IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA514/2019
[2021] NZCA 156

BETWEEN	COLIN GRAEME CRAIG Appellant
AND	RACHEL JOY MACGREGOR Respondent

Hearing:	17 November 2020
Court:	Kós P, Clifford and Collins JJ
Counsel:	S J Mills QC and T F Cleary for Appellant H J P Wilson, L Clark and B A Mathers for Respondent
Judgment:	4 May 2021 at 9 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis, with usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

[1] Between 2011 and 2015 the appellant, Mr Colin Craig, was the leader of the Conservative Party. Between 2011 and 2014 the respondent, Ms Rachel MacGregor, was the press secretary for Mr Craig and the party. Their tortured employment and personal relationships were the subject of an earlier

decision of this Court: *Craig v Slater*.[1] That proceeding was commenced in August 2015. Ms MacGregor gave evidence in *Craig v Slater*, but was not a party. In that earlier proceeding Toogood J found Mr Craig had engaged in moderately serious sexual harassment of Ms MacGregor, a conclusion this Court upheld on appeal.[2] In this appeal Mr Craig in effect attempts to challenge that conclusion.

[2] The proceeding underlying the present appeal, brought against Ms MacGregor herself, was filed in November 2016 but not served for some eight or nine months. Ms MacGregor however found out about the proceeding and filed a defence and counterclaim in June 2017. In the High Court, Hinton J found both Mr Craig and Ms MacGregor defamed each other to a limited extent.[3] Relevantly, the Judge also held Mr Craig had sexually harassed Ms MacGregor. That meant a defence of truth was unavailable to him on his defamatory statements that Ms MacGregor had falsely claimed to have been sexually harassed. The Judge also held Mr Craig's statements were not protected by the qualified privilege applying to replies to attacks.

Appeal

[3] Mr Craig appeals that High Court decision on two grounds:

(a) **Issue one**: whether the Judge erred in finding Mr Craig sexually harassed Ms MacGregor (meaning his defence of truth should succeed)?

(b) **Issue two**: whether the Judge erred in finding Mr Craig lost the qualified privilege he would otherwise have had?

[4] Before addressing those issues, we explain briefly this Court's prior decision in *Craig v Slater* and the defamation claims made by Ms MacGregor which are the subject matter of this appeal.[4]

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1 *Craig v Slater* [2020] NZCA 305 [*Craig v Slater* (CA)].
2 See [5]–[6] below.
3 *Craig v MacGregor* [2019] NZHC 2247 [High Court judgment]. See at [265]–[271] for a summary of the Judge's findings.
4 Strictly, Ms MacGregor's claims took the form of counterclaims. Nothing turns on that; there is no appeal in relation to Mr Craig's claims against Ms MacGregor, some of which the Judge upheld.

This Court's prior decision: *Craig v Slater*

[5] In the High Court in October 2018, Toogood J concluded that Mr Craig sexually harassed Ms MacGregor, and that the degree of sexual harassment was "moderately serious".[5] Our subsequent judgment on appeal records:[6]

> The primary defamatory imputation of Publication 1 was that Mr Craig had seriously sexually harassed Ms MacGregor. The Judge held that imputation to be true, finding Mr Craig's conduct amounted to "moderately serious" sexual harassment. Though Mr Craig may have been encouraged by Ms MacGregor's response to a letter sent in February 2012, his attentions were unwelcome thereafter. Though Mr Craig sought to reassure Ms MacGregor she would not lose her job over rejecting his further advances following the 2011 election night, the power imbalance in the workplace relationship meant Ms MacGregor chose not to complain for that very reason. Though not the primary factor, the harassment was an operative factor in Ms MacGregor's decision to resign.

[6] We dismissed Mr Craig's challenge to that finding of moderately serious sexual harassment. In particular, we said:[7]

> … Mr Craig's conduct was intentional, sexualised conduct directed at a workplace subordinate. The Judge was also right to hold that where a complaint of sexual harassment involves an allegation of intentional sexualised conduct or language, and there is a power imbalance favouring the perpetrator over the recipient, it is reasonable to draw a rebuttable inference that the sexual conduct or language was unwelcome, whether the complainant objected at the time of the alleged harassment or not.

[7] We continued:[8]

> … although Ms MacGregor did not make it known that Mr Craig's advances were unwanted, the Judge was perfectly entitled to find on the evidence before him that she did not do so because of her concerns over losing her job. Mr Craig was aware she was in some financial difficulty.

