

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2021-004-1422
[2023] NZHC 332**

BETWEEN GURWINDER SINGH BAINS
 Plaintiff

AND HARNEK SINGH
 Defendant

Hearing: 17 October 2022

Counsel: P A McKnight and A J Romanos for plaintiff
 R K P Stewart for defendant

Judgment: 28 February 2023

**JUDGMENT OF ASSOCIATE JUDGE TAYLOR
[Application for strike out of defences]**

*This judgment was delivered by me on 28 February 2023 at 3pm
pursuant to Rule 11.5 of the High Court Rules*

.....
Registrar/Deputy Registrar

Solicitors:
Langford Law, Wellington for plaintiff
Rice Craig, Papakura for defendant

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Introduction

[1] Mr Gurwinder (Gopa) Bains has brought defamation proceedings against Mr Harnek Singh.

[2] This judgment determines an interlocutory application brought by Mr Bains for orders striking out Mr Singh’s affirmative defences of honest opinion and qualified privilege.

Background

[3] Mr Bains is originally from Punjab, India. He emigrated to New Zealand in 2002 and since 2005 has participated in the activities of New Zealand Sikh organisations, including the Supreme Sikh Society of New Zealand (SSSNZ). However, he provides affidavits which make clear he is neither a current nor former member of the SSSNZ.

[4] Mr Singh works at a structural engineering company. He also runs a radio show on Radio Virsa that is prominent in the Sikh community. His personal Facebook page has approximately 5,000 friends and 10,000 followers.

[5] Mr Singh made posts on his personal Facebook page concerning Mr Bains. The parties disagree as to the English interpretation of the posts' Punjabi text.

[6] Four posts are presently at issue.

[7] The first post (**publication one**) is a republication of a Facebook post made by Judge Saab. Mr Saab's post refers to Mr Bains having been punched in the eye for saying he wanted to rape Mr Saab's partner (the **rape post**). Mr Singh's further commentary to the post, according to Mr Bains' interpretation, suggests Mr Bains has done an indecency and that he is corrupt.

[8] The second post (**publication two**) appears to be a poem, to which a photograph of Mr Bains is appended. Mr Bains' interpretation of the post is that it suggests Mr Bains is corrupt, that he has bought his good reputation, and that he is depraved and has miscondacted himself sexually.

[9] The third post (**publication three**), according to Mr Bains' interpretation, again suggests Mr Bains is corrupt and that he has miscondacted himself sexually.

[10] The fourth post (**publication four**), according to Mr Bains' interpretation, is to a similar effect as publications two and three.

[11] Mr Singh admits publishing the posts, and that the posts concerned Mr Bains. But he has raised three affirmative defences: truth, honest opinion and qualified privilege.

[12] Mr Bains applies for orders striking out the second and third of these affirmative defences.

Interlocutory application

[13] Mr Bains applies for orders that:¹

- 1.1 the defendant's second and/or alternative defence of honest opinion, as set out in paragraphs 37–43 of the statement of defence dated 8 March 2022, be struck out;
- 1.2 the defendant's third and/or alternative defence of qualified privilege, as set out in paragraph 44 of the statement of defence, be struck out; and
- 1.3 costs.

[14] The grounds on which the orders are sought are:²

- 2.1 In relation to the order sought in paragraph 1.1 above, the defence of honest opinion is not reasonably arguable because:
 - (a) the pleaded meanings on which the defence is based were not capable of being understood as expressions of opinion; and
 - (b) even if one or more of the pleaded meanings were capable of being understood as expressions of opinion (which is denied), then the alleged facts in paragraph 41 of the statement of defence are not, whether singularly or collectively, sufficiently pertinent to any such pleaded meaning.
- 2.2 In relation to the order sought in paragraph 1.2 above, the defence of qualified privilege is not reasonably arguable because:
 - (a) the defendant could not have any social or moral interest or duty to publish each of the publications, and the recipients could not have any corresponding interest or duty to receive these publications;
 - (b) the facts in paragraphs 44.1 to 44.5 have no bearing on whether each occasion of publication were privileged;
 - (c) even if the fact relied on in 44.5 did have a bearing on whether the occasion of publication was privileged, that fact is incontrovertibly false;
 - (d) the publications did not concern matters of legitimate public interest;
 - (e) the wide and indiscriminate dissemination of the publications was not warranted by any reasonable exigency or occasion.

¹ Notice of interlocutory application by plaintiff to strike out the defences of honest opinion and qualified privilege pursuant to HCR 15.1 dated 14 April 2022 at [1].

² At [2].

