

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

**CIV-2012-404-001701
[2015] NZHC 3363**

BETWEEN

IAN WISHART
Plaintiff

AND

CHRISTOPHER ROBERT MURRAY
First Defendant

KERRI MAREE MURRAY
Second Defendant

DIMENSION DATA NEW ZEALAND
LIMITED
Third Defendant

Hearing: 3 August 2015

Appearances: Plaintiff in person
E D Nilsson for First and Second Defendant
E M S Cox for Third Defendant

Judgment: 22 December 2015

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 22 December 2015 at 12.00 noon
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

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Introduction

[1] The plaintiff, Ian Wishart, is the author of the book *Breaking Silence: The Kahui Case*, which concerned the death of infant twins and the subsequent acquittal of their father on charges of murder. The book was written in collaboration with the babies' mother, Macsyna King. It generated a strong reaction on social media. Much of the comment emanated from a Facebook page set up by the first defendant, Christopher Murray, who facilitated a campaign calling for a boycott of the book.

[2] Mr Wishart sues Mr Murray in defamation for statements that he posted on Twitter and on the Facebook page and for statements posted on the Facebook page by third parties. He sues Mr Murray's wife, Kerri Murray, for statements that she posted on the Facebook page. He also sues Mr Murray's then employer, Dimension Data New Zealand Ltd (DDNZ), on the basis that Mr Murray's activities were, in large part, carried out while he was at work, using DDNZ's communications infrastructure, and that DDNZ encouraged Mr Murray in his boycott.

[3] The current pleading is the fourth amended statement of claim (ASOC4). DDNZ has applied to strike out part of it. Alternatively, it seeks an order staying the proceedings until a proper pleading is provided. DDNZ argues that the Court of Appeal's judgment in *Murray v Wishart* sets out the only way in which a Facebook page host can be held liable for the comments of third parties.¹ Consequently, it submits the only tenable causes of action against it are those alleging vicarious liability for Mr Murray's Facebook page statements and direct liability for endorsement or adoption of those publications by the actions of one of its employees in linking to the Facebook page from the company intranet. It also asserts that some of the pleaded allegations are time barred and that there are many aspects in which ASOC4 fails to comply with the Defamation Act 1992 and the High Court Rules.

[4] Mr Murray was granted leave to be heard in support of DDNZ's application. He did not file an application but at the hearing asked that parts of the claim against him be struck out or the proceeding stayed on conditions, raising similar arguments as those advanced by DDNZ.

¹ *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722.

[5] Mr Wishart resists the applications and maintains that ASOC4 is compliant and capable of being responded to.

Principles relevant to applications for strike out and stay of proceedings

[6] A strike out application proceeds on the assumption that the facts pleaded in the statement of claim are true.² Before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed. The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material. The fact that applications to strike out raise difficult questions of law and require extensive argument does not exclude jurisdiction but particular care is required in areas where the law is confused or developing.³

[7] The defendants' application for stay of the proceedings is brought in reliance on r 15.1 of the High Court Rules and on the Court's inherent jurisdiction. Rule 15.1 allows for all or part of a pleading to be struck out if it discloses no reasonably arguable cause of action and also provides:

- (3) Instead of striking out all or part of a pleading ... the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court's inherent jurisdiction.

[8] Given the procedural history of this case I accept that it may be appropriate for the Court to exercise its inherent jurisdiction to stay the proceedings on conditions if the defendants' complaints about the pleadings are made out. Mr Wishart is unrepresented. Pleadings in a defamation case are subject to specific requirements and proper pleadings are especially important to fairly inform the defendants of the case against them. The purpose of the use of the Court's inherent jurisdiction is to ensure that justice is administered according to law in a regular, orderly and effective manner.⁴

² *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

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

⁴ *Ghose v Ghose* (1997) 16 FRNZ 455 (HC) at 463.

The issues for determination

[9] The applications require determination of the following issues:

- (a) Does ASOC4 comply with s 7 of the Defamation Act 1992? In particular:
 - (i) Can several publications be pleaded as giving rise to a single cause of action?
 - (ii) What are the identifiable bases of liability alleged against each defendant and does each have to be pleaded as its own cause of action?
- (b) Does ASOC4 comply with r 5.17 of the High Court Rules?
- (c) Is the fifth cause of action (concerning third party statements on the Facebook page) tenable as pleaded? In particular:
 - (i) Are the grounds on which Mr Murray and DDNZ could be held liable for these statements limited to the circumstances identified by the Court of Appeal in *Murray v Wishart*?
 - (ii) If not, are the other pleaded bases of liability for third party statements tenable?
- (d) Is the claim for exemplary damages against DDNZ tenable?
- (e) Are some causes of action time-barred?

The current pleadings and the applications

[10] Mr Wishart filed his original statement of claim in March 2012. The first amended statement of claim was filed in July 2013 following my decision striking

out parts of the original statement of claim.⁵ After a partially successful appeal on the issue of liability for third party posts on the Facebook page, Mr Wishart filed a second amended statement of claim. Requests by the defendants for clarification resulted in a third amended statement of claim. In March and April 2015 DDNZ filed the present applications to strike out and to stay, which resulted in the ASOC4 being filed in May 2015.

[11] ASOC4 pleads five causes of action, though only the first, second and fifth are relevant to the applications:

- (a) The first cause of action concerns five tweets that Mr Murray posted on Twitter on 28 June 2011 (“the tweets”). Four contain links to the Facebook page that was central to the boycott campaign. It is alleged that Mr Murray is liable as the author of his own statements and that DDNZ is vicariously liable for Mr Murray’s statements.
- (b) The second cause of action concerns a series of posts made by Mr Murray to the Facebook page between 28 June and 4 July 2011 (“Mr Murray’s Facebook statements”). It is alleged that Mr Murray is liable as the author of statements he posted himself and DDNZ is either vicariously liable for Mr Murray’s acts or is directly liable as publisher because it adopted or endorsed the posts by hyperlinking to them from its intranet.
- (c) The third cause of action relates to radio interviews given by Mr Murray.
- (d) The fourth cause of action relates to Facebook posts by Mrs Murray.
- (e) The fifth cause of action relates to a series, or “thread”, of comments posted to the Facebook page by third parties between 3.39 pm and 3.59 pm on 28 June 2011 (“the third party Facebook statements”). It is alleged that Mr Murray is directly liable as publisher and that

⁵ *Wishart v Murray* [2013] NZHC 540.

DDNZ is either vicariously liable for Mr Murray's actions or directly liable as a result of conspiring with Mr Murray to publicise the Facebook page to its staff, publishing a hyperlink to the page on its staff website and otherwise adopting and endorsing the page to its staff.

[12] DDNZ seeks orders:⁶

- (a) striking out the causes of action against it except for those seeking relief based on its alleged vicarious liability for the actions of Mr Murray, its direct liability on the basis of endorsement or adoption, and those that are consistent with the Court of Appeal's direction in *Murray v Wishart*; and/or
- (b) requiring Mr Wishart to file an amended statement of claim in which:
 - (i) each cause of action contains only one basis of liability against each defendant and each alleged basis on which each defendant is alleged to have published or to otherwise be liable for each relevant statement; and/or
 - (ii) there is no allegation of tortious liability against the defendants for their publications other than in defamation; and/or
 - (iii) the equivalent of the first, second and fifth causes of action (as they apply to DDNZ) be limited to causes of action of vicarious liability for Mr Murray's alleged defamation only, and do not include allegations that DDNZ was a publisher and/or is "directly" liable for any act or omission of Mr Murray; and
- (c) striking out paragraph 4(p) of ASOC4; and

⁶ See the Amended Interlocutory Application by Third Defendant: Stay of Proceeding, dated 12 June 2015, and the Amended Interlocutory Application by Third Defendant: Strikeout and Orders for Proper Pleadings, dated 12 June 2015.

