IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2017-404-3091
[2021] NZHC 2299

UNDER	The Defamation Act 1992
BETWEEN	KRISTIN PIA CATO Plaintiff
AND	MANAIA MEDIA LIMITED First Defendant
	ROWAN DIXON Second Defendant
	JANE THOMPSON Third Defendant

Hearing:	20 August 2021 (VMR)
Appearances:	S J Mills QC and E D Nilsson for the Plaintiff S A McKenna and R G Scott for the Defendants
Judgment:	2 September 2021

JUDGMENT OF CAMPBELL J
(Evidence objections)

This judgment was delivered by me on 2 September 2021 at 4:00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

[1] The plaintiff, Ms Cato, sues the defendants in defamation. The parties served briefs in advance of trial. Each side notified challenges to the admissibility of parts of the other side's briefs. The parties have resolved some of those challenges between themselves. I am to resolve the balance.

Background[1]

[2] Equestrian Sports New Zealand (**ESNZ**) is the national sports organisation for equestrian sports in New Zealand. In 2017 a senior New Zealand equestrian show jumping team toured Australia. Subsequently, members of the team made complaints to ESNZ against another member of the team, Katie Laurie, and against Ms Laurie's father, Jeff McVean, who was the team's chef d'equipe and coach.

[3] ESNZ convened a Judicial Committee to consider the complaints. The Committee directed the parties to try to settle the complaints at mediation. The parties attended a mediation in late November 2017, at which they settled the complaints. The settlement included agreeing to publish a statement recording the fact of the settlement and the steps agreed to by Mr McVean and Ms Laurie. The agreed statement records that the details of the settlement were otherwise confidential.

[4] Ms Cato is a barrister. She acted for the complainants in the mediation. On 30 November 2017, Ms Cato released the agreed statement to the *iSpyHorses* website and *Show Circuit* magazine, which are two equestrian media outlets. The statement was not sent to *NZ Horse & Pony*, another equestrian media outlet.

[5] Following Ms Cato's release of the statement, for six days from 3-9 December 2017, *NZ Horse & Pony* posted on its website an article entitled *What goes on tour, doesn't stay on tour*. The first defendant (Manaia Media Ltd) is the publisher and the second defendant (Ms Dixon) is the editor of *NZ Horse & Pony*. Ms Dixon and the third defendant (Ms Thompson) are the co-authors of the article.

[6] Ms Cato considered the article defamed her by suggesting she had acted unethically and unprofessionally in releasing the statement, without authority and

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1 This background is largely taken from the Court of Appeal's judgment: *Cato v Manaia Media Ltd* [2019] NZCA 661.

instructions, "practically exclusively" to the *iSpyHorses* website, which is operated by her mother. Attempts to resolve Ms Cato's concerns were unsuccessful. Ms Cato then commenced, on 22 December 2017, this proceeding against the defendants.

[7] The proceeding is to be tried by a Judge with a jury.

Briefs served (and challenged)

[8] Ms Cato served briefs from five factual witnesses and three expert witnesses. The defendants served three factual briefs and one expert brief.

[9] The parties requested that, because the trial is to be before a jury, I make an oral evidence direction under r 9.10 of the High Court Rules 2016. I made a direction, by consent, that all of the evidence of the fact witnesses be given orally (rather than by reading their briefs), with the served briefs establishing the permissible scope of the evidence for each witness (subject to any admissibility rulings and to any leave granted at trial to lead supplementary evidence).

[10] The unresolved challenges are:

(a) Ms Cato challenges the admissibility of significant parts of the briefs of Ms Dixon and Ms Thompson and the entirety of the brief of Denise Rushbrook (a fact witness).

(b) The defendants challenge the entirety of the briefs of Bill Ralston and Paul Collins (both expert witnesses) and one passage in the brief of Culum Manson (a fact witness).

Relevant legal principles

[11] The admissibility of evidence is governed by the Evidence Act 2006 (**the Act**). Under s 7, all relevant evidence is admissible except evidence that is inadmissible or excluded under the Act or any other Act. Evidence that is not relevant is not admissible. Evidence is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding. This is not an exacting

test. The question under s 7 is merely whether the evidence has some – that is, any – probative tendency.[2]

[12] Under s 8 of the Act, evidence must be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or will needlessly prolong the proceeding. Unfair prejudice generally arises when the evidence carries a risk the jury will use the evidence for an improper purpose or in support of an impermissible chain of reasoning.[3]

[13] Under s 17, a hearsay statement (that is, a statement made by a person other than a witness, offered to prove the truth of its contents) is inadmissible except as provided in the Act. Under ss 23 and 24, a non-expert statement of opinion is inadmissible unless the opinion is necessary to enable the witness to communicate what he or she saw, heard or otherwise perceived.

