IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2020-419-196
[2024] NZHC 44

BETWEEN	DONG (ANNE) CAO First Plaintiff
AND	PAUL OULTON Second Plaintiff
AND	STUFF LIMITED First Defendant
AND	GARY JAMES FARROW Second Defendant

Hearing: 30 – 31 October, 1 – 3 and 6 – 10 November 2023

Counsel: K J Crossland & J K Boparoy for Plaintiffs
R K P Stewart & P K J Roycroft for Defendants

Judgment: 31 January 2024

JUDGMENT OF JOHNSTONE J

This judgment was delivered by me on 31 January 2024 at 3pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

[1] Each spring, the cherry trees at the plaintiffs' semi-rural home on the outskirts of Hamilton blossom spectacularly. In 2017 and 2018, an event was held there, called the Waikato Cherry Tree Festival. Unless it reached a certain scale, the festival did not require a resource consent.

[2] Ms Cao and Mr Oulton planned a larger festival for 2019: one requiring a resource consent. Prior to and during the period of the planned 2019 festival, a media organisation, Stuff Limited (Stuff), published a series of news articles written by its reporter Gary Farrow. The resource consent was not forthcoming. The day before it was due to commence, Ms Cao and Mr Oulton cancelled the festival, electing not to seek to hold a smaller-scale event. Ticketholders were upset.

[3] Ms Cao and Mr Oulton were unhappy with the news articles. They sued Stuff and Mr Farrow alleging defamation.

[4] A jury trial was held in this Court between 30 October and 9 November 2023. The jury found that an online article first published on 15 September 2019 defamed Ms Cao and Mr Oulton, by asserting that they needed a resource consent to have lawfully operated their 2017 and 2018 events. The entire balance of their case, relating largely to what the articles said about the planned 2019 festival, was rejected. The jury found that the articles did not mean what was alleged, or if they did those meanings were not defamatory, or if they were such defamation caused no more than minor harm.

[5] The issue that remains for determination is whether the remedy that Ms Cao and Mr Oulton seek – a declaration under s 24 of the Defamation Act 1992 that Stuff and Mr Farrow are liable to them in defamation, and solicitor and client costs – should be granted, or denied, because Stuff and Mr Farrow are protected by the modern defence of responsible publication on a matter of public interest.[1]

[6] Before determining that issue, I will describe the 15 September article and the events surrounding its publication in more detail. I will also describe the procedure that resulted in the jury's findings. This will help to illustrate the significance of the

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

jury's findings, and provide the necessary foundation for discussion of the defence. This part of the judgment includes an outline of how in this case I chose to apply the Court of Appeal's ruling that, in a case tried by a New Zealand jury, it is for the trial judge to determine whether the defence is established "based on the primary facts as found by the jury".[2]

Pre-article events

[7] Mr Oulton emigrated to New Zealand from the United Kingdom in 1995. He purchased an essentially bare five-acre block on Matangi Road in 1996, and had a large house transported in pieces onto the site. Over time, he reassembled and renovated the house, and extensively developed the grounds with plantings, drystone walls, ponds, and a stream. Avenues formed by cherry trees are a particular feature.

[8] Mr Oulton met Ms Cao in 2016. She had come to New Zealand from China in 2003, obtaining a master's degree in international business soon after her arrival. In January 2017, Ms Cao incorporated a company called NZ Pure Tour Limited. It offered accommodation and conducted tours, including of gardens, for groups from China.

The 2017 festival

[9] With NZ Pure Tour as their vehicle, Ms Cao and Mr Oulton hosted an inaugural, two-day cherry blossom festival in 2017. They served high teas and provided local artisan food. And they organised events and multicultural performances, seeking to create a family and friend-oriented event that brought the community together by celebrating nature, spring and life.

[10] Ms Cao's pre-event communications with the Waikato District Council had disclosed that the festival could be run as a "temporary event" under the council's District Plan, so long as various conditions were observed, including that:

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2 At [63].

(a) it did not occur more than three times per year;

(b) it did not involve assembly of more than 1,000 people per event; and

(c) it operated only within the hours of 7.30 am to 10 pm on Mondays to Saturdays, and 7.30 am to 6 pm on Sundays.

[11] Ms Cao and Mr Oulton viewed the inaugural festival as a success.

The 2018 festival

[12] Ms Cao and Mr Oulton decided to host the festival again in 2018, this time over three days featuring performers and vendors, together with a fourth day the following weekend involving a simple garden visit only. They anticipated 3,000 to 4,000 attendees, but there were more. At times they ceased gate sales. Across the four days, they sold tickets to at least 5,000 people.

[13] By letter dated 24 October 2018, a "monitoring officer" of the Waikato District Council issued Mr Oulton with a formal warning for breach of the District Plan. The letter observed that the festival had attracted more than 1,000 people, and on Sunday, "23 October" (this should be taken as a reference to 23 September) did not finish until 8 pm, each aspect being described as involving a breach of the plan. The letter asserted that Mr Oulton was liable for having committed an offence against s 9(3) of the Resource Management Act 1991, but in light of the "overall circumstances" advised that "no further enforcement action" would be taken.

Plans and preparations for 2019 festival

[14] In November 2018, Ms Cao wrote to the Mayor of Hamilton. She wrote that: 6,000 people attended the 2018 festival despite tickets being sold out on the first day; she would have 12,000 people attend the 2019 festival, with larger numbers in later years "really put[ting] the Waikato on the international tourism map"; and she "need[ed] help with regulations and financing". A preliminary meeting with the mayor occurred on 20 February 2019.

[15] From January 2019, Ms Cao and Mr Oulton met and continued to liaise with a council officer working on economic development and marketing. The officer provided support in various ways, including by providing information such as an electronic link to the council's resource consent pre-application service, and her recommendation to engage an experienced planner to undertake the application on behalf of NZ Pure Tour.

[16] During May to early September 2019, Ms Cao and Mr Oulton met council planners and submitted draft resource consent applications, attaching noise, traffic impact, and site reports. Their formal application was submitted on 25 July 2019. From time to time, council officers advised of various queries and concerns on matters such as traffic management. And Ms Cao and Mr Oulton sought to respond, on occasion with professional assistance.

[17] Also during this period, Ms Cao and Mr Oulton canvassed their neighbours seeking support for the festival. The neighbours were not all supportive. Indeed, solicitors McCaw Lewis wrote to the council on 11 September 2019, advising that their client had been approached for approval but was concerned over traffic and pedestrian measures, resident privacy, noise, and resident and visitor safety. McCaw Lewis reminded the council of its enforcement powers under the Resource Management Act.