[8] Of relevance to the second issue in this appeal is our conclusion that a confidentiality clause in the settlement agreement between the two did not give Mr Craig:[9]

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5 *Craig v Slater* [2018] NZHC 2712 [*Craig v Slater* (HC)] at [457].
6 *Craig v Slater* (CA), above n 1, at [85].
7 At [89] .
8 At [90].
9 At [83].

> … licence to mislead the board by saying that Ms MacGregor's claims were "ridiculous", and … leading them to believe that the claims were baseless and the product of her infatuation with Mr Craig.

[9] Mr Craig did not seek leave to appeal to the Supreme Court.

Ms MacGregor's claims

[10] This appeal is about defences. There is no contest over the actionable defamatory meanings drawn by the Judge from the publications complained of. Relevantly, these were as follows:[10]

(a) *Ms MacGregor's first cause of action:* statements made by Mr Craig (and through his wife) at a press conference with his wife on 22 June 2015, which bore meanings that Ms MacGregor had made false claims of sexual harassment against Mr Craig and was a liar.

(b) *Ms MacGregor's second cause of action:* statements made by Mr Craig in a letter to party members on 25 June 2015 which bore meanings as in (a), as well as that Ms MacGregor had withdrawn her false claims of sexual harassment and had some kind of (continuing) inappropriate relationship with him, a married man.

(c) *Ms MacGregor's third cause of action:* statements made by Mr Craig (and again through his wife) at a second press conference with his wife on 29 July 2015 which bore meanings as in (a), as well as that Ms MacGregor had victimised the Craigs and was the sort of person who would victimise and hurt a family.

(d) *Ms MacGregor's fourth cause of action:* statements made by Mr Craig in his "Dirty Politics" booklet published 29 July 2015 which bore meanings as in (a), as well as that Ms MacGregor had withdrawn her claims of sexual harassment and had falsely played "the victim".

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[10] Other defamatory meanings were proven but in respect of those Mr Craig succeeded in his defence of truth. We need not consider them in this appeal.

[11] The gravamen of each publication was that expressed in [10(a)]; the further meanings are really variations on the theme that her allegation of sexual harassment was false.

Issue one: Sexual harassment — and whether we should revisit the subject

[12] A chronology assists:

(a) the defamatory statements by Mr Craig about Ms MacGregor were made in June and July 2015;

(b) the claim against Mr Slater was commenced in August 2015;

(c) the claim against Ms MacGregor was filed in November 2016;

(d) Hinton J heard the present proceeding in September and October 2018 (with a further telephone hearing in April 2019);

(e) Toogood J's judgment in *Craig v Slater* was delivered on 19 October 2018 (and an appeal was filed shortly afterwards);

(f) Hinton J delivered her judgment in September 2019; and

(g) this Court's judgment in *Craig v Slater* was delivered in July 2020.

[13] Hinton J of course appreciated the interweaving of time and judgment presented certain problems. Her judgment records:[11]

> I had raised with the parties at the outset of this hearing my concerns over potential conflicting findings, particularly since the question of whether there had been sexual harassment was at issue in both. They were in agreement that the decision in *Craig v Slater* would not affect this proceeding.

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11 High Court judgment, above n 3, at [9].

As will become apparent, we think the view taken by the parties at that time too simplistic.[12] The authority of a prior High Court judgment is not a matter of purely private bargain. Public policy intrudes.

[14] The Judge held Mr Craig sexually harassed Ms MacGregor.[13] The letters received from 2012 onwards and texts or comments about sleeping between her legs were of a sexual nature.[14] Ms MacGregor did not welcome Mr Craig's conduct from 2012 onwards. The language in Ms MacGregor's texts from early 2012 was affectionate and appreciative of Mr Craig, but the Judge considered it was in response to Mr Craig's flattery of her rather than encouraging or reciprocating Mr Craig's sexual comments. The Judge also found Ms MacGregor did not welcome the massages and hugs from Mr Craig. It did not matter that Ms MacGregor did not object to Mr Craig's conduct as an employee in her position likely would not.[15]

[15] The Judge accepted Ms MacGregor may have been infatuated with Mr Craig much earlier, but not in June 2014 as stated in evidence by two party employees. Though considering the witnesses honest, the Judge considered their evidence inconsistent with the correspondence between Mr Craig and Ms MacGregor at the time and neither knew of the letters and texts Mr Craig sent Ms MacGregor nor whether she welcomed the letters.[16]