- (d) striking out claims for exemplary damages; and
- (e) staying the whole proceeding, or those parts of the proceeding that allege causes of action against DDNZ, on such conditions the court considers just until Mr Wishart obtains an order setting aside the stay on the grounds that he has then demonstrated his ability to comply with such conditions as this court imposes, including a condition that:
 - (i) Mr Wishart submits his application to set aside the stay with a draft fifth amended statement of claim in compliance with the High Court Rules and otherwise confined to those claims that are consistent with the directions of the Court of Appeal in *Murray v Wishart*;⁷ and
 - (ii) any such further pleading be confined to claims brought in this proceeding within the limitation period prescribed by ss 11(1) and 15 of the Limitation Act 2010; and
 - (iii) any further amended statement of claim not contain causes of action alleging liability in tort for publication of statements; other than by alleging causes of action in defamation; and
 - (iv) any further amended statement of claim contain only such causes of action alleging defamation for which the plaintiff can identify and plead the content and particulars of the publication; and
 - (v) Mr Wishart demonstrates that he can and will duly and promptly bring and prosecute any claim which he has before this court under this proceeding and do so consistently with the directions of the Court of Appeal and the High Court Rules; and

⁷ *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722.

- (vi) Mr Wishart meet all orders for costs and any orders for security for costs then in effect (including costs in respect of all previous statements of claim to be replaced by the further amended statement of claim) by payment not later than the date of the end of the stay; and
- (f) an order that, unless application is made and prosecuted by Mr Wishart under the leave reserved, the stay be permanent; and
- (g) costs on this application.

[13] Mr Murray seeks orders striking out parts of the fifth cause of action or alternatively staying the proceedings on condition that:

- (a) his costs in relation to the challenge to the first statement of claim in this court be fixed and paid;
- (b) his costs in respect of this hearing be fixed and paid;
- (c) he (and Mrs Murray) have leave to bring a further security for costs application if and when Mr Wishart obtains an order lifting the stay.

Compliance with r 5.17 High Court Rules and s 7 Defamation Act 1992

The issue

[14] Mr Wishart has grouped the tweets, Mr Murray's Facebook statements, and the third party Facebook statements together as single causes of action. DDNZ complains that these are founded on more than one act of publication and should be pleaded separately. Of particular concern are the third party Facebook statements; DDNZ contends that each comment constitutes a separate cause of action and should be pleaded accordingly. In addition, it says it is entitled to know, in relation to each of the 66 alleged publications, which individual publication is it alleged to be liable for and the legal basis upon which it is said to be liable, i.e. directly as a publisher or vicariously for the acts of its employee.

General principles

[15] Rule 5.17 provides that distinct causes of action, founded on separate and distinct facts, must if possible be stated separately and clearly. A cause of action is defined as “simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person”.⁸ DDNZ argues that a separate remedy must be sought for each cause of action;⁹ separate causes of action must be pleaded separately, each delineated by some introductory phrase;¹⁰ it must be made clear which particular pleaded facts each cause of action is based on;¹¹ and each communication of defamatory matter is a separate publication in respect of which proceedings may be brought.¹² Provision by the plaintiff of further particulars does not excuse material breaches of the rules as to pleadings.¹³

[16] In defamation proceedings the general principle is that each publication of a defamatory statement gives rise to a separate cause of action.¹⁴ Section 7 of the Defamation Act 1992 states that proceedings for defamation based on a single publication constitute one cause of action, no matter how many imputations the published matter contains. Section 37 requires that a plaintiff shall “give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings”. In *Lee v The New Korea Herald Ltd* Heath J held that a statement of claim in a defamation proceeding must indicate the circumstances in which the words were published, such as the date, place and medium of publication.¹⁵

[17] It follows that a single online comment may found a cause of action. However, although pleadings in defamation retain a more formal character than generally applies in other civil proceedings,¹⁶ there is also a need for pragmatism. Requiring each post in a Twitter feed or on a Facebook page to be pleaded as a

⁸ *Letang v Cooper* [1965] 1 QB 232 (CA) at 242-243.

⁹ High Court Rules, r 5.27(2).

¹⁰ *Thomson v Westpac Banking Corp (No 2)* (1986) 2 PRNZ 505 (HC) at 508–509.

¹¹ At 509.

¹² *Duke of Brunswick v Harmer* (1849) 14 QB 185.

¹³ *Thomson v Westpac Banking Corp (No 2)* (1986) 2 PRNZ 505 (HC) at 508.

¹⁴ *Duke of Brunswick v Harmer* (1849) 14 QB 185.

¹⁵ *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010 at [36].

¹⁶ At [36].

separate cause of action could result in impossibly unwieldy pleadings and there is precedent for treating multiple publications as founding a single cause of action.

Multiple publications by the same author as a single cause of action

[18] This issue was touched on by the Court of Appeal in *Leigh v Attorney-General*.¹⁷ In that case the defamation was said to arise out of various statements, written and oral, made about the plaintiff by a government Ministry and its Deputy Secretary to a Minister. The written statements were contained in a Briefing Paper, which was presented to the Minister at a meeting at which further alleged defamatory statements were made orally. The defendants objected to these being pleaded as two separate causes of action, saying that they constituted a single publication because they were so clearly connected that it was wrong in principle to say there were two publications. Although the Court of Appeal found that it was acceptable to plead the publications separately (noting as relevant the fact that there was a difference in the groups to whom each publication was made¹⁸) in reaching that conclusion it cited the following passage from the Australian case of *Phelps v Nationwide News Pty Ltd*:¹⁹

... it is to be borne in mind that, subject to unfairness amounting to abuse of process, or unreasonableness, or the inability of the publication to sustain the form of pleading chosen, it is generally for the plaintiff to select the manner in which he/she/it wishes to present a case. It is only if the plaintiff's selection of the mode of pleading is untenable for one of those reasons that it will be struck out.

[19] *Phelps* is an example of a plaintiff being permitted to plead arguably separate publications together as a single publication. The plaintiff claimed that she had been defamed in two parts of a newspaper. The first was a "pointer" on page 1 of the newspaper, which summarised and directed readers to the second alleged publication, an article contained on page 3 of the newspaper. The plaintiff pleaded her case in alternative ways – either as two causes of action based on each piece constituting a separate publication or as one cause of action with the pointer and the article together constituting a single publication. Simpson J held that "[t]here is no

¹⁷ *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148.

¹⁸ At [83].

¹⁹ *Phelps v Nationwide News Pty Ltd* [2001] NSWSC 130 at [22]; approved in *Australian Broadcasting Corp v Obeid* (2006) 66 NSWLR 605 (CA).

rigid dividing line, no categoric test that can be applied to the determination of the boundaries” between a single publication and multiple publications, and that in the many cases “where a reasonably minded person would recognise that either classification would be valid ... the plaintiff has the option as to the manner of pleading”.

