

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE

CIV-2023-404-2244  
[2024] NZHC 2358

BETWEEN

NGUYEN THI THANH HA  
Plaintiff

AND

DANG SON DINH  
First Defendant

MAI THI PHUONG PHAM  
Second Defendant

JULIE FAM  
Third Defendant

MINH NGUYEN  
Fourth Defendant

Hearing: 18 July 2024

Appearances: F Geiringer and S Price for the Plaintiff  
No appearance for the First to Fourth Defendants

Judgment: 23 August 2024

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**JUDGMENT OF GORDON J**

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This judgment was delivered by me  
on 23 August 2024 at 12 pm, pursuant to  
r 11.5 of the High Court Rules

Registrar/Deputy Registrar  
Date:

Solicitors/Counsel:  
Bennion Law, Wellington  
F Geiringer, Barrister, Wellington  
S Price, Barrister, Wellington

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[1] The plaintiff, Nguyen Thi Thanh Ha (known as Ha Nguyen),<sup>1</sup> is a 45-year-old married woman living in Wellington. The parties are members of the New Zealand Vietnamese community. Ms Nguyen brings a claim in defamation against the defendants.

[2] In 2021, Ms Nguyen had a dispute with a Vietnamese businesswoman based in Auckland known as Jenny Pham. This resulted in Jenny Pham bringing a defamation proceeding against Ms Nguyen (Jenny Pham proceeding). That proceeding has now settled. Jenny Pham is not a party to this proceeding. However, she was friends with the defendants at all material times.

[3] Ms Nguyen says the defendants wrongly accused her of hiring hackers to deactivate Facebook pages and Facebook groups of members of the New Zealand Vietnamese community and other criminal misconduct such as embezzlement and fraud. The accusations, which included purported proof in the form of screenshots of conversations allegedly between Ms Nguyen and the hackers, were published as Facebook posts which were widely read and shared throughout the New Zealand Vietnamese community. Ms Nguyen was not contacted by the defendants before any of these posts were published.

[4] The accusations are without foundation. There is expert evidence that the accusations are based on falsified digital documents. The defendants eventually accepted the documents were fabricated and have all published belated retractions.

[5] Although the defendants were served with the claim, none have taken any steps to defend the proceeding. Given the defendants' failure to file any documents in opposition or to appear, this matter proceeded by way of formal proof.

[6] Ms Nguyen seeks judgment, damages and costs.

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<sup>1</sup> I note that despite having the same or similar surnames, none of the parties or deponents in this proceeding are related.

## Formal proof in defamation hearings

[7] If a defendant does not file a statement of defence within the specified time and the plaintiff seeks judgment by default, then the proceeding must be listed for formal proof and no notice is required to be given to the defendant.<sup>2</sup> The plaintiff must file affidavit evidence establishing, to the Judge's satisfaction, each cause of action relied on and, if damages are sought, providing sufficient information to enable the Judge to calculate and fix the damages.<sup>3</sup>

[8] It is trite law that the standard for a judge to be satisfied of the plaintiff's evidence is "much the same as it would be if the proceeding had gone to trial," that is, on the balance of probabilities.<sup>4</sup> It is not the case that allegations of fact are deemed to be admitted.

[9] The court is not generally required to consider affirmative defences that have not been pleaded in formal proof hearings.<sup>5</sup> However, Mr Geiringer, counsel for Ms Nguyen, submits that counsel may have obligations as officers of the court to assure the court that there are no known defences.<sup>6</sup> It is on that basis that Mr Geiringer has included in the materials before the Court copies of affidavits from Jenny Pham and affidavits from the first to third defendants, which were filed in the Jenny Pham proceeding.<sup>7</sup>

[10] I make no comment on whether there is such an obligation but I have nevertheless considered the affidavits from the Jenny Pham proceeding. As will be seen later in this judgment I am satisfied that there can be no serious argument that any defences can be made out. In fact, as will be seen, the affidavit of the first defendant, Dang Dinh, goes a long way towards undermining any credible response he might have when his affidavit is considered in the context of other evidence.

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<sup>2</sup> High Court Rules 2016, s 15.9(1)–(2).

<sup>3</sup> Rule 15.9(4).

<sup>4</sup> *Ferreira v Stockinger* [2015] NZHC 2916 at [35], endorsed by the Court of Appeal in *Khan v Sheriff* [2018] NZCA 583 at [23].

<sup>5</sup> *Kim v Cho* [2016] NZHC 1771, [2016] NZAR 1134 at [4]; *Solomon v Prater* [2021] NZHC 481 at [11]; *Currie v Doe* [2023] NZHC 1508 at [15]–[16]; and *Staples v Freeman* [2021] NZHC 1308 at [4].

<sup>6</sup> Citing *Castillo v Ybanez* [2023] NZHC 1723 at [7].

<sup>7</sup> As part of the settlement of the Jenny Pham proceeding, Jenny Pham gave permission for Ms Nguyen to use documents provided in the discovery of that proceeding.

## **Background**

[11] Ms Nguyen was born and raised in Vietnam. She came to New Zealand in 2011 as a PhD candidate on scholarship funding from the Vietnamese government, though she was unable to complete her studies due to health issues. She has remained in New Zealand and is now a citizen of New Zealand (along with her husband and two children).

[12] Ms Nguyen says the New Zealand Vietnamese community is small and tight-knit, with the 2018 census data showing that there were 10,086 people who identified as Vietnamese, most of whom lived in Auckland and Wellington. For this reason, she says she is well-known throughout the Vietnamese community for her community and voluntary work.

[13] She is a founder, organiser, and teacher of VietKidsNZ, an unincorporated organisation that provides free Vietnamese language and culture classes for Vietnamese children in New Zealand. Her work for this organisation is voluntary.

[14] Ms Nguyen has moderated a Facebook group named “Vietnamese Embassies and Me” since 2016. Through the group, she helps Vietnamese expatriates in New Zealand to access consular services without the payment of bribes which were allegedly required. She has been quoted in the media for speaking out against the alleged corruption at the Vietnamese Embassy. In response, the Vietnamese Embassy has publicly accused Ms Nguyen of owing scholarship debt to the government due to her incomplete studies. Ms Nguyen denies these allegations.