Affidavit of Gurwinder Bains dated 21 March 2022

[15] Mr Bains has made an affidavit in support of his interlocutory application. He deposes, in response to Mr Singh's statement of defence, that he is not, and has never been, a member of the SSSNZ.³

Affidavit of Satnam Sangha dated 5 April 2022

[16] Satnam Sangha, Secretary General for the SSSNZ, has made an affidavit in support of Mr Bains' interlocutory application. He deposes that Mr Bains is neither a current, nor former, member of SSSNZ.⁴

Opposition

[17] Mr Singh opposes Mr Bains' application on the following grounds:⁵

- a. The affirmative defence of honest opinion is reasonably arguable because:
 - i. The words published by the Defendant were capable of being understood as being expressions of opinion; and
 - ii. The publication facts pleaded by the Defendant at paragraph 41 of his statement of defence are capable of providing the necessary foundation for the opinions being expressed.
- b. The affirmative defence of qualified privilege is reasonably arguable because:
 - i. The Defendant believed he had a social or moral duty or interest to publish each publication to his followers and his followers had a corresponding duty or interest to receive those publications;
 - ii. The particulars pleaded by the Defendant at paragraph 44 of his statement of defence have a direct bearing on the Defendant's belief as to the duty or interest concerned;
 - iii. Whether the publications concerned matters of legitimate public interest is irrelevant to the issue of whether the requisite duty or interest existed; and
 - iv. The extent of publication was not excessive given the circumstances in which the requisite duty or interest arose.

³ Affidavit of Gurwinder Singh Bains dated 21 March 2022 at [1]–[3].

⁴ Affidavit of Satnam Singh Sangha dated 5 April 2022 at [1]–[2].

⁵ Defendant's notice of opposition to interlocutory application by plaintiff to strike out defences of honest opinion and qualified privilege dated 6 May 2022 at [3].

Affidavit of Harnek Singh dated 6 May 2022

[18] Mr Singh has made an affidavit in support of his opposition. He deposes that he is the founding member of Gurduwara Sri Guru Singh Sabha (**GSGSS**), a New Zealand group that promotes Sikh ideology. He says he publicises his views on Sikh ideology on his radio show on Radio Virsa, and through his Facebook page. He says that from 2013 he has promoted moderate ideology of Sikhism for young, New Zealand born Sikhs so that they can merge and fit into New Zealand's multicultural society.⁶

[19] Mr Singh says that from 2014 onward he began receiving threats and online abuse from Damdami Taksal, a sect in Sikhism that Mr Singh describes as being very aggressive and violent. He says SSSNZ is run and supported by followers of Damdami Taksal. He deposes that in 2015, around 250 people from Damdami Taksal and another sect came to GSGSS's temple with the intention of threatening GSGSS and taking over the temple if GSGSS did not accept their values and beliefs. He says Mr Bains was a part of that group and was actively involved.⁷

[20] Mr Singh says Damdami Taksal continued to threaten him over the following years. He deposes that in 2019, during a live television broadcast, senior members of Damdami Taksal threatened him with physical violence and called on their followers to harm him. The threats culminated in an attack on 23 December 2020, in which Mr Singh was seriously injured and was in a coma for several days. He says a total of eight people have been arrested and charged with his attempted murder. Mr Singh says all of this is relevant background to the context in which his impugned publications were made.⁸

[21] Mr Singh explains that he felt it was appropriate for him to publish the various statements because he genuinely believes Mr Bains is corrupt. He says further that he is not the author of the words in publications three and four — he simply republished

⁶ Affidavit of defendant in support of notice of opposition to interlocutory application by plaintiff to strike out defences of honest opinion and qualified privilege dated 6 May 2022 at [1]–[4].

⁷ At [5]–[6].

⁸ At [7]–[12].

the words of others. He says he had no reason to believe those authors were expressing anything other than their genuinely held feelings and opinions.⁹

[22] Responding to Mr Bains and Mr Sangha's affidavits, Mr Singh states that while Mr Bains may not be a financial member of SSSNZ, he is undoubtedly a supporter of the society, its leadership and ideology. He says further that he posts his views and opinions on Facebook and on his radio show because he believes them and because he believes the Sikh community is suppressed by those promoting orthodox values. He says he considers it important that he informs all members of the Sikh community of the character of those who are held up as worthy supporters, leaders or representatives of sects, like SSSNZ, that support orthodox values.¹⁰

[23] Mr Singh says that he was not motivated by malice or ill will in publishing the impugned posts. He says his only motivation was to make followers of the Sikh religion aware of the character of those who are held up as model citizens or leaders of the Sikh community. He says he did not reach out to Mr Bains to get his response to the posts, because he had formed the view that Mr Bains would not tell him the truth. He also says that he was concerned that, had he done so, his physical safety would be put at risk. Given that he is still recovering from the attack in December 2020, he says he was not prepared to take that risk.¹¹

Reply affidavit of Gurwinder Bains dated 30 May 2022

[24] Mr Bains has made a lengthy affidavit in reply to Mr Singh's affidavit. The principal substantive points in reply are that Mr Singh's background explanations are irrelevant to the questions of law at issue in the present applications; that Mr Bains is not corrupt and that his acts of philanthropy conform to his adherence to the Sikh principle of dasvandh; that Mr Bains has never threatened to rape anybody; that Mr Bains is not a member of SSSNZ or Damdami Taksal; and that Mr Singh's view, being that Mr Bains would not tell him the truth had Mr Singh sought Mr Bains' response before publication, is groundless and baseless. Mr Bains says, therefore, that

⁹ At [13]–[21].