[14] Under s 83(2)(b), a brief may be given in evidence only if it does not contain a statement that is otherwise inadmissible under the Act.

[15] Under r 9.7(4) of the High Court Rules 2016, a brief of evidence must not contain evidence that is inadmissible or material in the nature of a submission. If a brief does not comply with those requirements the court may direct that it not be read in whole or in part: r 9.7(5). These rules reflect s 83(2)(b) of the Act.

[16] The parties referred not only to these general principles governing the admissibility of evidence, but also to specific principles applying in defamation proceedings. I refer to those, as necessary, below.

Issues in the proceeding

[17] In a joint memorandum of counsel dated 17 August 2021 (for a pre-trial conference) the parties set out the primary issues in the proceeding. The issues that bear noting in relation to the admissibility challenges are:[4]

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2 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].
3 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [7].
4 I have expressed these issues in more general terms than set out in the memorandum.

(a) Does the article bear any of the pleaded meanings?

(b) If the article bears any of the pleaded meanings, are those meanings defamatory of Ms Cato?

(c) Are any of the established defamatory meanings in fact conveyed as expressions of opinion?

(d) If so, were those opinions the genuine opinions of the defendants?

(e) Are any of the matters set out at paragraph 28 of the statement of defence matters in which there is a legitimate public interest?

(f) To what extent are those matters the subject matter of the article?

(g) To the extent that publication of the article involved the communication of a matter in which there was a legitimate public interest, did the defendants communicate that matter responsibly?

(h) Did Ms Cato fail to act reasonably by not responding to a message sent by the defendants on 2 December 2017?

(i) Did publication of the article cause no more than minor harm to Ms Cato's reputation?

(j) Did the defendants act with flagrant disregard of Ms Cato's rights in publishing the article?

(k) Did the defendants otherwise act in a way that aggravated the hurt and distress caused to Ms Cato?

Challenges to the defendants' briefs

[18] Mr Mills QC, for Ms Cato, organised the challenges to the defendants' briefs by topic. I will do the same.

Evidence of meaning

[19] Paragraph 45 of Ms Dixon's brief states:

> The article was not about Kristin Cato and her conduct at all. She was mentioned in passing as she was involved in the saga as the lawyer for the complainants. … I was not making any comments on the quality of Ms Cato's skills as a lawyer.

[20] Ms Thompson's brief includes:

> [60] The focus of the article was highlighting the incompetent handling of the complaint by ESNZ. … Regardless, we did believe the article to be a very important one, as it highlighted an ongoing issue that had resulted in the loss to New Zealand of two Olympians competitors [sic] and an Olympian coach.
>
> …
>
> [73] The purpose of the article was to outline the issues with the ESNZ judicial process and the failure of ESNZ to maintain relationships with Olympic level riders.

[21] Mr Mills submitted these passages were inadmissible evidence of the meaning of the impugned article. Mr McKenna, for the defendants, conceded the passages in paragraph 45 of Ms Dixon's brief were evidence of meaning and therefore inadmissible. He said the passages in Ms Thompson's brief were evidence of her intention in writing the article. He accepted that intention was not relevant to meaning, but said it was relevant to Ms Cato's allegation, in support of a claim for punitive damages, that the defendants acted in flagrant disregard of her rights.

[22] Where a plaintiff relies on the natural and ordinary meaning of the impugned words (as Ms Cato does here), evidence of the words' meaning is inadmissible.[5] An aspect of this is that the defendants cannot lead evidence of what they intended the words in question to mean.[6]

[23] I conclude that the following passages are inadmissible:

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5 A Mullis and R Parkes *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at 32.26, 32.30 and 33.7; S Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 861.

6 *Hulton & Co v Jones* [1910] AC 20 (HL) at 23; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (CA) at 172 (both cited in S Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 861).

(a) The passages in Ms Dixon's paragraph 45 (as Mr McKenna conceded).

(b) The sentences beginning "The focus of the article was …" and "The purpose of the article was …" in paragraphs [60] and [73] of Ms Thompson's brief. Evidence of the "focus" or "purpose" of the article is evidence of the article's meaning.

[24] The sentence beginning "Regardless, we did believe the article to be a very important one …" in paragraph [60] of Ms Thompson's brief is admissible. It is evidence of Ms Thompson's belief as to the importance of the article (which is relevant to Ms Cato's claim for punitive damages), rather than evidence of meaning.

[25] I record that Mr McKenna invited me to rule Ms Dixon's paragraph 45 and Ms Thompson's paragraphs [60] and [73] could address their respective intentions in writing or publishing the article. I decline to make a ruling in the abstract.

