IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-3091
[2023] NZHC 385

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: 1-18 August 2022

Appearances: S Mills KC, R Butler and D Nilsson for the plaintiff
F King and R Che Ismail for the defendants

Judgment: 3 March 2023

JUDGMENT OF ROBINSON J
[Public Interest Defence]

This judgment was delivered by me on 3 March 2023 at 10:00 am pursuant to Rule 11.5 of the High Court Rules

………………………………………………………………………
Registrar/Deputy Registrar

Solicitors: Lee Salmon Long, Auckland
McKenna King Dempster, Hamilton

Counsel: S Mills KC, Auckland
R Butler, Auckland

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Introduction

[1] *New Zealand Horse & Pony* (*Horse & Pony*) is an equestrian magazine published by the first defendant, Manaia Media Ltd (Manaia). Manaia also owns and operates the *Horse & Pony* website and administers its Facebook page. The second defendant, Ms Rowan Dixon, is the sole director and shareholder of Manaia. She is the editor of the *Horse & Pony* magazine and website and controls the Facebook page.

[2] The plaintiff brought defamation proceedings in respect of an article published on the *Horse & Pony* website on 3 December 2017 (Article). The third defendant, Ms Jane Thompson, wrote the Article.

[3] The defendants denied the plaintiff's claim and elected trial by jury. They also pleaded the affirmative defence first recognised in New Zealand by the Court of Appeal in *Durie v Gardiner*.[1] The defendants say the subject matter of the Article was of public interest; and their communication was responsible.[2]

[4] On 18 August 2022 the jury unanimously found that the Article bore all the meanings alleged by the plaintiff, and that those meanings were defamatory. It awarded the plaintiff compensatory damages of $225,000 and punitive damages of $15,000.

[5] I recorded the jury's verdict but at that stage I did not enter judgment. That was because it is my role as trial judge to determine whether the two elements of the defence are established on the primary facts as found by the jury.[3]

[6] For the reasons that follow, I do not consider the defendants have established the affirmative defence. As such, judgment is to be entered in accordance with the jury's verdict.

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

2 At [58]. I heard submissions in relation to the affirmative defence after the jury had retired. This process was the subject of separate rulings and was ultimately agreed by the parties. The jury returned its verdict while counsel's oral submissions were underway.

3 At [63].

Background

[7] During March and April 2017 a New Zealand show jumping team toured Australia. Some team members subsequently complained to Equestrian Sports New Zealand (ESNZ) about the conduct of others during the tour. On 27 November 2017 the parties to the complaint (but not ESNZ) attended a mediation. The parties reached an agreement, including about the terms of a joint statement that was released on 30 November 2017. Those matters were covered in the Article. The plaintiff is a lawyer. She acted for the complainants.

[8] The Article dealt with these matters in a way which the plaintiff alleged and the jury found was defamatory of the plaintiff. I have summarised the contents of the Article at [37] – [38] below. Relevant events leading up to the Article are not in dispute and are set out as follows.

Horse & Pony's July 2017 article

[9] A short article about the complaints was published in the July 2017 edition of *Horse & Pony* magazine. The article was published in *Horse & Pony's* "Newsworthy" column, which is described as providing "News and views from around the equestrian world". Under a heading "*NZ show jumping team conduct in question*" the article began:

> Equestrian Sport NZ has formed a judicial inquiry into the conduct of New Zealand's show jumping team on their recent trip to Australia, after a number of formal complaints were received.

[10] The article reported that:

> *NZ Horse & Pony* had approached ESNZ general manager Dana Kirkpatrick to find out more about the complaint, the process and the timeframes. Her response: No further correspondence will be entered into on this matter until the inquiry has been completed. I am not at liberty to discuss this further.

[11] The article went on to name each of the members of the team which included Katie Laurie, with her father Jeff McVean as chef d'equipe.

[12] The article continued:

> In the May minutes of the show jumping board, its states there were "issues of conduct of the entire team in Australia" which resulted in "board members and ESNZ fielding a large number of calls in relation to the tour and behaviour of the team".

[13] The article then referred to ESNZ regulations about the establishment of a Judicial Committee and the process for dealing with complaints.

[14] On 28 June 2017 Ms Kirkpatrick wrote to the second defendant advising that ESNZ had received a complaint about *Horse & Pony's* article.[4] Ms Kirkpatrick also complained the article had improperly implied that all members of the team were subject to a complaint. Ms Kirkpatrick confirmed that none of the team members named in the article apart from Ms Laurie were the subject of the judicial enquiry. Ms Kirkpatrick asked that *Horse & Pony* print a correction to the story and apologise to the Jumping Board and the members of the team for what she considered a misrepresentation of the facts.

[15] The second defendant disagreed. She advised Ms Kirkpatrick that she did not believe the article contained inaccuracies or a misrepresentation. Believing the article quoted accurately from a statement published on the ESNZ website as well as the published minutes of the ESNZ Jumping Board, she saw no need to issue any correction or apology. Following email exchanges, the second defendant confirmed this position to Ms Kirkpatrick in a letter dated 28 July 2017. At the end of her letter the second defendant commented:

> We note that we have taken up a significant role in reporting ESNZ competitions, activities, affairs and developments to the equestrian public of New Zealand since the demise of your in-house print publication. There now appears to be a vacuum; a communication strategy that relies on your website and to some degree, social media channels to disseminate information to your members.
>
> We suggest that you endeavour to ensure your published material is accurate, and also engage in more meaningful dialogue with the media than simply responding that you have no comment on contentious issues.

---

4 The July 2017 edition of the magazine was published in June 2017.

[16] Ms Kirkpatrick thanked the second defendant for her letter and advised it would be referred to the ESNZ Board for discussion at its August meeting. ESNZ did not reply further.

The joint statement

[17] On 27 November 2017 the parties to the complaint (but not ESNZ) attended a mediation. They reached agreement, including as to the terms of an agreed statement. The plaintiff released the statement to *iSpyHorses* and *Show Circuit* for publication.

[18] *Show Circuit* is a leading equestrian magazine that is published bi-monthly. It also operates a website and a Facebook page. At the relevant time *Show Circuit* had approximately 91,000 Facebook followers.

[19] *iSpyHorses* is a website publication. Its primary focus is on advertising horses for sale, but it also publishes a blog, competition results and articles submitted by *iSpyHorses* users. As at February 2018 it had approximately 55,000 Facebook followers. It is owned by Heather Cato who is the plaintiff's mother.

