

The claims and defences

[5] Mr Wiremu identifies the following statements made by Mr Ashby as annotations to the published photographs:

- (a) I'm in shock Dion is a cheater.
- (b) Cheat.
- (c) Here's a cheat.
- (d) Cheater returned to the uncheating zone.
- (e) "I'm so delusional" ... who condones cheating?
- (f) Dion was docked points for cheating...

(collectively "the Statements").

[6] Mr Ashby pleads that the Statements in their natural and ordinary meanings would have been understood to mean that:

- (a) Mr Wiremu engages in cheating behaviour at sports events;
- (b) Mr Wiremu is dishonest and lacks integrity; and
- (c) Mr Wiremu is deceitful and fraudulent.

[7] Mr Wiremu seeks a declaration that Mr Ashby is liable to him in defamation. He seeks general damages of \$50,000.

[8] Mr Ashby by his statement of defence accepted that Mr Wiremu's first pleaded meaning (that Mr Wiremu engages in cheating behaviour at sports events) is not materially different from the words' natural and ordinary meaning and how they would have been understood. Mr Ashby denies the other pleaded meanings.

[9] Mr Ashby accepts that the Statements themselves were defamatory of Mr Wiremu.

[10] He pleads that he removed the post from Facebook on or about 9 July 2017, within one or two days of Mr Wiremu's requesting removal.

[11] Mr Ashby pleads three affirmative defences:

- (a) Under s 8 Defamation Act 1992, he says that the Statements were true or not materially different from the truth.
- (b) Under s 9 of the Act, he says that the Statements were his honest and genuine opinion and were reasonably based on the facts presented in the accompanying photographs.
- (c) Under s 16 of the Act, he says that the Statements complained of meet the criteria for a defence of qualified privilege because they were a defence against attack.

[12] He particularises the qualified privilege pleading:

Particulars [of qualified privilege]

- (a) On 7 July 2018, in the plaintiff's Facebook page for his [Canterbury] Mini Motor Cross Club the plaintiff alleged that the defendant was "delusional", implying that the defendant's views to the situation were so false and far-fetched as to constitute mental illness.
- (b) The defendant does not suffer from any mental illnesses and does not suffer from delusions.
- (c) The defendant's response on 7 July 2018, which are the statements complained of, were for the purpose of refuting the plaintiff's allegation that the defendant was delusional, by showing that there was evidence to support the views the defendant had expressed.

[13] In the pleading which Mr Ashby initially filed, he purported to include a counterclaim which identified a post made by Mr Wiremu on the CMMC Facebook page in July 2016 in which Mr Wiremu had set out a detailed explanation of the circumstances in which a couple had been banned from that Club. This Court made

an order striking out Mr Ashby's counterclaim on the basis that the subject matter of the July 2016 Facebook post was entirely and solely the conduct of the couple and did not contain any allegation either directly or indirectly implicating Mr Ashby.¹

[14] In response to the statement of defence, Mr Wiremu filed two notices.

[15] First he filed a notice under s 41(1) of the Act of his intention to allege that Mr Ashby was motivated by ill will towards him or otherwise took improper advantage of the occasion of privilege. As particulars of the allegation of ill will, Mr Wiremu pleaded:

Particulars of ill will or improper advantage:

- (a) The defendant had no or insufficient belief in the truth of the Statements, or was reckless as to the truth of the Statements.
- (b) The defendant was motivated by ill will because the defendant's purpose in making the Statements was to punish the plaintiff.
- (c) The defendant by ill will wanted to punish the plaintiff due to the defendant's view that the plaintiff had defamed and ostracised third parties ... as recorded in the defendant's Statement of Defence ...
- (d) The defendant took improper advantage of the occasion of alleged qualified privilege because the extent and nature of the Statements was gratuitous and unnecessary to respond to the alleged attack on the defendant by the plaintiff.

[16] Secondly, by a notice pursuant to s 39(1)(b)(i) of the Act, Mr Wiremu alleged that the opinion relied on by the defendant was not his genuine opinion. Mr Wiremu pleaded the following particulars of that allegation:

Particulars [of "not genuine opinion"]

- 1. If a technical breach of the rules occurred, as alleged by the defendant to support the opinion, the statements then published were gratuitous and excessive as the alleged rules breach itself did not leave the defendant with the opinion published.
- 2. The defendant could only have held an honest opinion that the rules had been breached in a minor way. The defendant could not have held an opinion consistent with the nature of the statements.
- 3. The opinion was not genuine because the defendant made the statements out of ill will toward the plaintiff due to the defendant's

¹ *Wiremu v Ashby* HC Christchurch CIV-2017-409-548, 26 January 2018.

view that the plaintiff had ostracised and defamed third parties ... as recorded in the defendant's Statement of Defence ...

The roles of the parties in motocross sport

[17] Evidence was given as to the way in which Mr Wiremu and Mr Ashby fitted into the Canterbury motocross scene.

[18] Mr Wiremu was involved as a teenager in motor cross riding and racing and continues to be involved as his children are engaged in the sport. He established the CMMC in 2014. It is a not-for-profit organisation. It has a committee of 11, Mr Wiremu having been the president and his wife the secretary.

[19] Mr Ashby was introduced to the sport of motocross in 2010. He began volunteering on the committee of another club, the Christchurch Offroad Motorcycle Club (COMC). Mr Ashby at some point left the COMC committee with the intention of running his own events under the banner of Grassroots MX. He set up a Facebook page for Grassroots MX, with anyone free to "like" the Facebook group, access information and attend events.

[20] It is common ground that there was no disharmony between Mr Wiremu and Mr Ashby before the events which are the subject of this proceeding.