Evidence of the effect of the proceeding on the defendants

[26] Paragraph 54 of Ms Dixon's brief and paragraphs 18-20 and 70-72 of Ms Thompson's brief describe the effect the proceeding has had on them. Mr Mills said these passages were irrelevant and unfairly prejudicial. Mr McKenna's response was that there were similar passages in Ms Cato's brief. He did not explain to me how the passages were relevant.

[27] These passages are not relevant to any matter in issue in this proceeding. They are therefore inadmissible. It is no answer to say that Ms Cato's brief contains similar passages; that does not convert irrelevant evidence into relevant evidence. If the defendants wish to object to passages in Ms Cato's evidence they need to do so in the usual way.[7]

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[7] After the hearing I was provided with a copy of Ms Cato's brief. I understand the defendants objected to some passages in the brief and those objections were accepted. The copy I was provided does not identify those passages.

Evidence of Heather Cato's reputation

[28] The defendants' three witnesses of fact each have passages in their briefs that are directed to the reputation of Heather Cato. Heather Cato is Ms Cato's mother.

[29] Paragraph 40 of Ms Dixon's brief, for example, begins (challenged passage underlined):

> I was aware that ispyhorses.com is run by Heather Cato. I knew of Heather Cato but did not have any kind of personal relationship with her. I knew of Heather because she was an owner of several eventing horses. I had heard gossip that Heather was difficult to deal with and that as a result the horses she owned would frequently change riders. I am not saying that that was true, I am only raising it to relay how I knew who she was. …

[30] Paragraphs 27-29 and the second sentence of paragraph 32 of Ms Thompson's brief are similar. Ms Thompson says Heather Cato has "a reputation amongst the equestrian community of being a very difficult owner to ride for" and that the "gossip amongst riders was that it is best to avoid Heather". The entirety of the brief of Denise Rushbrook address Heather Cato's reputation and gossip amongst riders about her. Ms Thompson and Ms Rushbrook each refer to a particular event (the alleged treatment of a rider) as an explanation for what they say is Heather Cato's reputation.

[31] Ms Cato challenges the admissibility of this evidence on four independent grounds. She says the evidence is not relevant; that, if it is relevant, the evidence is unfairly prejudicial; that it is in any case inadmissible hearsay; and that parts are inadmissible non-expert opinion.

[32] I begin with relevance. The defendants say the evidence is relevant because they plead that any losses claimed by Ms Cato were not caused by the article. They say Ms Cato in her brief gives evidence of how she was treated at the 2017 Puhinui International Horse Trials in December 2017, just after the article was first published. The defendants say they refer to Heather Cato's reputation to show that any alleged mistreatment of Ms Cato at Puhinui was due to Heather Cato's reputation in the equestrian community, rather than to the article.

[33] To assess the relevance of this evidence it is necessary to outline what Ms Cato says in her brief about her experience at Puhinui. She says she went to the sponsors' tent. Her mother was in the tent, *iSpyHorses* being a sponsor. *NZ Horse & Pony* was also a sponsor and had a table nearby. Ms Cato says she saw an acquaintance sitting at the *NZ Horse & Pony* table and that later in the day the acquaintance made a Facebook post that Ms Cato considered to be defamatory. Ms Cato says she felt uncomfortable in the tent and decided to leave and walk up the main hill to watch some of the jumping competitions with two of her children. She says there were many spectators on the hill, and that virtually all of them turned their backs and moved away from her. She felt she was being publicly shunned.

[34] Ms Thompson and Ms Rushbrook purport to respond to this. After giving evidence of Heather Cato's reputation and of gossip about her, each say that if Ms Cato was with her mother at Puhinui she may have been shunned or was likely shunned because of her mother's reputation.

[35] In my assessment the defendants' evidence about Heather Cato's reputation is relevant to the matters in issue in this proceeding. Ms Cato's evidence about her experience at Puhinui invites the inference that it occurred because of the article. The defendants are entitled to attempt to disprove that connection by leading evidence of an alternative explanation for Ms Cato's experience. The proposed evidence passes the (minimal) relevance threshold in s 7.

[36] However, the evidence has very low probative value. Ms Cato's evidence of her experience at Puhinui is quite specific. She first says an acquaintance made a Facebook posting. Ms Thompson and Ms Rushbrook's evidence has no relevance to that. Ms Cato then says she was shunned by spectators when she went up the hill with two of her children. She does not say she went up there with her mother, and neither Ms Thompson nor Ms Rushbrook say that she did. Their evidence involves speculation that the spectators will have nonetheless associated Ms Cato with Heather Cato and shunned her because of it. This is very tenuous: Ms Thompson says she believed not many people in the equestrian world knew of Ms Cato, and Ms Rushbrook says she has never heard Ms Cato's name arise in equestrian circles. Even if Heather

Cato had a reputation of being a difficult owner to ride for it is most unlikely spectators at an equestrian event would shun her adult daughter for it.