[20] At the relevant time *Horse & Pony* had approximately 25,000 Facebook followers. The plaintiff did not release the statement to *Horse & Pony*. She explained in evidence that her clients remained concerned about the way in which *Horse & Pony* had reported about the complaints in its July 2017 article, without subsequent correction or apology.

Publishing the joint statement

[21] The plaintiff's evidence is that both *iSpyHorses* and *Show Circuit* had agreed to hold publication until after 3:00 pm on 30 November 2017. This was to give ESNZ the opportunity to publish the statement first. The article was subsequently published on the *iSpyHorses* website as follows:

> **Katie Laurie Apologizes For Conduct**
>
> iSpyHorses – Thu. 30-Nov-2017
>
> A number of complaints were made to Equestrian Sports NZ by the parents of team members of the 2017 ESNZ Senior Jumping Team tour of Australia. The

> complaints were against Jeff McVean who was the chef d'equip and coach for the team and his daughter Katie Laurie who was the senior member of the team. ESNZ convened a Judicial Committee to determine the complaints and a significant amount of evidence was filed by the parties. Contrary to mistaken reporting by Horse & Pony earlier in the year there was never any investigation or complaints relating to any other member of the team.
>
> The parties to these complaints have reached agreement following mediation, the details of which are confidential except to the extent to which the ESNZ Board and Jumping NZ has been informed.
>
> On the agreement that Mr McVean will never again hold any role with Jumping NZ or in relation to show jumping with High Performance NZ, the complainants have agreed to withdraw the complaints.
>
> Kate Laurie accepts and acknowledges that her conduct during the ESNZ Jumping 2017 Senior Show jumping Tour of Australia did not reflect the high standards expected of a senior team member. Towards the conclusion of the tour she failed to demonstrate individual responsibility by words and actions. She unreservedly apologies to the other team members, their supporters and ESNZ for the stress this has caused.
>
> SANCTIONS If in the period of 12 months following settlement she breaches any of the ESNZ Codes of Conduct, Katie's membership with ESNZ will be suspended for 3 months, and she will be precluded from competing at any ESNZ event during that 3 month period.
>
> The lawyer for the complainants said that they are relieved Mrs Laurie has accepted responsibility and apologised for her actions and that she and Mr McVean have agreed to the sanctions. Participants in any sport are entitled to expect fair and respectful treatment and the governing body (ESNZ) has a responsibility to enforce and uphold the codes of conduct that all riders, owners, officials and members are subject to. This has been a lengthy and stressful process for all involved. The complainants are looking forward to moving on with the season ahead. It is hoped that the equestrian community will continue to demand that the codes of conduct are enforced by ESNZ and they should speak up if they feel those standards have been breached
>
> PLEASE NOTE –
>
> The statement published is exactly what was agreed to be published by the parties to the mediation. It was released to the media in this form.
>
> The final paragraph is a statement issued by the lawyer for the complainants (as indicated)
>
> iSpyHorses has simply published the document in its exact form

[22] At the same time it was published on the *Show Circuit* Facebook page as "Breaking news". It was published in the same form, save that the heading was "Parties have agreed over breached agreement…"; and the final paragraph read "The

statement above that is published exactly [sic] what was agreed to be published by the parties to the mediation. It was released to the Show Circuit [sic] in this form".

[23] Both outlets had also agreed to monitor comments on social media after the statement was published. Above the published statement on *Show Circuit* was a warning:

> BEFORE YOU COMMENT, THINK CAREFULLY. WE ARE MONITORING THIS POST AND COMMENTS WILL BE DELETED SHOULD WE THINK THAT THEY ARE INAPPROPRIATE

The plaintiff's social media comment

[24] After the statement was posted it was shared and attracted comments. These included comments on the *iSpyHorses* Facebook page about its owner being the plaintiff's mother. The plaintiff provided her own comment on this issue:

> The lawyers for the McVeans have always knows [sic] this connection and there is no issue has been raised [sic] from their perspective. The statement published is word for word what was released to Showcircuit [sic]. And it accords with the agreement reached in mediation.

ESNZ's 1 December 2017 statement

[25] On 1 December 2017 ESNZ released its own statement as follows:

> **ESNZ statement on complaints to the Judicial Committee regarding Jeff McVean and Kate Laurie**
>
> Yesterday a statement was published regarding the resolution of the complaints to the Judicial Committee against Jeff McVean and Kate Laurie.
>
> The parties to the complaint attended a private mediation on Monday, 27 November 2017. Neither ESNZ nor the Judicial Committee were involved in that process. ESNZ and the Judicial Committee were unaware of the date of the mediation.
>
> The parties agreed to resolve the complaints between themselves, neither ESNZ nor the Judicial Committee has imposed any penalty on Mr McVean or Ms Laurie. Any penalties/sanctions were agreed by them.
>
> ESNZ congratulates the parties for resolving matters between them. ESNZ will not make any further comment until the Judicial Committee has considered the matter further.
>
> ESNZ reminds members of the need to exercise caution when commenting on social media sites at all times.

Horse & Pony's enquiries of ESNZ

[26] Later in the afternoon on 30 November 2017 the second and third defendants saw the statement that had been posted to the *iSpyHorses* website. They discussed that the statement had been released by the plaintiff who they understood to be the complainants' lawyer and Heather Cato's daughter. They noted that the statement had been released by the plaintiff, and not ESNZ, and questioned whether this might be a breach of confidence. They discussed whether they might write an article.

[27] On 1 December 2017 the second defendant emailed Ms Kirkpatrick at ESNZ with questions about the statement. Ms Kirkpatrick responded later that day. The second defendant's email with Ms Kirkpatrick's responses (in italics) were as follows:

> Good morning Dana, Nick and Richard
>
> I trust this finds you all well.
>
> I am writing concerning the publication yesterday on both the website ISpyHorses and the Show Circuit magazine's Facebook page, of what appeared to be a press release on the findings of the judicial inquiry into the conduct of one or more members of the senior show jumping team in Australia earlier this year.
>
> I note that you have yet to respond to my email and letter of July 28, other than to say that it would be 'referred to the August ESNZ board meeting for discussion'. The August board meeting minutes have yet to be published on your website; the most recent minutes are of the May 15 meeting.
>
> I have the following questions for you:
>
> 1. Did ESNZ sanction this statement? *This statement was provided in its entirety by the parties involved in the complaints.*
>
> 2. Was ESNZ aware it was going to be released, and if so, did ESNZ agree with the wording? *The parties' legal counsel did advise ESNZ it would be released.*
>
> 3. Will ESNZ be making its own official statement about the findings of the hearing? *We have made a statement today. To clarify, ESNZ has not had a hearing[.]*
>
> 4. Is this statement itself a breach of the confidentiality clause of the mediation? *That is a matter for the parties involved.*
>
> 5. How do the findings of the hearing affect Jeff McVean's position as jumping coach for the NZ.based evening squad riders? *I have not been advised of that.*