[20] The Judge referred to *Burrows v Knightley*, where defamation was alleged in respect of both a book and the four-part serialisation of the book in two newspapers.²⁰ In that case Hunt J held that where defamatory material was published by a defendant on different occasions, and “where there is apparent on the face of the matter complained of itself, either an intention on the part of the defendant that it be read together or direct references internally one to the other so that the reader may reasonably be expected to read it together, it is acceptable practice to plead all of the material in the one paragraph of the statement of claim and to identify the imputations said to have been conveyed by the material as a whole”.²¹

[21] It can be seen from these cases that, in determining whether multiple statements by the same author can properly be seen as a single publication, there is no rigid dividing line between categories and reasonable minds may differ. It is generally for the plaintiff to select how to present a case and it will only be if the plaintiff’s choice is so untenable or so unfair as to warrant striking out that the courts will intervene. The relevant considerations are:

- (a) where the case concerns related materials published by the defendant on different occasions, and it is clear that the defendant intended for the material to be read together or the materials contain internal references to each other so that the reader may reasonably be expected to read it together;

²⁰ *Burrows v Knightley* (1987) 10 NSWLR 651. The Judge also referred to *Lucas v John Fairfax Publications Pty Ltd* [2000] NSWSC 950, unreported, 13 October 2000, Levine J; *Rakhimov v John Fairfax Publications Pty Ltd* [2001] NSWSC 11, unreported, 25 January 2001, Levine J.

²¹ Cited at [13] of *Phelps*.

- (b) the diversity of the content contained in each of the related materials and whether the same or different imputations must be pleaded for each;
- (c) whether the related materials were published to the same or different people.

Statements by different authors as a single cause of action

[22] In relation to the third party Facebook statements the slightly different question arises: can statements by different authors constitute a single publication? This may pose difficulties, for example, in asserting a defence of honest opinion since the defendants will have to show that the opinion did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and the defendant had no reasonable cause to believe that the opinion was not the author's genuine opinion.²² However, in a case in which there are many different bases of liability asserted, there is a need for pragmatism.

[23] The English case *McGrath v Dawkins*,²³ in which the plaintiff sued for alleged defamatory comments made in comment threads on two different websites, supports this approach. HHJ Moloney QC, sitting as a High Court Judge, said:²⁴

A special feature of chatroom or forum publications is the way in which the thread of words published on the site is continually evolving by the addition of new comments. Depending when a particular reader views the thread, he may see some or all of the eventual total number of comments. In theory this can have several consequences for defamatory meaning and liability.

- a. While the website operator is prima facie liable for all the contents of the thread, individual contributors are of course liable only for their own words.
- b. Those individual contributions must be read in the context of the earlier contributions, which may affect the meaning of the latest one.
- c. As later contributors add further comments, the context of the thread as a whole will change. This will affect the meaning of the whole thread, for which the operator is liable; but an individual contributor cannot be held liable for a change in the meaning of his contribution,

²² Defamation Act 1992, s 10(2)(b).

²³ *McGrath v Dawkins* [2012] EWHC B3 (QB).

²⁴ At [52]–[53].

brought about by the later contributions of third parties which alter its context.

- d. Strictly speaking, whenever a new contribution was added, the thread would become a new publication with a different meaning. In the case of a thread with more than a few entries, it would rapidly become impracticable for a judge, let alone a jury, to ascribe a separate defamatory meaning at each point, and then apply it to such meaning-dependent issues as justification.
- e. The only practicable course here is to adopt the general approach of treating the final thread as a single publication for context and meaning purposes (albeit with several authors of distinct parts), while carefully avoiding the injustice of holding an individual contributor liable for any material changes in the meaning of his contribution brought about by later contributions from others.

[24] I consider that this is the correct approach where a single thread on a Facebook page includes allegedly defamatory statements by more than one person or persons other than the defendant host.

[25] With those principles in mind, I now turn to consider the pleading requirements for the tweets, Mr Murray's Facebook statements, and the third party Facebook statements.

The tweets as a single cause of action

[26] The first cause of action alleges defamation arising from a series of five tweets made by Mr Murray over the course of 28 June 2011, four of which link to the Facebook page. I consider that these statements may be pleaded as a single publication. They are all authored by Mr Murray. They were published within a short space of time and appeared on Twitter in chronological order, so that readers would reasonably be expected to read them together. Mr Murray's Twitter account had a definite number of followers (although, of course, the statements may have been read more widely than that) and so there would have been substantial overlap in the people who read each tweet. There is also considerable overlap in their content, reflected in the fact that four of the five contain a link to the same Facebook page, so that many of the same imputations arise. No substantial unfairness to the defendants arises as a result of their having to respond to the tweets as a single publication.

[27] The only potential issue is the pleading that DDNZ is vicariously liable for the tweets,²⁵ which is pleaded in part on the basis that Mr Murray sent his tweets during the scope of his employment²⁶ and from DDNZ's premises.²⁷ However the fifth and last tweet of the day was sent at 7.46pm and Mr Wishart does not specifically plead that this was sent from DDNZ's premises using its equipment; he earlier pleaded that only the first four tweets were sent on a working day from DDNZ's premises using DDNZ's communications infrastructure.²⁸

[28] However, if DDNZ is vicariously liable for the other tweets because they were sent in the course of Mr Murray's employment, it may prove to be artificial for it to avoid liability for comments not made within working hours and from its offices. More broadly, the argument that DDNZ is vicariously liable rests on the basis that it was in the business of promoting the use of social media and publicly endorsed Mr Murray's campaign, bringing the whole campaign within the course of Mr Murray's employment. So, save for rectifying the inconsistency between paragraphs [14] and [29](a) and (c), I do not see any basis for objecting to this aspect of the pleading.

Mr Murray's Facebook statements as a single cause of action

[29] The second cause of action alleges defamation arising from statements posted to the Facebook page by Mr Murray himself over the course of about a week. This includes the "info statement", which was present on the page from its creation on 28 June 2011 and summarises Mr Murray's opposition to the book, the "McDonald's statement" published on 4 July, the "opportunism statement" of 28 June, and the "facts statement" of 4 July.

[30] These comments may be pleaded as a single cause of action. This is consistent with the Court of Appeal's ruling that the statements could be read as one for determining the meaning of the alleged defamatory words.²⁹ The imputations pleaded to arise from the statements are not identical but they all relate to the boycott

²⁵ ASOC4 paragraph 29.

²⁶ ASOC4 paragraph 29(a).

²⁷ ASOC 4 paragraph 29(c).

²⁸ ASOC4 paragraph 14.

²⁹ *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [70].

campaign and its central claims that Mr Wishart was exploiting an opportunity to make money out of the death of the twins. Given the nature of the Facebook page as the hub of the boycott campaign it is clearly open to Mr Wishart to allege that Mr Murray intended the statements to be read together with the “info statement” serving as a consistent backdrop to other posts made on the page.

[31] The same issue regarding DDNZ’s vicarious liability arises because the “McDonalds” statement was published in two parts at 11.11 and 11.17pm on 4 July. Given they were not posted during working hours it is quite likely they were posted by Mr Murray at home. However, because Mr Wishart asserts that DDNZ is vicariously liable because the boycott campaign was undertaken in the course of Mr Murray’s employment this pleading may remain.

The third party Facebook statements as a single cause of action

[32] The fifth cause of action pleads that Mr Murray and DDNZ are liable for defamatory comments made by third parties on the Facebook page. Mr Wishart pleads that hundreds of thousands of comments were eventually posted to the page by third parties over seven weeks, but limits his allegations against Mr Murray and DDNZ to comments that appeared in a thread on 28 June 2011, beginning with a third party comment at 3.39pm and including Mr Murray’s own comments at 3.59pm. For the reasons discussed earlier this thread can be pleaded as a single publication founding a single cause of action.