The rules governing mini motocross

[21] The rules under which mini motocross may be raced are relevant background.

[22] A national body, Motorcycling New Zealand Inc, publishes its own rules in a Manual of Motorcycle Sport – Off Road. The Court was provided with three pages from those rules which apply to motocross.

[23] One rule expressly states that no outside pushing is permitted to assist a rider.

[24] Other rules deal with the start of a race. Two of those rules state:

- d. A line and/or bunting is to be placed 4-metres behind the rear of the start gates and all persons other than the riders must retreat behind this line prior to the 10-second board. The Starter shall not start the race

until such time as all riders' entourage and assistants are behind the 4-metre line.

- e. No person other than the starter and/or their assistants shall re-enter the 4-metre area after the 10-second board until all riders have left the start gate. This area is deemed to be under the starter's control and only the starter and/or their assistants can enter it to relieve a rider for any reason i.e. engine failure, stuck under the gate etc. Failure to comply is already covered by the rules as outside assistance.

[25] Mr Wiremu gave evidence that the CMMC tries to maintain consistency with the Manual of Motorcycle Sport but does not enforce clause d (above at [24]). While the CMMC enforces the 4 metre rule strictly in junior and senior motocross racing, it does not do so in mini motocross.

The history of exchanges

The events of 7 July 2017 preceding the 8 July 2017 Facebook post

[26] Mr Ashby's (8 July 2017) Facebook posting followed on from his becoming aware of an entry on CMMC's Facebook page posted at 9.41 pm on 7 July 2017 ("the banning post").

[27] The banning post was in the name of Mr Wiremu as CMMC's Club President. The post stated that the CMMC had banned a couple from the club following an incident at a meeting the previous year. The post recorded that the couple's son had been relegated from 1st place to 4th place in a race due to the actions of the father. His actions were stated to have included launching his son's bike over the start gate by intentionally hiding behind the starting box, kneeling down, and literally booting his child's bike over the gate once it dropped. The post explained that other parents had protested over the conduct and that those supervising the meet then witnessed first-hand a repeat of the conduct. The post then recorded subsequent, abusive conduct of the couple towards the organisers.

[28] The parties provided a common bundle of documents which reproduced further Facebook posts commencing at 10.59 pm on Friday 7 July 2017.

[29] Evidence was given by the parties themselves and by Mr Wiremu's wife, Lisa Wintour. There were no material differences in any part of the evidence given as to

the exchanges which took place. From 10.59 pm the exchanges are recorded in the documents produced. For the period between the banning post (at 9.41 pm) and the 10.59 pm post, the parties were unable to produce the documentary record of posts as Mr Ashby had taken those posts down shortly afterwards. The nature of the exchanges was however clearly established on the evidence.

[30] The 7 July 2017 posts occurred as follows on the CMMC Facebook page:

Approximately 9.41 pm

- Mr Wiremu posts the banning post (above at [26] and [27]). It is read by Mr Ashby.

After 8.41 pm

- Mr Ashby posts comments as to CMMC's non-affiliation with Motorcycling New Zealand, the need for clarity on which rules CMMC follows, and the undesirability of banning people new to the sport.

10.59 pm

- One Brian Greer posted:

Geez Tex MX, if you need a rule book to tell you that cheating is not allowed you're clearly not that intelligent are you. Could you read a rule book??

The continuation of exchanges on 8 July 2017

[31] Early on Saturday, 8 July 2017, the posts on the CMMC Facebook page continued.

[32] Mr Ashby made the next two posts, saying:

I never said cheating is ok. There is too much assuming in this post to continue. Stick to facts or court ruling or this too may escalate.

and:

Who the fcj are you?

Someone at CMMC posts:

Who the fcj are you Tex MX, why did you delete your other comment? You condoned their actions end of story. Are the [couple] paying you to build them a mx track too?

Mr Ashby posts:

Really if you knew the rules then follow them you broke a major safety rule by letting anyone closer than 4 meters from the starting from 10 second board until bikes are clear. If this rule was enforced then none of this would be debatable. Can you read?

Ms Wintour as CMMC posts:

Haha, are you really that delusional? Before you said that rule doesn't exist ...

Mr Ashby posts:

Can you follow simple debate rules even stick to subject and leave your nasty personal jabs out or I will enter mine.

and:

You condemn MNZ but use their rule book makes perfect sense! And why are you repeating my question you know who I am! I'm the legend you wish you could be you sure was kissing my ass before YOU was told to leave.

Ms Wintour as CMMC posts:

Yep delusional [crying laughing emoji].

Mr Ashby posts:

I was ascertaining what rules you follow ... thanks.

and:

Simple facts bro ...

and:

Let's debate ... come on. Or you just want to talk about how delusional I am which is debatable. Love circle conversations where one can only make turrets gestures like "delusional" when engaged. Proof is in the pudding.

Ms Wintour posts as (CMMC):

WTF!?!? Don't know what your smoking mate. Perhaps it's time to put the keyboard away.

[At this point Mr Ashby posts (around midday on 8 July 2017) on his Grassroots MX and Tex MX Facebook pages his photograph collage and the Statements]

Mr Ashby posts:

Ohhhh! It's YOU that can't tolerate losing so you want me to stop defending my stance with facts and stop typing. Get your team of lawyers ready to stop me from pointing out facts you'll need them cause you can't defend yourself with words obviously.

Ms Wintour posts (as CMMC):

Actually it's a few of us responding. As we are all hard at work setting up an event tomorrow and really can't be bothered with all your crap Tex. Read Al's comments as he sums it all up nicely.