> 6. Can ESNZ please clarify its position regarding the accuracy of the *NZ Horse & Pony* article that is mentioned in the release? As you are well aware, the information in our article was taken directly from the published minutes of ESNZ Jumping's conference call of May 2, 2017, and was demonstrably not inaccurate. If ESNZ does believe this information is inaccurate, why have the minutes not been amended and a clarification/correction issued? *Firstly this release was from the parties themselves. Secondly the ESNZ board discussed this and agreed to disagree and leave the matter at that.*
>
> For your reference:
>
> The published statement in ISpyHorses and Show Circuit's Facebook page reads:
>
> "**Contrary to mistaken reporting by Horse & Pony magazine earlier in the year, there was never any investigation or complaints relating to any other member of the team".** *This was written by the parties not by ESNZ.*
>
> The minutes read:
>
> **Australian Tour Conduct Australian Tour Conduct** [sic]
>
> **RS talked to the issues of conduct of the entire team in Australia which come to a head over the weekend with board members and ESNZ fielding a large number of calls in relation to the tour and behavior [sic] of the team.** *This is correct, it does not say that the entire team was under investigation or the subject of complaints.*
>
> (original emphasis)

[28] ESNZ's answers raised further questions for the second defendant which she emailed to Ms Kirkpatrick at 4:12 pm on 2 December 2017. Ms Kirkpatrick responded at 5:22 pm. The second defendant's additional questions together with Ms Kirkpatrick's answers in italics were as follows:

> Hi Dana thanks for responding, but I have some further questions for you, and need your most urgent response:
>
> - How can private parties impose what are ESNZ sanctions on Jeff or Katie? *It is my understanding that Kate and Jeff have agreed to self impose these but you will have to check that with Jeff and Kate.*
> - What more do the Judicial Committee have to do?
> - When will the Judicial Committee reach their conclusions? *They will meet ASAP.*
> - Did ESNZ approve or have any influence over the wording of the parties' release? *No.*

- While you have clarified that the parties' legal counsel did advise ESNZ it would be released, can you confirm that this included Katie and Jeff's legal counsel rather than just the legal counsel for the complainants? *Yes.*

The defendants' questions of the plaintiff

[29] On 2 December 2017 the third defendant was in the process of writing the Article. She had questions for the plaintiff. At 3:53 pm that day she sent the following Facebook messages to the plaintiff:

> Kirstin, [sic] Sorry to contact you via message on FB but I can't find any other way. I am writing a story for Horse & Pony about the McVean/Laurie situation, and have a few questions I would like to ask you.
>
> The questions are: Was the statement released by you? Did Katie and Jeff approve of the release before it went out? Has Katie, Jeff or their lawyer contacted you since this story was released to express their concern? Why was the release not sent to other media including us? Can you please explain how a private mediation can agree sanctions on behalf of ESNZ?
>
> We are looking at running the story in the morning (about 10am) so it would be appreciated if you could respond by then. Thanks. My email is [*redacted*] if you prefer to respond via email.

[30] The plaintiff says she sent the messages to her clients who instructed her not to contact *Horse & Pony* and not to provide comment. She did not.

[31] On 2 December 2017 at 3:30 pm the third defendant tried to contact Heather Cato on Facebook messenger. Her message was as follows:

> Heather, I'm currently writing this story on the McVean/Laurie situation and would like to clarify who issued the statement that you used on the ISpy site. I understand it may have been Kristen, [sic] but can you please confirm? Thanks

[32] With no response the third defendant tried again at 7:32 am on 3 December 2017:

> Heather, we are planning on publishing our story this morning, so would it be possible for you to get back to me about this? I've messaged Kristin with some questions as well, but she may not have seen them yet as I am not a FB friend of hers. I couldn't find any other contact details for her, otherwise would have emailed. Happy to take a statement for you for the story, to ensure we have all relevant points of you covered. My email is [*redacted]* if that is easier. Thanks. Jane

Third defendant's questions for Ms Laurie/Ms McVean

[33] The third defendant also had questions for Ms Laurie. At 3:58 pm on 2 December 2017 she sent her a Facebook message as follows:

> Am writing a story about this situation and am going to say this: "while Katie nor Jeff cannot comment any further on this situation, as to do so could result in a further mess, we understand from other sources that the release did not reflect what was agreed at the mediation nor was it approved for release." Will that be ok and not get you into further trouble? If you give me the name of your lawyer, I could contact them for an official statement in you prefer. Or if you want to say anything else, let me know.

[34] Ms Laurie replied later that evening suggesting that the third defendant should ask her mother.

[35] The third defendant sent a message to Ms McVean at 7:29 am on 3 December 2017 as follows:

> Vicki, I am writing a story about this whole messy situation. I've made it as objective as possible while running through the timeline of the whole thing. This is what I propose putting in: "While Katie nor Jeff cannot comment any further on the situation, as to do so could result in a further mess, we understand from other sources that the release did not reflect what was agreed at the mediation nor was it approved for release". Katie suggested I contact you to find out if that will be ok – I don't want to get you into further trouble! If you want to say anything else, let me know. I've also asked the Catos for comment but have received nothing back from them yet. ESNZ has replied but don't say a lot, just make the situation even more puzzling. Sorry to bug you on a Sunday morning! No day off for media unfortunately…

[36] Ms McVean did not confirm what the third defendant had proposed, and it was not incorporated into the Article.

The Article

[37] The Article begins:

> **What goes on tour, doesn't stay on tour**
>
> *The fallout from the senior show jumping team's six-week tour to Australia takes some further turns: We endeavour to unravel the saga.*
>
> This is a very complicated story. It is complicated because there are so many people involved, many with relationships and agendas that are not initially obvious. It involves legal processes and it potentially involves future legal

action. It involves an organisation that has a rich history of relationship issues between management and members, in a sport that has passionate participants who seldom hold back on their opinions.

So, to try to understand this saga, we will start at a point in March 2017 when a team of senior show jumpers left New Zealand's shores for Australia, with great hopes. It was announced with a media release from Equestrian Sport NZ on March 27: a six-week tour for an all-female team, made up of Lily Tootill, Katie Laurie (who was by then mostly based in Australia), Samantha Morrison and Natasha Brooks.