The first articles

[18] In 2019, Mr Farrow was a reporter, working at Stuff's Waikato Times office in Hamilton. A public relations advisor to Ms Cao and Mr Oulton contacted the Waikato Times in late 2019. Mr Farrow responded by arranging a site visit which took place on 29 August 2019.

2 September article

[19] During his visit on that day, Ms Cao and Mr Oulton showed Mr Farrow around their property and explained their hopes for the festival. The result was Mr Farrow's article, published online by Stuff on 2 September 2019 and in the printed Waikato Times of 3 September 2019, under the headline "Waikato International Cherry Tree

Festival gears up for biggest event ever". The article contained photographs, including of prior years' festivities and trees in bloom. Its tone was generally positive, noting the festival's growth.

Background to 15 September article

[20] Following his 2 September article, Mr Farrow was made aware of neighbours' concerns. He approached the council for comment, and he arranged to interview one of those neighbours, Daniel Wood, on Saturday, 14 September 2019. The day before the interview, Mr Farrow was sent two items of correspondence:

(a) First, a communications and engagement advisor at the council sent an email confirming it had received and was processing the resource consent application. Amongst other things, the email stated:

> Council (sic) has also advised the applicant that, in the absence of a resource consent, the festival could still take place but only if it met the requirements of the permitted activity provisions of the District Plan. This would require the applicant to hold a much smaller event than that being sought under the resource consent application.
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> The applicant has further been informed that if the festival takes place without a resource consent and the event does not comply with the permitted activity provisions of the District Plan, Council (sic) will consider what enforcement options are available.

(b) Second, Mr Wood sent Mr Farrow a copy of the resource consent application he had been given by Mr Oulton when seeking Mr Wood's approval. In doing so, Mr Wood described the application in unflattering terms.

[21] Mr Farrow's 14 September interview of Mr Wood lasted around 90 minutes. During the interview, which was recorded, Mr Wood outlined and indicated that about 20 neighbours shared his concerns about the size of the event and the flow-on effect on the neighbourhood. Mr Farrow sought photographs of difficulties Mr Wood described occurring in previous years. He did so by saying:

> Just sorry, just before I forget, do we have any pictures from previous years of the shit that's, yeah, gone on 'cause that would be really, really good to like, 'cause this is probably gonna be front page on Monday.

[22] When giving evidence before me, Mr Farrow indicated that he used such enthusiastic terms as a strategy to attempt to obtain the most significant or impactful information possible from Mr Wood. In a similar vein, he and Mr Wood spoke during the interview as follows:

> Mr Farrow: This is the thing, like only so much will fit in the article, like I've got 500 or 550 words so as you said we've gotta discuss the angle and what points we're actually, we're actually locking on to. So I mean part of it is that, you know, just they have made the application but not provided all of the required information as part of that and yeah they're basically not gonna get consent.
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> Mr Wood: They're running out of time to run the event as it is.
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> Mr Farrow: Yeah, yeah, that's right, and the event is gonna be severely stunted because of not having consent. They're gonna be able to have way less people or face enforcement and umm yeah like and there are all these people, they've probably sold tickets to like thousands and thousands and thousands of people and…
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> Mr Wood: That's what they say. That's what they say.

[23] Towards the end of the interview, Mr Farrow referred to the article he was intending to draft, and his intention to seek comment from Mr Oulton on the neighbours' alternate perspective, as follows:

> … I can have a, possibly tomorrow I could have a read through it with you as well just to make sure that things are like factual and correct and obviously you'll be interested to hear what Paul says when I call him.

[24] Soon after his interview with Mr Wood, Mr Farrow telephoned Mr Oulton and asked about ticket sales and progress with resource consent. Mr Oulton said ticket sales were double the previous year's sales to date. And he said the council was still working on the resource consent application, which he found very stressful.

[25] There was then the following exchange:

> Mr Farrow: Yeah that is quite, it is quite last minute isn't it? If they didn't give the consent or didn't give it in time, what would you do then?
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> Mr Oulton: Ah good question, I don't know, I'd have to take some advice. Don't know. What's the purpose of all the questioning? Are you gonna do an article, or… ?

[26] Mr Wood then advised he was planning an article about the festival and some of the concerns raised with him by community members. Mr Oulton acknowledged the previous year's problems and observed that this year the festival would be much better managed, offering the detail of traffic management solutions that had been devised, and emphasising the festival's various community benefits.

15 September article

[27] At 11.56 am on Sunday, 15 September 2019, Stuff published online Mr Farrow's next article on the festival. It was headed "Waikato cherry tree festival yet to receive resource consent, days from opening", and commenced as follows:

> The Waikato Cherry Tree Festival could be in doubt after neighbours complained to council (sic).
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> Resource consent is yet to be granted, less than a week out from the event, which can attract a crowd of 12,000 spread over 10 days.
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> With the event in its third year, residents of Matangi Rd are concerned they will see a repeat of their previous experiences of disruption during the event.
>
> But organisers say they have lived and learned, and this year's festival from September 20 to 29 will be much more orderly.

[28] The article proceeded to refer to Mr Wood and to expand on what he had told Mr Farrow. In this part, the article stated:

> At least 20 residents have recounted previous versions of the event, for which Waikato District Council consent was not granted.
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> They said this was accompanied by poor traffic management, cars parking on council verges and private property, blocking driveways, attendees trespassing on surrounding properties, and even residents missing appointments and flights because of difficulty accessing and leaving their nearby homes.

[29] The article then referred to Mr Oulton and similarly expanded on his response. Only in conclusion did the article mention the advice Mr Farrow had received by email from the council, including that if resource consent were not forthcoming, the festival could still take place but as a much smaller event.

[30] This article also appeared in the printed Waikato Times newspaper, on this occasion on Monday, 16 September 2019, on page three.

Failure to obtain resource consent

[31] By letter dated 17 September 2019, a consent manager of the Waikato District Council advised Mr Oulton that the council had decided that it was required under s 95C of the Resource Management Act to publicly notify the resource consent application, on the basis that the council had requested information which was not provided before a given deadline. As the letter observed, this meant that the council would not decide the application, and thus no resource consent would be granted prior to the festival being run.

[32] On 18 September 2019, Ms Cao and Mr Oulton sought to advise the public, via NZ Pure Tour's website, and ticketholders, via email, that two days of the intended festival had been cancelled, but other days would go ahead. And they advised the council that they intended to run the festival as a temporary event.