Mr Ashby posts:

Is this not the intended path you expected? Why did you specifically mention my name, my Grassroots and Mt. Venus tying everything about me with such a negative post about cheaters and vandalizing. I feel this is a personal attack on me which opens legal doors for me. I'm just warning you to step back to the shallow end its pretty deep in my pool.

Ms Wintour posts (as CMMC):

Can you please clarify your threat Tex? Yes our Lawyer is already in possession of the posts and photos you have put up defaming Dion.

Facebook exchanges on Mr Ashby's Tex MX Facebook page

[33] Facebook exchanges also occurred on the Facebook page operated by Mr Ashby as "Tex MX", one of the two pages on which Mr Ashby published his collage. The posts on that page included:

Mr Ashby posts:

Dion was docked points for cheating and he threw a fit which is uncalled for and unsportsmanlike behaviour and should be banned from all national events.....fair aye?? ??

One Josh Wiltshire posts:

Yeah its cheating.

Mr Ashby posts:

Just a small mistake that tempts all parents but also a lesson on patience. He probably regrets acting on instinct and not having control over one self. A pattern is emerging if you're paying attention.

The photograph collage

[34] One Ben Thoms forwarded to Mr Ashby photographs of Mr Wiremu and his son taken at a national motocross meeting in 2014. He told Mr Ashby that “unlawful assistance” had been given by Mr Ashby to his son at the start gate, with a resulting penalisation of the son for a rule breach.

[35] Mr Ashby annotated four photographs with the Statements and arranged them into a collage. He says he was unable to upload them to the CMMC page and instead and posted them:

- from his Tex MX profile, with the heading “I’m so delusional who condones cheating?”; and
- on his Grassroots MX page, with the heading– “I’m in shock Dion is a cheater” by “sharing” the Tex MX post.

Texting between Mr Wiremu and Mr Ashby from 12.05 pm Saturday 8 July 2017

[36] The parties also produced copies of text messages which were exchanged on Saturday, 8 July 2017 between Mr Wiremu and Mr Ashby beginning soon after Mr Ashby posted the photograph collage and the Statements:

12.05 pm Mr Wiremu:

Hey Tex, I hope u can afford a good Lawyer because u are need one.

12.06 pm Mr Ashby:

All facts a judge will laugh at you.

12.07 pm Mr Wiremu:

Whatever u let think ill drag i through court until your broke.

7.03 pm Mr Wiremu:

Hey, legend, sorry only just got the chance to read all your posts battling with the girls this arvo. Cant see anywhere you were attacked in the post but nonetheless you have taken it to the next level. Cant see waste time bickering time with you when ive got a kids event to set up, lets catch up to discuss give me a call or are you swimming in the deep end of your pool? Thought you knew me better than that, your threats are pathetic mate and your becoming a laughing stock at the shallow end of the pool. May be you want to come along when MNZ fly down to meet me on Monday, yes they'll be getting copies of the photo's you put up. Got my phone on me ...

10.05 pm Mr Wiremu:

You have until tomorrow morning 8am to remove the defamatory posts and furnish an appropriate apology clearly rescinding all defamatory allegations.

10 July 2017 7.41 am Mr Ashby:

You shall do the same then.

7.56 am:

I owe you nothing, there is no slander of you, you are not a very intelligent man are you. Ive asked you, you have declined. All communications between us will cease, start looking for a lawyer.

Nature of the Publication

[37] Mr Ashby accepts that he published the Statements.

[38] Through Mr Allan, Mr Ashby accepts that some people read the Statements at the time. As Mr Allan noted, there were at least 17 reactions to the posting from

Mr Ashby's Tex MX Facebook profile. In his evidence, Mr Ashby also spoke of people having discussed the posting directly with him.

[39] Publication of the Statements is established to that extent.

[40] The extent of publication beyond those numbers is unclear. It is open to the Court to infer a degree of publication where a website is generally accessible.² The fact of internet publication does not create a presumption of law that there has been a substantial publication.³ But in the case of generally accessible web pages and bulletin boards with many subscribers, it may be inferred that publication has occurred.⁴

[41] In this case, Mr Ashby admits that his Grassroots Facebook page has 1387 followers. The post was also shared twice, meaning that it was also seen by people other than followers of Grassroots MX. I draw the inference that the Statements will probably have been seen by significantly more than 17 people.

[42] The evidence also establishes (and Mr Ashby conceded) that persons who read the Statements are likely, through the cross-references contained, to have also had access to the banning post. Those people would have appreciated, upon reading the banning post, that what was reported there was an instance of cheating.

[43] The evidence also establishes that the posts appeared on the Facebook pages of Grassroots MX and Tex MX late in the morning of 8 July 2017 and were not taken down until the morning of Monday 10 July 2017 at the earliest.

What happened in the 2016 incident?

[44] Through the publication of his collage and the Statements, Mr Ashby invited the reader to see a comparison between the (2016) conduct of the couple as described in the banning post and Mr Wiremu's conduct in the earlier 2014 incident.

² Ursula Cheer *Burrows & Cheer Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015), at 876 citing *Al Amoundi v Brisard* [2006] EWHC 1062, [2007] 1 WLR 113, at 35.

³ *Al Amoundi*, above n 2, at 37.

⁴ *Al Amoundi*, above n 2, at 35, adopting the commentary in Matthew Collins *The Law of Defamation and the Internet* (2nd ed, Oxford University Press, Oxford, 2005) at 5.04.

[45] The CMMC post in relation to the 2016 incident identified key features of the alleged conduct of the father:

- intentionally hiding behind the starting box;
- launching the son's bike over the start gate; and
- "cheating".