The team would compete at Equifest (March 30 – April 2) and Aquis Champions Tour at Elysian Fields (April 26 – 30) as well as at a show in Hawkesbury. Ironically, as it turns out, the press release, which was quoted on ESNZ's website and sent to the equestrian media, included a quote from Jeff McVean, the chef d'equipe.

"They all get on really well. It does make it easier they all train with me, so there is no change in training methods for them".

[38] It continued as follows:[5]

(a) Paragraph 8: Refers to an ESNZ press release issued after the first main event of the tour on 6 April 2017.

(b) Paragraphs 9 – 13: Attach and quote from the minutes of a meeting of the ESNZ Jumping Board on 2 May 2017 as also referred to in *Horse & Pony's* July 2017 article.

(c) Paragraphs 14 – 18: Refer to a subsequent announcement by ESNZ on 31 May 2017 concerning the complaints. The Article suggests a lack of information, and comments: "Transparency is a slow process, it seems".

(d) Paragraphs 19 – 27: Set out the July 2017 article in full.[6] The Article records "we have decided to post the article in its entirety again here, as it was never shared on our website, and we stand by the story".

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5 The paragraph number references were not in the original article but are taken from those that were added for ease of reference to the reformatted Article attached as Schedule 1 to the Plaintiff's Fourth Amended Statement of Claim.

6 Set out at [9] – [13] above.

(e) Paragraphs 28 – 31: Refer to the complaint from ESNZ about the July 2017 Article. At paragraph 31:

> You might be thinking at this stage, 'So what, H&P? Get over it!' Perhaps you might be thinking that it was about time ESNZ put more effort into managing their relationships with one of a diminishing group of key equestrian media in New Zealand? Or maybe you trusted that ESNZ would have managed the process fairly, now that there was an official Judicial Committee. We certainly did – on both counts.

(f) Paragraphs 32 – 37: Observe that there were no further communications from ESNZ before the statement was published on *iSpyHorses* Facebook page on 30 November 2017. At paragraph 34 the Article records that the statement was:

> An unusual one for many reasons, not just for the note at the end and the fact the lawyer wasn't named, but that it was posted on the iSpyHorses site practically exclusively despite it saying it was released to the media. Being the highest-selling and most long-standing equestrian magazine in New Zealand, you would think *NZ Horse & Pony* would have been included and have been sent a copy. But no. Instead we were mentioned in the release, which was in itself unusual. We decided to take a closer look.
>
> We are not going to reproduce the full story from the iSpyHorses website, as we believe it had the possibility to be considered defamatory, but the gist of it is that the complainants will withdraw their complaints as long as Jeff McVean never again holds any role with Jumping NZ, and that Katie "unreservedly apologises" for her conduct. It then goes on to say that for the next 12 months, if Katie breaches any of ESNZ's Code of Conduct, she will be suspended from ESNZ for 3 months.

(g) Paragraphs 38 – 44: Set out in full the second defendant's questions of ESNZ and ESNZ's responses set out at [27] above.

(h) Paragraphs 45 – 48: Set out ESNZ's press release dated 1 December 2017 (as set out at [25] above).

(i) Paragraphs 49 – 54: Set out *Horse & Pony's* supplementary questions for ESNZ, together with ESNZ's answers (as set out at [28] above).

(j) Paragraphs 55: Records *Horse & Pony's* understanding that "the statement on the *iSpyHorses* website was released by the complainants'

lawyer but have yet to have this confirmed". The Article notes that the plaintiff is the daughter of *iSpyHorses* founder/director Heather Cato. The Article reports that the authors had approached the plaintiff and Heather Cato for confirmation and comment but received no reply. It cites from the plaintiff's LinkedIn profile.

(k) Paragraphs 56 – 57: Purport to quote from the plaintiff's comment on the *iSpyHorses* Facebook page concerning the connection between herself and her mother (as set out at [24] above). However, the defendants removed from that quotation the plaintiff's explanation that she also released the same statement to *Show Circuit*.

(l) Paragraph 58: Raises questions concerning ESNZ's role in receiving and managing the complaints and the function of the Judicial Committee it formed.

(m) Paragraphs 59 – 63: Note the statement was first posted on *iSpyHorses'* Facebook page on 30 November 2017 but was re-posted at the top of the page on 2 December 2017. The Article observes that the post was shared, and that "there were a large number of comments made, some of them defamatory". It expresses sadness at the "rift" that developed, with the parties employing lawyers and ESNZ forming a Judicial Committee.

(n) Paragraphs 64 – 65: The Article concludes—

> For us, one of the main questions is whether this situation could have been dealt with in a more constructive – and expedient – way by the sport's governing body. Can you imagine the speed and effectiveness with which the All Black's management would have dealt with an on-tour behavioural issue?
>
> We will endeavour to keep you updated if more information comes to hand, and hope that Katie doesn't do what she has hinted at: take up the option of riding for Australia. Not only would it be a loss to New Zealand's jumping prospects on the world stage, it would be another example of a fall-out between ESNZ and one of the highest performing athletes.

[39] On 6 December 2017 ESNZ published its second statement which read as follows:

> **Final Resolution of Dispute Relating to Showjumping Tour to Australia**
>
> The parties to the above dispute have agreed amongst themselves, at a mediation not involving ESNZ or the Judicial Committee, to resolve the complaints made against Mr McVean and Ms Laurie.
>
> As part of the judicial process, the Judicial Committee encouraged the parties to attempt to reach an agreement themselves through mediation. Although ESNZ did not know the date of the mediation, ESNZ and the Judicial Committee had previously been informed that parties would attempt to resolve the matter in that way. Counsel undertook to advise the Judicial Committee if a resolution was reached. This undertaking was adhered to by the lawyers.
>
> The ESNZ Board advised the parties, prior to their attending mediation, that the Board expected to endorse and/or enforce any agreement reached between the parties. The Board did note that there would be limitations on what it could do, and that it could only act within its powers.
>
> The parties have agreed to the imposition of certain sanctions and in accordance with the earlier commitment by ESNZ to honour the outcome of any mediation, ESNZ has agreed to publish the statement on its website. ESNZ also confirms that it will respect the outcome of the mediation, as agreed between the parties.
>
> For the sake of clarity, ESNZ confirms that Mr McVean has not relinquished his roles with ESNZ Eventing or High Performance Eventing. Further, Mr McVean is free to carry on coaching jumping riders who retain him on a private basis.
>
> ESNZ is pleaded that the parties have been able to resolve matters between themselves.
>
> ESNZ encourages its members not to comment on Facebook regarding this statement. ESNZ reminds its member that they are required to comply with Social Media policy.

[40] ESNZ's second statement then set out in full the statement that had been agreed by the parties.