[33] There is, however, one aspect of the pleading that needs to change. Mr Wishart pleads this “single comment thread as representative of third party publications that the First Defendant is responsible for”.³⁰ The defendants rightly object. Mr Wishart explains that he has not used the term “representative” to convey that he is relying on statements beyond those actually pleaded. However, that meaning is not clear and since there is no recognised basis for liability for “representative” publications Mr Wishart must make it clear that he is relying only on the statements actually pleaded as forming the basis for alleged liability.

³⁰ ASOC4 paragraph 120.

Particulars

[34] The final aspect is compliance with r 5.17. Schedule D provided with Mr Rennie's submissions identifies the paragraphs that lack the necessary particulars such as dates and places of publication. Mr Wishart must provide the details that are missing to the extent that he is able. Of course, if there are particulars that he is unable to give it is permissible to state that fact.

First and second causes of action - bases of liability as separate causes of action

[35] The tweets and Mr Murray's Facebook statements are pleaded as two separate causes of action. However, the substance of the allegations disclose five ways in which Mr Murray and DDNZ might be liable:

- (a) Mr Murray's direct liability for his own tweets;
- (b) DDNZ's vicarious liability for Mr Murray's tweets;
- (c) Mr Murray's direct liability for his own Facebook statements;
- (d) DDNZ's vicarious liability for Mr Murray's Facebook statements;
- (e) DDNZ's direct liability for Mr Murray's Facebook statements on the basis that DDNZ adopted or endorsed those statements, by the actions of its employee in linking to the Facebook page from DDNZ's intranet.

[36] Although many of these causes of action have considerable factual overlap, each is necessarily founded on separate and distinct facts. Any claim for vicarious liability on the part of DDNZ, for example, will include all the facts that are relevant to Mr Murray's personal liability and then an additional set of facts that shows how the publications were made in the course of Mr Murray's employment. Thus, each of these bases of liability, and the facts on which they are founded, should be pleaded separately. Of course, to avoid unnecessary repetition in the pleadings Mr Wishart

can, under one cause of action, refer back to facts already pleaded as part of another cause of action without setting them out again in full.

The fifth cause of action – bases of liability as separate causes of action

The issue

[37] The fifth cause of action suffers from the same problem – it comprises several distinct causes of action. The defendants argue that once these causes of action are separated out, it is apparent that several of them are not tenable.

[38] The fifth cause of action alleges that both Mr Murray and DDNZ are “either directly or vicariously liable”³¹ for the third party statements on the Facebook page. It can be seen immediately that this pleading is unacceptably muddled since it does not make it clear whether DDNZ is alleged to be both directly and vicariously liable or only vicariously liable. In fact, there appear to be (at least) seven causes of action, founded on separate and distinct facts, contained in this section of the statement of claim, namely:

- (a) Mr Murray’s direct liability as publisher in accordance with the Court of Appeal’s directions in *Murray v Wishart* – that is, he had actual knowledge of the defamatory statements and failed to remove them;³²
- (b) DDNZ’s vicarious liability for Mr Murray’s actions in terms of (a);
- (c) Mr Murray’s direct liability on the basis that the statements were the natural and probable consequence of his original Twitter and Facebook statements;
- (d) DDNZ’s vicarious liability for Mr Murray’s actions in terms of (c);
- (e) Mr Murray’s direct liability as publisher on the basis that he republished the comments by linking to the Facebook page in

³¹ ASOC4 paragraph 97.

³² This is the basis of liability identified by the Court of Appeal in *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722.

circumstances which showed his endorsement or adoption of the material linked to;

- (f) DDNZ's vicarious liability for Mr Murray's actions in terms of (e);
- (g) DDNZ's direct liability as publisher on the basis that it endorsed or adopted the comments by linking to the Facebook page from its intranet.

[39] As with the alleged liability for the tweets and Mr Murray's Facebook statements each of these modes of liability are a distinct cause of action as they are necessarily founded on separate and distinct facts. They should therefore be pleaded separately. That assumes, of course, that each is a tenable cause of action that has been brought within time. The defendants say they are not all tenable.

Does Murray v Wishart preclude other bases of liability?

[40] Following the Court of Appeal judgment in *Murray v Wishart*,³³ it is now arguable that the host of a Facebook page, as Mr Murray was, can be directly liable as publisher for third party statements on that page if he (1) had actual knowledge of the defamatory statements and (2) failed to remove them within a reasonable time.

[41] The Court of Appeal said:

[148] Given our conclusions as to the appropriate test for determining whether Mr Murray was a publisher of the third party statements, the question we must now address is whether the claim relating to third party statements is tenable, in light of our findings. That requires that there be a tenable claim that Mr Murray knew of the third party comments listed in the statement of claim and failed to remove them within a reasonable time in circumstances that give rise to an inference that he was taking responsibility for them.

...

[155] That requires us to consider whether we should strike out the claim in its entirety or give Mr Wishart a chance to replead it. In his oral submissions in this Court, Mr Wishart asked that if the Court believed the claim did not disclose a tenable cause of action, he be permitted to replead it in a manner which did. We consider it is fair to allow this, but we make it

³³ *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722.

clear that Mr Wishart should not seek to pursue the claims in relation to third party comments unless he can properly plead that Mr Murray knew those comments were on the Facebook page and failed to remove them within a reasonable time.

[42] Since Mr Wishart pleads facts said to show that Mr Murray had actual knowledge of the Facebook statements and failed to remove them within a reasonable time³⁴ the cause of action against him for that conduct is tenable. However, the defendants submit that the test set out in *Murray v Wishart* is the *only* basis on which a Facebook page host can be liable in defamation as the publisher of a third party comment. Therefore, they say that the pleadings that Mr Murray could be liable for third party statements as the natural and probable consequence of his own statements or because he endorsed or adopted them are untenable.

[43] I do not agree that *Murray v Wishart* prescribes the only way in which liability can arise for third party comments posted on a Facebook page. That decision was concerned with whether there was a tenable basis on which Mr Murray might be liable as a Facebook page host – i.e. as the person who had created the forum for the discussion to take place and who had a degree of control over the page’s contents. The focus of the argument on the appeal was whether actual knowledge of the comments posted by third parties was required or whether constructive knowledge was sufficient. The Court of Appeal held that only actual knowledge would suffice for the purposes of the test. Its statement that “the actual knowledge test should be the only test to determine whether a Facebook page host is a publisher” must be read in this light.³⁵ It does not mean that liability could not arise in other ways and there is nothing in the decision to suggest that.

[44] Nor do I accept Mr Rennie’s submission that DDNZ can be liable for the third party Facebook statements only if Mr Wishart can successfully plead that DDNZ met the requirements of the *Murray v Wishart* test itself (i.e. actual knowledge and failure to remove). Mr Rennie submitted that “[t]here can be no tenable cause of action against [DDNZ] for third party posts unless the plaintiff pleads, in a separate cause of action, the elements required by the Court of Appeal’s direction”. In fact, DDNZ could not be directly liable on the *Murray v Wishart*

³⁴ ASOC4 paragraphs 114, 124 and 155.