[37] The very low probative value of the evidence is outweighed by the risk it will have an unfairly prejudicial effect on the proceeding. The risk is that the jury will form a negative view of Heather Cato's reputation and extend that, by association, to Ms Cato's reputation. This would be impermissible reasoning, as the evidence does not bear on Ms Cato's reputation. The evidence might also encourage antipathy towards Ms Cato generally. Again, that would be unfair.

[38] For those reasons, I find the evidence of Heather Cato's reputation in the briefs of Ms Dixon and Ms Thompson, and the entirety of the evidence of Ms Rushbrook, must be excluded under s 8. It is not necessary for me to address the other grounds on which Mr Mills said the evidence was inadmissible.

[39] I do note one matter. At the hearing Mr McKenna invited me to exclude Ms Cato's evidence about her experience at Puhinui. He said her evidence was based on speculation of what was going on in the minds of those who allegedly shunned her. He submitted that if her evidence was nonetheless admitted, justice required that the defendants be able to give evidence in response.

[40] If the defendants wish to have that part of Ms Cato's evidence excluded, they need to pursue an objection in the usual way. I am not going to rule on the admissibility of evidence when the objection is raised for the first time during oral submissions.

Evidence of the substance of the ESNZ complaints

[41] Ms Dixon's and Ms Thompson's briefs include passages recording the substance of gossip or rumours about what happened on the Australian tour to give rise to the complaints made to ESNZ against Mr McVean and Ms Laurie. At paragraph 21 of her brief Ms Dixon says (with the challenged passages underlined):

> Gossip started to circulate within equestrian circles that there had been some kind of altercation between at least some of the team members. The gossip I

> heard was … . This was simply unsubstantiated gossip and none of it was verified. To date no one really knows what exactly happened on the tour.

[42] In the final sentence of paragraph 43 of her brief, Ms Dixon says that many people were speculating that Mr McVean had been engaging in particular behaviour (which Ms Dixon identifies) in order to incur a serious penalty from ESNZ.

[43] Ms Thompson says in her brief at paragraph 43 that she had heard rumours there were issues during the tour and relationships had deteriorated significantly. No objection is taken to that evidence. Ms Thompson then records the substance of the rumours in paragraphs 45, 46 and 50 of her brief. In the course of that evidence, Ms Thompson says some of the allegations made in the rumours were "wild and unfair". Objection is taken to all of that evidence.

[44] Ms Cato objects to Ms Dixon's and Ms Thompson's evidence on the grounds the evidence is irrelevant, consists of inadmissible hearsay, is unfairly prejudicial and discloses confidential information.

[45] As to relevance, the defendants say the substance of the rumours is relevant to their affirmative defence that the article was a responsible communication on a matter of public interest. They plead that matters of public interest include the conduct of former equestrian Olympians and Olympian trainers at international equestrian competitions, the conduct of ESNZ members while representing New Zealand at international competitions and the origin, history, nature and content of complaints to ESNZ in respect of sportspersons representing New Zealand. They plead the article was a responsible communication on those (and other) matters of public interest.

[46] Mr Mills says the evidence is not relevant to this defence for two reasons. First, speculation about the conduct or about the details of the complaints made to ESNZ is not relevant to the existence of a matter of public interest. Secondly, the subject matter of the article was not those alleged matters of public interest, as the article did not address the alleged uncertainty about the conduct or complaints.

[47] I find the evidence is relevant to the affirmative defence. Whether there was public interest in the conduct of members on the tour, or in the complaints that arose,

will depend to some extent on the nature of the conduct or the complaints. The subject matter of the article arguably[8] includes the matters that the defendants allege were of public interest. It is not to the point that only part of the article explicitly addresses the uncertainty about the substance of the conduct or the complaints. The article is arguably about, among other things, the matters of alleged public interest.

[48] Mr Mills next says the evidence is inadmissible hearsay. Mr McKenna submits that the evidence of the rumours is not hearsay because it is not offered to prove the truth of the rumours. It is offered merely to prove the existence and content of the rumours.