[41] On 6 December 2017 the NZ Herald and Stuff each published articles on their websites.[7] None referenced the plaintiff.

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[7] Eduan Roos "Showjumping Coach Jeff McVean accepts life ban after alleged misconduct on tour" *The New Zealand Herald* (online ed, 6 December 2017); Eduan Roos "'He can still train me' – NZ Olympic showjumper defends father after life ban" *The New Zealand Herald* (online ed, 6 December 2017); and Aaron Goile "New Zealand equestrian Katie Laurie set for nationality switch after misconduct dispute" *Stuff* (online ed, 6 December 2017).

The jury's verdict

[42] The jury held unanimously that in its natural and ordinary meaning the Article both meant and was understood to mean that:

(a) the plaintiff had acted unethically and unprofessionally (or improperly) as counsel for the complainants in the dispute that was the subject of the Article by:

(i) being responsible for releasing a statement about Mr McVean and Ms Laurie to the media that is damaging to their reputations, without their consent;

(ii) misusing her position as a lawyer for the complainants to benefit her family by releasing the statement to *iSpyHorses*, when the statement would have received wider and more effective publicity for the vindication of her clients if it had been released to *Horse & Pony*; and

(iii) hiding that misuse of position by not identifying herself in the statement or disclosing her relationship with the founder and director of *iSpyHorses*.

(b) the plaintiff had acted unethically, and unprofessionally (or improperly), in her capacity as a lawyer by breaching confidentiality provisions in a mediation or settlement statement by releasing the statement to the media without the consent of all the parties to the agreement; and

(c) there were grounds to suspect the plaintiff had acted in these ways.

[43] The jury found that it was defamatory to convey or imply each of these meanings. Further, the jury did not consider the defendants had proved that although the Article was defamatory of the plaintiff, she had suffered only minor harm. As

noted, it awarded the plaintiff compensatory damages of $225,000 and punitive damages of $15,000.

The *Durie v Gardiner* defence

[44] In establishing a public interest defence in New Zealand, the Court of Appeal in *Durie* set out in detail how that defence evolved from (and ultimately subsumed) the defence of qualified privilege.[8] Building on English[9] and Canadian case law,[10] the Court considered the elements of the new defence should be:

(a) the subject matter of the publication was of public interest; and

(b) the communication was responsible.

Is the subject matter of the Article a matter of public interest?

[45] On the public interest element the Court of Appeal said:

> [64] In determining whether the subject matter of the publication was of public interest, the judge should step back and look at the thrust of the publication as a whole. It is not necessary to find a separate public interest justification for each item of information. As already mentioned, public interest is not confined to publications on political matters. It is also not necessary the plaintiff be a public figure.
>
> [65] Defining what is a matter of public interest in the abstract with any precision is a notoriously difficult exercise. Trial judges are however likely to find the discussion of public interest in Torstar of assistance. There it was said that to be of public interest the subject matter should be one inviting public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.

[46] This first stage of the *Durie* analysis is a threshold determination of whether the defamatory publication is prima facie deserving of protection. It is a matter for the judge to decide.[11] The focus for the judge is on the substance of the publication, not

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8 *Durie v Gardiner*, above n 1, at [36] – [68].

9 See, for example, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL); and *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359.

10 *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640 [*Torstar*].

11 In this way it is analogous to the judge’s determination of whether the “occasion” of publication was privileged for the purposes of qualified privilege.

its "occasion".[12] The judge should assess the overall subject matter of the publication. The defamatory statement in the article should not be scrutinised in isolation.[13]

[47] In *Torstar* McLachlin CJ observed that the judge must take care to characterise the subject matter of a publication accurately.[14] An overly narrow characterisation may inappropriately defeat the defence by restricting the legitimate scope of the public interest. On the other hand, characterising the subject matter too broadly "might render the test a mere rubber stamp and bring unworthy material within the protection of the defence".[15]

Pleadings

[48] The defendants plead that the Article was a responsible communication on the following 13 matters of public interest:

(a) the performance and conduct of former equestrian Olympians and former equestrian Olympian trainers at international equestrian competitions;

(b) the conduct of ESNZ, the national sports organisation for equestrian sport in New Zealand;

(c) the conduct of ESNZ members while representing New Zealand at international sporting competitions;

(d) the history and outcome of official investigations by ESNZ;

(e) the persons involved in investigations by ESNZ;

(f) the origin, history, nature and content of complaints to ESNZ in respect of sportspersons representing New Zealand;

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12 *Torstar*, above n 11, at [100].
13 At [101].
14 At [107].
15 At [107].

(g) the processes by which complaints to ESNZ are resolved, including by way of mediation;

(h) the history and outcome of complaints lodged with ESNZ regarding the alleged misconduct of its members while representing New Zealand;

(i) statements that are issued to the media by the parties to such ESNZ complaints regarding the outcome of those complaints;

(j) apologies issued by the parties to the complaints in respect of their conduct that was the subject of the ESNZ complaints;

(k) the history and outcome of complaints regarding former equestrian Olympians and a former equestrian Olympian trainer;

(l) statements that are issued to the media by former equestrian Olympians and a former equestrian Olympian trainer regarding the outcome of complaints against them; and

(m) apologies issued by former equestrian Olympians and a former equestrian Olympian trainer to the complainants in respect of their relevant conduct that was the subject of such complaints.

[49] The plaintiff pleads that any interest in any of these matters is limited to persons involved in equestrian sports subject to the jurisdiction of ESNZ. More broadly, she pleads that the defamatory statements contained in the Article are not relevant to any of the alleged matters of public interest pleaded by the defendants.

Submissions

[50] In written submissions counsel for the defendants acknowledged that their pleaded subject matter is extensive, but maintains that the thrust of the Article concerns:

(a) sanctions against high-profile figures within equestrian sports in New Zealand;

(b) the apparent failure to control or overall mishandling of the complaints process of high-profile figures by ESNZ and the Judicial Committee by their lack of awareness of the outcome reached by way of the private mediation and the subsequent joint statement; and

(c) the history of ESNZ and the Judicial Committee failure to control or mishandling of complaints against high-profile figures within equestrian sports in New Zealand.

[51] Counsel observes that the present case is unusual because the plaintiff "is not necessarily the main subject matter of the publication". Indeed, the various subject matters of the Article pleaded by the defendants (set out in the preceding paragraph) make no reference to the plaintiff. However, counsel submits that the plaintiff's involvement in the mediation and in releasing the joint statement is a "secondary subject matter" which is ancillary to the overall subject matter of the Article. As such, counsel submits that the defamatory statements about the plaintiff go to the heart of the overall subject matter of the Article.