³⁵ At [144].

approach because it was not the Facebook page host. Therefore, to the extent that Mr Rennie criticises Mr Wishart for attempting to argue that DDNZ is directly liable for the posts, I agree with him.³⁶ But Mr Rennie’s submission ignores the fact that, if Mr Murray is found to be liable as a publisher, DDNZ is arguably vicariously liable. It may be difficult to establish vicarious liability in relation to this mode of publication (essentially a failure to act) but it cannot be said to be untenable.

[45] However, the allegations against DDNZ appear in the “Summary” part of the pleading and it is uncertain what function those paragraphs are intended to play. Further, paragraph [212] contains an allegation in conspiracy without any indication as to whether the intention is to actually assert a separate cause of action in conspiracy (with its very different requirements) or whether it is simply an example of inappropriate language in the context of a defamation claim. I have assumed the latter. Either way, however, the pleading needs to be amended.

[46] In summary, there is a tenable argument on the basis of *Murray v Wishart* that Mr Murray was a publisher of the third party Facebook statements. That being so, there is also a tenable argument that DDNZ was vicariously liable for Mr Murray’s actions as publisher. But the Court of Appeal’s decision does not preclude other ways in which defendants may be made liable for third party Facebook posts. I now turn to consider in more detail the alternative ways in which Mr Wishart alleges Mr Murray and DDNZ are liable for these statements.

Third party statements as the natural and probable consequence of Mr Murray’s own statements

[47] Mr Wishart alleges that one of Mr Murray’s initial false statements was to the effect that Mr Wishart had paid the babies’ mother, Ms King, so that she was profiting from the book. He says many of the third party comments in the Facebook thread were repetitions of Mr Murray’s own false statements and that such repetitions were the natural and probable consequence of the original statements. Mr Wishart also points to the alleged widespread publication of a “boycott message”

³⁶ For example, paragraphs [175]–[179] of ASOC4 do seem to allege that both Mr Murray and DDNZ knew of the Facebook statements, suggesting that Mr Wishart seeks to hold them both directly liable on the *Murray v Wishart* approach.

which was effectively a chain message copied and pasted by members of the public to the Facebook pages of certain bookshops, stating that their stores would be boycotted if they carried the book because Ms King should not “be allowed to profit from this”. He sets out in full a specific example posted to the Paper Plus Facebook page by one Prue Fothergill at 1.57 pm on 28 June. Mr Wishart submits that this post was “rapidly followed by identical messages posted by a number of different people”.

[48] At paragraphs [189] – [202] of the ASOC4 Mr Wishart pleads that both Mr Murray and DDNZ are liable in defamation because these third party defamations were a natural and foreseeable consequence of Mr Murray’s initial false statements.

[49] Mr Wishart says both the Facebook thread and the chain messages to the stores were the natural and foreseeable outcome of earlier publications made by Mr Murray on the Facebook page that Ms King was to profit from the book. Mr Wishart posted a statement to the Facebook page that Ms King was not making any money from the book but says the page continued to carry the false allegations while “whipping up public hysteria” against Mr Wishart and Ms King.

[50] The general rule is that a publisher of a defamation is not liable for its repetition by a third party. The English courts have recognised exceptions to that, one of which is where the repetition is a natural and probable consequence of the original publication.³⁷ The principle that an original publisher can be liable for republication by others if that republication was foreseeable as the natural and probable consequence of the original publication has been accepted in New Zealand.³⁸ In *Leigh v Attorney-General* the Court of Appeal said:³⁹

Cases such as *McManus v Beckham* ... are authority for the proposition that a plaintiff can rely on subsequent media publications to show increased damage where those publications were foreseeable at the time of the alleged defamation.

³⁷ See *Speight v Gosnay* (1891) 60 LJQB 231 at 232.

³⁸ Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at 844.

³⁹ *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148 at [60].

[51] That statement does, however, highlight what is a frequent confusion in the cases on this point as to how the republications should be pleaded – whether the republications constitute their own cause of action for which the original publisher can be directly liable; or whether they are part of the original cause of action and simply go to increase the damage that flows from the original publication. *Gatley on Libel and Slander* summarises the two positions as:⁴⁰

Where a defendant's defamatory statement is voluntarily republished by the person to whom he published it or by some other person, the question arises whether the defendant is liable for the damage caused by that further publication. In such a case the claimant may have a choice: he may (1) sue the defendant both for the original publication and for the republication as two separate causes of action, or (2) sue the defendant in respect of the original publication only, but seek to recover as a consequence of that original publication the damage which he has suffered by reason of its repetition, so long as such damage is not too remote.

The cases do not always distinguish clearly between the two situations and in many cases it will make no practical difference whether the defendant's liability is based upon one rather than the other. ...

[52] As different considerations will apply depending on how the plaintiff runs its case – for example, there may be a difference between the two approaches for limitation purposes – the authors of *Gatley* conclude that it may be better if a publisher can be liable only *as a publisher* of the republication where he authorised or intended it; otherwise republications simply go to increase the damage flowing from the original publication.⁴¹

[53] I therefore consider it is tenable to assert that Mr Murray could be liable for the third party republications of his defamatory statements if they were the natural and probable consequence of his original defamatory publications. Although Mr Wishart can plead this as an additional cause of action it may be preferable to plead it as being additional damage as part of the causes of action founded on the original publications of Mr Murray's own tweets and Facebook posts.

⁴⁰ Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at 254. See also the discussion of Dobson J in *Leigh v Attorney-General* HC Wellington CIV-2008-485-2315, 14 July 2009 at [66]–[67].

⁴¹ Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at 256.

[54] It must also follow that, if the relevant acts were done in the course of Mr Murray's employment DDNZ would be exposed to vicarious liability for those acts.

[55] However these two causes of action (Mr Murray's alleged direct liability and DDNZ's alleged vicarious liability) need to be pleaded separately. Further, although Mr Wishart can plead the Facebook thread as one publication, he will need to provide the details (author, time and specific place of publication) of each of the chain messages for which he sues Mr Murray and DDNZ. He cannot rely on the specific Fothergill posting of the boycott chain message as "representative" of any other unspecified publications. The defendants are entitled to know exactly which publications they are said to be liable for.

Endorsement or adoption of third party statements

[56] At paragraphs [203] – [209] of the ASOC4 Mr Wishart pleads that Mr Murray is liable for third party posts on the Facebook page "under the principle of Endorsement or Adoption" ... "by continuing to promote and publish links to a page he knew contained disputed facts which he knew case the plaintiff in a bad light". There is no reference to DDNZ. At paragraph [210], however, under the heading "Summary", he makes a general allegation of defamation against Mr Murray and adds that DDNZ is vicariously liable. At paragraph [211] he sets out the basis on which he alleges that DDNZ is vicariously liable with an alternative pleading at paragraph 212 of direct liability against DDNZ.

[57] For the reasons I discuss shortly I consider that, in principle, a pleading alleging that Mr Murray is directly liable as a result of his endorsing or adopting third party statements is tenable. So, too, would be a pleading alleging that DDNZ is vicariously liable for Mr Murray's acts in endorsing or adopting third party statements is tenable. I also consider that a pleading alleging that DDNZ is directly liable itself for endorsing or adopting third party statements would be tenable. However, the manner of the current pleading is hopelessly confused and does not provide a clear factual basis on which each of these parties is alleged to be liable.