[49] I accept, with two reservations, Mr McKenna's submission. For the most part the passages themselves make clear the evidence is not being offered to prove what occurred on the tour or what complaints were made. The two reservations are:

(a) The witnesses can only give evidence of the rumours they heard. They cannot give evidence they were told (by someone other than a witness) of the existence of rumours and cannot make general assertions as to the existence of rumours. Both would be hearsay. This applies to the passages to which Ms Cato objects in Ms Dixon's paragraph 43 and Ms Thompson's paragraphs 46 and 50. They cannot be led in their current form.

(b) Some of the evidence is being offered as proof of its content. Ms Thompson at paragraph 46 says "we understood [Mr McVean] had not been involved in any behaviour of this nature" and at paragraph 50 describes certain allegations concerning Mr McVean as "wild and unfair". These passages are hearsay and inadmissible.

[50] The next objection raised is that the evidence is unfairly prejudicial. Mr Mills says there is a risk the jury will perceive the evidence as proof of the substance, or likely substance, of the complaints. He says this will engender sympathy for the defendants' alleged attempts to protect Mr McVean's and Ms Laurie's reputations in

[8] This is ultimately a matter for trial.

the face of serious complaints. He submits this will be unfairly prejudicial to Ms Cato because she will be unable to respond to the evidence, owing to the confidentiality of the complaints process and issues of privilege.

[51] I do not accept there will be unfair prejudice to Ms Cato. It will be clear to the jury the evidence is merely of rumours. This can be reinforced by jury directions. It is not obvious the evidence would engender sympathy for the defendants' actions. The issues of confidentiality and privilege do not create any unfairness for Ms Cato. What is in issue is the existence and substance of the rumours (in respect of which there are no issues of confidentiality or privilege), not the substance of the complaints.

[52] Finally, Mr Mills submits the evidence concerns confidential matters. He says the complaints process before ESNZ was confidential, as was the mediation.

[53] I accept those processes were confidential. But the challenged evidence is not evidence of the complaints or of the mediation. It is merely evidence of rumours of what happened on tour and of the complaints that arose.

Other challenges to Ms Dixon's brief

[54] Ms Cato raised several challenges that did not fall under the above topics. At the hearing counsel addressed me briefly, if at all, on these.

[55] At paragraph 15 Ms Dixon says an incident involving Andrew Nicholson (another equestrian) was "in the forefront of people's minds" in 2017, that it was "widely felt" the incident was mismanaged by ESNZ and that this made it "particularly topical news" when the members of the team to Australia became involved in a dispute. Ms Cato objects that this is a mix of inadmissible hearsay and non-expert opinion. I find:

(a) Ms Dixon merely speculates as to what was in other people's minds or what was widely felt. Her evidence in that form is hearsay and inadmissible. She can give evidence of what she saw or heard others discussing. That would not be hearsay.

(b) Her evidence that the subject dispute was "particularly topical news" is a statement of opinion. It is inadmissible under s 23.

[56] At paragraph 48 Ms Dixon gives evidence there was "considerable public interest in the story". This is both a statement of opinion and a matter of submission. It is inadmissible.

[57] In paragraph 48 Ms Dixon goes on to say that the incident was "yet another example of ESNZ having mismanaged a situation". This is a statement of opinion. It is inadmissible.

[58] In the final sentence of paragraph 49 Ms Dixon describes something that happened at the Puhinui International Horse Trials. Ms Cato says there is no suggestion that Ms Dixon observed what happened and the evidence is hearsay. Mr McKenna says it is evidence of what Ms Dixon observed and this can be clarified if required. The natural reading of the sentence is that Ms Dixon is conveying her observations. It is admissible.

Other challenges to Ms Thompson's brief

[59] In paragraph 8 Ms Thompson gives evidence about the effects of the Kaikoura earthquake on her home and community. In paragraph 14 she describes her work history since the article in issue. Mr Mills submits the evidence is irrelevant and unfairly prejudicial. Mr McKenna's response is that Ms Cato's brief contains numerous irrelevant statements about her personal circumstances leading up to the article.

[60] I find both paragraphs are inadmissible. I cannot see how either would tend to prove or disprove anything of consequence in this proceeding. Mr McKenna may be right that Ms Cato's brief contains irrelevant material. The appropriate response is to object, not to burden the court and jury with additional irrelevant material.

[61] In paragraph 25 Ms Thompson gives evidence about an interaction between Ms Cato and a photographer at the Puhinui International Horse Trials in December 2017. She says Ms Cato took exception to having her photograph taken. She refers

to an email Ms Cato sent to the photographer threatening legal action. Mr Mills says this is not relevant to anything in issue. The incident relates to Ms Cato's wish to protect her and her family's personal privacy, not to her professional reputation. Mr Mills further submits that if the evidence has any probative value, it is outweighed by its unfairly prejudicial effect, as the purpose of the evidence is to put Ms Cato in a bad light.