[15] In addition, Ms Nguyen operates a Facebook page called “Protect the Rights of Vietnamese Employees in New Zealand”. The page offers information, assistance and advocacy to Vietnamese workers in New Zealand. This work is also voluntary.

[16] Around the middle of 2021, Ms Nguyen made comments on Facebook criticising employers of Vietnamese workers for their exploitation of these workers. Her criticisms did not name any particular employer. Jenny Pham, an Auckland-based businesswoman, believed these criticisms were about her and, in turn, made criticisms of Ms Nguyen on Facebook.

[17] On 6 October 2021, the second defendant, Mai Pham, made a post and further comments under that post on the Facebook group “Vietnamese Link in Wellington”. Mr Geiringer refers to this as the “shock post” and I adopt that term in this judgment. The shock post accused Ms Nguyen of receiving up to \$100,000 in government funding intended for VietKidsNZ and keeping it for herself.

[18] Around one month later, on 3 November 2021, Jenny Pham brought the Jenny Pham proceeding against Ms Nguyen. Ms Nguyen defended the defamation claim and later (on 25 March 2022) counterclaimed in defamation.

[19] While the Jenny Pham proceeding was on foot, in December 2021 and January 2022, a number of prominent Vietnamese New Zealand Facebook groups and pages were subjected to a large number of (false) copyright claims. In response, Facebook disabled these groups and pages in accordance with its policy. This caused consternation because, as Mr Geiringer submits, Facebook groups and pages are the “lifeblood” of the New Zealand Vietnamese community. Several groups were never recovered and any prior communication data contained within them were lost.

[20] On 8 January 2022, the first defendant, Dang Son Dinh, published a post on his Facebook page. Mr Geiringer refers to this post as the “copyright attacks post” and I adopt that term in this judgment. The copyright attacks post alleged that the “IT Prince” and his wife were responsible for the false copyright claims and that “she” paid journalists to write false articles. Ms Nguyen was not named directly but Ms Nguyen says that the post is very obviously about her. I return to this issue later in the judgment.

[21] The copyright attacks post was republished by Mai Pham on her personal Facebook page later that same day.

[22] Ms Nguyen instructed her lawyer to write to Dang Dinh on 8 February 2022 in relation to the copyright attacks post, requesting that Dang Dinh apologise and pay costs and damages by way of settlement. Ms Nguyen reserved her right to take legal action against Dang Dinh. Correspondence ensued but settlement was never achieved.

[23] On 20 April 2022, Jenny Pham served a set of documents on Ms Nguyen in the Jenny Pham proceeding. Mr Geiringer refers to these documents as the “TMD documents” and I adopt that term in this judgment. The documents purported to show conversations between Ms Nguyen and a 17-year-old hacker based in Vietnam named Tran Minh Doan, in which Ms Nguyen flirts with him and hires him to disable Facebook groups and pages. As noted above, there is expert evidence which establishes that these documents are falsified and this was subsequently accepted by the defendants.

[24] On 4 May 2022, a person with the username “Hoang Linh” published a post on the Facebook page “Vietnamese Overseas Students and People in New Zealand”. Mr Geiringer refers to this as the “hypocrite post” and I adopt that term in this judgment. The hypocrite post accused Ms Nguyen of hiring a hacker to make the false copyright claims and of inappropriate behaviour towards a 17-year-old, attaching the TMD documents. Ms Nguyen says that either: “Hoang Linh” is Dang Dinh’s pseudonym and so he was the author of the post; or he authorised its publication; or he provided the documents in circumstances in which it was reasonably foreseeable that they would be published.

[25] The hypocrite post was republished by the third defendant, Julie Fam, and the fourth defendant, Minh Nguyen, later that same day. Ms Nguyen promptly instructed her lawyers to write to the first, third and fourth defendants requesting they take down the hypocrite post, apologise, and explain the origin of the TMD documents. Despite repeating this request several times, this did not eventuate.

[26] On 27 May 2022, Mai Pham made a post on her Facebook page. Mr Geiringer refers to this as the “Mai Pham post”. I will adopt that term. The Mai Pham post called Ms Nguyen “vile” and accused her of hiring another hacker (not Tran Minh Doan) to make false complaints against other people’s Facebook pages.

[27] On 12 September 2022, Keith Ng provided expert evidence on behalf of Ms Nguyen that the TMD documents were all fabricated. This evidence was served on the defendants either later that day, or the day after. It was eventually accepted by all parties that the TMD documents were fake.

[28] On 30 October 2022, Jenny Pham posted an apology on her Facebook page. This apology was reposted by Mai Pham and Minh Nguyen later that same day. Dang Dinh reposted Jenny Pham's apology on 18 November 2022 but did not make the post publicly accessible until 26 November 2022. Around the same time these apologies were posted and reposted, Dang Dinh, Mai Pham and Julie Fam filed affidavits in the Jenny Pham proceeding explaining that they had been defrauded by hackers in Vietnam. I return to this explanation and the nature and quality of these apologies in my assessment of damages.

### **Summary of the claims**

[29] Ms Nguyen brings a total of seven causes of action in defamation against the four defendants. These are set out, in summary form, below:

- (a) In relation to the first defendant, Dang Dinh, Ms Nguyen claims:
  - (i) On 8 January 2022, Dang Dinh published on his Facebook page the copyright attacks post. The copyright attacks post identifies Ms Nguyen through innuendo and makes defamatory statements. Ms Nguyen claims damages in the sum of \$125,000.
  - (ii) On 4 May 2022, Dang Dinh either published under the pseudonym "Hoang Linh" or authorised the publication of the hypocrite post on the Facebook group "Vietnamese Overseas Students and People in New Zealand". The post included the TMD documents together with defamatory commentary on the TMD documents. Ms Nguyen claims damages in the sum of \$240,000 and punitive damages in the sum of \$80,000.
- (b) In relation to the second defendant, Mai Pham, Ms Nguyen claims:
  - (i) On 6 October 2021, Mai Pham published the shock post, being two comments and a screenshot on the Facebook group



“Vietnamese Link in Wellington”. Ms Nguyen claims damages in the sum of \$25,000.