[46] Accordingly, the 2016 incident with which Mr Ashby compared Mr Wiremu's 2014 conduct, was described as involving intentional and deceptive misconduct, in breach of the rules of the sport, and carried out with a view to obtaining a competitive advantage for the son.

What happened in the 2014 incident?

[47] Mr Wiremu described the 2014 incident in detail in his evidence. His evidence in that regard was not challenged in cross-examination. It was credible and accords with what can be seen in the photos comprising Mr Ashby's collage. I accept the evidence.

[48] Mr Wiremu indicated that his son was competing in the six to eight year old 50cc class. He was on the start gates for his race. While there is a rule that there should be a line or bunting four metres back from the start gate zone, there was nothing to physically delineate the line. Mr Wiremu stated that the four metre line is not enforced so strictly in mini motocross. The point remains that when the starter's sign comes up 10 seconds before the race, parents are required to stand back and not touch their children. Mr Wiremu explained that there is also then a five second sign.

[49] Mr Wiremu stated that on this occasion the sign had come up and parents, including himself, had stood back for the race to start. They were still within four metres.

[50] The children's bikes do not have hand clutches (as larger bikes do). They have a centrifugal clutch and only one gear. To get a good start, a common method is that

the rider will engage the hand throttle to full throttle, lean heavily on the rear brake to keep the bike from moving and the rear wheel from turning. Because the throttle is twisted by the right hand, the rider cannot hold the front brake as well.

[51] The 2014 incident occurred after the 10 second sign had come up but before the 5 second sign.

[52] At that point Mr Wiremu's son slipped off his brake pedal and his bike shot to his right into the gap between his start gate and the gate of the bike of the rider next to him. This jammed both gates.

[53] Mr Wiremu stated that he saw what had happened and that his son was blocking the next rider with the race about to start. The next rider was the competition leader.

[54] Mr Wiremu said that he was worried that his son would block the next rider's start and there would be an accident. He hesitated at first because of the 10 second rule. He states that "parental urges" took over. Still before the 5 second sign came up, he ran forward and pulled his son back from in front of the other bike. He held his son back. He did not let him go until the gates had dropped and the majority of the bikes had gone. He described his son as being very competitive at starts and often in the first few riders out. This time the son started well behind.

[55] Mr Wiremu said that the gate starter approached him immediately after the incident to say that he should not have done it. Mr Wiremu agreed with the starter and explained that his son had been obstructing the other child's gate with the result that he pulled him back and held him back. Mr Wiremu says that he told the starter he accepted that it was wrong. He suggested that the race could be red flagged and restarted if the starter saw fit. Instead the starter gave Mr Wiremu a warning and stated that that would be "the end of it". Sometime later during the meet another child's mother complained to the race stewards and as a result of that complaint the stewards docked Mr Wiremu's son points. The result was that Mr Wiremu's son finished overall one place behind, instead of one place in front, of the other child (who was not the child who had been the neighbouring rider).

[56] In relation to that incident, Mr Wiremu says that he has accepted from the outset that he broke the rules. He does not accept that he cheated. On the other hand, he views the conduct in the 2016 incident as clearly involving cheating.

Issues

[57] The issues which arise for determination are:

- (a) Do the Statements have any of the pleaded meanings?
- (b) If so, are any of the Statements defamatory?
- (c) Has the defendant proved that established meanings were the truth or not materially different from the truth?
- (d) If not, has the defendant proven that the Statement is his honest opinion?
- (e) Were the Statements covered by a qualified privilege arising from defence against attack?
- (f) If the defendant's defences fail, what remedies are appropriate?

The meaning of the Statements

The legal test

[58] By his pleading, Mr Ashby conceded that the natural and ordinary meaning of the Statements meant and would have been understood to mean that Mr Wiremu cheated at the 2014 event. He otherwise denied the meanings pleaded by Mr Wiremu (above at [6]).

[59] In defamation, words will take the natural and ordinary meaning attributed to them by reasonable people. I am to apply the "reasonable person" test identified by the Court of Appeal in *New Zealand Magazines Ltd v Hadlee (No 2)*:⁵

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

In determining whether words are capable of bearing an alleged defamatory meaning:

- (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.
- (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. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: *Charleston v News Group Newspapers Limited* [1995] 2 AC 65; [1995] 2 All ER 313 (HL) at p 72; 318.

Application of the test

[60] The direct meaning which Mr Ashby's words conveyed was that Mr Wiremu was a cheat. The context was that the cheating was occurring in motocross racing but the allegation on a natural reading is not so confined. The allegation was that Mr Wiremu is by nature a cheat and that it could be demonstrated by reference to the collage.

[61] What do "cheat", "cheater", and "cheating" convey to the ordinary reasonable person? The meaning is not to be restricted to the literal meaning of the words. It is to be a matter of impression.

[62] To explain his view of “cheat”, a “cheater”, and “cheating” Mr Ashby in his initial pleading referred to the online *dictionary.com*. There he found, as the fifth offered definition of the verb “cheat”, “to violate rules or regulations”. What Mr Ashby did not refer to were the preceding definitions which included, first, “to defraud; swindle” and secondly, “to deceive, influence by fraud” and “to practice (sic) fraud or deceit”.

[63] In the context in which Mr Ashby published the Statements, the meanings which the ordinary reasonable person would as a matter of impression carry away encompass elements of fraudulent and/or deceitful conduct and conduct which is lacking in integrity and honesty. The meaning of the Statements, in their context, was not limited to mere violation of rules. The meaning of the words was not limited to the single (2014) event but was plainly a statement as to Mr Wiremu’s general character.