¹⁰ At [23]–[25].

¹¹ At [26]–[27].

Mr Singh's affidavit is a pointless exercise of allegations and claims that have no bearing on Mr Bains' application on questions of law.¹²

Mr Bains' submissions

[25] Mr McKnight, for Mr Bains, submits that the meanings in the impugned publications are incapable of being understood as expressions of opinion. They could only be understood as direct statements of alleged facts. Further, given the wide and indiscriminate nature of Mr Singh's posts, Mr Singh could have had no duty, and the recipients no interest, in their publication. Mr McKnight submits that Mr Singh's defence is predicated on a misconception that his subjective beliefs are relevant to the objective issue whether an occasion of publication is privileged. And he says the particulars raised in support of the defence are incongruent with any nominal duty or interest between Mr Singh and the recipients.¹³

[26] Mr McKnight first addresses the defence of honest opinion. He says that only statements that are obviously and clearly expressed as opinions are protected. He submits further that there must be some indication of a basis for the opinion that allows readers to assess the validity of the opinion for themselves. From the words used, Mr Singh's publications were incapable of being recognised as opinions. They were instead bare comments, with the result that the defence of honest opinion is unavailable.¹⁴

[27] Mr McKnight submits that Mr Singh's statements cannot, as a matter of principle, attract qualified privilege. They do not come within the rubric of a "responsible public interest communication". The publications did not relate to matters of genuine public concern — Mr Singh's subjective beliefs in this respect is irrelevant. So, Mr McKnight submits, whether in view of the incongruence of Mr Singh's particulars to any legally recognisable duty or interest, the basing of his defence on his subjective beliefs, or the posts' wide and indiscriminate publication, the defence of qualified privilege is not reasonably arguable. It should be struck out.¹⁵

¹² Reply affidavit of Gurwinder Singh Bains dated 30 May 2022 at [1]–[60].

¹³ Plaintiff's synopsis of submissions on interlocutory application dated 14 April 2022 (dated 19 July 2022) at [6]–[7].

¹⁴ At [10]–[31].

¹⁵ At [32]–[43].

Mr Singh's submissions

[28] Mr Stewart, for Mr Singh, submits that this interlocutory application will only determine whether Mr Singh is able to raise more than one affirmative defence at trial. He submits that the defences of honest opinion and qualified privilege are reasonably arguable and Mr Singh should go to trial. He says the only delay that has been caused to date was brought on by Mr Bains' present application, which has postponed the first case management review.¹⁶

[29] As to honest opinion, Mr Stewart says the words used in the impugned publications were capable of amounting to expressions of opinion. Where reasonable people may differ as to whether the words are a statement of fact or an expression of opinion, the issue should be left to the trial judge or jury. He submits further that, as to the requirement that the facts underlying the opinion be set out, it is enough for the author to give a sufficient indication of the facts.¹⁷

[30] Mr Stewart says there is an issue in that Mr Bains' translation of the publications from Punjabi text into English is disputed. He says the Court must resolve the issue before it can determine whether the words used were capable of conveying opinion, and that this issue will need to be determined at trial with the benefit of expert evidence. He says that the words used in all four publications, properly translated, are capable of conveying expressions of opinion — or at least reasonable people may differ as to whether the words are statements of fact or expressions of opinion. The issue must be put to the trial judge or jury.¹⁸

[31] On qualified privilege, Mr Stewart says the traditional form of qualified privilege, which involves considerations of duty and interest, does not require the publication to be a matter of public interest — it requires only the existence of a duty and a corresponding interest. He submits that Mr Singh's publications were arguably an occasion that attracted common law qualified privilege on the basis of duty and interest. And he submits the publication was not excessive and did not go beyond the

¹⁶ Defendant's synopsis of submissions on plaintiff's interlocutory application dated 14 April 2022 (dated 27 July 2022) at [1]–[5].

¹⁷ At [6]–[16].

¹⁸ At [17]–[40].

exigency of the occasion. The qualified privilege defence being reasonably arguable, it should not be struck out.¹⁹

Legal principles

[32] Rule 15.1 of the High Court Rules 2016 provides, relevantly:

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading[.]