[33] On 19 September 2019, the day before the festival was due to start, a council enforcement officer issued Mr Oulton with an abatement notice. The notice reminded him of the restrictions applicable to a temporary event permitted under the District Plan, advised that council staff would undertake an inspection, and warned that failure to comply with the notice might result in "further enforcement action".

[34] That evening, Ms Cao and Mr Oulton decided to cancel the entire festival and place NZ Pure Tour into voluntary liquidation. Commencing that day, and continuing until some months later, all ticketholders were reimbursed their purchase monies, including with funds Ms Cao and Mr Oulton borrowed and contributed personally.

Further articles

[35] On 19 September 2019, Stuff published online Mr Farrow's third article on the festival, under the heading "Cherry tree festival cancelled after being denied resource consent". Subsequent online articles appeared as follows:

(a) on 20 September 2019, headed "Cherry Tree festival organisers go into liquidation, ticket holders fuming";

(b) on 23 September 2019, "Cherry tree festival ticket holders and creditors waiting for news of refund"; and

(c) on 16 December 2019, "Money still owed by failed Cherry Tree Festival organisers".

[36] By September 2020, Mr Farrow had moved to a new role as a technician with Free FM 89.0, a local radio station. He was also hosting a current affairs show broadcast by the station, episodes of which could later be accessed online. In the latter role, on 4 September 2020, Mr Farrow broadcast an episode which addressed Ms Cao and Mr Oulton's plan to hold the festival that month, as a temporary event held over three days. The theme of Mr Farrow's broadcast involved querying whether the 2020 festival could be held compatibly with the COVID-19 Level 2 restrictions, which were in effect locally.

[37] Later, on 23 September 2020, Stuff published a further article observing that the festival was running that year as a "permitted (temporary) activity".

The defence of responsible publication on matters of public interest: part one — roles of judge and jury

[38] In 1998, in *Lange v Atkinson*, the Court of Appeal extended the scope of the defence of qualified privilege, to generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament, and those with immediate aspirations to be members, so far as those actions and qualities directly affected their capacity to meet their public responsibilities.[3]

[39] Eighteen years later, in *Durie v Gardiner*, that Court recognised the modern defence of responsible publication on matters of public interest, subsuming the *Lange* form of qualified privilege.[4] The elements of the modern defence are that the subject matter of the publication was of public interest, and its communication was undertaken responsibly.[5] The defendant bears the onus of proving both elements.[6] The defence

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3 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 428.
4 *Durie v Gardiner*, above n 1.
5 At [58].
6 At [59].

is not confined to journalists: it is available to anyone who publishes material of public interest in any medium.[7]

[40] On the issue of the respective roles of judge and jury in relation to the defence, the Court of Appeal's approach was informed by case law from England and Wales, and Canada. In *Grant v Torstar Corp*, a majority of the Supreme Court of Canada held that it was for the trial judge to determine whether the communication was on matters of public interest, and for the jury to determine whether it was responsible.[8] Dissenting, Abella J considered both elements should be for the trial judge.[9] The latter view is consistent with the approach of the House of Lords in *Reynolds v Times Newspapers Ltd*.[10]

[41] The New Zealand Court of Appeal adopted Abella J's view, observing, amongst other things, that requiring juries to determine whether a communication was responsible was likely to result in lengthy and complicated jury questions. Recognition of a new defence should not compound the problem of the notorious complexity, length and cost of defamation jury trials.[11]

[42] Thus, the Court of Appeal concluded:

> [63] Accordingly, in a case tried by a jury in New Zealand, it will be for the trial judge to determine whether the two elements of the defence are established based on the primary facts as found by the jury.

[43] The Court then turned to making observations about how the judge might rule upon what is a matter of public interest, and whether the communication was responsible. In the latter regard, it set out a non-exhaustive list of factors that might be relevant.[12] I will address those factors further below.

[44] But for now, the question arises, what are the "primary facts" to be found by the jury? Should they be confined to matters juries would previously have been called

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7 At [59].
8 *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640 at [100] and [128]–[135].
9 At [142].
10 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).
11 *Durie v Gardiner,* above n 1, at [62(d)].
12 At [67].

upon to decide, or are juries now to be asked to determine additional matters such as those the Court listed, which might further inform the judge's findings on whether the defence is established?

What are the "primary facts" to be found by the jury?

[45] The Court of Appeal in *Durie* did not elaborate on this topic. The only other reference to "primary facts" in its judgment is to the concern expressed by the majority in *Torstar*, that the English approach in *Reynolds* entails a complex back and forth between the jury determining the primary facts and the judge determining responsibility.[13] The Court of Appeal considered that problem could be "minimised by appropriate trial management".[14]

[46] I take the view that, in a defamation jury trial where the responsible publication defence is pleaded, the trial judge should limit the "primary facts" to be determined by the jury strictly to the disputed elements of the tort of defamation and of any other pleaded affirmative defence (such as truth or honest opinion), and to the quantum of damages (where claimed). I do not consider it appropriate to seek the jury's view of additional factual matters.

[47] I take this view largely because I infer from the Court of Appeal's judgment that it did not intend, by introducing the defence, to add to the complexity of defamation jury trials by requiring juries to undertake any additional duties. None of the appellate authorities expressly state that they should. And the Court's decision to decline to task juries with determining the element of responsibility was expressed as being made for the purpose of avoiding additional complexity, length and cost.

[48] This division of responsibility can be seen broadly to align with the division of responsibility between the judge and jury in criminal trials. In the latter context, the judge has been described as the 13th fact finder.[15] Following a guilty verdict, the judge is entitled when sentencing a defendant, where the evidence supports it, to reach their

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13 At [62](e), citing *Grant v Torstar Corp*, above n 8, at [134].
14 *Durie v Gardiner*, above n 1, at [62](e).
15 See *Henriksen v R* [2023] NZCA 430 at [16]; and *R v Connelly* [2008] NZCA 550 for the criminal context.

own view of the relevant facts, provided that such view is not inconsistent with the verdict.[16] This entitlement extends, where appropriate, to determining that notwithstanding a guilty verdict, a defendant is not liable to conviction.[17] Further, it is the task of juries in criminal cases to offer their opinion, by way of their verdict(s), only upon whether the essential elements of criminal liability have been established, and not to make further comment as to culpability.

[49] Applying this view, the "appropriate trial management" that the Court of Appeal anticipated can be directed simply towards ensuring that the jury are required to consider only traditional jury questions of liability and remedial quantum, and to confront only evidence that is relevant to questions in issue on the pleadings. Evidence going only to the issues for the trial judge, of public interest and responsible publication, can be reserved for a supplementary trial phase occurring after the delivery of the jury's verdicts. In some cases, there may be considerable overlap between the evidence relevant to matters of primary fact, and the evidence relevant to matters of public interest and responsible publication; for example, where aggravated damages are sought, and are for the jury to determine. But at least in this case, owing to the way in which it was pleaded, the evidential overlap was relatively modest.