[58] In general the allegations of endorsement or adoption rest on Mr Murray's hyperlinks to the Facebook page. It is alleged in paragraphs [204] – [207] of the ASOC4 that he posted links to the page on his Twitter page on 28 June 2011; added a prominent link to the head of his Twitter page advertising the boycott and inviting people to click on the link; and in an email on 4 July he published a link to the page to one of his superiors at DDNZ encouraging him to publish the link on the company website. It is also alleged that he promoted the page in radio interviews on 29 June.⁴²

[59] Liability for defamatory content posted elsewhere on the internet if the defendant endorses or adopts it by way of hyperlinking to it has been recognised in other jurisdictions. In *Crookes v Newton*,⁴³ the Supreme Court of Canada held that, generally, hyperlinks were not to be treated as a communication of the defamatory statements on the webpage being linked to. Rather, hyperlinks were essentially a reference – content neutral and comparable to a footnote, with the majority suggesting that the Court might have reached a different conclusion if “a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content”.⁴⁴

[60] However, in a separate concurring opinion McLachlin CJ and Fish J phrased the test differently, saying that in some circumstances the text combined with a hyperlink may amount to publication of the defamatory material found by clicking on the hyperlink – namely, where the text indicated “adoption or endorsement of the content of the hyperlinked text”.⁴⁵

[61] In *Murray v Wishart* the Court of Appeal referred to both the majority judgment and that of McLachlin CJ and Fish J but declined to go further. The Court did not need to because the obviously close connection between the Twitter feed and the Information Statement on the Facebook page, to which it was hyperlinked, meant it was unnecessary to “reach any more general view about the role of hyperlinking” –

⁴² In fact, the transcripts of the interviews do not show anything to indicate endorsement or adoption of third party comments; to the contrary Mr Murray suggests that he did not approve of the more extreme statements.

⁴³ *Crookes v Newton* 2011 SCC 47, [2011] 3 SCR 269.

⁴⁴ At [42].

⁴⁵ At [48].

the issue before the Court simply concerned whether Mr Murray’s Twitter statements could be read together with his information statement to determine the meaning of the tweets.⁴⁶ Although the Court of Appeal eschewed specific resolution of the role of hyperlinks in defamation its treatment of that point implied that making information accessible by hyperlink may, arguably, be sufficient to prove publication of the hyperlinked material.

[62] It is notable that since *Murray v Wishart* was decided the Supreme Court of New South Wales has adopted McLachlin CJ and Fish J’s approach in *Visscher v Maritime Union of Australia (No 6)*,⁴⁷ finding that in order for a hyperlinker to be liable as a publisher of hyperlinked content, the plaintiff must establish that the hyperlinker accepted responsibility for the publication of the hyperlinked material, namely that there was “an approval, adoption, promotion or some form of ratification of the content of the hyperlinked material”.⁴⁸ The Court expressly found that the majority approach in *Crookes* was inconsistent with Australian authority and that “while one might accept that ‘by itself’ the mere posting of a hyperlink might not amount to publication of the linked or referenced material, it is difficult to follow why it is necessary for the hyperlink to present content from the hyperlinked material in a way that actually repeats the defamatory content before it can amount to publication”.⁴⁹

[63] Mr Murray submits that even if the *Crookes* or *Visscher* approach were to apply in New Zealand the allegation that he could be liable as a result of the hyperlinks is untenable on the facts because there is nothing in the relevant posts containing the hyperlinks to the Facebook page that in any way suggests an endorsement or adoption of the specific thread sued on:

- (a) only one tweet containing a hyperlink to the Facebook page post-dated the relevant comment thread;

⁴⁶ *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [31]–[32].

⁴⁷ *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350.

⁴⁸ At [29].

⁴⁹ At [28].

- (b) there is nothing in that tweet or Mr Murray’s main Twitter page containing the link that in any way suggests an adoption of any third party comment on the Facebook page (let alone those sued on);
- (c) the hyperlinks do not redirect readers to the thread of comments now sued on. They re-directed readers to the main Facebook page, which was separate and distinct from the part of the page containing the third party comments.⁵⁰

[64] These are questions of fact for trial. Given the lack of specific consideration of the point in New Zealand the position must be regarded as still developing, with the result that extreme caution would be needed in deciding to strike out the claim.⁵¹ The possibility that a hyperlinker could be liable for the “promotion” of the hyperlinked material, allows for argument that Mr Murray’s actions in promoting and linking to the page amount to publication of its contents.

[65] As with the other alleged modes of liability, if it is arguable that Mr Murray is directly liable for the third party Facebook statements on the basis of adoption or endorsement, then it is also arguable that DDNZ is vicariously liable for Mr Murray’s actions if these were done in the course of employment. I consider it is also tenable to argue that DDNZ itself is directly liable (through the actions of its employee in hyperlinking to the Facebook page from DDNZ’s intranet) for the posts on the same principle of adoption or endorsement.

Exemplary damages

[66] The prayer for relief to the fifth cause of action seeks exemplary damages against Mr Murray on the basis that he published untrue statements that were grossly defamatory of Mr Wishart, and conducted himself in a reckless, malicious, vindictive and/or calculating manner. It is pleaded that DDNZ is vicariously liable for such damages. DDNZ objects on the basis that this pleading is time barred and has no legal basis, which I take to be a submission that exemplary damages are not available for a claim based on vicarious liability.

⁵⁰ *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [32].

⁵¹ *Couch v Attorney-General* [2008] NZSC 45, [2008]3 NZLR 725 at [33].

[67] I agree with the latter submission. In the Court of Appeal case of *S v Attorney-General*,⁵² the Judges were unanimous that exemplary damages were not available against a vicariously liable defendant. Vicarious liability is a form of strict liability concerned with seeing that the person who has been wronged is compensated by someone who is able to pay. Exemplary damages are designed to punish. The Court held that it would not be fair to punish the person who had not, in fact, committed the wrong. The possibility of exemplary damages against the Crown was left open in the situation where an official of the State has deliberately, recklessly or in a grossly negligent manner directly inflicted personal injury on the plaintiff, an exception that has no application in the present case.⁵³

[68] The point has not been finally decided by the Supreme Court. However, in *Couch v Attorney-General (No 2)* Tipping J addressed the issue of whether exemplary damages were available against a vicariously liable defendant and considered that:⁵⁴

The law recognises two ways in which one person may be liable for the conduct of another. The first is by means of vicarious liability; the second is by attribution. Vicarious liability is imposed largely as a matter of policy. When one person is acting on behalf of another, the wrong is seen for the purposes of compensation as having been committed both by that person and by the other. But the policy behind awarding compensatory damages against a person on the basis of vicarious liability does not mean that exemplary damages should be similarly awarded. There is no policy basis for punishing someone for the conduct of another unless the first person's conduct itself also qualifies for punishment. People should not be vicariously liable for punishment on account of the conduct of someone else just because that conduct renders them liable to compensate the plaintiff.

[69] In light of this dicta it is not tenable for Mr Wishart to claim exemplary damages against DDNZ for any alleged vicarious liability and I strike out that claim for relief. If he continues to claim exemplary damages against Mr Murray and DDNZ for their alleged direct liability he should articulate precisely how their conduct can be said to warrant such relief in respect of each cause of action.

⁵² *S v Attorney-General* [2003] 3 NZLR 450 (CA) – Blanchard, McGrath, Anderson and Glazebrook JJ at [99]-[95] and Tipping J concurring at [122]-[124].

⁵³ At [93].

⁵⁴ *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [158].