[33] There are established criteria for strike out:²⁰

- (a) A strike out application proceeds on the assumption the pleaded facts are true, unless those pleaded facts are entirely speculative or without foundation.
- (b) The cause of action or defence must be clearly untenable.
- (c) The jurisdiction is to be exercised sparingly and only in clear cases.
- (d) The jurisdiction is not excluded by the need to decide difficult questions of law.
- (e) The Court should be slow to strike out a claim in any developing area of the law.

Analysis

[34] The questions to be determined in this judgment are:

¹⁹ At [41]–[63].

²⁰ *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

- (a) In relation to the defence of honest opinion, whether meanings of the publications were incapable of being understood as expressions of opinion?
- (b) In relation to the defence of qualified privilege, whether Mr Singh had a legally recognisable duty to publish the publications and whether the recipients had a legally recognisable interest in such publication?

[35] I deal with each of these questions in turn.

In relation to the defence of honest opinion, whether the meanings of the publications were incapable of being understood as expressions of opinion?

[36] Mr Romanos, for Mr Bains, submits that the meanings of the publications were incapable of being understood as expressions of opinion. He submits they could only be understood as direct statements, or repetitions of alleged facts. He further submits that it is not reasonably arguable the meanings were understood to have been expressed upon the alleged publications' facts; such particulars were not sufficiently indicated in the publications.

[37] Mr Romanos submits there are two legal issue at play. He submits firstly there is what the learned authors of *Gatley on Libel and Slander* refer to as “recognisability as opinion”.²¹ He submits that the leading New Zealand authorities hold that the presentation is crucial as to whether or not the statement is an expression of opinion,²² and that “only” statements which are “obviously” and “clearly expressed as opinion” may be protected.²³

[38] As to the second issue, Mr Romanos submits that the publication of facts requirement is to enable readers to “assess the validity of the opinion for themselves against the relevant facts truly stated”.²⁴ And as a matter of law, even if the words appear to indicate an opinion, if the author fails to indicate sufficiently to readers on

²¹ Richard Parkes and Godwin Busutill (eds) *Gatley on Libel and Slander* (13th ed, Sweet & Maxwell, London, 2022) at [13-006]–[13-012].

²² *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [18].

²³ *Craig v Slater* [2020] NZCA 305 at [94] citing *Mitchell v Sprott*, above n 22, at [17].

²⁴ *Durie v Gardiner* [2017] NZHC 377, [2017] 3 NZLR 72 at [116].

what facts the words are based, then they are treated as bare comment, i.e. a statement of fact.

[39] Mr Romanos then analyses each of the four publications against these two legal issues discussed above.

Publication one

[40] Mr Romanos submits that the relevant meaning is “the plaintiff is corrupt in that he obtained the award fraudulently” and the publication consists of an announcement to “the people of Te Puke” — a question whether Mr Gopa Bains referred to in the rape post is the same Gopa Bains who received the award, and he submits that the publication then makes a series of blanket assertions. Mr Romanos submits that the suggestion that Mr Bains was a corrupt person in the way that Mr Singh presented it, is incapable of striking a reasonable reader as an opinion.

[41] Mr Romanos then submits that if the Court disagrees with that analysis, then there are insufficient facts pleaded to provide “an indication of basis”. He submits the four publication facts relied on by Mr Singh are:

- (a) Mr Bains made donations to charitable causes;
- (b) Mr Bains received the award at a ceremony on 21 March 2021;
- (c) in August 2021, Mr Bains expressed a desire to rape the partner of Facebook user Judge Saab;
- (d) Mr Bains lied to the police in relation to the cause of the injury he sustained.

[42] In analysing these facts, Mr Romanos submits that:

- (a) in relation to the first fact, there is no indication in the publication by which readers could have comprehended that Mr Bains’ “donations to charitable causes” were the basis for the defamatory meaning. He

submits from the March 2021 publicity given to Mr Bains on receipt of the award for his “outstanding contribution in the field to humanity, welfare and sports”, it may be that Mr Bains has a reputation for civic service and philanthropy, but it was fanciful to suggest that the ordinary reasonable reader could have implicitly comprehended Mr Singh’s bald claims of corruption on this basis;

- (b) in relation to the second fact, Mr Romanos submits that Mr Singh’s mere receipt of the award cannot support an opinion that it was fraudulently obtained;
- (c) in relation to the third and fourth facts, Mr Romanos submits that it is illogical that Mr Singh’s alleged conduct in August 2021 after receiving the award could be understood as a basis for saying that he obtained the award fraudulently back in March 2021.

[43] In summary, Mr Romanos submits that to the extent the meaning was understood as an opinion, Mr Singh’s absence of any pertinent factual basis rendered it a bare comment and therefore a statement of fact.

[44] Mr Stewart, for Mr Singh, as a preliminary issue, submits that Mr Bains translation of the publications from the Punjabi text into English is disputed. He submits the Court must resolve this issue before it can determine whether the words used by Mr Singh were capable of conveying opinion. Mr Stewart submits it is for this reason alone that Mr Bains’ application should fail as the translation issue is one that can only be determined at trial after hearing expert evidence.