Submissions

[16] Mr Mills QC, for Mr Craig, sought to challenge the Judge's finding on the facts. In written submissions he sought to point to the terms of the correspondence as inconsistent with sexual harassment. Ms MacGregor's evidence acknowledged a positive reaction to his letters, and she considered him a kind man in 2013. The Judge found Mr Craig and Ms MacGregor had a positive and affectionate relationship even after 2012 and exchanged affectionate correspondence through to the end of 2013. Ms MacGregor's responses to Mr Craig's letters went beyond not

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12 Following delivery of Toogood J's judgment in the *Slater* proceeding, counsel for Ms MacGregor filed submissions alleging Mr Craig's present proceeding was an abuse of process. Counsel did not however pursue the point or seek strike-out.

13 High Court judgment, above n 3, at [176].

14 At [178].

15 At [179].

16 At [181].

wanting to offend an employer and when correspondence was unwelcome, she made that known. To the extent Ms MacGregor's view of Mr Craig changed, her recollection of events was "limited or confused". The Judge wrongly disregarded the evidence of the party employees that Ms MacGregor was infatuated with Mr Craig. Ms MacGregor accepted Mr Craig never sent her sexually explicit text messages. Ms MacGregor's attitude towards Mr Craig is said to only have changed between June and September 2014; this change in attitude was only short lived and did not coincide with any of the letters containing sexual content.

[17] Ms Clark (who argued this part of the appeal for Ms MacGregor) contended that the Judge's finding that Mr Craig sexually harassed Ms MacGregor was supported by both fact and law. The legal test was entirely orthodox; her decision was not open to realistic challenge. The principal documentary evidence had also been before Toogood J in *Craig v Slater.* The oral evidence given was not fundamentally different.

Analysis

[18] At the hearing we challenged the basis on which Mr Craig's submissions could be advanced, given the contrary conclusion reached by this Court just four months earlier. We suggested the argument represented a collateral attack on our earlier decision, and might be an abuse of process.

[19] Mr Mills endeavoured to suggest that the evidence in the two cases was distinguishable, such that we might reach a different view in November from that we had reached in July.

[20] We do not accept that submission. First, the essential findings are, of course, identical. Toogood J alone made a finding on the degree of seriousness of the harassment, but nothing turns on that. There are other differing degrees of emphasis in the High Court judgments (for instance, as to whether Ms MacGregor wrote to Mr Craig, affectionately, in July 2012), but again nothing turns on those differences.[17] Secondly, documentary evidence in the two cases was very similar; differences between them do not call the finding of Toogood J (upheld in this Court)

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[17] High Court judgment, above n 3, at [40]; *Craig v Slater* (HC), above n 5, at [129].

into question. Thirdly, the same may also be said of the oral evidence in the two proceedings. There were differing degrees of cross-examination on messages exchanged in Christmas cards. Mr Craig and Ms MacGregor performed differently as witnesses, in different trials, on what had been said between them on a flight from Napier in September 2014. But nothing turns on that either: Hinton J concluded it was difficult to assess what had happened; Toogood J found Mr Craig's account unconvincing.[18] It may be noted that in the present proceeding, Mr Craig did not cross-examine Ms MacGregor on the content of her recollection of this event. We do not discern a material difference in the evidence the two party employees gave in either proceeding which would justify a different finding as to the existence of sexual harassment. At the end of the day, the evidence and primary factual findings in the *Slater* and *MacGregor* proceedings are broadly the same. Hinton J's conclusion Mr Craig sexually harassed Ms MacGregor broadly adopts the same view of the same evidence as that adopted by Toogood J, and which this Court upheld on appeal.

[21] The circumstances do not however give rise to an issue estoppel. Mr Craig was a party to the *Slater* proceeding but Ms MacGregor was not. Issue estoppel only applies if Ms MacGregor can be said to be Mr Slater's privy.[19] Ms MacGregor does not share any significant connection, contractual or otherwise, with Mr Slater. The only relevant connection between them is that Ms MacGregor made her allegations of sexual harassment to a Mr Williams, who then passed them on to Mr Slater, who then republished them. And, of course, Ms MacGregor gave evidence in the *Slater* proceeding.