(ii) On or about 8 January 2022, Mai Pham reposted the copyright attacks post on her Facebook page. Ms Nguyen claims damages in the sum of \$100,000.

(iii) On 27 May 2022, Mai Pham published the Mai Pham post on her Facebook page. Ms Nguyen claims damages in the sum of \$100,000.

(c) In relation to the third defendant, Julie Fam, Ms Nguyen claims:

(i) On 4 May 2022, Julie Fam reposted the hypocrite post, including the TMD documents, on her Facebook page. Ms Nguyen claims damages in the sum of \$100,000.

(d) In relation to the fourth defendant, Minh Nguyen, Ms Nguyen claims:

(i) On 4 May 2022, Minh Nguyen reposted the hypocrite post, including the TMD documents, on his Facebook page. Ms Nguyen claims damages in the sum of \$75,000.

[30] Ms Nguyen also seeks costs against all the defendants.

### **The law on defamation**

[31] Ms Nguyen must establish the following elements to prove a claim in defamation:<sup>8</sup>

- (a) a defamatory statement has been made;
- (b) the statement is about her; and

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<sup>8</sup> *Smith v King* [2021] NZHC 1252 at [15].

- (c) the statement was published by the defendant.

*The statement must be defamatory*

[32] There is no statutory definition for a defamatory statement. In common law, a defamatory statement has been defined as:<sup>9</sup>

- (a) a statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally;
- (b) a false statement about a person to their discredit;
- (c) a publication without justification calculated to injure the reputation of another by exposing them to hatred, contempt or ridicule; or
- (d) a statement which tends to make others shun and avoid the plaintiff.

[33] The defamatory meaning of each statement must be pleaded by the plaintiff.<sup>10</sup> The meaning must be one that “an ordinary, reasonable person would draw or infer from the words, taken in their context and in light of generally known facts”.<sup>11</sup> A meaning may also be based on knowledge of extrinsic facts (legal innuendo), and if such meanings are pleaded the plaintiff may be required to identify those among the persons to whom publication was made who knew the relevant facts.<sup>12</sup> The issue of whether the words of the statement are capable of bearing the pleaded meaning is a question of law.<sup>13</sup>

[34] The Court of Appeal has recently held that for a meaning to be defamatory, it must tend to affect the plaintiff’s reputation adversely in a “more than minor” way.<sup>14</sup>

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<sup>9</sup> *Yu v Xia* [2022] NZHC 3243 at [19]. See also *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010 at [44].

<sup>10</sup> Defamation Act 1992, s 37.

<sup>11</sup> *Craig v Slater* [2020] NZCA 305 at [15], citing *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625; *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA) at 237; and *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [56].

<sup>12</sup> *Lee v The New Korea Herald Ltd*, above n 9, at [37].

<sup>13</sup> *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [17].

<sup>14</sup> *Craig v Slater*, above n 11, at [44].

Whether harm is more than minor depends on the “character” or seriousness of the allegation and the extent of publication having regard to the number of people who saw it.<sup>15</sup>

[35] The requirement for the harm to be more than minor has been characterised as either an element of the tort of defamation,<sup>16</sup> or as a presumption which is rebuttable by way of affirmative defence.<sup>17</sup> It is not necessary to discuss which formulation should be preferred because in any case, as I will come to discuss, I am satisfied that harm caused to Ms Nguyen by the statements is serious.

*The statement must be about the plaintiff*

[36] A plaintiff is sufficiently identifiable when the “words published would themselves reasonably lead people acquainted with the plaintiff to the conclusion that [s]he was a person referred to”.<sup>18</sup> A person can be identified even if they have not been named.<sup>19</sup>

*The statement must be published by the defendant*

[37] A statement is published if it is communicated to a person other than the plaintiff.<sup>20</sup> There is no publication if it is only made to the plaintiff. Courts have generally recognised that “publication on the internet is publication for defamation purposes”.<sup>21</sup>

[38] Liability extends to any person who participated in, secured, or authorised the publication. A person who supplies the primary author with information intending or knowing that it will be republished may be jointly and severally liable for the whole damage suffered by the plaintiff.<sup>22</sup> A publisher is responsible for the republication if

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<sup>15</sup> *Wilson Parking v DLA Piper* [2023] NZHC 2705 at [42].

<sup>16</sup> *Craig v Slater*, above n 11, at [45].

<sup>17</sup> *Sellman v Slater* [2017] NZHC 2392, [2018] NZLR 218 at [68]–[69].

<sup>18</sup> *Hyams v Peterson* [1991] 3 NZLR 648 (CA) at 654.

<sup>19</sup> See, for example, *Chinese Herald Ltd v New Times Media Ltd* [2004] 2 NZLR 749 (HC) at [49]–[50].

<sup>20</sup> *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 (CA) at 527.

<sup>21</sup> *Castillo v Ybanez*, above n 6, at [43].

<sup>22</sup> *Sellman v Slater*, above n 17, at [104]–[105], citing *B v N* [2002] EWHC 1692 (QB) at [25].

the republication was foreseeable as a natural and probable consequence of the original publication.<sup>23</sup>

[39] When the identity of the publisher is unclear, the court can make conclusions on the balance of probabilities based on inferences from the evidence. In *Solomon v Prater*, after summarising other cases where the identity of the publisher was in question, Clark J held that:<sup>24</sup>

The cases show that, although the evidence varies depending upon the context, the courts tend to test the evidence against two propositions: that the defendant had some motive to harm the plaintiff and that the person responsible may have been a third party.

### **Were the statements defamatory?**

[40] The causes of action relate to one of the following four publications or their republications: the shock post, copyright attacks post, hypocrite post, and Mai Pham post. I will consider whether each element of defamation is established on the balance of probabilities in relation to these posts in turn.