[45] Mr Stewart submits that the words used in all four publications as translated in the statement of defence are capable of conveying expressions of opinion or, at the very least, reasonable people may differ as to whether the words are statements of fact or expressions of opinion, and therefore the issue must be left to a trial.

[46] Mr Stewart submits the comment asks a series of rhetorical questions: *who is this “Gopa Bains”?* *What has he done to himself?* Mr Stewart submits this imports

a qualitative aspect into the commentary, namely whether or not the SSSNZ was morally and/or socially right in giving Mr Bains the award against the background of the conduct complained of — that Mr Bains lied to the police that he was hit in the face with a kiwifruit cutter, but in reality was punched near his eye for saying he wanted to rape another man’s partner.

[47] Mr Stewart submits that Mr Bains alleges that Mr Singh says that Mr Bains is “corrupt” or a “thief” and he submits this is incorrect. The actual words used are less equivocal and much more inclined to be interpreted by a reasonable reader as matters of opinion. Mr Stewart submits that at the core of the comment Mr Singh is reflecting on a potentially poor choice of character in granting the award in that same year and poor choice of character is not the kind of statement that is an imputed fact, but is the kind of statement that is capable of expressing a view or an opinion to a reasonable reader.

[48] In relation to the issue of indication of basis of the published facts, Mr Stewart relies on:

- (a) The statements contained in the rape post;
- (b) Reference to Mr Bains being the Takanini management committee’s gold medallist who was “honoured” with a golden brick;
- (c) Photographs of Mr Bains, including two photographs showing him with the golden brick; and
- (d) Generally known facts that:
 - (i) Mr Bains made donations to charitable causes; and
 - (ii) Mr Bains received the award at the ceremony on 21 March 2021.

[49] Mr Stewart submits that publication one asks the reader to reflect on Mr Bains’ conduct, being inconsistent with his high station as the recipient of such an award.

He submits any reasonable reader would naturally think the commentary is an opinion and the reasonable inference from the words used in this context is that Mr Singh is questioning who is the real Gopa Bains — the one who was honoured by the SSSNZ, or the one who threatened to rape another man's partner. He submits the reader is effectively invited by the questions to reflect upon the inconsistency of the conduct, and that is certainly the conclusion/observation conveyed by the publication.

Conclusion on publication one

[50] Mr Romanos has argued that the differences in translation of the publication from Punjabi to English between Mr Bains and Mr Singh are small. However, given the importance of the language used as to whether or not the publication is capable of being read as an expression of opinion, the dispute over translation weighs in favour of the strike-out application being denied and the dispute being dealt with at trial following the hearing of expert evidence.

[51] As to publication one, my view is that the publication is capable of being read as an expression of opinion. As to the issue of bare comment and the publication of facts giving an indication of basis, in my view it is arguable that there is sufficient indication of facts by Mr Singh to cause the reader to infer that the opinion is that Mr Bains is not what he seems.

[52] Accordingly, in my view Mr Singh's affirmative defence of honest opinion should not be struck out in relation to publication one.

Publication two

[53] Mr Romanos submits that the honest opinion defence is raised by Mr Singh in relation to both pleaded meanings:

- (a) the plaintiff is corrupt in that he has bought, rather than earned, his good reputation; and
- (b) the plaintiff is depraved in that he has misconducted himself sexually.

[54] Mr Romanos submits that from the republication of the poem, authored by Pritam Gurdev, the meanings arise from the first two stanzas of the poem and Mr Singh's explicit connection of Mr Bains' image with the poem.

[55] Mr Romanos submits that because of the opening words of the first stanza "I hear", the readers are presented with Pritam Gurdev's recounting of facts he has "heard from others": "*I hear virtue has been sold – bought by the depraved – reputations are bought and sold with money – by the Sardars*". Mr Romanos submits the first stanza consists of Mr Singh's republication of allegations Pritam Gurdev claims to have been told by others. By Mr Singh's depiction of Mr Bains' image in connection with the poem, these allegations inculcate Mr Bains, and relayed allegations cannot be an opinion.

[56] Mr Romanos submits that the second stanza consists of bald assertions which inculcate Mr Bains by depiction of his image.

[57] As to an indication of basis, Mr Romanos submits the alleged publication of facts has the same difficulty in relation to publication one in that they are bare comments devoid of any pertinent publication facts.

[58] Mr Stewart, on the other hand, submits that publication two was after publication one and therefore must be viewed in the context of that earlier publication. He submits that each stanza of the poem (and the poem in its entirety, as translated by Mr Singh) is capable of conveying an opinion, namely a criticism of Mr Bains for effectively "buying" his reputation by repetition of the words "honours are bought and sold with money" and the use of the word "depraved" is clearly a reference to the rape post.