[52] Counsel submits that the primary subject matter of the Article is best encapsulated in its final paragraphs as set out at [38(n)] above.

[53] Counsel also emphasises the following passage from the statement released by the plaintiff which they submit directly links her to the substance of the matter:

> **The lawyer for the complainants** said that they are relieved Ms Laurie has accepted responsibility and apologized for her actions, and that she and Mr McVean have agreed to the sanctions.
>
> (counsel's emphasis)

[54] Counsel refers to various comments posted to the *Horse & Pony* Facebook page in response to the Article which he submits demonstrates that the "primary subject matter" of the Article gave rise to substantial concerns within the equestrian

community. Counsel also points out that the New Zealand Herald and Stuff published articles on 6 December 2017 which he submits covered the "primary subject matter".

Plaintiff's submissions

[55] Counsel for the plaintiff objected to the submission that the plaintiff's involvement in the mediation and release of the joint statement was a "secondary" or "ancillary" subject matter of the Article. They pointed out that this was inconsistent with counsel for the defendant's opening and closing addresses in which they put to the jury that the Article had almost nothing to do with the plaintiff at all.

[56] Counsel for the plaintiff's objection may be understandable, but I do not consider much to turn on it. It is for the judge to characterise the subject matter of a publication in order to determine whether it is a matter of public interest.[16] As I have noted, counsel made submissions to me in relation to the public interest defence after the jury had retired. Logically, their submissions proceeded on the basis that the jury would find the Article to be defamatory. Otherwise, the defendants would have no need for the defence.

[57] In these circumstances any inconsistencies between counsel's addresses to the jury concerning the meaning of the Article and their submissions to me concerning its subject matter are alternative arguments rather than essential contradictions.

[58] More substantively, counsel for the plaintiff disputes the defendants' claim that the Article is about ESNZ's loss of control of its judicial complaints process involving top equestrian athletes or the use of private mediation as a means of dealing with those complaints. He submits that the Article is not framed in those terms, nor does it convey any accurate and reliable information about those matters to its readers. He says that the "thrust" of the Article is not an investigation into ESNZ losing control of its complaints process. Instead, he submits that the Article is both a 65-paragraph complaint about why *Horse & Pony* did not receive the joint statement but was mentioned in it; and an attempt to suggest that someone – in particular the plaintiff –

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[16] At [107].

had done something wrong and suspicious. He says the introduction to the Article hints at intrigue involving many people with hidden relationships and agendas.

[59] Counsel for the plaintiff submits that the Article then incompletely and inaccurately retells the story of *Horse & Pony's* July 2017 article; and misleadingly describes selective portions of the joint statement.

[60] He accepts that the Article goes on to refer expressly to what the defendants say is its primary theme:

> Overall, the wording [of the joint statement] gives the impression that the mediation was part of the ESNZ's Judicial Committee process, and therefore it seemed most irregular that the statement hadn't been released by ESNZ itself…

[61] And further on in the Article:

> The obvious question… is that if ESNZ was not a party to the complaints (and it was, according to the May 31 announcement on the ESNZ website), why was the Judicial Committee formed in the first place, and who actually received the complaints to start with? What is ESNZ's role in managing this sort of complaint and protecting the reputation of the organisation, and indeed the sport of show jumping?

[62] However, he submits further that while these two passages rhetorically raise questions about ESNZ's management of disciplinary procedures, they do so in a misleading, uninformative and uninformed way. He says the rhetorical questions can be answered easily and are wrong to suggest that there are grounds for concern about ESNZ's process. Counsel for the plaintiff submits that the Article mischaracterised the joint statement and left out important information in order to raise suspicion when none was warranted. He says the Article provided no factual foundation for serious questions to be asked and did not report on any conduct within ESNZ that was actually of concern.

[63] Overall, counsel for the plaintiff says, the Article detracted from public understanding of the issues it purported to cover. He says there was no legitimate public interest in publication of the Article and it does not deserve the protection of the public interest defence.

[64] Finally, counsel for the plaintiff submits that the extent of the defamation contained in the Article is relevant to whether its overall subject matter is one of public interest. He emphasises the Court's role as a gatekeeper of the defence. To illustrate his point, he submits that if 99 per cent of an article was a defamatory comment about the personal habits of a politician's partner and 1 per cent about the professional effectiveness of the politician, the publishers of the defamatory article could not be protected by the public interest defence.

Discussion

[65] I am required to step back and look at the thrust of the publication as a whole. It is not necessary to find a separate public interest justification for each item of information contained in the Article. And, to state the obvious, the inclusion of defamatory statements within the Article does not itself signify that the overall subject matter of the Article is not a matter of public importance. The entire point of the public interest defence is that in appropriate circumstances the law will protect the publishers of defamatory statements that are not probably true.

[66] The Article covers various topics including:

(a) complaints about the conduct of athletes and coaches representing New Zealand in overseas competitions;

(b) the adequacy of the process by which those complaints are resolved;

(c) the role of ESNZ within that process; and

(d) the outcome of the complaints process including an agreement by a high-profile national coach to cease coaching New Zealand representative teams.

[67] Standing back and looking at the thrust of the Article, I accept that the subject matter of the Article, broadly and as a whole, was of public interest. The matters referred to above are of general public interest, and of particular interest to the New Zealand equestrian community.

[68] In saying that, I do not accept counsel for the defendants' submission that the plaintiff's involvement as lawyer for the complainants is a "secondary" or "ancillary" subject matter going to the heart of the overall subject matter. I do not consider the defamatory statements about the plaintiff related to matters of public interest. However, in the circumstances of this case I consider this is better addressed in the context of the second limb of the defence, namely whether the communication was responsible.

[69] That is also the context in which I will consider counsel for the plaintiff's submission that the Article was inaccurate and misleading. I do not consider that a publication must be accurate in order for its subject matter to be of public interest. The rationale for the defence is that in appropriate circumstances the law will protect defamatory statements that are not probably true.

Was the Article a responsible communication?

[70] It is for the judge to determine whether a communication was responsible, having regard to all the relevant circumstances of the publication.[17] Drawing on the House of Lord's analysis in *Reynolds*, and that of the majority of the Supreme Court of Canada in *Torstar*, the Court of Appeal held that the relevant circumstances to be taken into account may include:[18]

> (a) The seriousness of the allegation – the more serious allegation, the greater the degree of diligence to verify it.
>
> (b) The degree of public importance.
>
> (c) The urgency of the matter – did the public's need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity.
>
> (d) The reliability of any source.
>
> (e) Whether comment was sought from the plaintiff and accurately reported – this was described in Torstar as a core factor because it speaks to the essential sense of fairness the defence is intended to promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens the risk of inaccuracy. The target may well be able to offer relevant information beyond their denial.