[22] In another part of the substantial body of authority on defamation Mr Craig has bequeathed the common law, *Craig v Stringer*, Mr Craig had brought an action against Mr Stringer for stating that Mr Craig had sexually harassed Ms MacGregor and Mr Stringer had brought his own action against Mr Craig for saying he lied about the sexual harassment.[20] The parallels with this case will be apparent, though the decision of this Court did not address the substance of the existence or not of sexual harassment. Relevantly, however, this Court held that Mr Stringer could not be

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18 High Court judgment, above n 3, at [68]; *Craig v Slater* (HC), above n 5, at [189].

19 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266. See also *McGougan v Depuy International Ltd* [2018] NZCA 91, [2018] 2 NZLR 916 at [74]–[77].

20 *Craig v Stringer* [2020] NZCA 260.

considered a privy of Mr Slater.[21] That Mr Stringer and Mr Slater would share a mutual interest in the sexual harassment allegation being proven true did not make one the privy of the other.

[23] It follows the fact that both Ms MacGregor and Mr Slater were sued by Mr Craig for making comments to the same effect does not mean they have such a community or mutuality of interest that Ms MacGregor can be regarded as Mr Slater's privy. She lacks the particular legal or relational interest to Mr Slater or the outcome of the *Slater* proceeding to be a privy. The substance of Ms MacGregor's involvement in the earlier litigation is relevant.[22] But simply acting as a witness does not of itself confer the benefits of protection from re-litigation of the same issue by reason of issue estoppel.

[24] However, the absence of an issue estoppel does not conclude the matter in Mr Craig's favour. This Court is now being asked to reach inconsistent findings of fact about whether Mr Craig sexually harassed Ms MacGregor based on two sets of evidence we have found materially consistent. It is not the habit of this Court to speak with a forked tongue. As we have recently restated, this Court follows its own decisions, save in four exceptional circumstances.[23] None of those exceptions apply here. Nor is the prior decision capable of being distinguished on the basis of divergent facts. Mr Craig and Ms MacGregor are both entitled to expect that this Court will reach the same conclusion on materially the same issue, on materially the same evidence. To put it another way, Mr Craig would need to point to substantially different evidence, on which the prior decision might be distinguished, to be entitled to a different conclusion. Unlike issue estoppel, stare decisis is untroubled by party identity.

[25] This Court has already held, in *Craig v Stringer*, that Mr Craig was entitled to bring these separate defamation actions, even though they arose from related publications.[24] Doing so was not, in the circumstances of these particular cases, an

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21 At [23].
22 *McGougan v Depuy International Ltd*, above n 19, at [92].
23 *Singh v Police* [2021] NZCA 91 at [13]–[17].
24 *Craig v Stringer*, above n 20, at [24]–[33].

abuse of process.[25] Mr Craig was entitled to bring his separate action against Ms MacGregor. He was also entitled, as of right, to appeal the judgment below, to the extent it was adverse to him. But on an issue already determined by this Court in an earlier appeal, albeit involving different parties, he is not entitled to a different result here unless he can distinguish that decision by pointing to materially different facts established in evidence at the later trial. That he could not do. That the earlier decision was made in an appeal he was party to, and he himself brought, merely reinforces the point. He cannot claim any procedural unfairness in the first decision being reached against his interests.

Issue two: Loss of qualified privilege

[26] The Judge set out what she regarded as the relevant principles of qualified privilege. This is the summary she gave:[26]

> Reply to an attack is a recognised category of qualified privilege arising when a person has been attacked. This qualified privilege allows the person subjected to the attack to respond to the attack to the same audience that received the attack, provided that the response is relevant to the attack, does not go too far, and is not motivated by ill will. Further, if the attack is justified because it is true, the privilege is unavailable.

[27] The Judge accepted Ms MacGregor's statements attacked Mr Craig and the occasion of his responses was privileged. But she held Mr Craig lost that privilege in relation to all four causes of action.[27] She found:[28]

> … I consider Mr Craig took improper advantage of the occasion. He did not refer to Ms MacGregor only to the extent reasonably necessary to respond to attack, even allowing for the leeway in this defence. Rather, he sought to exonerate himself by implicating and/or attacking her. He could have said: "We reached a prompt and amicable settlement of all issues between us. The terms and circumstances of that settlement have been grossly exaggerated by the media. Beyond that, I cannot say more because the terms of the settlement are confidential", or similar. He chose to go further and that is not protected.

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25 Compare to *Rippon v Chilcotin Pty Ltd* [2001] NSWCA 142, (2001) 53 NSWLR 198; and *Nanang International Sdn Bhd v The China Press Bhd* [1999] 2 MLJ 681 (Malaysian High Court), in both of which the Courts held the collateral action should have been combined in the initial action.