[62] I find this evidence admissible. It is relevant because, as Mr McKenna submitted, it tends to prove Ms Cato was defensive and perceiving herself to be the object of attention. It is for that reason prejudicial to Ms Cato, but not in any way that is unfair.

[63] In paragraph 33 Ms Thompson gives evidence about the general behaviour of spectators at cross-country equestrian events. She speculates that this behaviour likely explains why spectators may have turned their backs on Ms Cato. Mr Mills says the paragraph is a mix of inadmissible opinion and submission. I accept that the first and final sentences of the paragraph are submission and are to be excluded. The balance presents as evidence of what Ms Thompson has observed at such events. It is admissible.

[64] In paragraph 37 Ms Thompson describes an interaction between her and Ms Morrison, who is one of Ms Cato's witnesses. Mr Mills submits the evidence is irrelevant. Mr McKenna says the interaction was brought up by Ms Morrison in her own brief. On the face of Ms Thompson's brief the evidence appears relevant. I reject the challenge.

[65] In paragraph 40 Ms Thompson describes evidence apparently given by Ms Morrison that "the gossip and innuendo has survived because of our reporting". Ms Thompson then says the gossip and innuendo has survived for different reasons. Mr Mills submits this is inadmissible opinion and is in the nature of submission. I agree it is inadmissible opinion.[9]

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[9] If Ms Thompson's description of Ms Morrison's evidence is accurate, Ms Morrison's evidence may be inadmissible for the same reason.

[66] In paragraph 42 Ms Thompson describes evidence apparently given by Ms Mitchener, another of Ms Cato's witnesses, that a Mr McGregor made a rude comment to her (Ms Mitchener). Ms Thompson then gives evidence that Mr McGregor was on the Australian tour, had a good knowledge of what went on and would have formed his own opinion on what happened. Mr McKenna says the evidence is relevant to refute a statement by Ms Mitchener that speculates on why Mr McGregor may have spoken to her. Nonetheless, I accept Mr Mills' submission that Ms Thompson's evidence is non-expert opinion and speculation. It is therefore inadmissible.[10]

[67] In paragraph 47 Ms Thompson says that since this incident she understands ESNZ has "totally overhauled" its judicial system, which she says was not working. She says that if one good thing has come of this incident it is that ESNZ now has a more robust and fair system. At paragraph 51 she says the ESNZ judicial process "was obviously flawed". I accept Mr Mills' submission that these passages are a mix of opinion and submission. They are inadmissible.

[68] In paragraph 48 Ms Thompson refers to criticisms of Ms Laurie and says most of them were attributable to "tall poppy syndrome". That is a statement of her opinion. It is inadmissible.

[69] In the first sentence of paragraph 52 Ms Thompson gives evidence that before the subject article ESNZ had issues with Andrew Nicholson that received widespread media coverage. In the next sentence she says this resulted in Mr Nicholson declaring he would not ride for New Zealand again. Mr Mills says these sentences are irrelevant. I disagree. They are relevant to the public interest defence. I accept, however, that Ms Thompson cannot give evidence that "this resulted in" Mr Nicholson declaring he would not ride again. She may give evidence that he made the declaration, but her view on the causal linkage is inadmissible opinion.

[70] In the final sentence of paragraph 52 Ms Thompson says there had been a number of issues with how Ms Laurie had been treated by ESNZ for some time. On the face of this evidence it is inadmissible hearsay.

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[10] If Mr McKenna's description of Ms Mitchener's evidence is accurate, Ms Mitchener's evidence may be inadmissible for the same reason.

[71] In the first sentence of paragraph 53 Ms Thompson says that as a result of what she described in paragraph 52 there was considerable interest from the equestrian community in the ESNZ investigation into the Australian tour. This is a statement of opinion. It is inadmissible.

[72] In paragraph 59 Ms Thompson says that in preparing the article she spoke to Ms Laurie's mother, Ms McVean, who did not want to go on the record. Ms Thompson then describes what Ms McVean told her, which was a mixture of the reasons for having settled the complaints at mediation and Ms Laurie's future plans. Mr Mills says this evidence is inadmissible hearsay. In my view the evidence is inadmissible. The content of Ms McVean's statement appears to be irrelevant. If there is any relevance to the content, the evidence is hearsay.

[73] Finally, Ms Cato challenges paragraphs 73 and 74 of Ms Thompson's brief. I have already ruled the first sentence of paragraph 73 to be inadmissible evidence of meaning. In the balance of paragraph 73 Ms Thompson describes the issues that arose from the mediated settlement. Mr Mills submits this is submission. Mr McKenna says it is evidence relevant to the public interest defence. I agree with Mr McKenna. Ms Thompson is merely describing the questions that she perceived arose from the mediated settlement. She is not arguing that those issues are ones of public interest.