[41] I pause to note that the majority of the publications were originally made in the Vietnamese language and have been translated to English for this proceeding. The translations of the shock post, copyright attacks post, and hypocrite post were carried out by an independent translator. The translation of the TMD documents was taken from the affidavit of Dang Dinh in the Jenny Pham proceeding. The remaining evidence was translated by Ms Nguyen, who has a formal qualification in intercultural communication and applied translation, with some assistance from Stephanie Nguyen, one of the witnesses in this proceeding. There is no reason for me to question the accuracy of the translations for the purposes of this proceeding. In determining the claims on the basis of the English translation of the alleged defamatory words, I follow the approach of Heath J and bear in mind that translated words might carry a greater or lesser degree of potency in English than in another language such as Vietnamese.<sup>25</sup>

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<sup>23</sup> *Woodgate v Harris* [2011] NZAR 787 (HC) at [16].

<sup>24</sup> *Solomon v Prater*, above n 5, at [42].

<sup>25</sup> *Lee v The New Korea Herald Ltd*, above n 9, at [3].

*The shock post*

[42] Mai Pham published the shock post on 6 October 2021. The post was headed “CALL FOR COMMUNITY TO HELP VICTIMS WITH HA NGUYEN BENEFITS” and suggested that Ms Nguyen was behind a YouTube channel which uploaded a video of a person’s interaction with the Vietnamese embassy without that person’s permission and for her own gain. In the post, Mai Pham called for her followers to help report the YouTube channel.<sup>26</sup>

[43] In a comment under that post, Mai Pham wrote:

SHOCK: Someone who used to donate to Vietkids has just sent me a message saying they received a financial report from Ha Nguyen but there was no transaction that declared any government funding received.

I invite everybody to check out the “Community Organisation Grants Scheme” for the community activity groups from the government: [link]

[44] In another comment, Mai Pham wrote “Government transparently announced all the Organisations which received Funding in the month of June/2021” and attached a screenshot of a list of community grants from the website of a government ministry. In the screenshot, the \$4,000 grant to VietKidsNZ was circled.

[45] In a further comment, Mai Pham attached a screenshot of a conversation on Facebook Messenger between her and another person. In the screenshot, that other person wrote:

Vietkid woman applied for 1 year funding of nearly 100 thousand so has to continue on teaching that class.

[46] The pleaded defamatory meanings of the shock post are that Ms Nguyen:

- (a) had received government funding for the purpose of teaching VietKidsNZ classes, but had dishonestly failed to include that funding in VietKidsNZ’s financial accounts;

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<sup>26</sup> Although Ms Nguyen says the content of the post is not true and potentially defamatory, she considers it to be trivial compared to the defamatory statements made in the comments. Accordingly, the pleaded defamatory meanings of the shock post are based on the content of Mai Pham’s comments only.

- (b) had received government funding for the purpose of teaching VietKidsNZ classes, but had dishonestly used those funds for her own benefit;
- (c) was guilty of fraud; and
- (d) was guilty of theft.

[47] I consider the shock post, on its plain meaning, imputes the defamatory meanings pleaded, and that those meanings may tend to lower the plaintiff in the estimation of right-thinking members of society.

*The copyright attacks post*

[48] Ms Nguyen alleges that on 8 January 2022, Dang Dinh published a post on his Facebook page. The relevant passages are set out below:

You guys must have noticed about the incidents of various groups of the Vietnamese community disappearing at the time of Christmas 2021, must you not??? It must have been that there was only one person pulling the strings on these because it could not be that 4 or 5 big groups were blocked just because of three frivolous images of a milk container being claimed as violating the "copyright" and then disappearing without trace ... Now I will give you a summary of events that happened to me:

- 17/12/21: there was a fake nick name pretending a family member of mine and asked my help to separate an image... haha... this trick is too old, Mr. IT Prince (Hoàng Tử IT).

...

With my IT experience being not much, not little (just nearly 10 years really), I found out a few things

- the domain of Adonal.Store was registered in Viet Nam from 31/12/2021 to 5/1/2022, that was when the domain was closed. After I tracked down the email of that uneducated IT Prince, I emailed him on 4/1/2022 [three laughing emojis]

The domain he registered in Viet Nam was through the service of inet.vn and I was a little bit late because he timely cancelled the domain on 5/1/2022 after receiving my email lolz...

...

My Facebook page and my group were still fine, so I wanted to send a message to the IT Prince couple that you think that in this land of New Zealand, there

is only you working on the IT field and knowing IT well so you created this such drama to delete evidences on your wife messing up and slandering business people and their businesses in New Zealand, especially when your wife is in the process of reconciliation after getting the court order requested by the businesswoman.

...

I will be able to get the registry record to see if the domain name is anything related to Mrs. Deadbeat<sup>27</sup> or Mr. IT Prince stealing candies. After I make the discovery, I will buy candies for you to suck to relieve your stress.

The incidents of groups like Ăn vặt, Du học and Mortgage being crashed down were only a diversion so that people thought that the Vietnamese community was being attacked [three laughing emojis], so I invite admins of these pages to share with me information on the nick names who claimed the copyright violation and I will track down the domain names to see where they come from. I heard rumours said that the domain registry would be kept up to 6 months, we will gradually track this down, is not it right, Mr. IT Prince?

She hired the media to write bullshit stuff to show that she is fighting against her debtor... Oh, no... correctly speaking, it should be the Embassy and to show that she is under the repress of the government... The story that she is making up would be an excellent one to help seek refugee status and later on, to get a citizenship ... However, when the court order came, all allies get involved -it is very stressful, is not it??? [three laughing emojis]

[49] The pleaded defamatory meanings of the copyright attacks post are that Ms Nguyen:

- (a) together with her husband, used fake copyright claims to shut down Vietnamese Facebook groups in order to mislead the public;
- (b) is a criminal conspirator;
- (c) knowingly owes money to the Vietnamese Embassy which she has refused to repay;
- (d) paid journalists to write false articles about her fights with her creditor, the Vietnamese Embassy; and
- (e) planned to use false information to gain refugee status.