26 High Court judgment, above n 3, at [153].

27 At [214]–[215], [244], [254] and [263].

28 At [215].

[28] The Judge also found Mr Craig lost privilege because the attack he replied to (that he sexually harassed Ms MacGregor) was true.[29]

Submissions

[29] For Mr Craig, Mr Mills submits the Judge applied the wrong test for reply to attack privilege in two respects. First, the Judge erred in finding Mr Craig lost privilege for going further than was reasonably necessary. Reasonableness is not the test; his statements need only be relevant, affording a wide latitude, to rebutting the attack.[30] Secondly, the Judge was wrong to find the statement in the third cause of action could not attract privilege because the attack responded to was true. The truth of an attack is irrelevant to the existence of privilege.[31] The correct test is whether Mr Craig was motivated by ill-will in responding to the sexual harassment attack when he knew it was true. Mr Craig's honest belief in the falsity of the sexual harassment allegation was not put in issue by Ms MacGregor's s 41 notice under the Defamation Act 1992 and the Judge accepted Mr Craig did not lie in making his statements.

[30] For Ms MacGregor, Mr Wilson (who argued this part of the appeal) makes three submissions. First, qualified privilege is unavailable where the original attack is true. Only responses to (false) defamatory statements attract reply to attack privilege given the moral duty to respond to false aspersions. The Supreme Court in *Craig v Williams* did not find the truth of the attack irrelevant to the existence of privilege, only that knowledge of the truth of statements in response is relevant to whether privilege is lost. Secondly, the Judge was correct to find Mr Craig went beyond the scope of privilege. By stating Ms MacGregor was a liar and made false sexual harassment claims, he launched fresh attacks, not relevant to the attacks he faced, and overstepped his privilege. In doing so the Judge did not apply a "reasonableness" criterion. Thirdly, Mr Craig lost the occasion of privilege as he used it for an improper purpose. The misleading nature of Mr Craig's 22 June 2015 press conference (Ms MacGregor's first cause of action) elevated his statements from being a shield to protect himself to an excessive counter-attack on Ms MacGregor. Mr Craig knew Ms MacGregor's attacks were true as he was aware of the solid foundation of her

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29 In relation to Ms MacGregor's third cause of action: at [254].
30 Relying on *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457 at [45].
31 At [61].

sexual harassment claim, that he acted inappropriately and that he settled her sexual harassment claim. He also knew his statements in reply were false and misleading. Mr Craig's lack of honest belief in the truth of his reply was put in issue by Ms MacGregor's s 41 notice which informed him of the basis on which she would argue he could not honestly believe the truth of his statements.

Analysis

(1) The truth of the attack as a bar to the defence

[31] We start with the truth of the attack. It is the essence of qualified privilege that, as a defence to defamation, it protects erroneous communications defaming the plaintiff, in certain situations. If the reply to attack is itself accurate, the defence of truth applies to it.[32] But qualified privilege serves the inaccurate as well as the accurate, and its importance lies more with the former than the latter. The new defence of responsible public interest communication, a form of qualified privilege, reflects that reality, qualifying the privilege by reference to the exercise of responsibility, including care.[33] Reply to attack privilege is qualified in different ways from the new defence. But it is not lost per se by the reply being shown to be false, because the attack was true. This point was made clear by Lord Diplock in *Horrocks v Lowe* when he said:[34]

> What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue.

[32] However, as the Supreme Court made clear in *Craig v Williams*, what is essential (so that the reply is bona fide and not an improper use of a privileged occasion) is that the defendant believed his reply to be true when responding to an attack on his reputation.[35] The point was also made clear by the McKay Committee

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32 It is sometimes overlooked that falsity is not actually a prerequisite of a cause of action in defamation. It is a statement that tends to lower the plaintiff in the "estimation of right-thinking members of society generally": *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin. Rather, *truth* is a defence to the action.

33 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [66]–[67]; and *Craig v Slater* (CA), above n 1, at [97] and [107].

34 *Horrocks v Lowe* [1975] AC 135 (HL) at 149.

35 *Craig v Williams*, above n 30, at [23] and [124]–[127].

in 1977, its report being the progenitor of the current Defamation Act. The Committee identified the "essence of malice" (removing the protection) as being:[36]

> … that the defendant took improper advantage of the occasion which gave rise to the privilege by making statements which he did not believe to be true, or for the purpose of venting his spite or ill will towards the plaintiff, or for some other indirect or improper motive.