[50] I note that by adopting this procedure, the Court will address the concern raised in *Torstar* about "complex back and forth" between jury and judge. And further, that in suitable cases, it may facilitate the prompt determination of defamation proceedings pursuant to summary judgment applications by publisher-defendants wishing to avoid jury trials, who consider they can demonstrate the responsibility with which they published statements of public interest, even if those statements appear with hindsight to have been defamatory.

The questions for the jury in this case

[51] Given the above, the task of devising the questions to be asked of the jury in this case required consideration of the essential elements of liability at issue, putting

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16 *R v Connelly*, above n 15, at [14], citing *R v Heti* (1992) 8 CRNZ 554 (CA); *R v Accused (CA125/87)* (1988) 3 CRNZ 331, 335 (CA); *R v Harris* [1961] VR 236 (SC); *R v Whittle* [1974] Crim LR 487 (CA); *R v Solomon & Triumph* (1984) 6 Cr App R (S) 120 (CA).

17 Sentencing Act 2002, ss 106 and 107.

aside additional questions that might inform whether Stuff and Mr Farrow had published the articles responsibly. Of course, these elements emerged from the pleadings.

The pleadings

[52] Ms Cao and Mr Oulton filed their first statement of claim in August 2020. It named only Stuff as a defendant, and it alleged that the 19 September 2019 to 16 December 2019 articles were defamatory. As is apparent, the 2020 articles had not yet been published. The 15 September 2019 article was not mentioned.

[53] As required by s 37 of the Act, this statement of claim set out the literal content of the articles in issue, and pleaded that they each carried a series of particular meanings said to be defamatory. The pleaded meanings were allegedly meanings that were "natural and ordinary", rather than meanings which arose by innuendo. The claim continued by referring to the articles remaining online, being re-published by local Chinese language media, and causing significant reputational and economic harm, including by the posting of hate mail to NZ Pure Tour's Facebook pages and in-person verbal abuse. And it sought remedies in the forms of:

(a) a declaration under s 24 of the Act that Stuff is liable to Ms Cao and Mr Oulton in defamation;

(b) damages;

(c) a recommendation by this Court under s 26 of the Act that Stuff publish a correction; and

(d) solicitor and client (that is, actual) costs.

[54] In March 2022, Ms Cao and Mr Oulton applied to join Mr Farrow as a second defendant and filed an amended statement of claim. The amended claim added Mr Farrow's September 2022 broadcast as an allegedly defamatory publication, but not the 15 September 2019 article. Instead, it referred to the latter publication and

pleaded that it "was speculative and scaremongering and illustrated [Mr Farrow's] predetermination to discredit [Ms Cao and Mr Oulton]".

[55] On 30 June 2022, the close of pleadings date,[18] Ms Cao and Mr Oulton filed a second amended statement of claim, dropping their claim for damages from its list of remedies sought, and adding the 15 September 2019 and 23 September 2020 articles to the list of allegedly defamatory publications. However, they did not allege that the 15 September 2019 article carried particular defamatory meanings, claiming only that it was "speculative and misleading".

[56] It was not until 31 October 2023, the second day of the trial, that Mr Crossland, for Ms Cao and Mr Oulton, sought leave to amend the second amended statement of claim to allege that the 15 September 2019 article carried the following particular meanings:

(a) The Waikato Cherry Tree Festival (the Event) needed to obtain a resource consent to lawfully operate previous events in 2017 and 2018.

(b) Ms Cao and Mr Oulton were deliberate rule breakers by running the previous events without obtaining a resource consent.

[57] I granted leave, with Mr Stewart for Stuff and Mr Farrow responsibly consenting because his clients had not been substantively prejudiced by the delay in Ms Cao and Mr Oulton's application for leave.

[58] Broadly speaking, Stuff's statements of defence in response to this series of statements of claim admitted the articles, denied their pleaded meanings[19] and defamatory nature, and alleged as a positive defence that each of the articles were published responsibly in respect of matters of public interest. Having pleaded that defence, Stuff elected not to plead the affirmative defence of truth.

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[18] The close of pleadings date is the date directed by the Court in the course of pre-trial case management as the date following which no amended pleading or affidavit may be filed, interlocutory application made or step taken, without leave of a Judge: see High Court Rules 2016, r 7.6 and r 7.7.

[19] Stuff and Mr Farrow accepted that the pleaded meanings were capable of being accepted by the jury. I was thus not required to determine that issue as trial Judge.

Elements of liability, excluding responsible publication defence

[59] Pleadings alleging defamation commonly assert that statements are false and malicious. However, these are not matters for the plaintiff to prove.[20] The law presumes the pleaded meanings to be both false and harmful until the defendant proves otherwise. Thus, it is for the defendant to establish a successful defence of truth, by displacing the presumption of falsity,[21] and for the defendant to demonstrate that any defamatory statement carried no more than minor harm.[22]

[60] In light of the pleadings, and in particular the election not to plead "truth" as a defence, the elements of liability at issue in this case were:

(a) whether Ms Cao and Mr Oulton had proved:

(i) the articles bore the pleaded "natural and ordinary" meanings;

(ii) those meanings were defamatory; and

(iii) any such defamatory statements "identified" — that is, would be understood by the reader to relate to Ms Cao and/or Mr Oulton; and

(b) whether Stuff and Mr Farrow had proved the harm done by the defamatory statements was no more than minor.

The question trail

[61] The question trail, devised for the jury with the assistance of counsel, cited the contentious passages of each article, and then asked a series of question about each alleged meaning. The first three questions were as follows:

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20 *Leersnyder v Truth (NZ) Ltd* [1963] NZLR 129 (SC).
21 Defamation Act 1992, s 8.
22 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [68], cited with approval in *Craig v Slater* [2020] NZCA 305 at [44]–[45].

Meaning of the statement?

1. Have Ms Cao and Mr Oulton proved that, in their context and in their natural and ordinary meaning, the 15 September 2019 Statements meant that:

    a. the Waikato Cherry Tree Festival (the Event) needed to obtain resource consent to lawfully operate previous events in 2017 and 2018?

    Yes / No (circle one)

    b. Ms Cao and Mr Oulton were deliberate rule breakers by running the previous events without obtaining a resource consent?

