comments posted on them). Its*

⁴⁸ [2011] EWHC 3031 (QB).

⁴⁹ At 38.

⁵⁰ *Tamiz v Google Inc* [2013] EWCA CIV68.

involvement is not such, however, as to make it a primary publisher of the blogs. *It does not create the blogs or have any prior knowledge of, or effective control over, their content.* It is not in a position comparable to that of the author or editor of a defamatory article, nor is it in a position comparable to that of the corporate proprietor of a newspaper in which a defamatory article is printed ...

...

[26] I am also very doubtful about the argument that Google Inc's role as that of a secondary publisher, facilitating publication in a manner analogous to a distributor. In any event it seems to me that such an argument can get nowhere in relation to the period prior to notification of the complaint. *There is a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory: Emmens v Pottle (1885) 16 QBD 354, 357-358; Vizetelli v Muddie's Select Library Ltd [1990] 2 QB 170, 177-180; Bottomley v S W Woolworth & Co Ltd (1932) 48 TLR 521. There are differences in the reasoning in support of that conclusion but the conclusion itself is clear enough.* The principle operated in *Bottomley* to absolve Woolworth from liability for publication of a defamatory attack in a consignment of remaindered American magazines that it distributed; the company did not check every magazine for defamatory content, there was nothing in the nature of the individual magazine that should have led it to suppose that the magazine contained a libel and it had not been negligent in failing to carry out a periodical examination of specimen magazines. *Since it cannot be said that Google Inc either knew or ought reasonably to have known of the defamatory comments prior to notification of the appellant's complaint, that line of authority tells against viewing Google Inc as a secondary publisher prior to such notification.* Moreover, even if it were to be so regarded, it would have an unassailable defence during that period under s 1 of the 1996 Act considered below.⁵¹

(emphasis added)

[113] Lord Justice Richards went on to refer approvingly to the approach taken in *Habeeb*:

33 ... I have to say that I find the notice board analogy far more apposite and useful than the graffiti analogy. The provision of a platform for the blogs is equivalent to the provision of a notice board; and Google Inc goes further than this by providing tools to help a blogger design the layout of his part of the notice board and by providing a service that enables a blogger to display advertisements alongside the notices on his part of the notice board. Most importantly, it makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms.

34 ... Those features bring the case in my view within the scope of the reasoning in *Byrne v Deane*. Thus, if Google Inc allows defamatory material

⁵¹ Section 1 Defamation Act 1996 (UK).

to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for the continued presence of that material on the blog and thereby to have become a publisher of the material. Mr White QC submitted that the vast difference in scale between the Blogger set-up and the small club-room in *Bryne v Deane* makes such an inference unrealistic and that nobody would view a comment on a blog as something with which Google Inc had associated itself or for which it had made itself responsible by taking no action to remove it after notification of a complaint. Those are certainly matters for argument but they are not decisive in Google Inc's favour at this stage of proceedings where we are concerned only with whether the appellant has an arguable case against it as a publisher of the comment in issue.

(emphasis added)

[114] It is clear from the Court of Appeal's decision in *Tamiz* that the creation and maintaining of a blog on a blogger platform is not a passive activity. Although the case concerned Google's liability rather than that of the individuals who had established the blogs using the Google platform, it is implicit that parties who actually create and control the content of the blogs are also to be regarded as publishers of comments posted on them once they know or ought to know of them.

[115] In Australia, too, the proposition that an internet service provider performing a passive role cannot be a publisher has been rejected on the ground that it would cut across the principles that have formed the basis for liability in the news agent/library type cases, and the cases in which the failure by a person with the power to remove defamatory material gives rise to an inference of consent to the publication.⁵²

[116] I consider that the notice board analogy is apt in considering publication via Facebook. The host of a Facebook page has established what is, essentially, a noticeboard. It may be a public "noticeboard", on which anyone can post comments. It may also be a private "noticeboard", available to a specified group. In either case, the host has the power to control content by deleting postings. The host also has the power to control those who post on the site by blocking users. Those blocked may include potential plaintiffs, affected by what is posted, but unable to see the offending content and complain.

⁵² *Trkulja v Google Inc LLC and Anor (No. 5)* [2012] VSC 533.