[33] The Judge therefore went too far in suggesting the defence was unavailable for a reply where the attack was true. The defendant may be wrong in the charge he or she makes in reply, but the relevant enquiry goes further than that; instead it examines whether he or she knew that was the case when the reply was published.

(2) Reasonableness, responsibility and relevance

[34] We do not consider the second sentence of [215] of the judgment — which we set out at [27] above — is objectionable. But some additional explanation is needed. As we noted above, "responsibility" is not an element of this defence. Nor is "reasonableness", as the Supreme Court majority made clear in *Craig v Williams*:[37]

> Whatever the conditions required to invoke qualified privilege for political comment, the qualified privilege available to a defendant who responds to what that defendant believes is an unjustified attack on their reputation is not lost through lack of care in the manner suggested in the summing up. As Lord Diplock observed in *Horrocks v Lowe*, "indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true". Similarly, in *Harbour Radio Pty Ltd v Trad*, Kiefel J rejected the notion that a test of reasonableness of response, in addition to relevance, was to be applied in determining whether the occasion was privileged.

[35] As that quotation makes clear, however, "relevance" remains a prerequisite for the defence. The purpose of reply to attack privilege was described by Dixon J in these terms in *Penton v Calwell*:[38]

> … to enable the defendant on his part freely to submit his answer, whether it be strictly defensive or be by way of counter-attack, to the public to whom the plaintiff has appealed or before whom the plaintiff has attacked the defendant. The privilege is given to him so that he may with impunity

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36 Committee on Defamation *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (December 1977) at [270].

37 *Craig v Williams*, above n 30, at [45] (footnotes omitted), citing *Horrocks v Lowe*, above n 34, at 150; and *Harbour Radio Pty Ltd v Trad* [2012] HCA 44, (2012) 247 CLR 31 at [108] and [112].

38 *Penton v Calwell* (1945) 70 CLR 219 (HCA) at 233–234.

> bring to the minds of those before whom the attack was made any bona fide answer or retort by way of vindication which appears fairly warranted by the occasion.
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> … The foundation of the privilege is the necessity of allowing the party attacked free scope to place his case before the body whose judgment the attacking party has sought to affect. …

In *Horrocks v Lowe*, in a passage approved by the Supreme Court in *Craig v Williams*, Lord Diplock observed:[39]

> The exception [to the rule that the plaintiff must prove mala fides] is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest upon which the privilege is founded. … As Lord Dunedin pointed out in Adam v Ward … the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference.

[36] The leading English text, *Gatley on Libel and Slander*, puts it in these terms:[40]

> … a person whose character or conduct has been attacked 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 fairly relevant to the accusations made.

That passage, up to the proviso, was quoted with approval by the Supreme Court in *Craig v Williams*.[41] We do not discern the omission of the second part of the quotation to represent disapproval of it. As Professor Cheer observes, the sole purpose of the defence is to:[42]

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39 *Horrocks v Lowe*, above n 34, at 151, citing *Adams v Ward* [1917] AC 309 at 326–327. See also *Craig v Williams*, above n 30, at [42].

40 Alistair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [14.51].

41 *Craig v Williams*, above n 30, at [21].

42 Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (8th ed, Lexis Nexis, Wellington, 2021) at 145 (footnote omitted), citing *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 470 per Lord Oaksey.

> … allow the defendant to justify himself or herself to the people who heard the charge against them. If the defendant goes beyond what is necessary for defence and "proceeds to offence", he or she exceeds his or her privilege.

[37] Want of bona fides, and an absence of fair relevance of the reply in responding to the attack, may be evidence of a predominant motivation of ill will, or of a taking of improper advantage. In either case, the effect of s 19 of the Defamation Act is that the privilege will be lost. The editors of *Gatley* suggest the test of relevance should not be applied in an overly strict and objective matter: a defendant must be given some leeway in complying with his or her duty or interest.[43] In our view, there is considerable merit in that analysis, but that less leeway may be expected where the reply defames a non-attacker. We turn to that now.