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17 *Durie*, above n 1, at [66].
18 At [67].

(f) The tone of the publication.

(g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

[71] These factors go to the adequacy of the factual inquiry undertaken by the author and the circumstances of the communication. As Toogood J observed in *Craig v Slater*:[19]

> A person acting responsibly is likely to have undertaken an inquiry into the facts which is as comprehensive as the circumstances may reasonably require, including seeking and accurately reporting comment from the plaintiff.

[72] This list of factors is not exhaustive. Not all factors will necessarily be relevant in every case. The factors must be applied in a practical and flexible way and with some deference to a publisher's editorial judgment, particularly in cases involving professional editors and journalists.[20]

[73] Below, I consider each factor in turn.

(a) The seriousness of the allegation

[74] The jury found that the Article meant that the plaintiff acted unethically and unprofessionally (or otherwise improperly) in her capacity as lawyer for the complainants. Further, it found she had done so by releasing a statement to the media and damaging the reputations of others without their consent; surreptitiously misusing her position as a lawyer in order to benefit her family; and breaching confidentiality provisions in a mediation or settlement agreement.

[75] These are serious allegations. I accept the expert evidence of Paul Collins, barrister, that for a lawyer to act as the jury found the Article to have alleged the plaintiff acted would amount to misconduct of a type that could lead to charges by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal and result in pecuniary penalties and/or suspension.

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19 *Craig v Slater* [2018] NZHC 2712 at [348].
20 *Durie*, above n 1, at [68].

[76] Counsel for the defendants submits that the seriousness of the allegations are to some extent mitigated by what one expert witness referred to as the "source, setting and seriousness" of the publication. In particular, counsel submits that the defamatory allegations were less serious when published in a "niche, equestrian magazine" than they might have been if published, for example, in a decision of the Standards Committee of the New Zealand Law Society. Moreover, counsel submits that the seriousness of the allegation in this context is "significantly mitigated" to the extent that those who read the allegations are lawyers like the plaintiff herself. Counsel submits that the more serious an allegation, the more due diligence a legally trained reader will undertake before accepting it to be true.

[77] I disagree. I do not accept that in this context the seriousness of a defamatory statement is a variable that depends on the nature of the publication in which it is made. The seriousness of a defamatory statement should be objectively assessed. To hold otherwise would undermine the essential requirement that publishers of defamatory statements who seek to rely on the defence must have communicated responsibly.

[78] In this regard I note the Court of Appeal's observations in *Durie* that the emergence of social media and "citizen journalists" has radically changed the nature of public discourse, and that "the proliferation of unregulated bloggers and other commentators who can be reckless means that the imposition of a responsibility requirement is highly desirable and a necessary safeguard for reputation and privacy rights".[21]

[79] Nor do I accept that the seriousness of defamatory allegations is mitigated if those who read them are lawyers who might be expected to carry out their own due diligence before believing the allegations. As the Court of Appeal observed in *Durie*, the more serious the allegation, the greater the degree of diligence required to verify it.[22] But it is for those who publish the allegations to diligently verify them. That responsibility should not be left to those who read the allegations.

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21 At [56(c)].
22 At [67(a)].

(b) The degree of public importance

[80] Counsel for the defendants submits that the subject matter of the Article is at the higher end of the spectrum of public importance, noting in particular that the complaints involved high-profile figures within equestrian sports in New Zealand.

[81] I disagree. In my view these matters are at the lower end of the spectrum of public importance. Complaints about the conduct of athletes representing New Zealand offshore may warrant some public attention, but they are hardly matters of national security, political significance or otherwise affecting the overall welfare of citizens.

(c) The urgency of the matter

[82] In *Torstar* the Supreme Court of Canada held that in many cases "the public importance of the matter maybe inseparable from its urgency",[23] and that the legal requirement to verify accuracy should not "unduly hamstring the timely reporting of important news".[24]

[83] Counsel for the defendants says the way in which ESNZ had handled the complaints process was a developing news story that was a "perishable commodity" requiring urgent publication on 3 December 2017. Counsel points out that on 6 December 2017 Stuff published a news article titled "*New Zealand Equestrian Katie Laurie set for nationality switch after misconduct dispute*" and submits this demonstrates the urgency with which the defendants needed to publish their own article.

[84] On the other hand, counsel for the plaintiff says there was no urgency to publish the Article. Instead, counsel suggests the timing of the publication was focused more on reaching members of the equestrian community while they were gathered for the Horse of the Year show underway at the time. He points to messages between the second and third defendants on 3 December 2017 in which the third defendant suggested that "Time wise, the best time to post would be later this afternoon, possible

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23 *Torstar*, above n 11, at [112].
24 At [113].

around 4 or 5 I think. Bit of Sunday reading after the show for some…". The second defendant thought that was a good idea.

[85] I do not consider there was any urgent need to publish the Article. I accept that the relative urgency of publication needs to be assessed at the time of publication, rather than with hindsight. On 1 December 2017 ESNZ had issued a statement advising it would make further comment once its Judicial Committee had met. The next day Ms Kirkpatrick emailed the defendants advising that the Judicial Committee would meet "ASAP". I accept counsel for the plaintiff's submission that at this stage it was likely ESNZ's next statement would be highly relevant to any article seriously assessing ESNZ's regulatory performance in dealing with the complaint. Nevertheless, the defendants chose to publish the Article without waiting for that statement.

[86] As it turns out, ESNZ released its second statement on 6 December 2017. That statement was relevant. It confirmed that the mediation formed part of the ESNZ's Judicial Committee's process, and that the Judicial Committee had "encouraged the parties to attempt to reach an agreement themselves through mediation". It also explained that the ESNZ Board had advised the parties prior to their mediation that the Board expected to endorse and/or enforce any agreement they might reach at mediation. Further, in accordance with its earlier commitment to honour the outcome of the mediation, ESNZ agreed to publish the joint statement on its website.

(d) The reliability of any source

[87] The defendants do not suggest that the Article in general or the defamatory statements in particular drew on information provided by reliable sources. Counsel for the defendants suggests that they did not rely on any source in publishing the Article because nobody other than Ms Kirkpatrick was willing to go on the record.

[88] In this regard counsel for the plaintiff points out that the third defendant had no source for the incorrect statement she told Ms Laurie and Ms McVean she was

proposing to include in the Article.[25] Instead, he submits she was hoping they would verify a statement she knew to be false.