Conclusion

[64] I find that the Statements in their natural and ordinary meaning did mean and would have been understood to mean that:

- (a) Mr Wiremu engages in cheating behaviour at sports events; and
- (b) Mr Wiremu is dishonest and lacks integrity; and
- (c) The plaintiff is deceitful and fraudulent.

Defamatory statements

[65] The Statements were defamatory in their natural and ordinary meanings as I found those to be. They had the tendency to lower Mr Wiremu in the estimation of right-thinking members of society generally.⁶ The publications were also by their nature calculated to injure the reputation of Mr Wiremu by exposing him to ridicule.⁷

⁶ *Newton v Dunn* [2017] NZHC 2083, (2017) 14 NZELR 621 at [252].

⁷ See *Newton v Dunn*, above n 6, at [252], citing *Parmiter v Coupland* (1840) 6 M&W 105 at 109, 151 ER 340 (Exch) at 342 per Parke B.

Truth

[66] Mr Allan summarised Mr Ashby's defence of truth in his closing submissions:

The plaintiff conceded (*ad nauseam*) that he intentionally broke the rules to assist his son in the race in question at Invercargill. This "cheating" was further reinforced by the Stewards' decision to dock points from the plaintiff's son. While the plaintiff spent some time in justifying his actions (i.e. parental loyalty, H[ealth] & S[afety], fairness to others) he nevertheless did not free himself from the truth that he intentionally and knowingly broke rules of the competition to assist his son. This is cheating as that term is generally used. The defendant submits intentionally breaking the rules is cheating and that the plaintiff cheated on this occasion/race. The truth of the defendant's statement is to gain evidence by the photographs accompanying the statements.

[67] The photographs which Mr Ashby used for his collage evidence the fact that Mr Wiremu broke the rules in relation to the start of the race. Mr Wiremu's own evidence confirms that. Mr Wiremu in his evidence also confirmed that his breach of the rules was intentional. As Mr Wiremu put it in his cross-examination:

The minute I stepped down onto that starting zone I knew what I'd done was wrong.

[68] In further cross-examination, Mr Wiremu accepted the reason the stewards gave for docking points from his son was that Mr Wiremu had provided him with outside assistance at the start of the race in breach of the rules.

[69] This evidence all relates to Mr Wiremu's intentional breach of the rules which he has consistently accepted occurred.

[70] What there is no evidence of is any intention on the part of Mr Wiremu to dishonestly or deceitfully obtain an advantage for his son. There is no suggestion of an intentional concealment of his actions as the banning post reported to have occurred in the 2016 incident. Mr Wiremu's actions were plain to see for those attending the 2014 meeting.

[71] The steps which Mr Wiremu took were also by their nature calculated, through pulling his son back and holding him back, to put his son at a disadvantage to other riders. That was achieved by holding him back until the gates had dropped and the

majority of bikes had gone. I find that the disadvantage was as Mr Wiremu intended it when he intervened.

[72] Mr Ashby's defence of truth is not established. Mr Wiremu broke the racing rules but, in doing so, he did not cheat according to the natural and ordinary meaning which that expression (and its cognate expressions) had in Mr Ashby's collage.

Honest opinion

Statutory framework

[73] The defence of honest opinion is appropriately identified as "the very essence of freedom of speech; the right that citizens should be able openly to air their views and exchange criticisms on matters which concern them".⁸

[74] Four aspects of the defence of honest opinion are potentially relevant in this case. These four factors I draw from the longer list identified by Collins J in *Newton v Dunn*.⁹ I adopt his Honour's characterisation and references:

(a) (Opinion, not fact) –

... the words complained of must be an expression of opinion and not a statement of fact. Whether the statement in issue "is one of fact or opinion depends on how the words look to an ordinary, reasonable reader".¹⁰ The rationale underpinning this aspect of the law is that "words which are clearly comment are likely to be treated with more caution by the reasonable reader and hence less damaging than assertions of fact".¹¹

(b) (Indication of facts on which opinion is based)

...the facts on which the opinion is based must be indicated in the publication or generally known at the time of the publication.¹² This requirement reflects the basis of the defence of honest opinion, namely that a reader of the statement in question "should be able to assess the commentator's opinion and compare it with his or her own".¹³

⁸ *Newton v Dunn*, above n 6, at [205], quoting Stephen Todd and others (eds) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [16.8.01].

⁹ *Newton v Dunn*, above n 6, at [206] – [213].

¹⁰ Cheer, above n 2, at [3.3.2]; *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [17].

¹¹ *Mitchell v Sprott*, above n 10, at [17] citing *Gatley on Libel and Slander* (9th ed, Sweet & Maxwell, London, 1998) at [12.7].

¹² Defamation Act, s 11.

¹³ Todd and others, above n 8, at [16.8.02].

(c) (True facts)

...the facts upon which the opinion is based must be true or not materially different from the truth.¹⁴ The defence of honest opinion is not available where the defendant comments on things that never happened or which the defendant has gotten wrong. “One cannot legitimately criticise a person for something they never did”.¹⁵ Section 38 of the Defamation Act provides that where a defence of honest opinion is raised the defendant must specify in his or her pleadings which of the statements complained of are statements of fact, and must give particulars specifying the “facts and circumstances on which the defendant relies in support” of their defence. Where the particularised facts and circumstances are true, they must also be logically connected to the opinion. In other words, the defence of honest opinion cannot succeed where the opinion cannot be drawn from the established facts and circumstances. To succeed with a defence of honest opinion, “the defendant need prove only those statements of fact which are relevant, and which provided the foundation for the opinion”.¹⁶

(d) (Plaintiff’s notice)

...s[ection] 39 of the Defamation Act provides that where a plaintiff intends to allege that the defendant’s opinion is not genuine, he or she must serve a notice to that effect on the defendant within 10 working days of the service of the defendant’s statement of defence. The plaintiff must specify in this notice any facts or circumstances on which he or she intends to rely to support their allegation that the defendant’s opinion is not genuine.