    Yes / No (circle one)

Question 1a. — Ms Cao

2. If the answer to question 1a. is "yes", have Ms Cao and Mr Oulton proved that, in its context, that meaning was defamatory of Ms Cao?

    Yes / No / NA (circle one)

3. If so, have Stuff Limited and Mr Farrow proved that the harm Ms Cao suffered because of the statement(s) that carried the meaning in question 1a. was no more than minor?

    Yes / No / NA (circle one)

Question 1a. — Mr Oulton

4. If the answer to question 1a. is "yes", have Ms Cao and Mr Oulton proved that, in its context, that meaning was defamatory of Mr Oulton?

    Yes / No / NA (circle one)

5. If so, have Stuff Limited and Mr Farrow proved that the harm Mr Oulton suffered because of the statement(s) that carried the meaning in question 1a. was no more than minor?

    Yes / No / NA (circle one)

[62] Questions 6 to 9 similarly sought answers (if Question 1b were to have been answered "yes") on the topics of identification and harm. Questions 10 to 115 related to articles first published on 19 September 2019 and later, and were structured identically.

[63] As is apparent, the question trail required the jury to give special verdicts in respect of applicable elements of the pleaded defamation, rather than upon a global basis at the end of each question sequence. While the latter approach was available, the former had the advantage of ensuring that the jury would follow the correct process of analysis. And, in my view, it did not unduly extend the process of taking verdicts in a way that might be inappropriate were it applied in the context of criminal charges.

[64] The question trail commenced with a set of notes on generic issues: unanimity, onus and standard of proof, unnecessary answers, and the meaning of "defamation". The note on defamation was as follows:[23]

> Defamation: a defamatory statement is one that tends to lower the reputation of a person(s) in the reasonable view of others.

[65] It was drawn from classical case law,[24] defining a defamatory statement as one that tends to lower the plaintiff in the estimation of reasonable people,[25] or that tends to make others shun and avoid the plaintiff.[26]

The jury's findings

[66] The jury answered Question 1a "yes", and Question 1b "no", finding that the 15 September 2019 article meant the festival needed to obtain resource consent to have

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23 On 6 November 2023, I made a trial ruling outlining my reasons for this definition. A persistent trial issue that arose was that the parties sought to adduce evidence and to question witnesses on topics relevant only to the truth of the statements. I informed counsel that such questions were not relevant and that if the trial were to continue on this path I would have to intervene. Mr Stewart recognised the issue and tentatively mentioned the possibility of an amendment to the statement of defence, to allow the defence of truth to be put before the jury. I indicated that the prospects of a successful application to that effect mid-way through the trial were poor. Responsibly, Mr Stewart did not pursue the point. Instead, he sought that the element of falsity should form part of the advice to the jury on the meaning of defamation. I declined that request as the preponderance of authority firmly rejects such a definition, where truth has not been pleaded as an affirmative defence.

24 There are two other commonly accepted definitions: "A false statement about a person to his or her discredit" (*Youssoupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 (CA) at 584); and "A publication without justification which is calculated to injure the reputation of another by exposing him or her to hatred, contempt or ridicule" (*Parmiter v Coupland* (1840) 6 M & W 105 (Exch) at 342). Although substantially similar to the definitions I have adopted, each contemplates and includes the absence of a defence as a necessary part of the definition, and in my view, are therefore conceptually flawed.

25 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240.

26 *Youssoupoff v Metro-Goldwyn-Mayer*, above n 24, at 587.

operated lawfully in 2017 and 2018, but not that Ms Cao and Mr Oulton were deliberate rule breakers because they did not do so.

[67] The jury then answered Questions 2 to 5 "yes", finding that the former meaning was defamatory of both Ms Cao and Mr Oulton and caused harm that was not minor (or less than minor). Given the jury's answer to Question 1b, Questions 6 to 9 did not require to be answered.

[68] As indicated above, Questions 10 to 115 were all answered to the effect that the articles first published on 19 September 2019 onwards did not mean what was alleged, or if they did those meanings were not defamatory, or if they were such defamation caused no more than minor harm.

[69] In essence, the jury determined as matters of "primary fact", which will inform my judgment on the availability of the responsible publication defence, that the 15 September 2019 article:

(a) defamed Ms Cao and Mr Oulton by asserting that they failed to obtain a resource consent for the 2017 and 2018 festivals, and so operated them unlawfully; but

(b) did not assert that they did so deliberately.

The defence of responsible publication on matters of public interest: part two — unavailability on the facts of the present case

[70] In their reply to the statements of defence filed by Stuff and Mr Farrow, Ms Cao and Mr Oulton admitted that the articles dealt with matters of public interest. The consequence is that it remains necessary only to determine whether the 15 September 2019 article's assertion, that Ms Cao and Mr Oulton operated the 2017 and 2018 festivals unlawfully by failing to obtain a resource consent, was published responsibly.

[71] To my mind, this question has an obvious answer. It is most unlikely that it will be responsible to publish a defamatory statement that is known to be incorrect.

The next section of this judgment explains the process by which I have concluded that is what occurred in this case.

Supplementary trial phase — factual finding on defendants' knowledge that defamatory statement incorrect

[72] Following delivery of the jury's verdicts, a supplementary trial phase was held before me as trial Judge sitting alone. This phase involved the parties calling further evidence and then making submissions. The evidence went beyond that relevant only to matters of "primary fact" by addressing issues of responsible publication. And the submissions addressed the availability of the defence in light of that evidence and the applicable legal principles.

[73] Prior to the trial commencing, the parties had prepared and exchanged briefs of evidence to be given by experienced and senior journalists, offering their views on whether the articles had been published responsibly. Following argument, I ruled that the evidence that had been briefed was not admissible, it not being likely to offer me substantial help as fact-finder.[27]

[74] During this supplementary phase, Mr Farrow was referred to the code of ethics with which Stuff journalists such as Mr Farrow were at the time obliged by their employment contracts to comply. He confirmed that at the time of his articles he was aware of the code's substantial emphasis upon accuracy.

[75] Mr Farrow further confirmed:

(a) he received the council's email of 13 September 2019 described at [20](a), and therefore that by around midday on 14 September 2019, he was aware a much smaller event than that the subject of the 2019 resource consent application could take place without a resource consent;

(b) he knew the 2017 and 2018 events had been smaller than the planned 2019 event; and

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[27] Refer, Evidence Act 2006, s 25(1).