(3) Caught in the cross-fire: where a reply defames a non-attacker

[38] In most instances the defence arises where it is the attacker who is defamed by the reply. This case is different. As Mr Mills acknowledged, the attackers here were Messrs Williams, Stringer and Slater. Not Ms MacGregor. There is a slightly Delphic observation in the judgment that Ms MacGregor may have "armed" Mr Williams for the attack he made on Mr Craig.[44] But the Judge does not suggest that by confiding in her believed-friend, Mr Williams, Ms MacGregor intended him to use the material to attack Mr Craig. The evidence is quite contrary: after giving him the material she sought (through a lawyer) and obtained a confidentiality undertaking from Mr Williams.[45] Though she was the ultimate source of the attack, Ms MacGregor bears little, if any, responsibility for the public attacks by Messrs Williams, Slater and Stringer.[46]

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43 *Gatley on Libel and Slander*, above n 40, at [14.64]. See, for example, *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 (CA) at 170 per Lord Esher.

44 High Court judgment, above n 3, at [214]. The Judge qualifies this as being "at least to the extent of her comments about the suicide allegation and Mr Craig not paying her". We think it arguably apt also for the sexual harassment allegation.

45 At [84].

46 There is perhaps an analogy with the case law on whether a person who originates a defamatory statement may be liable for its repetition by others. The test is whether its repetition was foreseeable as the natural probable consequence of the original publication: see *Slipper v British Broadcasting Corp* [1991] 1 QB 283 (CA); and *McManus v Beckham* [2002] EWCA Civ 939, [2002] 1 WLR 2982.

[39] Some formulations of reply to attack privilege suggest it may be confined to claims brought by the attacker. For instance, the formula approved by the Supreme Court minority in *Craig v Williams* is drawn from *Duncan and Neill on Defamation*:[47]

> A defamatory attack made publicly gives its victim a right to reply publicly. In doing so, the victim is entitled to make statements defamatory of his attacker, including statements impugning the attacker's credibility and motives. Provided that such statements are fairly relevant to a rebuttal of the attack and that the ambit of their dissemination does not significantly exceed that of the original attack, their publication will be the subject of qualified privilege.

Authorities have drawn an analogy between reply to attack privilege and self-defence in criminal law.[48] It might thus be thought that the legitimate interest of the person (defendant) responding to the attack would be limited to a counter-attack on the attacker. And that the privilege would not extend to defamation of a third party who has not perpetrated the attack. However, the limited case law on this question does not appear to take that position.[49]

[40] In the context of this case, and without qualification (as Mr Craig contends), that would leave the law in a deeply unattractive state. We have an employer in the public eye who sexually harasses his employee. Lacking insight, he believes his actions were not sexual harassment. Objectively assessed, they were. The employee confides in a believed-friend. That person breaches the confidence (and his own express undertaking) and uses the information for his own political purposes, to attack the employer. The employer then counter-attacks. In doing so he brands the employee a liar and a maker of false accusations. In fact, she is neither — but the employer enjoys privilege and thus is not liable for defaming her. That seems profoundly wrong.

[41] As noted at [37] above, a want of bona fides or absence of fair relevance of the reply in responding to the attack may be evidence of a predominant motivation of

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47 Brian Neill and others *Duncan and Neill on Defamation* (4th ed, LexisNexis, London, 2015) at [17.25] (footnotes omitted). See *Craig v Williams*, above n 30, at [116].

48 *Turner v Metro-Goldwyn-Mayer Pictures Ltd*, above n 42, at 470–471; and *Norton v Hoare (No 1)* (1913) 17 CLR 310 (HCA) at 318 and 322.

49 *Watts v Times Newspapers Ltd* [1997] QB 650 (CA) at 671; *Alexander v Clegg* [2004] 3 NZLR 586 (CA); *Oei v Ban* [2005] SGCA 35, [2005] 3 SLR 608 at [36]; and *Sefton v Baskin* [1918] NZLR 157 (SC) at 161.

ill will or of a taking of improper advantage — thereby defeating the defence. We also noted the suggestion in *Gatley* that the test of relevance should not be applied in an overly strict and objective matter, and that a defendant must be given some leeway in complying with his or her duty or interest. In our view, however, less leeway exists where the reply defames a non-attacker. Here, as the Singaporean Court of Appeal said in *Oei v Ban*, it must genuinely be necessary to bring in the third party's name in explanation.[50] That is consistent with this Court's approach in *Alexander v Clegg*, where reference to the third party was necessary given his close relationship with the attacker and the attacks he made.[51] Where a defendant goes further than necessary in (as it were) counter-attacking a non-attacker, that act tends to suggest an improper purpose inconsistent with an occasion of privilege. In that case, he or she needs to look instead to the defences of truth or honest opinion.[52] The defendant should not be entitled to skirt the more demanding thresholds for these defences by slipping instead through the back door of privilege, simply because they were the subject of attack by another person altogether.