[59] As to the reliance by Mr Bains on "I heard" leading stanzas one, three and five, Mr Stewart submits that a literal interpretation of these as repeated facts is not borne out by a full examination of the stanzas, which make it clear that, naturally read, they are not representations of fact but expressions of opinion on matters of virtue.

[60] Mr Stewart submits that considering the whole of the publication, the poetic discourse is clearly arguable as opinion. He submits they are not the kind of features of language one would expect to see from a statement of fact, and the words are reasonably read in context as an expression of opinion.

Conclusion on publication two

[61] In my view, publication two is capable of being read as a statement of opinion, particularly given its poetic context. Similar to publication one, given the background facts of the award and the rape post, which arguably would be known to the readers, in my view it is arguable that the publication is capable of being viewed as inviting readers to view the statements of opinion against the known background facts.

[62] Accordingly, in my view, Mr Singh's affirmative defence of honest opinion should not be struck out in relation to publication two.

Publications three and four

[63] Mr Romanos submits that the pleaded meanings are:

- (a) "The plaintiff is corrupt in that he bought, rather than earned, the award";
- (b) "The plaintiff thought that after receiving the award he could misconduct himself sexually with impunity/with no consequences".

[64] Mr Romanos submits that the words giving rise to these meanings are incapable of being understood as anything other than allegations of fact. In relation to publication three, he submits that Mr Bains is claimed, in the words attributed to Azaad NZ, to have spent some money, bought an award and then considered he could cross any sexually indecent limits he liked. In relation to publication four, Mr Romanos submits that Mr Singh claims that Mr Bains bought the award and then thought "who cares, I can do whatever I want".

[65] As to indication of basis, Mr Romanos submits there is a gulf between the words used and any pertinent publication of facts. He says that from Azaad NZ's reference in publication three to Mr Bains having "spent some money" and having "bought an award", no reasonable reader could somehow jump from those words to a reference to Mr Bains' philanthropy. Mr Romanos submits that publication four is merely a bald assertion that Mr Bains bought the award and therefore thought he could do what he liked, and the dissonance between the words used and the publication facts relied on is so wide it cannot reasonably be sustained.

[66] Mr Stewart, on the other hand, submits that there is no doubt that these publications are expressions of opinion. He submits that the words in publication three, in context, are capable of conveying the opinion that by making the donations and receiving the award as a result, Mr Bains had effectively bought a reputation (is corrupt) and that allows him to do anything, but instead he ended up with "blue eyes" (a reference to being hit in the face as detailed in the rape post).

[67] As to publication four, Mr Stewart submits the words as published are also capable of conveying the opinion that by making the donations and receiving the award as a result, Mr Bains had effectively, and corruptly, bought a reputation that would allow him to do anything. He submits that the reference to "thinking he can do anything" is clearly a reference to the earlier rape post and to the facts it contains.

Conclusions on publications three and four

[68] In my view, publications three and four are capable of being expressions of opinion and this matter should be left to trial to be decided. Similar to publications one and two, it is arguable that reference to background facts is a sufficient indication of basis to consider the expressions of opinion in the light of those facts.

[69] Accordingly, I consider that Mr Singh's affirmative defence of honest opinion should not be struck out in relation to publications three and four.

In relation to the defence of qualified privilege, whether Mr Singh had a legally recognisable duty to publish the publications, and whether the recipients had a legally recognisable interest in such publication?

[70] Mr Romanos submits that Mr Singh’s proposition that the publications were protected by qualified privilege faces an incongruent legal framework. He summarises Mr Bains’ view of the legal position as follows:

- (a) The Court of Appeal’s first *Lange* decision (***Lange No 1***) recognised a limited extension for generally published statements that directly concerned the functioning of representative and responsible government.²⁵
- (b) The Court of Appeal’s second *Lange* decision (***Lange No 2***) upheld its earlier decision.²⁶ Mr Romanos submits that the Court amplified its earlier conclusions, including making it clear that it was “essential” that “only those matters which are properly of public concern ... are protected” and reinforcing that inquiring into the circumstances of publication included: the publisher’s identity, the context in which the publication arose, the likely audience and the actual content.²⁷
- (c) The Court of Appeal in 2018 in *Durie v Gardiner* surveying the *Lange* developments and recalibrated the law governing generally published statements.²⁸ They found in lieu of further expansions of common-law qualified privilege, society’s interests were best served by recognising a new defence of “responsible public interest communication” (**RPIC**).²⁹ Mr Romanos submits that the Court held that the form of qualified privilege recognised in *Lange* should no longer be available in its own right, but would be subsumed into the new RPIC defence.³⁰

²⁵ *Lange v Atkinson* [1998] 3 NZLR 424 (CA) [*Lange No 1*] at 467–468.