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

Is it tenable to argue that Mr Murray was a publisher of the anonymous comments?

[118] It is clear from Mr Murray's affidavit evidence that, although he could not control comments that were posted, he was able to exercise considerable control over whether they remained. On his own account Mr Murray not only could, but did take frequent and active steps to remove postings that he considered defamatory or otherwise inappropriate. He also blocked particular individuals whose views he considered unacceptable. Mr Murray could not, on the available evidence, be viewed as a passive instrument.

[119] Further, although Mr Murray describes the difficulties presented by the auto-update function on the Facebook page, he does not suggest that this prevented him from culling abusive or inappropriate postings but merely that it made the process slower and more difficult.

[120] Two other aspects are significant. The first is that Mr Murray blocked Mr Wishart and his supporters from the page. This would inevitably have made it more difficult for Mr Wishart to identify and complain about potentially defamatory material. These facts might, ultimately, be relevant to the question whether, even if Mr Murray did not have actual knowledge of particular postings, he ought to have known that future postings were likely to contain defamatory material.

[121] The second is Mr Wishart's claim that he warned Mr Murray about the defamatory postings. This fact is in dispute, but it does appear from the evidence that there was a level of dialogue between Mr Wishart and Mr Murray (and possibly

between Mr Wishart and anonymous users of which Mr Murray may have been aware). Depending on the factual finding ultimately made, this issue may also be relevant to whether Mr Murray should have known that defamatory postings were being made.

[122] In these circumstances I am satisfied that Mr Wishart's allegation that Mr Murray was a publisher of the anonymous statements is tenable. Mr Murray may, of course, be able to avail himself of the innocent dissemination defence. But at this stage of the proceeding it is not appropriate to strike out the statement of claim.

Statement of claim oppressive, unduly prolix and contains irrelevant material

[123] Mr Salmon has specific concerns about a number of passages in the statement of claim which he says are irrelevant, argumentative or plead evidence, with the effect that the pleading is impossible to properly respond to.

[124] His first complaint relates to paragraph 19 which alleges that:

The Twitter statements took readers directly to the main Boycott page to read the defamations there. Accordingly, the plaintiff repeats paragraphs 56 through to 103 (the meanings and inferences of the Facebook statements) in 125 to 191 (the meanings and inferences of Facebook commenters) of the statement of claim, as if pleaded in full here and says further that the defamatory publications on the Boycott page were seen by the first defendant's Twitter followers when they visited that page, adding further defamatory and harmful context to the original "tweets" of the first defendant.

[125] Mr Salmon submitted that this paragraph has no apparent purpose in the context in which it is pleaded, namely the first cause of action founded on the Twitter statements. I agree with this concern. There is nothing objectionable about Mr Wishart pleading that the Twitter statements took readers directly to the main Boycott page. However, it is unnecessary and, indeed, inappropriate to bring into this cause of action the various pleadings relating to the Facebook page itself which are the subject of later causes of action.

[126] Mr Salmon also objects to paragraphs 22-50, 54-55, 85-103, 119-120 (other than the prayer for relief), 123, 127, 143, 197-232, 234-238 and 240-255 as

containing mainly irrelevant and purely evidential matters or submissions that cannot effectively be responded to. I agree that paragraphs 22-48 contain evidential material that is not appropriate in the statement of defence. Paragraph 49 and 50, however, are directed towards the extent and effect of publication and may properly be included.

[127] Paragraphs 54 and 55 are explanatory of the structure of the statement of claim and are not proper pleadings. There is no allegation contained in them to which the defendants might respond.

[128] Paragraphs 84 and 85 do not contain allegations to which the defendants could respond. Paragraphs 86 and 87 are permissible.

[129] Paragraphs 88-95 are impermissible because they do not actually contain any allegations to which the defendants could respond. Nor does paragraph 96, which is in the nature of submission rather than pleading. Paragraph 97 is permissible. Paragraphs 98-103 are not permissible.