(c) in respect of the all-important passage of the 15 September 2019 article set out at [28], describing "at least 20 residents [recounting] previous versions of the event, for which Waikato District Council consent was not granted":

> … in writing the article I could have worded it better. I'll take it on the chin. I conflated the '18 and '17 festivals in that line and wrote that part of the sentence. So the intent your Honour was to say that the previous events had not had resource consent but not implying that they required resource consent. So I can understand how the respectful jury and the readers of this article could construe that differently but it's a, it's a sentence which I'll, like I say I'll take on the chin and if I, if I could have rewritten this article and rewritten that sentence I would have your Honour. Basically, this part of the sentence should say "which Waikato District Council consent was not needed or required or sought".

[76] In summary, Mr Farrow's evidence contained his admission (indeed, his assertion) that the defamatory aspect of his 15 September 2019 article arose because it was inadvertently worded incorrectly. It asserted the 2017 and 2018 festivals had been operated unlawfully, because a resource consent had not been obtained, when (at least with hindsight) he accepted it should not have done so. It should not have done so because he knew (and therefore so too did his principal, Stuff) that the 2017 and 2018 festivals could have been operated lawfully without a resource consent.

[77] I record that I am not persuaded Mr Farrow's wording was inadvertent. His recorded conversation with Mr Wood about his article being "front page on Monday",[28] and his evidence before me, demonstrate that he held particular enthusiasm for a story highlighting the organisers' failure to obtain resource consent for the 2019 festival with only a matter of days remaining before its intended commencement, notwithstanding large numbers of ticket sales. And although Mr Farrow referred in his evidence to the 2018 festival having breached the relatively low attendance limits for temporary events, I find it unlikely he was aware of that aspect until well after the 15 September 2019 article, when Ms Cao and Mr Oulton had commenced this proceeding. There is no evidence of Ms Cao, Mr Oulton or the council publicising the 24 October 2018 warning letter. And if Mr Farrow had been aware of the excess attendees in 2018, I anticipate he would have discussed them with

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[28] See [21] above.

Mr Wood and written about them in his article. Instead, in my view the defamatory aspect of the 15 September 2019 article was written because Mr Farrow intended to assert that there was some unsatisfactory aspect to the 2017 and 2018 festivals having previously been operated without resource consent, and because this incorrect assertion would serve to excite further public interest in the unsatisfactory position of the 2019 festival. I accept that, later in the 15 September 2019 article, Mr Farrow referred specifically to the council having advised that the 2019 festival could still take place as a much smaller event. But as the jury's verdict confirms, this reference was insufficient to overcome the inaccurate impression created by the earlier passage relating to the 2017 and 2018 festivals.

Durie *factors*

[78] As mentioned above, the Court of Appeal in *Durie* offered a list of factors that might be relevant to the question whether a communication was made responsibly. These include:[29]

(a) the seriousness of the allegation;

(b) the degree of public importance;

(c) the urgency of the matter;

(d) the reliability of any source;

(e) whether comment was sought from the plaintiff and accurately reported;

(f) the tone of the publication; and

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

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[29] *Durie v Gardiner*, above n 1, at [67].

[79] However, as the Court observed:

> [68] The list of factors is not exhaustive and in some cases the circumstances may be such that not all factors in the list are relevant.

[80] In cases such as the present, where the defamatory statement in question is known by the publisher prior to publication to be incorrect, review of the *Durie* factors tends to emphasise the importance of the publisher's knowledge above other aspects. This is likely because publishing incorrect statements that are known to be incorrect does not serve the public interest. *Durie* factor (g) is to similar effect.

[81] It is convenient to review the *Durie* factors applicable in this case by reference to the submissions for Stuff and Mr Farrow.

Submissions for Stuff and Mr Farrow on responsibility in fact

[82] For Stuff and Mr Farrow, Mr Stewart submitted with reference to the *Durie* factors that the 15 September 2019 article was published responsibly. In particular:

(a) As to the "seriousness of the allegation", although the jury had found the 15 September 2019 article to contain a defamatory statement, the statement's core allegation (that the previous event had not been run with resource consent) was true. And the jury did not find that the article implied Ms Cao and Mr Oulton were deliberate rule breakers.

(b) In its context, there was high public interest and urgency pertaining to the 15 September 2019 article. The 2019 festival was due to commence within days.

(c) The reliability of sources was considered, and Mr Wood's views were not given undue weight. Mr Farrow exercised reasonable diligence to verify the allegation when he reinterviewed Mr Oulton, providing as he did so an opportunity to comment.

(d) The tone of publication was neutral and raised legitimate doubts whether the event would be able to run.

(e) The defamatory statement was arguably necessary to include because it provided context for the upcoming 2019 festival and the practical realities it faced.

[83] Mr Stewart further submitted that Mr Farrow followed Stuff's code of ethics, by ensuring Mr Wood did not improperly influence him in writing the article, by putting matters to Mr Oulton, and by incorporating verified information with which he had been provided by the council.

Review

[84] In my view:

(a) The "core allegation" of relevance is that found by the jury to be implied by Mr Farrow's assertion that previous festivals were run without resource consent; that is, that for this reason they were run unlawfully. This allegation is not as serious as it might have been. The jury did not find the festivals were deliberately run without the required resource consent. But the seriousness of the allegation is heightened by it having been made by a publisher who was aware it was incorrect.

(b) Similarly, there can be no public interest or urgency in conveying factual assertions that are known to be incorrect.

(c) The council was indeed a reliable source. But, as discussed above, its observation that the 2019 festival might be operated lawfully without a resource consent was (I consider deliberately) left until too late in the article to avoid Mr Farrow's statement about the 2017 and 2018 festivals implying they were unlawfully run for want of a resource consent. And when Mr Farrow reinterviewed Mr Oulton, he did not raise that issue for comment. Mr Oulton therefore was not provided with an opportunity to comment on the defamatory aspect of the 15 September 2019 article. This is not surprising, as Mr Farrow (and through him Stuff) knew it was incorrect.

(d) Issues of the tone of the publication, and the legitimacy of publication on other matters of public interest, are not particularly relevant when inaccurate information is published. Inaccurate information does not provide proper context for comment on contemporary matters.

(e) Finally, while Stuff's code of ethics contemplates the possibility of inaccurate reporting despite best, or even reasonable, efforts, it does not contemplate reporting that is known to be incorrectly worded. Given the jury's finding, and Mr Farrow's awareness of the correct position, his article did not comply with the charter.

[85] In other words, due to its inaccuracy, it was not necessary to communicate the defamatory statement in this case relating to the 2017 and 2018 festivals, in order to communicate on the 2019 matters of public interest.

Conclusion on responsibility in fact

[86] Overall, I find as a matter of fact that the defamatory aspect of the 15 September 2019 article was not published responsibly.