²⁶ *Lange v Atkinson* [2000] 3 NZLR 385 (CA) [*Lange No 2*] at [38].

²⁷ At [12]–[13].

²⁸ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.

²⁹ At [53]–[68].

³⁰ At [86].

[71] Mr Romanos submits that in view of the *Durie* decision, expanded protection for generally published statements must now be looked at through the lens of RPIC, rather than qualified privilege. He submits further that even if *Lange* remained the incumbent authority, an extension of the type Mr Singh proposes would be radical and contrary to the decisions of *Cabral* and *Lupton*, the last significant decisions before *Durie*, where the Court rejected qualified privilege for the generally published statements at issue.³¹

[72] Mr Romanos submits that Mr Singh’s claim for qualified privilege fails because:

- (a) An authors’ easily recognisable duty can only arise if “the mass of right-minded men in the position of the defendant would have considered it their duty under the circumstances to communicate the information concerned”;³² and
- (b) The recipients legally recognised interest in the publication can arise only “as a matter of substance apart from its mere quality as news” and not “as a matter of gossip or curiosity.”³³

[73] Mr Romanos submits that Mr Singh’s position in relation to qualified privilege is a radical departure from the authority in that it proposes that a generally published statement may be afforded protection, even if it is not a matter of public interest. He submits that this defence is fundamentally defective because:

- (a) It is Mr Singh’s own belief of the shared duty and/or interest between himself and the recipient which is the basis of the defence, whereas qualified privilege is an objective test.

³¹ *Cabral v Beacon Printing & Publishing Company Ltd* [2013] NZHC 2684, at [34]-[40]; *Lupton v Fairfax New Zealand Ltd* [2016] NZHC 1801, at [71]-[114].

³² *Lange No 2*, above n 26, at [19].

³³ *Lange No 1*, above n 25, at 437; Parkes and Busutill, above n 21, at [15-012].

- (b) Mr Singh’s particulars of qualified privilege include only one particular bearing on Mr Bains’ purported influential membership of the SSSNZ, which is denied.

- (c) Publication one was directed explicitly to “the people of Te Puke” and such a wide publication was unwarranted. Mr Romanos refers to the Australian decision of *Goyan v Motyka* which was based on five publications in letters and a book which the defendants had distributed to members of, and groups affiliated with, the Ukrainian community.³⁴ In support of the defence of qualified privilege the defendant’s relied on the plaintiff’s activities in the Ukrainian community and their having played a long and prominent role in Ukrainian affairs and organisations.³⁵ He submits that the trial judge rejected the qualified privilege and that the Court of Appeal rejected the defendants’ proposition that a reciprocal interest arose out of the parties common ethnicities and the plaintiff’s prominence in activities in the Ukrainian community.³⁶ By analogy Mr Romanos is advocating that Mr Singh’s association with the GSGSS is insufficient justification to claim qualified privilege.

[74] Mr Stewart, on the other hand submits that the current state of the law is as follows:

- (a) the Court of Appeal’s judgment in *Durie v Gardiner* subsumed only the form of qualified public interest recognised by *Lange No 1*. The traditional qualified privilege involving duty and interest remains part of the common law of New Zealand;

- (b) traditional duty and interest qualified privilege does not require the publication to be a matter of public interest — only the existence of a duty and a corresponding interest;

³⁴ *Goyan v Motyka* [2008] NSWCA 28.

³⁵ At [46].

³⁶ At [47]–[49], [83] and [88].

- (c) the publications by Mr Singh on his personal Facebook page were occasions of common law qualified privilege on the basis of duty and interest; and
- (d) the publication was not excessive. Publication did not go beyond the exigency of the occasion and the fact that the publications may have been seen by followers who had no interest in them does not deprive Mr Singh of the privilege when publication is simultaneously communicated to those who have the required interest.

[75] Mr Stewart submits that usually excessive publication will not be privileged, but there have been cases where the question of whether the privilege applied to a nationwide publication was left to trial, or where the Court accepted the risk of publication to uninterested persons was reasonable in the circumstances.

[76] As to the former situation, Mr Stewart cites *Julian v Television New Zealand Ltd* in which Television New Zealand had broadcast a story about a water-purifying device which it described as a “rip-off” and the distributor was said to have “duped” thousands of New Zealanders.³⁷ The plaintiff and his company issued proceedings alleging that the news item was false and defamatory, claiming serious economic and financial loss. In the context of the hearing to determine preliminary questions, the judge found that the occasion could reasonably be held to be privileged because the public generally had an interest in receiving information about a product sold nationally and the media had a reciprocal interest or duty to disseminate it.³⁸ However, the judge left the question of whether the defence applied on the facts for full trial.³⁹

[77] In relation to the second situation where the risk of publication to uninterested persons is found to be reasonable in the circumstances, Mr Stewart cites *Gatley on Libel and Slander* which references cases where publication in a newspaper of general circulation did not defeat the privilege, because the medium used was one circulating among persons with a legitimate interest, even though it might be seen by others.⁴⁰ He

³⁷ *Julian v Television New Zealand Ltd* HC Auckland CP 367-SD/01, 25 February 2003.