[75] To that list, I add reference to s 10(3) of the Defamation Act, which provides that a defence of honest opinion shall not fail because the defendant was motivated by malice.

[76] In Mr McKenzie’s submission, the defence of honest opinion fell at the first hurdle because, in Mr Ashby’s Facebook posts, there was no expression of facts which could be said to set a foundation which led to an opinion. Mr Allan submitted that, to the contrary, the photographs in the collage truly displayed the events which they captured.

[77] Counsel did not refer me to any case in which photographs were published along with the impugned statements and were relied on by the defendant as containing relevantly indicated facts.

¹⁴ Defamation Act, s 11.

¹⁵ Cheer, above n 2, at [3.3.1](b).

¹⁶ Todd and others, above n 8, at [16.8.02].

[78] I conclude that it is open to a defendant, where a photograph or photographs accompanied the impugned publication, to relate an honest opinion to matters of fact which can be identified in the photography. In this case, Mr Wiremu accepts that the photography shows him in the act of breaking the starting rules.

[79] It is then necessary to determine whether the words complained of in this case were an expression of opinion rather than a statement of fact. The test I apply is whether it would appear to a reasonable person reading the material complained of that Mr Ashby was merely presenting his or her comment or opinion on the photographs and was not purporting to put forward another fact.¹⁷

[80] Here, it is to be recognised that Mr Ashby published with the Statements with the collage of photographs. But the conclusions are not presented as derived from the photos themselves. The Statements instead appear as repeated and uncategorical statements that Mr Wiremu is a cheat and/or engages in cheating. The Court of Appeal in *Mitchell v Sprott* explained that:¹⁸

[p]resentation is crucial to whether a statement is or is not an expression of opinion.

[81] The way in which Mr Ashby set out the Statements is readily distinguishable from the defendant's statements in *Du Claire v Palmer* where the impugned statements (in a letter) made reference through personal pronouns, verbs and other nouns indicating a personal opinion.¹⁹

[82] By viewing the full page collage as a whole publication, with its repeated bold references to “cheat”, “cheater”, or “cheating”, the ordinary, reasonable reader would form the view that Mr Ashby is expressing fact and not opinion. The impression given by the collage with Statements collectively would have been no different were Mr Ashby to have printed across the photos the statement that:

It is a fact that Mr Wiremu is himself a cheat.

¹⁷ Todd and others, above n 8, at [16.8.03].

¹⁸ *Mitchell*, above n 10, at [18].

¹⁹ *Du Claire v Palmer* [2012] NZHC 934, at [50] – [53].

Conclusion

[83] Mr Ashby has not established the defence of honest opinion because the Statements were published as statements of fact. It is unnecessary to examine other aspects of that defence.

Qualified privilege – defence against attack

Mr Ashby's pleading

[84] As his third affirmative defence, Mr Ashby pleaded “defence against attack”. The relevant part of his (amended statement of defence) reads:

28. The [Canterbury Mini Motocross] Club operates a Facebook page under the name Canterbury Mini MX Club which at the time of the events in question had 2364 members (the ‘club page’).
29. As the president of the Club the plaintiff is responsible for any statements purportedly made by him on the club page and which is not subject to immediate correction by him.
30. On 7 July 2017 the club page published a statement (the ‘... statement’) purportedly from the plaintiff as a reminder to readers that he had expelled (the [‘couple’]) and that they were not welcome in the wider Canterbury Motorcross scene. The statement described a finding of cheating as well as making other allegations.
31. The defendant felt that the ... statement was unduly harsh; and hypocritical given that the described cheating by the [couple] in the ... statement was the same behavior (sic) as the breaches.
32. As a result an exchange took place between the plaintiff and the defendant on the club page during which it was alleged that the defendant was delusional following which, the defendant was blocked from posting any club page.
33. The defendants (sic) actions as described in paragraph 17 were a reasonable response to the statements made by the plaintiff against him.

[85] Mr Wiremu filed and served the notice of intention to allege the defendant was motivated by ill will or otherwise took improper advantage of the occasion of privilege under s 41(1)(b) of the Act as set out at [15] above.

The common law and the statutory context

[86] The common law recognises certain occasions as being of qualified privilege, including the classical situation often described as “duty and interest”.²⁰ By his pleading, Mr Ashby pleaded that the statements were subject to qualified privilege because they had been made as “defence against attack”.

[87] This form of privilege (sometimes viewed as a subset of “duty and interest” privilege) is succinctly described in *Gatley on Libel and Slander* under the heading “Reply to attack”.²¹

... a person whose character or conduct has been attacked²² is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made.²³

[88] However, as observed in Professor Todd’s *The Law of Torts in New Zealand*:²⁴

There are limits to the generosity of this privilege.

[89] Those limits include that:

- (a) the purpose of the privilege is to allow the defendants to justify themselves to the people who read the original attack,²⁵ and
- (b) the privilege is lost if the defence “proceeds to offence”.²⁶

The “delusional” posts and Mr Ashby’s response

[90] Ms Wintour was working on administration of CMMC matters at home and around midday on 8 July 2017 took Mr Wiremu his lunch. At that point, Ms Wintour

²⁰ Todd and others, above n 8, at [16.11.01(1)].

²¹ *Gatley*, above n 11, at [14.51].

²² There is no privilege however, where the claimant has merely provoked controversy, without making an attack: *Church of Scientology v Anderson* [1980] WAR at 81 (reversed on other grounds [1981] WAR 279).