The defence of responsible publication on matters of public interest: part three — availability when only a s 24 declaration is sought

[87] As stated above, Ms Cao and Mr Oulton filed a second amended statement of claim on the close of pleadings date. Amongst other things, this statement of claim dropped their claim for damages. Their claim for a recommendation by the Court under s 26 of the Act, that Stuff publish a correction, remained. However, that aspect was not pursued prior to the trial, and when the trial commenced it was abandoned. This left only the claim for a declaration under s 24 of the Act, and the consequential claim for solicitor and client costs.

[88] The above findings provide a sufficient factual basis for my view that I should grant the declaration that Ms Cao and Mr Oulton seek. I will do so at the conclusion of this judgment.

[89] However, Mr Crossland submitted on behalf of Ms Cao and Mr Oulton that, regardless of my view of the facts, as a matter of law the defence of responsible publication on matters of public interest should not (and does not) operate in cases where the only remedy sought at trial is a s 24 declaration.

[90] I will not express a concluded view upon Mr Crossland's submission, as to do so is not necessary for the purposes of this judgment. Instead, I will touch only lightly upon the parties' respective arguments, for the purpose of confirming that I do not consider the matter to have been settled by statute or case law.

Argument for Ms Cao and Mr Oulton

[91] Mr Crossland's argument for Ms Cao and Mr Oulton relied on the fact that, at first instance in *Lange v Atkinson*, Elias J (as she then was) wrote:[30]

> In concluding that a defence of qualified privilege is available to a claim for damages for defamation arising out of political discussion even where the communication is made to the public generally, I do not wish to express any view upon the availability of the defence to a claim for declaration under s 24 of the Defamation Act 1992.
>
> …
>
> I … confine my decision as to the availability of privilege to claims for damages. Nothing I have said is intended to suggest that the privilege would be a defence to an application for a declaration. The availability of qualified privilege as a defence to a claim for declaration will need to be considered carefully in a case where it arises. If the defendant is protected against liability for damages, a balance in keeping with the pragmatic approach of the common law may be that the defence does not apply to a claim for declaration. Much will turn on the assessment of whether the costs of litigation and the exposure to solicitor and client costs in an application for declaration is unacceptably chilling of political discussion.

[92] Mr Crossland's argument is that allowing the defence of responsible publication to protect against declaratory relief would unacceptably encroach on the ability of those claiming to have been defamed to seek vindication of their reputation. Mr Crossland submits that reputation must be protected, and truth must be valued. If the defence were to operate in cases where only a s 24 declaration were sought,

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30 *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 (HC) at 47.

defamed persons would have no means by which to obtain even that modest form of relief.

[93] Mr Crossland observes that, as with its predecessor in the *Lange* form of qualified privilege, and as with comparable defences overseas, the responsible publication on matters of public interest defence was introduced to avoid "liability chill"; that is, the notion that without access to the defence, publishers will be slow to make statements on matters of public interest for fear of the consequences of doing so should it later be difficult to establish the statements' truth. Mr Crossland submits that the chilling effect of exposing defendants in defamation cases to the potential remedy of a declaration under s 24 is not nearly the same, or even similar, to the chilling effect of exposing them to liability to pay damages. Accordingly, the responsible publication defence should be confined so that it operates only when damages are sought.

Argument for Stuff and Mr Farrow

[94] For Stuff and Mr Farrow, Mr Stewart submitted that the defence was legally available in this case, for three core reasons:

(a) First, unavailability would be inconsistent with the wording of s 24.

(b) Second, the Court of Appeal in *Durie* did not indicate that the defence is not available in proceedings seeking declaratory relief.

(c) Third, contrary to Mr Crossland's submission as to the absence of liability chill, Mr Stewart submits that if the defence were not available the presumption of solicitor and client costs arising under s 24 would be unacceptably chilling of communications on matters of public interest.

Statutory remedies regime

[95] Part 3 of the Act, headed "Remedies", supplements the non-statutory range of remedies in defamation, including the remedy of damages, by providing for declarations, retraction or reply, and Court-recommended correction.[31]

[96] Section 24 provides as follows:

> **24 Declarations**
>
> (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
>
> (2) Where, in any proceedings for defamation,—
>
> (a) the plaintiff seeks only a declaration and costs; and
>
> (b) the court makes the declaration sought,—
>
> the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the court orders otherwise.

[97] The provision appears to have been enacted to provide and encourage use of an expedient means of protecting reputation. Actions in defamation might be brought without incurring the potential delay and cost of proving a particular quantum of damage to reputation. And a plaintiff might avoid allegations that their claim "was simply a gold-digging one".[32] As Geoffrey Palmer MP said when introducing the Defamation Bill:[33]

> Part III deals with remedies. Clause 17 is a new clause that provides that a plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation. To encourage plaintiffs to take advantage of that provision, the Bill provides that the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings unless the court orders differently if the plaintiff seeks only a declaration and costs and the court makes the declaration. *That clause will suit persons who are more interested in clearing their name quickly than in obtaining damages.*

[98] However, the wording of s 24 appears to contemplate plaintiffs simultaneously seeking both damages and a declaration. Under s 24(1), a declaration may be sought

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31 Section 24 (declarations), s 25 (retraction or reply), ss 26 and 27 (correction).

32 Committee on Defamation *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (Government Printer, Wellington, December 1997) at [401].

33 (25 August 1988) 491 NZPD 6370 (emphasis added).

"in any proceedings for defamation". And under s 24(2), the solicitor and client costs presumption arises only "where" the plaintiff seeks only a declaration and costs, implying that there may be cases where the plaintiff seeks other remedies also.

[99] Thus, observing that the nature of a s 24 declaration is a declaration "that the defendant is liable to the plaintiff in defamation", the language used in s 24 is seen to draw no distinction between the types of liability involved in declaring the defendant's liability "in defamation" as against their liability to pay damages. And if the nature of the liability is the same, a defendant entitled to the responsible public interest publication defence, and therefore not liable to pay damages, must similarly not be liable to a declaration. This was essentially Mr Stewart's first point.

[100] Yet the point may simply serve to expose a drafting flaw. If the nature of the "liab[ility] in defamation" sufficient to found a declaration is no less than that sufficient to found liability to pay damages, there seems little prospect of proceedings seeking s 24 declarations to provide any more expedient means of reputational vindication than proceedings for damages.