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<sup>27</sup> A translator's note explains this term refers to a woman who avoids paying debts.

[50] I am satisfied that the New Zealand Vietnamese community knew the relevant extrinsic facts to understand the copyright attacks post as defamatory of Ms Nguyen, even though she is not named in the post. The issue of identity is discussed later in the judgment at [63]–[70] below. The statements in the post impute the defamatory meanings pleaded and those meanings may tend to lower Ms Nguyen’s estimation of right-thinking members of society generally.

*The hypocrite post*

[51] On 4 May 2022, the hypocrite post was posted in the Facebook group “Vietnamese Overseas Students and People in New Zealand” by someone using the name “Hoang Linh”. I return to the issue of identity of Hoang Linh later in this judgment.

[52] The hypocrite post was headed “THE REAL FACE OF THE “HYPOCRITE” HA NGUYEN” and describes an investigation into the copyright attacks causing the Facebook groups and pages to be disabled, as follows:

Hi everybody,

Surely everyone knows that many large community Facebook pages disappeared during the Christmas season at the end of 2021, and after that many people in admin roles suffered from being attacked, leading to losing their accounts, affecting their mental health and business. And most of us have lost a platform to exchange and search for information in NZ.

I will not beat around the bush. After several months of investigation, the result was “someone who everyone knows” – not unexpected by many people. However, the level of nastiness, vileness, wretchedness, and despicableness (though these words are still not enough to describe this woman) still makes many people in the investigation shocked. Everyone please see the pictures below to understand clearly (if anyone does not understand, you can comment directly and ask questions in each picture).

Some highlights:

- Pursue and destroy Son Dinh (she did all these things herself, but sued Son Dinh for \$20,000). This is a “distraction” trick to prove her innocence. Hire a hacker to report 3 accounts (old account, new account + wife's account), fanpage “Foody” and group “International students and Vietnamese in New Zealand” (more than 22,000 members). Please, can those who speak up in defense of Ha Nguyen, saying that you shouldn't “put someone in a corner” look at the actions of Ha Nguyen?



- Took down Seamus's Facebook page ([RN]'s<sup>28</sup> husband, who Ha Nguyen lost the lawsuit to and had to pay \$25,000 in compensation)

- order Mai Pham's Facebook page to be taken down

- A pair of hackers named Doan and Linh took turns hacking the groups and personal Facebook accounts of many people (including agents).

- The words of a teacher teaching literacy to children, a married woman with children, to a 17 year old hacker, what does everyone think?

All of this evidence will be sent to NZ Police and Cyber Security for investigation. I hope the community is aware of this and knows to be wary of this malicious, scheming, sinister woman who throws stones and hides her hands.

[53] The “pictures” referenced in the post were the TMD documents attached to the post. The TMD documents purportedly show conversations between Ms Nguyen and Tran Minh Doan, a hacker that she was said to have hired to carry out the copyright attacks, on Facebook Messenger. The TMD documents are lengthy and the conversations take place over the period between 8 December 2021 to 10 April 2022. For example, on 5 March 2022, Ms Nguyen purportedly requested that Dang Dinh’s Facebook fan page be destroyed:

**Ha Nguyen:**

Hey hunnie, I need your help with some work.

Can you destroy Dang Son’s fanpage for me?

<https://www.facebook.com/FOODYVNNZ/>

What is the price hunnie? there will be a lot more work so give me a good price ok?

**Tran Minh Doan:**

Sure

[54] The TMD documents also purportedly show Ms Nguyen requesting Mai Pham and Jenny Pham’s pages to be destroyed:

**Ha Nguyen:**

also MAI PHAM

Let’s destroy them all including The Hypocrite - JENNY PHAM

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<sup>28</sup> I have anonymised the identity of this person.

right now, focus on the page first.

hey babe, if I do many more FB accounts, any discount for me?

**Tran Minh Doan:**

Of course you are my VIP customer, you are like my sister.

Big discount

[55] There are many similar conversations purported to be shown by the TMD documents. In these conversations, Tran Minh Doan and Ms Nguyen purportedly refer to each other using nicknames. Tran Minh Doan calls her a “hot girl” and “lovely sis”, and Ms Nguyen calls him “hunnie” and “babe”. Ms Nguyen purportedly wrote in one conversation: “I just can’t wait to see how handsome my babe is...”

[56] The pleaded defamatory meanings of the hypocrite post are that Ms Nguyen:

- (a) hired a hacker to make false complaints against other people’s Facebook pages;
- (b) maliciously sought to cause other people harm;
- (c) is a criminal conspirator;
- (d) behaved in an inappropriately suggestive way toward a 17-year-old boy; and
- (e) used unethical tricks designed to mislead people in the course of her legal action.

[57] I find that the words of the hypocrite post together with the attached TMD documents are capable of bearing the defamatory meanings pleaded. The flirtatious tone of the messages shown in the TMD documents are particularly harmful to Ms Nguyen’s reputation because they are likely to expose her to hatred, contempt or ridicule.

*The Mai Pham post*

[58] On 27 May 2022, Mai Pham published the Mai Pham post on her Facebook page. The Mai Pham post is set out below:

Show the vile one more proof. Ordering many times but the Fb pages are still there, you must be very angry, you despicable person, using other's hand to throw stones, hiding your hands.

[59] Two screenshots are attached to the Mai Pham post. The first screenshot shows a comment left by Julie Fam referring to herself as "immortal." The second screenshot shows a purported Facebook Messenger conversation between Ms Nguyen and a hacker where Ms Nguyen instructs the hacker to disable Julie Fam's Facebook page, writing: "Do it right now for me, she challenged me by saying she is immortal."

[60] The pleaded defamatory meanings of the Mai Pham post are that Ms Nguyen:

- (a) hired a hacker to make false complaints against other people's Facebook pages;
- (b) maliciously sought to cause other people harm;
- (c) is a criminal conspirator; and
- (d) is a vile and despicable person.