²³ A challenge to sue does not exclude a plea of privilege if action is brought: *Penton v Calwell* (1945) 70 CLR 219.

²⁴ Todd and others, above n 8, at [16.11.01(2)].

²⁵ Todd and others, above n 8, at [16.11.01(2)].

²⁶ Citing *Turner v Metro-Golden-Mayer Pictures Ltd* [1950] 1 All ER 449 (HL) at 470 – 471 per Lord Oaksey.

informed Mr Wiremu of the post that Mr Ashby had been making on the CMMC Facebook page in relation to the rules.

[91] Mr Allan cross-examined Mr Wiremu upon the basis that the CMMC Facebook posts as to “delusional” were made by Ms Wintour. Mr Allan did not put it to Mr Wiremu that Mr Wiremu had himself authorised the “delusional” posts.

[92] However, in cross-examination of Ms Wintour, Mr Allan referred to the Wiremu/Wintour catch-up during the day and had this exchange:

Q You didn’t see him?

A I saw him at some point that day to bring him out some food and that’s when I enlightened him kind of what was going on.

Q And what, he just said, “deal with it” or, “I’m busy digging holes with a 14-tonne digger, I can’t deal with it now”, something like that?

A Yeah, we had an event the next day so everything was pretty full on and we just kind of – yeah.

Q So would it be fair to say you took it upon yourself to respond on your husband’s behalf?

A Yeah.

[93] On the evidence, and upon the basis on which Mr Wiremu was cross-examined, I find that the posts referring to “delusional” and subsequent posts raising the possibility of forms of misconduct on the part of Mr Ashby were made by Ms Wintour without Mr Wiremu’s authorisation. The highest point the evidence reaches for Mr Ashby is that Ms Wintour took it upon herself to respond – that does not convert the post she made into a post made by Mr Wiremu or with his authorisation.

[94] One further aspect of the evidence falls for consideration at this point. It concerns the reason for Mr Ashby’s posting the Statements and the photo collage to his Grassroots MX and Tex MX Facebook pages.

[95] Mr Ashby explained in his evidence:

I got a series of photos of Dion [Wiremu] breaching the rules (that he so harshly attacked the [couple] for) and, when I couldn’t upload them to his page, where our argument unfolded, I posted them on the GrassRoots MX

page. I used an App on my cell phone to write over the photos with my stylus...

[96] Mr Ashby continued in his evidence that within an hour of the post, Mr Wiremu had phoned him "...angry about my post and demanded I take it down".

[97] Mr Ashby added that at no time was Mr Wiremu prevented from posting on the Grassroots MX page.

Discussion

[98] There is an issue in this case, by reason of the "delusional" and other references having been posted by Ms Wintour and not by Mr Wiremu, as to whether the allegations of cheating on the part of Mr Wiremu could be covered by qualified privilege at all. Notwithstanding Ms Wintour's acceptance in cross-examination that she took it upon herself to make the posts "on behalf of Mr Wiremu", the evidence does not indicate that Mr Wiremu authorised the posts. Had this been the single difficulty relating to the claim of qualified privilege, I would have found against Mr Ashby on this particular ground.

[99] I find against the claim of qualified privilege for a separate reason, relating to the extent of Mr Ashby's response. The level of his response, impugning as it did Mr Wiremu's honesty and integrity, exceeded the legitimate level of defence to attack which is permitted. I find Mr Ashby's response to have been at a level which was unreasonable and disproportionate.²⁷

[100] The online discussion which had previously developed with Mr Ashby's exploration of the rules of motocross racing in the light of the banning of the couple. Mr Ashby had effectively invited the reader to view the banning of the couple (notwithstanding their reported cheating) as an excessive response on the part of the CMMC. That drew the "delusional" posts of Ms Wintour. She followed those up with her pondering as to what Mr Ashby might be smoking.

²⁷ See *Gatley*, above n 11, at 597, citing *Menji v Hermitage* [2012] EWHC 3445 (QB) at [102] – [103].

[101] Had Ms Wintour's observations been posted by Mr Wiremu, it would have been legitimate for Mr Ashby to respond by reference to Mr Wiremu's ability or inability to reason clearly and logically (with or without the involvement of drugs). The case law would have permitted Mr Ashby to do so with a considerable degree of latitude given the allegation of delusional behaviour. The Wintour posts attacked Mr Ashby's mental powers of reasoning, not his integrity. Mr Ashby's response became an out and out attack, standing on its own, upon Mr Wiremu's integrity.

[102] The nature of Mr Ashby's response, beyond its content, is exacerbated in this case by how it was published. The photo collage and the Statements were published not on the CMMC Facebook page, where the discussion about rules had been occurring, but on Mr Ashby's Grassroots MX and Tex MX Facebook pages. Mr Ashby's comments on those pages were likely to be read in isolation, not against the background of the exchanges on the CMMC Facebook page. It is no answer on Mr Ashby's part to say, as he said in evidence, that he had been unable to post the photo collage and statements to the CMMC Facebook page. Until that point, all his posts of dialogue had been successfully effected. There is no evidence to indicate that the difficulty he encountered with posting the photo collage related to a blocking of a page rather than the inability of the page to accept such a collage. In cross-examination, it was not put to Mr Wiremu or Ms Wintour that Mr Ashby's continuing access to the CMMC Facebook page had been blocked.

Conclusion

[103] Mr Ashby's response to the "delusional" comments was excessive both as to its content and as to the audience to which it was published.

[104] Mr Ashby's defence of qualified privilege is not established. That defence is unavailable to protect him from the consequences of his defamatory comments.