[101] Section 24 was introduced prior to *Lange* and *Durie*. It might be that it should now be interpreted so that a s 24 declaration only can be sought, and granted, without consideration of the responsible publication defence, because in that situation the nature of the defendant's declared "liability in defamation" is limited to expressing the fact of defamation and the absence of other defences (such as 'truth'). If that were the case, s 24 might be said to better serve its apparent purpose of expedient reputational vindication.[34]

Case law

[102] On appeal in *Lange*, the Court of Appeal did not disturb or refer to Elias J's qualifying statement cited at [91] above. Since then, there has been only one brief judicial reference, but no final view was expressed.[35]

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[34] I note that a declaration of this nature might be described as in essence, a declaration of falsity. The availability of a declaration of that nature was rejected in *Loutchansky v Times Newspapers Ltd (No 6)* [2002] EMLR 44 (QB).

[35] *Dyer Whitechurch v Pauanui Publishing Ltd* HC Auckland M1736/IM99, 27 June 2000 at [27].

[103] Several New Zealand courts have proceeded on the broad basis that a declaration is only available where no defence is established:

(a) In *Smith v Dooley*, the Court of Appeal noted the following about the availability of declaratory relief and defences:[36]

> [103] There is considerable force in Mr Stewart's submission that it would be unjust for the Court to exercise its s 24 discretion to deprive Mr Dooley of a declaration *where defamation had been established and all affirmative defences defeated.* ….
>
> [104] On the other hand, the s 24 declaration was designed for plaintiffs interested in clearing their name quickly. It follows that inexplicable delay must count against a declaration.

(b) Associate Judge Osborne (as he then was) refused to grant an application for summary judgment where the defence of qualified privilege was at issue, noting that the plaintiff had to satisfy the Court "that defamation is made out and that *qualified privilege does not apply* … ".[37]

(c) In *Fourth Estate Holdings (2012) Ltd v Joyce*, the Court of Appeal observed that declarations under s 24 "should not lightly be denied any relief at all" if the defamatory meanings were made out but only "[i]f a claim for damages would have succeeded", as it would otherwise "generally be inconsistent with the policy rationale for enacting s 24 to refuse relief".[38] The corollary is that s 24 may only mandate a declaration if the action would have otherwise succeeded; that is, when no affirmative defence could be established.

[104] However, the Courts in these cases were not directly engaging with Elias J's obiter comments. They might be distinguishable on that basis.

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36 *Smith v Dooley* [2013] NZCA 428 (emphasis added).
37 *Van de Klundert v Clapperton* [2015] NZHC 425 at [42] (emphasis added).
38 *Fourth Estate Holdings (2012) Ltd v Joyce* [2020] NZCA 479, [2021] 2 NZLR 758 at [85].

[105] Similarly, Mr Stewart is correct in making his second point, that in *Durie* the Court of Appeal did not address the availability of the defence of responsible publication in cases seeking only s 24 declaratory relief. But in light of Elias J's express reservations, I do not consider *Durie* to have disposed of the issue.

[106] Indeed, the division of responsibility as between jury and judge established in *Durie* might be said to support the survival of the remedy of declaration, even in cases where the responsible publication defence is made out. The prospect of this Court summonsing community members to act as jury members, requiring their attendance and attention over a period of days, and taking their verdicts finding that a plaintiff had been defamed, only then to decline any relief whatsoever, is at best unattractive.

Costs liability

[107] When stating her reservations about application of the new defence to s 24 declaration cases, Elias J observed that "[m]uch will turn on the assessment of whether the costs of litigation and the exposure to solicitor and client costs in an application for declaration is unacceptably chilling of political discussion".[39]

[108] The nature of that exposure to solicitor and client costs is significant: such costs are to be awarded "unless the court orders otherwise".[40] In a case such as the present, where any harm done by the defamatory statement will have been outweighed by that arising from other, non-defamatory publicity (here, of Ms Cao and Mr Oulton's various organisational shortcomings relating to the 2019 festival), solicitor and client costs may greatly exceed the amount of damages that might have been awarded.

[109] But the consequence of recognising the responsible public interest publication defence, depriving defamed plaintiffs of any mechanism for vindication of the truth, is also severe.

[110] As indicated, I have resolved to leave assessment of the appropriate balance to be struck specifically in s 24 declaration-only cases to an occasion on which the facts require it.

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39 *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 30, at 48.
40 Defamation Act, s 24(2).

Result

[111] I grant Ms Cao and Mr Oulton's claim for a declaration that Stuff and Mr Farrow are liable to them in defamation for publishing the 15 September 2019 article, and in particular, the assertion made by that article that they operated the 2017 and 2018 festivals without the resource consent that was required in order for those festivals to have operated lawfully.

Costs

[112] I note the s 24(2) presumption that solicitor and client costs should be awarded.

[113] For the following reasons, it may be argued strongly that the presumption should not apply in this case:

(a) As stated at [52]-[57], Ms Cao and Mr Oulton originally sued upon two, then three, articles. But these were not the 15 September 2019 article in respect of which they succeeded. When, at the close of pleadings date, they sued upon the 15 September 2019 article, they still did not plead its allegedly defamatory meaning, claiming only that it was "speculative and misleading". It was not until the second day of the jury trial that they alleged that the 15 September 2019 article carried two particular meanings, only one of which they succeeded upon.

(b) The jury rejected the entire balance of Ms Cao and Mr Oulton's case, including the allegation that the article claimed they deliberately operated the 2017 and 2018 festivals without the necessary resource consent.

(c) Ms Cao and Mr Oulton admitted in evidence that attendees of the 2018 festival were far in excess of the numbers permitted for temporary events under the District Plan. The council's warning letter of 24 October 2018 referred not only to excessive attendee numbers but also to operating hours. Thus, although Stuff and Mr Farrow defamed

Ms Cao and Mr Oulton by asserting that they operated the 2017 and 2018 festivals unlawfully by doing so without a resource consent, it would have been correct to assert simply that they operated the 2018 festival unlawfully.

(d) Ms Cao and Mr Oulton adduced considerable evidence that they were harmed as a consequence of publicity relating to the 2019 festival. But the bulk of that harm appears to have derived from their own organisational failures.

(e) I have not identified evidence of particular harm arising from the 15 September 2019 article's reference to the 2017 and 2018 festivals.

(f) Accordingly, while the jury found that Stuff and Mr Farrow had not proved that that harm was no more than minor, its extent cannot be discerned with precision, and in both relative and absolute terms appears modest.

[114] In light of the above, my current inclination is to let costs lie where they fall. In the event either party wishes to file and serve submissions on costs, they may do so within 15 workings days of this judgment by way of a memorandum of no more than five pages in length. If a such a memorandum is filed by one party only, the other parties may respond by way of a similar memorandum, filed and served within a further 10 working days.

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Johnstone J