[61] I consider the words in the Mai Pham post, on their plain meaning, clearly impute the meanings pleaded, and those meanings are defamatory in that they may tend to lower Ms Nguyen in the estimation of right-thinking members of society generally.

**Were the statements about the plaintiff?**

[62] The shock post, the hypocrite post and the Mai Pham post directly name Ms Nguyen. Accordingly, the only statement where identity is in issue is the copyright attacks post.

[63] The copyright attacks post does not directly name Ms Nguyen, however, she says the post makes many innuendos from which it can be inferred that she is the subject. I do not propose to set out all the innuendos relied on by Ms Nguyen. I need only refer to one innuendo to be satisfied that Ms Nguyen is sufficiently identifiable.

[64] In the copyright attacks post, Dang Dinh referred to the “IT Prince couple” and “Mr. IT Prince stealing candies”. In a comment under the copyright attacks post, Dang Dinh wrote: “... the information on the IT Prince is based on the fame of his wife whom everyone surely knows of”.

[65] Ms Nguyen explains that shortly after she and her husband immigrated to New Zealand, her husband found an interim job in a supermarket where many other Vietnamese immigrants worked. During that job he was accused of stealing candy from the supermarket and this accusation spread throughout the New Zealand Vietnamese community. Ms Nguyen’s husband now works in the information technology (IT) industry.

[66] Ms Nguyen’s explanation of the innuendo is supported by the evidence of Nguyen Thi Thu Ha (known as Stephanie Nguyen) and Nguyen Thi Nhi Ha (known as Red River Nguyen). Both depose that when they saw the post, they immediately recognised that it was about Ms Nguyen, and Ms Nguyen would have been identifiable to others in the New Zealand Vietnamese community.

[67] Mr Geiringer submits that the reference to a man who works in IT stealing candies is “about as unusual and unique as you can get” and that, despite not being directly named, Ms Nguyen is clearly identifiable. I agree. This is clearly a case where a legal innuendo operates to identify Ms Nguyen as the subject of a defamatory statement without requiring her to be named.

[68] Out of an abundance of caution, Mr Geiringer also refers to Dang Dinh’s explanation contained in an affidavit he swore in the Jenny Pham proceeding that he was not referring to Ms Nguyen, but another woman named NL,<sup>29</sup> and attaches screenshots purporting to show a conversation between that woman and a hacker.

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<sup>29</sup> The woman’s name has been anonymised.

[69] There are many reasons why this explanation is not credible. For one, NL is not married. She has a boyfriend, but he does not have IT expertise. Her boyfriend has never stolen candy or anything else in New Zealand. She has never heard of Dang Dinh. All this was confirmed in correspondence between Ms Nguyen's lawyer and the person who has control of NL's Facebook page (as referred in Dang Dinh's affidavit).

[70] There can be no serious argument that Ms Nguyen was not the subject of the copyright attacks post. Accordingly, I find that the copyright attacks post sufficiently identifies Ms Nguyen.

### **Were the statements published by the defendant?**

[71] Save for the publication of the hypocrite post, discussed below, the publication of the shock post, copyright attacks post, Mai Pham post and republications of the copyright attacks post and hypocrite post, were made by the relevant defendant under their own name. As the Court of Appeal has held, users on Facebook identify themselves by name and are not properly considered "anonymous".<sup>30</sup> Publication by the defendant is therefore not in issue for those posts.

[72] The hypocrite post was published on Facebook by someone under the name "Hoang Linh". Mr Geiringer submits that this is a pseudonym used by Dang Dinh. Alternatively, it is submitted that Dang Dinh authorised the publication of the hypocrite post, or provided the TMD documents to another person in circumstances where it was reasonably foreseeable that they would result in publication. I will address these submissions later in the judgment when I discuss Dang Dinh's conduct. For present purposes it is sufficient to note that Ms Nguyen deposes that the administrators of the Facebook group "Vietnamese Overseas Students and People in New Zealand" at the time were Dang Dinh and his wife. As administrators, Dang Dinh and his wife had sole control of the Facebook group, including the ability to block posts, remove posts, and "pin" posts (which has the effect of keeping a post at the top of the page so that it is the first post a visitor would see, even after further posts were

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<sup>30</sup> *Murray v Wishart*, above n 13, at [84].

made). When the hypocrite post was published by Hoang Linh, it was pinned to the “Vietnamese Overseas Students and People in New Zealand” group.

[73] In *Murray v Wishart*, the Court of Appeal considered the test for when the host of a Facebook page could be deemed to be a publisher of third-party statements on that Facebook page. The Court held that “the actual knowledge test should be the only test to determine whether a Facebook page host is a publisher”.<sup>31</sup> The actual knowledge test, as set out in the High Court decision on appeal, is “if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it”.<sup>32</sup>

[74] In the context of the Facebook group “Vietnamese Overseas Students and People in New Zealand”, I consider the actual knowledge test is appropriate. Analogous to the exclusive control possessed by the owner of a Facebook page, only Dang Dinh or his wife could have pinned the post to the Facebook group. This suggests that either Dang Dinh or his wife must have known of the defamatory content of the post and not only failed to remove it, but took active steps to promote its visibility by pinning the post.

[75] There is no evidence to implicate Dang Dinh’s wife. I am satisfied, on the balance of probabilities, that at the very least Dang Dinh published the hypocrite post by pinning the post. The support for that finding (namely that it was Dang Dinh and not his wife) is in my discussion and conclusions as regards Dang Dinh’s part in the fabrication of the TMS documents discussed later in this judgment.

### **Conclusion on defamation claims**

[76] In summary, I have found that the shock post, copyright attacks post, hypocrite post and Mai Pham post all impute the pleaded defamatory meanings. The statements all plainly refer to Ms Nguyen except the copyright attacks post, but I have found that Ms Nguyen is sufficiently identified by the innuendos contained in the copyright

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<sup>31</sup> *Murray v Wishart*, above n 13, at [144].

<sup>32</sup> *Murray v Wishart* [2013] NZHC 540, [2013] 3 NZLR 246 at [117].

attacks post. The publications are made by the respective defendants. All findings are on the balance of probabilities.