[70] I also note that in amending his pleading Mr Wishart must observe r 5.27 of the High Court Rules, which requires that:

- (1) The statement of claim must conclude by specifying the relief or remedy sought.
- (2) *If the statement of claim includes 2 or more causes of action, it must specify separately the relief or remedy sought on each cause of action immediately after the pleading of that cause of action.*

(emphasis added)

Limitation issues

[71] The primary period for bringing a claim in defamation is two years.⁵⁵ The statements sued on were posted on 28 June 2011. The defendants say that the limitation period therefore expired on 28 June 2013. The first amended statement of claim is dated 10 July 2013. The defendants say that any causes of action pleaded for the first time in that or any subsequent amended statement of claim are time-barred and liable to be struck out as frivolous, vexatious or an abuse of process.⁵⁶

[72] Mr Wishart maintains that all the pleaded causes of action had been originally pleaded within the limitation period and that any fresh allegations are merely particularisation of existing causes of action.

[73] This ground raises two questions. First, when does time start running in relation to statements published online? Secondly, what constitutes a fresh cause of action as opposed to the further particularisation of an existing cause of action?

When did time start running?

[74] The defendants' argument assumes that publication occurs on the day the material is first published on the internet and no later. Generally, however, publication occurs every time a reader accesses the defamatory material. This is sometimes referred to as the "multiple publication rule". Under this rule, time starts running with each and every publication. However, the rule poses problems for internet publications which can be stored and retrieved indefinitely. The multiple

⁵⁵ Limitation Act 2010, ss 11 and 15.

⁵⁶ *Trustees Executors Ltd v Murray* [2007] NZSC 27, [2007] 3 NZLR 721 at [33].

publication rule exposes online publishers to seemingly indefinite liability. Other jurisdictions have adopted a single publication rule.⁵⁷ In New Zealand, however, the multiple publication rule still applies even in the context of internet publications.

[75] In *Solicitor-General v Siemer*, which involved alleged contempt of court through published information on a website in breach of an interim injunction, Chisholm and Gendall JJ said that:⁵⁸

[70] With the arrival of the internet, Courts have been alive to the scope for continuing, and continuous, publication of material on the electronic facility. Some cases have dealt with when and where publication via the internet takes place, and they all point in the same direction – publication occurs where, and when, the offending statement is downloaded and read. While that is not the law in many States of the USA where the “one publication” principle applies, it is the law in England, Australia, and, we hold, New Zealand.

[76] The Supreme Court endorsed that approach, albeit without analysis. In a footnote the Court observed that:⁵⁹

In the case of a contempt committed on the internet it seems there is a new publication every time access to the item is permitted: *Loutchansky v Times Newspapers Ltd (No 2)* at [51]–[76] and *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 at [42]–[44], [128] and [191]–[196].

[77] Despite the attraction of a single publication rule in New Zealand I am satisfied that the multiple publication rule either applies or it is arguable that it does so.

[78] The Facebook page was taken down on 14 August 2011. I must assume the possibility that there were visitors to the page up to and including that date. I therefore treat the limitation period as having expired on 14 August 2013. This means that the first amended statement of claim was within time and any causes of action included in that pleading and carried through to ASOC4 are also within time.

[79] However, causes of action introduced for the first time after 14 August 2013 are, prima facie, time barred, subject to late knowledge issues. The late knowledge

⁵⁷ E.g. Defamation Act 2013 (UK), s 8.

⁵⁸ *Solicitor-General v Siemer* HC Auckland CIV-2008-404-472, 8 July 2008.

⁵⁹ *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at n 82; see also the brief discussion in *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148 at [80].

period for defamation claims is two years from the late knowledge date.⁶⁰ DDNZ concedes that there may be a late knowledge issue arising in respect of the allegation against it of endorsement or adoption of Mr Murray's statements on the Facebook page. In a memorandum from DDNZ's solicitors, filed before this hearing with their amended interlocutory application for stay and strike out, it was acknowledged that in October 2012, when disclosure to Mr Wishart of various internal DDNZ documents was attempted, the documents were sent to an incorrect email address and that the parties did not realise the mistake until after the telephone conference before me in June 2013. DDNZ accepts that if Mr Wishart had received the documents when they were first sent he would have been able to plead that cause of action before the expiry of the primary period. At this stage, therefore, it is possible that the extended period will apply, which precludes a strike out on this ground.

Do some allegations constitute fresh causes of action that are time barred?

[80] In *Transpower New Zealand Ltd v Todd Energy Ltd*,⁶¹ the Court of Appeal identified the circumstances in which an amended pleading is to be regarded as introducing a fresh cause of action:

- (a) a cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another;
- (b) only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction";
- (c) the test of whether an amended pleading is "fresh" is whether it is something "essentially different", which is a question of degree;
- (d) after the limitation period has run, the plaintiff will not be permitted to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given".

⁶⁰ Limitation Act 2010, ss 11(3)(a) and 15.

⁶¹ *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].

[81] The Court also cited the following passage from *Attorney-General v Carter*:⁶²

The circumstance that the underlying facts may be the same or similar does not save a cause of action from being fresh if the plaintiff seeks to derive a materially different legal consequence from those facts.

[82] Mr Rennie submitted that the original basis for the cause of action relating to the third party posts pleaded each of the 17 comments as a specific act of publication with its own imputations. The current pleading, which treats the statements as a single publication with one overall set of imputations, first appeared in the second amended statement of claim filed on 31 October 2014, well outside the limitation period and is therefore time barred.

[83] I do not accept that this change alters the essential nature of the claim to the extent that there is a fresh cause of action for limitation purposes. The factual assertions are the same. The relief sought is the same. The only difference is the legal categorisation of the statement, from individual publications each carrying their own imputations to a single publication from which imputations can be drawn as a whole. For the reasons discussed earlier either approach would have been possible so the case is not different in essence from that pleaded previously.

[84] The next allegation under challenge relates to a comment posted by a Prue Fothergill on a separate Facebook page in respect of which specific relief is sought for the first time.⁶³ This comment was pleaded in the first amended statement of claim as part of the “incitement” narrative. It now appears as a “natural and foreseeable consequence” of Mr Murray’s statements. I do not see the current allegation as fundamentally different from the nature of the earlier complaint, particularly if pleaded as additional damage consequential upon Mr Murray’s own statements.

[85] Next is the allegation that Mr Murray published the thread by hyperlinking to it from Twitter or promoting it on air (the endorsement or adoption allegation), which was first pleaded specifically in the second amended statement of claim filed on 17 October 2014. The facts had been referred to in earlier pleadings but it was

⁶² *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [48].

⁶³ See [193] of ASOC4.

not alleged that they amounted to publication. A cause of action in defamation requires an allegation of publication by a particular means. The fact of hyperlinking without any allegation that this act constituted an act of publication is insufficient in itself to ground a cause of action. As a result, the current pleading of publication by either Mr Murray or vicariously by DDNZ by way of endorsement or adoption through hyperlinking is out of time.

[86] I note, however, that because of the late knowledge issue relating to DDNZ the allegations that DDNZ *itself* endorsed or adopted the third party statements are not to be struck out on limitation grounds.