[42] In this case we think the Judge was right to say Mr Craig "went too far", although that conclusion needs grounding in both legal principle (as above) and fact (which now follows). The relevant facts are four-fold.

[43] First, Ms MacGregor was not the attacker. Moreover, there is no suggestion Ms MacGregor acted in concert with Mr Craig's defamers so that her position can be said to be synonymous with that of Messrs Williams, Slater and Stringer for the purposes of Mr Craig's reply. Her position was, therefore, entirely distinguishable from that of the third party claimant in *Alexander v Clegg*.[53]

[44] Secondly, Mr Craig was capable of replying to the attacks by Messrs Williams, Slater and Stringer without also defaming Ms MacGregor. The Judge demonstrated how in the passage of her judgment set out at [27] above. It may be that Mr Craig

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50 *Oei v Ban*, above n 49, at [36]. See also *Gatley on Libel and Slander*, above n 47, at [14.65]. In our view the example given in *Oie v Ban* at [36] needs to be read subject to the constraint of genuine necessity; it is not an open invitation to engage in blame-shifting under the guise of reply to attack privilege.

51 *Alexander v Clegg*, above n 49, at [62].

52 See Defamation Act 1992, ss 8–12.

53 *Alexander v Clegg*, above n 49.

could have gone further if had chosen to express his reply as an opinion and engaged the alternative defence of honest opinion (truth being unavailable). But he did not do so. We consider Mr Craig went significantly further than genuinely necessary in his response to the attacks of Messrs Williams, Slater and Stringer.

[45] Thirdly, Mr Craig deliberately targeted Ms MacGregor in his replies, instead of targeting those who in fact had attacked him. Mr Craig knew exactly what he was doing here. Ms MacGregor was not so much caught in the cross-fire, as caught in the cross-hairs, of Mr Craig's counter-attack to Messrs Williams et al. The counter-attack targeted her deliberately. On 18 June 2015, he sent an email to his lawyer (which he later disclosed) stating his plan was to:

> … issue a statement advising of her performance failures, mental instability and pointing out the big flaws in her claim. The angle is "blackmail attempt fails" – once you work it through it is a good angle. It will be a media storm of course and we both end up bloodied. In reality though I have nothing left to lose if her claim is printed already …

Mr Craig made no effort to confine his collateral attack on Ms MacGregor to the extent genuinely necessary to reply to Messrs Williams, Slater and Stringer. Rather, he treated her as a member of the attacking group, and set about attempting to harm her reputation in a misguided attempt to restore his own.

[46] Fourthly, the gravamen of his defamation of Ms MacGregor was false, and he must have known there was a good prospect that, on examination, his conduct would be found to be sexual harassment.[54] He had faced and settled a claim of sexual harassment in the Human Rights Commission mediation process. The settlement recorded both parties acknowledging that "on occasions some of their conduct was inappropriate" (for which he apologised, though Ms MacGregor did not).[55] These important details were omitted from the sanitised account he offered in his reply. Further, he acknowledged in evidence before the Judge that some of his communications "went too far", were "too intimate" and had "sexual connotations".

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54 As we noted earlier at [31] above, n 32, falsity is not a prerequisite of a cause of action in defamation.

55 High Court judgment, above n 3, at [99].

[47] We conclude that for these four reasons, Mr Craig took improper advantage of the occasion of privilege. The publications went beyond a permissible, protected reply to the attacks made by Messrs Williams, Slater and Stringer. We are satisfied the s 41 notice served by Ms MacGregor, focusing on the third and fourth points just made, adequately notified Mr Craig of the particulars of ill-will to be advanced to defeat the defence. We hold the defence of reply to attack privilege is unavailable to Mr Craig insofar as he defamed Ms MacGregor in his reply in the respects found by the Judge. We so hold in relation to each of the particulars of publication listed at [10] above. As we have already noted, the gravamen of the publications was that she had made false claims of sexual harassment and was a liar; the further meanings pleaded were simply variations on that fundamental theme.[56]

Result

[48] The appeal is dismissed.

[49] The appellant must pay the respondent costs for a standard appeal on a band A basis, with usual disbursements.

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[56] At [11] above.