[130] The next complaint relates to paragraphs 119 and 120. Paragraph 119 is not a proper pleading; headings in a pleading are not required to be separately numbered. The various assertions at paragraph 120 are alleged to be admissions made by Mr Murray during the Radio Live interview and are in the nature of evidence rather than allegations. Paragraph 127 is not a permissible pleading. Nor is paragraph 128. Paragraph 143 is not a permissible pleading but more in the nature of submission. Paragraph 196, 198, 200 and similar paragraphs are not pleadings but merely headings. However, the other paragraphs 197-229 to which Mr Salmon objects I consider permissible because they go to the asserted link between Mr Murray's actions and those of the third parties who posted comments which will be relevant to the issue of publication and any defence of innocent dissemination.

[131] I do not, however, consider paragraphs 230-232 as proper pleadings. Nor are paragraphs 234-238, these, once again, being admissions said to have been made by Mr Murray. This is evidence rather than a pleading.

[132] Paragraphs 240-255 are in the nature of submission and not permissible.

Security for costs

[133] Mr and Mrs Murray seek security for costs from Mr Wishart under r 5.45 of the High Court Rules and for an order that the proceeding be stayed until such security is given. The basis for the application is that there is reason to believe that Mr Wishart will be unable to pay the defendants' costs in the event that he is unsuccessful.

[134] The threshold question is whether there is good reason to believe that Mr Wishart will be unable to meet an order if required. If that threshold test is met it is a matter for my discretion if I consider it just in all the circumstances to make an order for security. The exercise of that discretion involves the balancing of the parties' respective interests as explained in *A S McLaughlin Ltd v NEL Networks Ltd*:⁵³

The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not likely to be denied.

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

[135] The defendants' assertion that Mr Wishart will not be able to meet a costs award rests on the fact that property owned by Mr Wishart is owned by him and others as trustees and, secondly, that his personal financial position is limited, with his income coming primarily from his publishing business which is said to have low circulation and limited revenue.

[136] Mr Wishart has provided an affidavit setting out his financial position. Mr Wishart's family trust is a shareholder in the two businesses from which income is derived, HATM Magazines Ltd and Howling at the Moon Publishing Ltd.

⁵³ *A S McLaughlin Ltd v NEL Networks Ltd* (2002) 16 PRNZ 747 (CA) at [15]-[16].

Dividends have not been paid out to the shareholder but rather income is paid out as shareholders' salaries or retained for capital purposes. Although Mr Wishart acknowledges that he has suffered financial harm from the alleged defamation, he maintains that steps taken to overcome that loss will result in more revenue. In addition, he has written three books since Breaking Silence and has provided details of sales figures which suggest that revenue from book sales is going to rise.

[137] Mr Wishart also provides information about his status as settlor and beneficiary of his family trust and value of property owned by that trust. Finally, he points out that it is not credible to suggest that he would elect to become bankrupt, given the extent and nature of his work in order to avoid paying costs.

[138] Mr Wishart is not in a significantly different position from many professional or business people. I am satisfied that he has an income stream through shareholder salaries paid by the two businesses. I am not satisfied that he would be unable to pay an award of costs if required.

[139] I would add that, if I had been satisfied that he would be unable to pay an award of costs, I would nevertheless have exercised my discretion against requiring security. This is a novel case. The fact that I have declined to strike out Mr Wishart's claim means, self-evidently, that I regard the claim as tenable. However, I do not expect it to be an excessively long or difficult case to defend at trial because the scope of the factual issues is clear and relatively limited. For these reasons the application for security for costs fails.

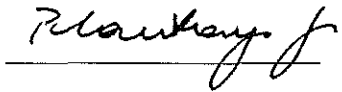
Conclusion

[140] The application to strike out the statement of claim is dismissed. However:

- (a) In relation to the allegations made against Mr Murray and Mrs Murray in relation to comments that they posted themselves, some are not capable of bearing the pleaded meanings and the statement of claim must be amended to reflect my rulings;

- (b) Some of the allegations are prolix and are in the nature of either evidence or submission and must be amended in accordance with my rulings;
- (c) Rather than impose a timetable for the filing of amended pleadings I direct the Registry to arrange a telephone conference as soon as convenient to the parties at which a suitable timetable can be discussed.

[141] The application for security for costs is dismissed.

A handwritten signature in black ink, appearing to read "P Courtney J", is written over a horizontal line.

P Courtney J