[87] The effect of the Limitation Act is amenable to a table:

Basis of liability as pleaded in ASOC4	Pleaded in ASOC1?
Mr Murray’s liability for Twitter statements	Yes – not time barred
Mr Murray’s liability for Facebook statements	Yes – not time barred
Mr Murray’s liability for third party Facebook statements on <i>Murray v Wishart</i> test	CA gave leave to replead after settling the law – not time barred
Mr Murray’s liability for third party Facebook statements on basis they are natural and probable consequence of Mr Murray’s original postings	Yes - ASOC1 pleaded that: Mr Murray encouraged others to leave messages; third party statements “flowed from” M’s original postings; the original postings had an “immediate and direct impact on tenor” of third party postings; Mr Murray incited third party postings. These allegations were sufficient as pleading of publication as natural and probable consequence – not time barred.
Mr Murray’s liability for third party Facebook statements on basis of endorsement or adoption	No – ASOC1 did plead that Mr Murray publicised his new page on Twitter but other than that the endorsement or adoption argument is not mentioned – time barred.
DDNZ’s vicarious liability for Twitter statements	Yes – not time barred.
DDNZ’s vicarious liability for Mr Murray’s Facebook statements	Yes – not time barred.
DDNZ’s direct liability for Mr Murray’s Facebook statements – endorsement or adoption	No but DDNZ concedes there may be a late knowledge issue arising in respect of this cause of action (the late knowledge period is six years) – not time barred.
DDNZ’s direct liability for third party Facebook statements – endorsement or adoption	No but DDNZ concedes there may be a late knowledge in respect of the endorsement / adoption of Mr Murray’s Facebook statements and this also must be true of this cause of action – not time barred

DDNZ's vicarious liability for third party Facebook statements on basis that Mr Murray is liable on <i>Murray v Wishart</i> principles	Yes - ASOC1 pleaded that Mr Murray made publications from DDNZ's premises and used its infrastructure and that DDNZ endorsed the campaign and praised Mr Murray. Law unsettled until <i>Murray v Wishart</i> , after which Mr Wishart given leave to replead – not time barred
DDNZ's vicarious liability for third party posts on basis that Mr Murray is liable for them as a natural and probable consequence of original postings	Yes - clear suggestions that DDNZ was vicariously liable and that Mr Murray had incited or caused the third party statements – sufficient to show cause of action – not time barred.
DDNZ's vicarious liability on the basis that Mr Murray endorsed or adopted the material he hyperlinked to	Mr Murray's alleged direct liability on this basis is time barred so DDNZ's alleged vicarious liability is as well.

Summary and conclusion

[88] There is no basis of liability pleaded in ASOC4 that can be said, at this stage, to be untenable. Importantly, the Court of Appeal's decision in *Murray v Wishart* does not preclude other basis of liability for third party statements posted on a Facebook page.

[89] However, the allegation that Mr Murray is liable for the third party Facebook statements on the basis of adoption or endorsement (and DDNZ's vicarious liability flowing from that) constitutes a fresh cause of action and is out of time. So that pleading must be struck out. Likewise, there is no legal basis for the claim for exemplary damages.

[90] Moreover, the defendants cannot be expected to plead to the ASOC4 in its current state. Substantial amendments are required to ensure that separate causes of action are properly pleaded as such and that the allegations are fully particularised. In summary:

- (a) Mr Wishart is entitled to plead each of the following groups of online posts as a single publication and single cause of action:
 - (i) the tweets authored by Mr Murray;
 - (ii) the specified Facebook posts made by Mr Murray; and

- (iii) the thread of third party comments posted on Facebook between 3.39 pm and 3.59 pm on 28 June 2011, although he must make it clear that he does not plead the particularised posts as being “representative” of any other alleged defamatory posts.
- (b) Mr Wishart must plead proper particulars of each alleged defamatory statement, such as the dates and places of publication, insofar as it is possible for him to do so. He should refer to Schedule D of the schedules provided by Mr Rennie.
- (c) Mr Wishart must also state separately and clearly each of the various ways in which he alleges that each defendant is liable for each of these publications. As discussed, there appear to be 12 alleged bases of liability, each of which relies on separate and distinct facts:
 - (i) Mr Murray’s direct liability for his own tweets;
 - (ii) DDNZ’s vicarious liability for Mr Murray’s tweets;
 - (iii) Mr Murray’s direct liability for his own Facebook statements;
 - (iv) DDNZ’s vicarious liability for Mr Murray’s Facebook statements;
 - (v) DDNZ’s direct liability for Mr Murray’s Facebook statements on the basis that DDNZ adopted or endorsed those statements;
 - (vi) Mr Murray’s direct liability for third party Facebook statements on the basis of *Murray v Wishart* (that is, actual knowledge and failure to remove);
 - (vii) DDNZ’s vicarious liability for (vi);

- (viii) Mr Murray's direct liability for third party Facebook statements on the basis that they were the natural and probable consequence of his own Twitter and Facebook statements, although this may be better pleaded as being additional damage flowing from original publications as pleaded at (i)–(iv), rather than as its own cause of action;
 - (ix) DDNZ's vicarious liability for (viii), should that be pleaded as its own cause of action;
 - (x) Mr Murray's direct liability for third party Facebook statements on the basis that he adopted or endorsed them (but see (d) below);
 - (xi) DDNZ's vicarious liability for (x);
 - (xii) DDNZ's direct liability for third party Facebook statements on the basis that it adopted or endorsed them, through the actions of its employee.
- (d) All of these bases of liability are tenable, and therefore the defendants' applications for strike out are dismissed in respect of (i)–(ix) and (xii). However, the causes of action set out at (x) and (xi) were not pleaded in the first amended statement of claim. They therefore constitute fresh causes of action and are out of time.
- (e) Paragraph [4](p) of ASOC4 is struck out because it confuses direct and vicarious liability.
- (f) Mr Wishart's amended pleading must not introduce any further fresh causes of action that were not pleaded in his first amended statement of claim (subject only to the late knowledge issue).
- (g) The claims against DDNZ for exemplary damages on the basis of vicarious liability are struck out.

[91] I make some general comments as to the pleadings:

- (a) Mr Wishart's reference to conspiracy at [212] of the ASOC4 is inapt in the context of the pleadings as they currently stand.
- (b) Mr Wishart should take care to include only those facts that are relevant to a particular cause of action.
- (c) Mr Wishart should ensure his pleadings comply with r 5.27 of the High Court Rules.

[92] The applications for stay are granted. The whole proceeding is stayed until Mr Wishart obtains an order setting aside the stay on the grounds that he has produced a draft fifth amended statement of claim that complies with this decision. To this end I direct that by 31 March 2016 Mr Wishart must file an application to set aside the stay together with a draft fifth amended statement of claim that complies with this decision. Leave is reserved to seek an extension of that time if, for good reason, it proves to be insufficient.

[93] Mr and Mrs Murray also sought to have me impose the following conditions on the stay:

- (a) that their costs in relation to the challenge to the first statement of claim in this court be fixed and paid;
- (b) that their costs in respect of this hearing be fixed and paid;
- (c) that they have leave to bring a further security for costs application if and when Mr Wishart obtains an order lifting the stay.

[94] The issue of costs on this application is dealt with below. As to costs in relation to previous pleadings, I decline to make any order that relates to pleadings that were not the subject of argument before me on the present applications. I also decline to give leave to bring a further application for security for costs. I refused Mr and Mrs Murray's previous application for security for costs and the Court of

Appeal did not interfere with that decision. No reasons were advanced that would justify a second application being made.

[95] As to costs on this application, whilst ASOC4 is substantially intact in terms of the allegations made, it is not an adequate pleading and the defendants could not have been expected to plead to it. I make an order in favour of DDNZ and Mr Murray for costs on a 2B basis, though I note that only DDNZ filed written applications so Mr Murray's costs will be limited to the hearing itself.

P Courtney J