[74] Paragraph 74 is different. Ms Thompson expresses her belief that these are serious issues. The paragraph is submission. It is inadmissible.

Challenges to the plaintiff's briefs

[75] Mr McKenna organised the defendants' challenges by brief.

Bill Ralston

[76] Mr Ralston is a former editor and journalist. He has about 30 years' experience in New Zealand news media. In his brief he gives his expert opinion on:

(a) The ethical and professional standards that apply to editors and journalists in New Zealand, particularly in relation to investigative reporting; and

(b) Whether the editors and authors of the article in issue in this proceeding complied with those standards.

[77] The defendants object to the entirety of Mr Ralston's brief. They raise one general objection and several particular objections.

[78] The general objection is that Mr Ralston's brief as a whole is irrelevant. There are two aspects to this irrelevance objection. The main aspect is that, to the extent his brief is intended to refute the defendants' affirmative defence of a responsible communication on a matter of public interest, it is irrelevant. Mr McKenna said that the Court of Appeal, when recognising this defence in *Durie v Gardner*, was at pains to make clear the defence is available to all who publish material of public interest in any medium, and so is not merely a defence of "responsible journalism".[11] He submitted therefore that Mr Ralston's evidence of journalistic standards was not relevant to the Court's assessment of the availability of this defence.

[79] Mr McKenna is correct that the defence is not limited to responsible journalism. But it does not follow that evidence of journalistic standards is irrelevant to an assessment of this defence. One element of the defence is that the communication was responsible. In *Durie* the Court of Appeal said that determining whether a communication has met the applicable standard of responsibility involves mixed questions of fact and law and is a highly evaluative exercise.[12] Evidence of journalistic standards will have a tendency to prove the applicable standard of responsibility and whether that standard has been met. That is not to say the evidence will be determinative. It is merely to say the evidence passes the relevance threshold of s 7, which is all that matters at this point.

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11 *Durie v Gardner* [2018] NZCA 278, [2018] 3 NZLR 131 at [59].
12 *Durie v Gardner* [2018] NZCA 278, [2018] 3 NZLR 131 at [62](c).

[80] The other aspect of the defendants' general irrelevance objection is that, to the extent Mr Ralston's brief is directed at Ms Cato's claim for punitive damages, it is irrelevant. The defendants say this is because his brief "does not demonstrate the defendants have acted in flagrant disregard of the rights of the plaintiff". I reject that objection. The question is not whether it demonstrates flagrant disregard, it is whether it has a tendency to prove flagrant disregard. It has.

[81] Of the defendants' more particular objections, the first is to paragraph 11. After noting that Ms Cato says the article conveys meanings that include serious allegations regarding her conduct as a lawyer, Mr Ralston says he has assumed for the purposes of his brief that those meanings are conveyed. Mr McKenna submits Mr Ralston is unable to give an opinion on the meaning of the article and that his evidence is unfairly prejudicial as it gives unfair weight to Ms Cato's alleged meanings.

[82] I do not accept this objection. Mr Ralston is not purporting to give an opinion on the meaning of the article. He is simply stating, as is usual for an expert, one of the assumptions on which he is expressing his opinion. This does not give unfair weight to Ms Cato's allegations. Mr Ralston explicitly says he has not been asked to comment on whether the alleged meanings do arise from the article.

[83] Next, objection is taken to Mr Ralston's reference to Facebook comments and other communications that were not available to a reader of the article. Mr McKenna says these matters are not admissible for determining the meaning of the article. That is correct. But Mr Ralston does not refer to those matters for that purpose. I do not accept the objection.

[84] Similarly, the defendants object to Mr Ralston stating in paragraph 43 that the authors of the article "appear to have formed the view early that Ms Cato had acted wrongfully, and may have breached the confidentiality agreement reached at mediation". Mr McKenna submits this is an opinion as to the meaning of hearsay statements. I do not accept that submission. It is correct the evidence is an opinion, but it is an opinion within Mr Ralston's area of expertise and is based on documentary statements by Ms Dixon and Ms Thompson, both of whom are witnesses. The statements are therefore not hearsay.

[85] At paragraph 30 Mr Ralston expresses the view that the documented communications between Ms Dixon and Ms Thompson suggest that a primary driver of the defendants in publishing the article was self-interest in terms of protecting *NZ Horse & Pony*'s commercial position. Mr McKenna submits that Mr Ralston is speculating as to the intent of the authors. He also submits that intent is not relevant to any issue to be decided at trial. I reject both submissions. This evidence is part of Mr Ralston's expression of an opinion within his area of expertise. It is relevant to the public interest defence and also to Ms Cato's claim for punitive damages.