(e) Was comment sought from the plaintiff and accurately reported?

[89] In *Durie* the Court of Appeal observed that in most cases it is inherently unfair to publish defamatory allegations without giving the target of those allegations an opportunity to respond.[26] This factor goes to the essential sense of fairness that the public interest defence is intended to promote. In my view this is an important factor in assessing the responsibility of the communication in this case.

[90] The third defendant tried to contact the plaintiff via Facebook messenger for comment at 3:53 pm on the Saturday afternoon before publishing the Article the next day. She also tried to contact the plaintiff's mother. Neither the plaintiff nor her mother responded. The Article records:

> … We have approached both Heather and Kristin for confirmation and comment, but have had no response from either of them to our requests for clarification…

[91] Counsel for the defendants submits that the defendants' efforts to obtain comment from the plaintiff are a prime example of what a responsible journalist would do in the circumstances. Counsel for the plaintiff submits that the defendants' attempts at balance fell "woefully short" of what should be expected given the gravity of the allegations.

[92] Counsel for the defendants submits that the third defendant put "non-evasive questions" to the plaintiff and that she did not need her client's instructions in order to respond to them. He says that these questions (particularly the first and the last question) go to the heart of the plaintiff's conduct during the entire process, so that she had the opportunity to respond to the allegations against her before the Article was published.

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[25] At [34] and [36] above.
[26] *Durie*, above n 1, at [67(e)].

[93] I do not accept that submission, particularly in light of the serious defamatory meanings the jury found the Article to contain. The Facebook Messenger message did not put to the plaintiff that they intended to publish an Article containing those allegations found by the jury. In order to put these serious allegations fairly, the defendants needed to put them directly to the plaintiff so she had a meaningful opportunity to respond to them.

[94] Counsel for the defendants submits that if the plaintiff had responded to the third defendant's messages, her initial queries may have developed into more fulsome queries. I do not accept that submission. It was for the defendants acting responsibly to put the allegations squarely in the first place. Moreover, the defendants should have given the plaintiff more time to respond to the intended allegations and gone to greater lengths to contact her directly. In light of the seriousness of the defamatory allegations, I accept the expert evidence of Mr William (Bill) Ralston for the plaintiff that the steps the defendants took to seek the plaintiff's comment were "grossly insufficient".

[95] I also accept counsel for the plaintiff's submission that including the quote from the plaintiff's comment on the *iSpyHorses* website was not a sufficient substitute for seeking, obtaining and publishing her response to allegations that had been squarely put to her. That is particularly so in circumstances where the defendants removed from the quote that the plaintiff had sent the statement to *Show Circuit* as well as *iSpyHorses*. There is obvious merit in counsel for the plaintiff's submission that altering the plaintiff's comments as such would bolster the impression that *iSpyHorses* was the primary ("practically exclusive") publisher of the statement, thereby reinforcing the inference that the plaintiff had released the statement improperly in order to benefit her mother.

(f) Tone of the publication

[96] In *Torstar* the Supreme Court of Canada held:[27]

> While distortion or sensationalism in the manner of presentation will undercut the extent to which a defendant can plausibly claim to have been

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[27] *Torstar*, above n 11, at [123].

> communicating responsibly in the public interest, the defence of responsible communication ought not to hold writers to a standard of stylistic blandness.

[97] Counsel for the defendants submits that the tone of the Article is investigatory and mysterious but not sensationalist. He says direct references to the plaintiff were factual in tone. Counsel says further that the defamatory allegations were inferential, requiring the reader to "read between the lines", which he submits diminishes the sting of the defamation.

[98] I accept counsel for the plaintiff's submissions that the tone of the Article is set by its introductory invitation to the reader to look for "relationships and agendas that are not initially obvious" and its reference to potential "future legal action". Given the seriousness of the allegations the jury found the Article to contain, I also agree with counsel that the tone of the Article undermines the defendants' claim to have been communicating responsibly. I do not accept counsel for the defendants' submission that requiring the reader to read between the lines in order to infer the defamatory allegations necessarily diminishes their sting.

(g) Were the defamatory statements necessary to communicate on the matter of public interest?

[99] This is an important factor in the present case. As noted above, the defendants say that although the plaintiff is not the main subject matter of the Article, the defamatory allegations made against her in the Article are a secondary or ancillary subject matter. Counsel for the defendants go so far as to submit that it was integral to the Article to include the defamatory allegations.

[100] As I have noted, I disagree. The plaintiff was merely a lawyer acting for her clients. The Article did not need to mention her at all, directly or inferentially. Nor did it need to mention the plaintiff's mother. The defendants certainly did not need to include the defamatory statements about the plaintiff in order to comment on matters of public interest.

[101] Counsel for the defendants submits that one of the issues dealt with in the Article was whether or not the plaintiff had acted prematurely and against the wishes of ESNZ when she released the statement, thereby "hijacking the ESNZ process".

However, Ms Kirkpatrick's answers to the second defendant's questions on 1 and 2 December 2017 made clear that ESNZ had been informed by lawyers representing the parties that the statement was going to be released. As such, those issues could have been canvassed without referring to the plaintiff. In any event, it was entirely unnecessary for the Article to include the defamatory allegations that the jury found it to have.

Conclusion

[102] In my view the seriousness of the defamatory allegations the jury found in the Article far outweighs the relatively low public importance of its subject matter. Acting responsibly, the defendants should have fairly and squarely put those defamatory allegations to the plaintiff and given her time to respond. They did not. I do not consider there was any particular urgency to the publication, particularly when ESNZ had told the defendants that its Judicial Committee would be meeting "ASAP" and following which ESNZ would comment further. The defendants would reasonably have expected that further comment to concern matters the defendants say they were investigating (which, it turns out, it did). And in any event, I do not consider it was necessary for the Article to contain the defamatory allegations in order for the defendants to communicate on those matters. For that purpose, the Article did not need to refer to the plaintiff or her family at all.

Result

[103] The defence that the Article was a responsible communication on a matter of public interest fails.

[104] I enter judgment in favour of the plaintiff. In accordance with the jury's verdicts the plaintiff is awarded general damages of $225,000 and punitive damages of $15,000.

[105] The plaintiff as the successful party is entitled to costs. If the parties are unable to agree counsel for the plaintiff should file a memorandum of no more than 10 pages (excluding attachments) by 5:00 pm on **Friday, 31 March 2023** and counsel for the

defendants should do the same by 5:00 pm on **Wednesday, 26 April 2023**. Unless I require anything further, I will deal with costs on the papers.

Robinson J