Remedies

Declaration

[105] Mr Wiremu first seeks a declaration that Mr Ashby is liable to him in defamation. Such is a remedy made available under s 24 of the Defamation Act.

[106] Given the findings I have made, Mr Wiremu is entitled to a declaration.

Damages

[107] Mr Wiremu seeks an award of general damages of \$50,000.

[108] The Court of Appeal has in *Williams v Craig* restated the general principles applicable to compensatory damages in defamation.²⁸ Harrison J, delivering the judgment of the Court, stated:

General principles

[31] In *John v MGN Ltd*, Sir Thomas Bingham MR summarised the principles relating to compensatory damages in defamation as follows:

The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's person or personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place.

[32] We add this observation: a favourable verdict on liability is the successful plaintiff's primary vindication. Its primacy is acknowledged in the introduction by s 24 of the Defamation Act 1992 of the plaintiff's right to seek only a declaration of liability with a consequential right to indemnity for an award of solicitor and client costs. The liability verdict is itself public

²⁸ *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1.

recognition that a statement or statements made by a defendant is false and defamatory. It is that verdict which restores the plaintiff's reputation (which may explain the tradition, followed at least by politicians, of donating damages awards to charity). We emphasise that the function of general damages is solely compensatory. They must bear a "relation to the ordinary values of life [and not operate] as a road to untaxed riches". Assessment of compensatory damages is by its very nature a subjective exercise. But it must be kept within reasonable bounds.

[33] Compensatory damages may be aggravated where a jury is satisfied the defendant has acted towards the plaintiff in a manner which compounds or increases the effect of the original defamation. The defendant's behaviour after the original publication, including in conducting his or her defence, can operate in this way.

[109] Mr Mackenzie recognised that the damages awarded in particular cases are, by their nature, fact-specific but referred me to four cases in which damages had been awarded. Two of them were cases involving professionals against whom serious allegations of impropriety and dishonesty were made.²⁹ In another instance, the defamation was published in a newspaper alleging criminal conduct by the plaintiff.³⁰ Both the gravity of the allegations and the likely impact on professional reputation put those cases in a different category to the present.

[110] A fourth case cited by Mr Mackenzie, *O'Brien v Brown*, bears some similarity to the present in that there was an internet publication (a posting to an electronic news bulletin and an email-list).³¹ But, again, there are material differences. The initial publication in *O'Brien* suggested that the plaintiff had committed a criminal offence in his professional role as a Chief Executive Officer of a national company. The District Court positively found that the plaintiff had been exposed to public odium and contempt and that he had suffered some damage to reputation and character. The damages awarded to the plaintiff were set (in 2001) at \$30,000 for general damages and \$12,000 for punitive damages.

[111] In assessing an appropriate sum to award by way of general damages, I take into account in this case:

²⁹ *Reeves v Mace* HC Auckland CP22/00, 125 June 2001 (compensatory general damages of \$95,000); *Ross v Hunter* [2017] NZDC 22579, [2018] DCR 770 (general damages of \$40,000 and exemplary damages of \$10,000 to the first plaintiff; general damages of \$24,000 and exemplary damages of \$10,000 to the second plaintiff).

³⁰ *Ahn v Lee* [2009] DCR 298 (general damages of \$85,000 awarded).

³¹ *O'Brien v Brown* [2001] DCR 1065.

- (a) Given that the Court will be making a declaration as to the defendant's liability, the damages are a secondary remedy.³²
- (b) The damages will serve as a consolation for the wrong done.³³
- (c) The Statements, because they were defamatory, are presumed to have damaged Mr Wiremu's reputation.
- (d) The evidence indicates that publication was to a relatively limited number of people for a limited period of no more than a few days.
- (e) The publication was nevertheless to a community (the motocross sport community) in which the plaintiff had status as a president of one body.
- (f) Mr Wiremu's evidence as to the effect of the Statements upon him was limited to observations that he had been shocked, quite upset and angry. He accepted in cross-examination the proposition that he had not called evidence from anybody else to indicate that he had been treated differently as a result of the publication.
- (g) The manner in which Mr Wiremu dealt with Mr Ashby's Facebook posts in the afternoon exchanges by text message indicates an aptitude on the part of Mr Wiremu to handle an aggressive verbal exchange with robustness and a degree of disdain.

[112] In summary, Mr Wiremu's evidence does not point to substantial hurt to feelings or a significant loss of reputation. As in *Cassell & Co Ltd v Broome*, the damages it is appropriate to award in this case will be for a solatium rather than as a monetary recompense for harm measurable in money.³⁴ It needs to be very modest. \$10,000 is an appropriate award of damages in this case.

³² *Williams*, above n 28, at [32].

³³ *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) at 1070 – 1071.

³⁴ Above n 33, at 1070 – 1071.

Costs

[113] Costs must follow the event. Mr Ashby will be ordered to pay costs to Mr Wiremu but the amount will be reserved. Unless there are particular matters of which the Court is unaware, the appropriate award would appear to be on a 2B³⁵ basis.

Orders

[114] I order:

- (a) There is a declaration that the defendant is liable to the plaintiff in defamation.
- (b) The defendant is to pay to the plaintiff general damages of \$10,000.
- (c) The defendant is to pay to the plaintiff the costs and disbursements of the proceeding (disbursements to be fixed by the Registrar), with the amount of costs, if not agreed, to be the subject of memoranda (four page limit) filed by the plaintiff and the defendant within ten working days and 15 working days respectively.

Osborne J

Barristers:
T J Mackenzie, Barrister, Christchurch
P N Allan, Barrister, Christchurch
A McKenzie, Barrister, Christchurch

³⁵ High Court Rules 2016, category 2 under r 14.3(1) and band B under r 14.5(2).