[86] At paragraph 50 Mr Ralston says it is "entirely possible for a busy person to miss or overlook a Facebook message". The defendants object to that statement on the ground it is outside Mr Ralston's area of expertise. I do not accept that objection. The statement forms part of Mr Ralston's expression of the opinion that a Facebook message is insufficient as an attempt to contact a person at the centre of an investigative story. It is within Mr Ralston's area of expertise.

[87] Finally, Mr McKenna submits that Mr Ralston's evidence seeks to give the jury expert knowledge outside that which a general member of the public would have when reading the article. He says it will colour the jury's interpretation of the article in a way that is unfairly prejudicial to the defendants. I do not accept that. It is clear that Mr Ralston's evidence is directed at journalistic standards and whether the defendants met those standards. His evidence on those matters does not colour the interpretation of the article.

Paul Collins

[88] Mr Collins is a barrister with extensive experience and expertise in matters relating to lawyers' ethics and professional conduct. In his brief he records he was asked to express his opinion about the consequences for Ms Cato, in her capacity as a lawyer, if the pleaded meanings of the article (which Mr Collins abbreviates as "the impugned conduct") "were found by a professional authority to be true". Mr Collins outlines the system of professional discipline of lawyers in New Zealand. He then addresses the professional implications for Ms Cato, the level at which the impugned

conduct might be found to be culpable, and likely penalties, all assuming "the impugned conduct is found by a professional authority to be true".

[89] The defendants object to the entirety of Mr Collins' brief. The primary objection is that the evidence is irrelevant, because Ms Cato will not be before a professional authority. Mr McKenna says the evidence wrongly inflates the seriousness of the pleaded meanings by giving hypothetical outcomes that are of no assistance to the jury when determining quantum.

[90] Mr Mills responds that Mr Collins' evidence is relevant to the gravity of damage caused by the pleaded meanings among a subset of the audience, namely members of the legal profession. He relies on a High Court of Australia decision, *Reader's Digest Services Pty Ltd v Lamb*,[13] to support the proposition that evidence of this sort is relevant to the gravity of the damage caused by the pleaded meanings.

[91] In *Lamb* the statement in issue was found at trial to mean that the plaintiff journalist had, in order to secure a newspaper story, exploited a tragedy that had befallen an old friend. The plaintiff called evidence from two other journalists that betrayal of a friend's trust was a breach of journalists' ethical standards. The defendants challenged the admissibility of that evidence. The High Court said the evidence was inadmissible to prove what the statement meant or to prove whether the statement was defamatory. But it was admissible to prove the gravity of the damage. In the words of Brennan J:[14]

> A jury is entitled to take into account in assessing general damages the effect of the libel on those who read it … . In making its assessment, a jury is properly assisted by evidence that the making of the defamatory imputation found by them had an especially adverse impact upon the plaintiff's reputation in the eyes of some group or class in the community.

[92] A key point in that passage is that the evidence in question addressed the impact of the defamatory imputation. Mr Collins' evidence does not do that. His evidence addresses not the impact of the pleaded meanings, but the impact of the pleaded meanings being found by a professional authority to be true. That is a

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13 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500.
14 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 507.

distinction with a significant difference. Mr Collins' evidence would be relevant if the pleaded meanings were that a professional authority had found that Ms Cato had engaged in the impugned conduct. But that is not what is pleaded.

[93] For that reason, I find that Mr Collins' brief is not admissible. This is no reflection on Mr Collins' expertise. It merely reflects the basis on which he was asked to express his opinion.

Culum Manson

[94] Mr Manson is Ms Cato's husband. In paragraph 13 of his brief, after explaining that he and his business regularly engage lawyers, he states "But I would not retain a lawyer if I believed that there were reasons to doubt their integrity and loyalty."

[95] The defendants challenge that statement. Mr McKenna submits it is non-expert opinion and therefore inadmissible. Mr Mills disagrees. He says it is a statement of fact as to Mr Manson's state of mind and is relevant to the gravity of damage caused by the pleaded meanings.

[96] I accept Mr Mills' submission. The statement is made with reference to the article. It is not a mere opinion. It is relevant to the gravity of damage.

Result

[97] The evidence referred to above at [23], [27], [38], [49], [55]-[57], [60], [63], [65]-[72], [74], and [93] is inadmissible and cannot be read (or, in the case of the fact witnesses, cannot be led).

[98] Success on the challenges has been shared. There will be no order as to costs.

Campbell J