[77] The remainder of the claims are in relation to the republication of the copyright attacks post and hypocrite post. No additional issues arise with those republications and accordingly I also find those republications defamatory. All seven causes of action are made out.

[78] I turn now to discuss the assessment of damages for these defamatory statements.

### **Assessment of damages**

[79] A separate quantum of general damages has been pleaded for each of the seven causes of action.<sup>33</sup> Ms Nguyen also seeks punitive damages against Dang Dinh, which I will discuss separately after first determining general damages.

[80] Damages in defamation have three purposes:<sup>34</sup>

- (a) to compensate for harm to reputation;
- (b) to vindicate the plaintiff's good name; and
- (c) to take account of the distress, hurt and humiliation which the defamatory statements have caused.

[81] The Court of Appeal has held that a "favourable verdict on liability" for the plaintiff is the primary vindication because it is itself public recognition that a statement or statements made by a defendant are false and defamatory.<sup>35</sup> It is also the favourable verdict which restores a plaintiff's reputation.<sup>36</sup>

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<sup>33</sup> A summary of the claims and the damages sought are summarised at [29].

<sup>34</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [31], citing *John v MGN Ltd* [1997] QB 586 (CA) at 607–608. See also *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 631 at [48].

<sup>35</sup> *Williams v Craig*, above n 34, at [32].

<sup>36</sup> At [32].

[82] However, a judgment in favour of the plaintiff without an award of damages is a “defective verdict”.<sup>37</sup> As observed by the Court of Appeal of England and Wales in *Cairns v Modi*, most interested bystanders who need to be convinced are unlikely to read a detailed judgment and instead just want to know the “headline” result: how much did the plaintiff get?<sup>38</sup>

[83] The quantum of general damages may be aggravated (increased) where the defendant’s conduct toward the plaintiff, including after the original publication, has compounded or enlarged the effect of the defamation.<sup>39</sup>

[84] The quantum of damages may be mitigated by the matters to be taken into account as set out in ss 29 to 32 of the Defamation Act 1992. Of relevance are the matters provided by s 29(a)–(b):

- (a) in respect of the publication of any correction, retraction, or apology published by the defendant, the nature, extent, form, manner, and time of that publication.
- (b) in respect of the publication, by the defendant, of any statement of explanation or rebuttal, or of both explanation and rebuttal, in relation to the matter that is the subject of the proceedings, the nature, extent, form, manner, and time of that publication.

[85] The calculation of damages for liability in defamation is a difficult and necessarily subjective exercise undertaken by comparison to awards made in analogous cases.<sup>40</sup> I adopt Isac J’s helpful summary of factors which are usually relevant in the assessment of quantum:<sup>41</sup>

- (a) Damage or material loss caused by the defamatory statement. This could be a decline in a company’s business, although the loss must be particularised and supported by evidence. Where the alleged loss is reputational, the state of the defamed person’s reputation prior to the first defamatory statement will be relevant.
- (b) The nature or gravity of the defamatory statement. The more closely it touches the plaintiff’s person or personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be.

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<sup>37</sup> *Craig v Slater*, above n 11, at [117].

<sup>38</sup> *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015 at [31]–[32].

<sup>39</sup> *Siemer v Stiassny*, above n 34, at [51].

<sup>40</sup> *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) at 45 per McKay J; *Syed v Malik* [2023] NZHC 1676 at [39].

<sup>41</sup> *Syed v Malik*, above n 40, at [38] (footnotes omitted).



- (c) The extent of publication and influence of the publisher. A publication to one or two people causes less damage than a publication by a national broadcaster or on social media to a large audience.
- (d) The defendant’s conduct. Behaviour that increases the hurt caused by the defamation—such as continuing to publish defamatory allegations, refusing to apologise, or conducting the litigation in an insulting way—can aggravate damages.

[86] In relation to the extent of publication, the courts have recognised that the quality of the recipients of the defamation can be more important than the quantity. Defamatory statements are recognised as particularly damaging if spread in particular communities that are significant to the plaintiff, such as the plaintiff’s religious community<sup>42</sup> or the plaintiff’s professional community.<sup>43</sup>

[87] In assessing the spread of online publications, substantial publication is not presumed but Judges can draw inferences about how far material has spread.<sup>44</sup> This can include inferences based on, for example, the number of followers of an Instagram account,<sup>45</sup> the number of contacts on a WeChat friends list,<sup>46</sup> or the average number of unique hits on an internet site.<sup>47</sup> Overseas jurisdictions have also recognised a “grapevine effect” for online publications as the basis on which general damages may be recovered in defamation actions.<sup>48</sup> The Court of Appeal of England and Wales in *Cairns v Modi* explained the grapevine effect as follows:<sup>49</sup>

... we recognise that as a consequence of modern technology and communication systems any such stories will have the capacity to “go viral” more widely and more quickly than ever before. Indeed it is obvious that today, with the ready availability of the world wide web and of social networking sites, the scale of this problem has been immeasurably enhanced, especially for libel claimants who are already, for whatever reason, in the public eye. In our judgment, in agreement with the judge, this percolation phenomenon is a legitimate factor to be taken into account in the assessment of damages.

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<sup>42</sup> *Syed v Malik*, above n 40, at [25] and [45]. The plaintiff was a member of the Muslim community where he lived in Victoria, Australia.

<sup>43</sup> *Ross v Hunter* [2017] NZDC 22579, [2018] DCR 770 at [35]. The plaintiffs were barristers and solicitors practising in Hawke’s Bay.

<sup>44</sup> *Wiremu v Ashby* [2019] NZHC 558 at [40].

<sup>45</sup> *Spring v Williams* [2022] NZHC 2165 at [25].

<sup>46</sup> *Yu v Xia*, above n 9, at [23].

<sup>47</sup> *Ross v Hunter*, above n 43, at [36].

<sup>48</sup> *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69, [2002] 2 LRC 674 at [88].

<sup>49</sup> *Cairns v Modi*, above n 38, at [27].