³⁸ At [69]–[70].

³⁹ At [70].

⁴⁰ Parkes and Busutill, above n 21, at [15-074].

further cites to the Court of Appeal of Singapore in *Chen Cheng v Central Christian Church* to support this point.⁴¹

[78] Mr Stewart's submissions as to why there was a duty and an interest in Mr Singh's publication by the wide means used are summarised as follows:

- (a) There are several sects in Sikhism. Two of those sects, Damdami Taksal and Akhand Kirtani Jatha are aggressive and violent. The SSSNZ based in Takanini is run and supported by followers of the Damdami Taksal sect. The Sikh Temple at Lady Ruby Drive is run and supported by followers of the Akhand Kirtani Jatha.
- (b) There has been conflict between the two sects, including attack and serious injury of Mr Singh in 2020. The vast majority of Mr Singh's followers on his personal Facebook page are either members or followers of the SSSNZ or followers of Mr Singh.
- (c) While Mr Bains is not a member of either Damdami Taksal or Akhand Kirtani Jatha, Mr Singh is of the view that Mr Bains supports the views of either group in their stance against Mr Singh and his followers. Mr Singh's motivation in publishing the statements on his personal Facebook was that those who follow him on Facebook either support or oppose his views, and to that extent there is a reciprocity of, or shared, interest. To the extent that there may be some followers of Mr Singh who are uninterested, Mr Stewart submits that the publication to those persons should not mean that the privilege is lost.
- (d) Mr Singh's duty to the recipients of the publications was to bring important matters that may affect their religious beliefs to their attention. Allegations against Mr Bains, and his very public connection to the SSSNZ, and that he had lied to the police and/or threatened rape were matters of genuine serious concern to all those who follow Mr Singh, on whichever side of this religious debate they sit. Similarly,

⁴¹ *Chen Cheng v Central Christian Church* [1998] SGCA 51, [1999] 1 SLR 94.

the making of awards or the obtaining of SSSNZ public endorsement if advanced without self-benefit or self-promotion are matters of interest to Mr Singh's followers.

- (e) Mr Singh holds a status or position where he is expected to comment on the moral rights and wrongs of both his supporters and his opponents. The publications were not speculation or idle gossip and they conveyed matters of genuine concern.

[79] Mr Stewart submits that the evidence currently before the Court discloses an arguable qualified privilege defence based on the traditional common law of duty and interest conception. Further he submits that there are a number of factual disputes concerning the extent of Mr Bains' conduct in 2015 relating to the march on Mr Singh's temple and his subsequent involvement in the SSSNZ, which are matters that can only be determined following the hearing of all evidence at trial.

[80] Mr Stewart accepts that it is for the Court to determine whether such duty and interest existed. Nevertheless, he submits the affidavit evidence discloses an arguable basis for a reasonable person in the position of Mr Singh, with his background and experiences, to have a duty, and his followers to have a corresponding interest, in the statements pertaining to the character of a person who supports SSSNZ, the values it follows and those it chooses to honour, in the context of its escalating conflict with Mr Singh and the religious values he espouses.

Conclusion on qualified privilege

[81] In my view, there is an arguable case for qualified privilege which should be dealt with at trial. The background between the two religious sects and their interaction needs to be explored at trial to determine whether that is a sufficient basis to justify a duty and interest for the general method of publication adopted by Mr Singh using his Facebook page. From the evidence, which will need to be produced at trial, it will need to be determined whether there is a sufficient duty and corresponding interest in relation to the publications. In my view, the affidavit evidence discloses that the duty and interest are arguable and therefore, the defence of qualified privilege should not be struck out.

Result

[82] As a consequence of the conclusions I have reached at [50] to [52], [61], [62], [68], [69], and [81], Mr Bains' application to strike out the defences of honest opinion and qualified privilege should be dismissed. Mr Singh's arguments in relation to these affirmative defences are not untenable.

[83] As to the third affirmative defence of truth of the statements, this will need to proceed to trial in any event.

Orders

[84] The application by Mr Bains to strike out the affirmative defences of honest opinion and qualified privilege is dismissed.

Costs

[85] Costs are reserved. Counsel are directed to endeavour to agree costs on this application but if not agreed within 20 working days of the date of this judgment:

- (a) counsel for the defendant shall file a memorandum as to costs (not exceeding five pages) within five working days of expiry of the 20 working day period;
- (b) counsel for the plaintiff shall file a reply memorandum (not exceeding five pages) within five working days of receipt of the memorandum from counsel for the defendant.

[86] Costs will be decided on the papers.

Associate Judge Taylor