*Ms Nguyen's reputation*

[88] As noted above in [12]–[15], Ms Nguyen was well-known in the New Zealand Vietnamese community for her dedication to the community. She founded and operated VietKidsNZ on a voluntary basis, an organisation that provided free classes to Vietnamese children, and moderated a Facebook group that helped immigrants with their employment issues. She has been outspoken against alleged corruption in the Vietnamese embassy.

[89] There are two affidavits filed in support of Ms Nguyen's prior reputation. Stephanie Nguyen says Ms Nguyen is "an influencer in the Vietnamese community". She describes how Ms Nguyen assisted her with bringing a successful claim against her employer in the Employment Relations Authority in 2022.<sup>50</sup> She also deposes that:

Before the cases involving Jenny Pham, Dang Son Dinh, and others occurred, I only heard compliments about Ha for her courage and integrity and her contributions to the community, except that some Vietnamese business owners and the Vietnamese Embassy were unhappy about her criticisms of their practices.

[90] Similarly, Red River Nguyen describes Ms Nguyen as "someone who is prepared to stand up for community values". She deposes that:

Ha is well known among Vietnamese people in New Zealand as someone who dares to be active and outspoken about things that affect the community but are not often openly discussed. This is because these topics are very difficult and sensitive, including corruption and exploitation. These topics sometimes reflect badly on Vietnamese officials in New Zealand and employers, who are often rich, powerful people with strong links in the community. So, people are afraid to talk about them.

... She has created many enemies for the sake of the community, many people hate her and want to harm her or shut her up to protect their wrongdoings. But there are also many people who admire her.

[91] I am satisfied that prior to the publications, Ms Nguyen had a high profile within the New Zealand Vietnamese community as someone with a reputation for community service and advocating for others. The defamatory publications are all the more serious because they destroyed her reputation within the very community to which she had dedicated her life since moving to New Zealand in 2011.

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<sup>50</sup> *Nguyen v DZPK* [2022] NZERA 666.

[92] It is clear from Ms Nguyen's evidence that the defamatory publications have caused her profound distress, embarrassment and shame. Given there are overlapping defamatory statements between the defamatory publications, it is not possible to attribute these effects to any particular publication.

[93] Ms Nguyen describes people whose names she did not recognise left "nasty" comments and threats towards her on social media. Some friends and acquaintances stopped contacting her, while others contacted her to ask whether the accusations were true. She received calls from people based in Vietnam asking about the incident. About five families withdrew their children from VietKidsNZ classes and the number of people contacting her for employment help has greatly reduced.

[94] The administrator of a Facebook group for Vietnamese people in New Zealand called "New Zealand from N to Z" removed Ms Nguyen from the group, expressing concerns that she would harm the group. Ms Nguyen also says the publications have had a negative effect on her health, her social life, her work and study, and her family. In short, her reputation and standing within the New Zealand Vietnamese community was destroyed. I accept that the impact of the publications on her was significant.

*Seriousness of the defamatory statements*

[95] The accusation in the shock post that Ms Nguyen embezzled up to \$100,000 in government funds damages not only her reputation but also damages the reputation of VietKidsNZ, an organisation with which she was closely associated, asserting its purpose as a vehicle for her corruption. I do not consider the inclusion of the screenshot per se showing the government grant of \$4,000 increases the gravity of the accusation, as it is a real document. It is the use of a real document and the inference Mai Pham invites recipients to draw from the screenshot — that Ms Nguyen dishonestly used government funding meant for VietKidsNZ — which is defamatory. This was a serious allegation.

[96] The accusations that Ms Nguyen was hiring hackers to disable Facebook groups and pages as contained in the copyright attacks post, hypocrite post and Mai Pham post are serious. To adopt a term used by Mr Price, counsel for Ms Nguyen for this portion of the submissions, the Facebook groups were "social glue" for the

New Zealand Vietnamese community and their removal caused great distress. To be accused of being secretly being responsible for their removal was an accusation of malicious betrayal. Mr Price also notes that this accusation is of a serious crime carrying a maximum penalty of three years' imprisonment.<sup>51</sup>

[97] The nature of the other accusations in the copyright attacks post — that Ms Nguyen was falsifying information for her own gain — go directly against the reputation of integrity and service that Ms Nguyen had built up within her community.

[98] The hypocrite post attached evidence (the TMD documents) which had been falsified to make the defamatory statements more compelling, including imputations that Ms Nguyen, a 45-year-old married woman, was flirting with a minor living in Vietnam. This was a serious allegation. This falsified evidence was widely believed and discussed in the comments of the hypocrite post and elsewhere.

[99] The Mai Pham post similarly attaches falsified evidence which is offered as proof of its defamatory claims, though Mr Geiringer acknowledges that it is a smaller publication when compared to the TMD documents contained in the hypocrite post.

#### *Extent of publication*

[100] The shock post was published by Mai Pham on the Facebook group “Vietnamese Link in Wellington”. This has more than 3,500 members. The shock post attracted 44 comments, 29 interactions and two shares.

[101] The copyright attacks post was first published by Dang Dinh on his Facebook page. Dang Dinh had more than 1,000 Facebook friends, 139 of whom were mutual friends with Ms Nguyen. The copyright attacks post attracted 112 reactions, 34 comments and three shares. As noted by Ms Nguyen, these statistics only capture the spread of the post within Facebook and does not include potential reposts on popular messaging applications used in the Vietnamese community.

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<sup>51</sup> Crimes Act 1961, s 240(1)(d).

[102] The copyright attacks post was republished by Mai Pham on her Facebook page. Mai Pham had 350 friends and followers, 202 of whom were mutual friends with the plaintiff. This post attracted 16 interactions and nine comments within five hours.

[103] As I have found, Dang Dinh is responsible for the publication of the hypocrite post on the Facebook group “Vietnamese Overseas Students and People in New Zealand”. This group had about 2,600 members at the time. Within 24 hours, the hypocrite post had attracted around 135 reactions, 95 comments and five shares.

[104] The hypocrite post was republished by Julie Fam on her Facebook page. Julie Fam had more than 2,400 friends and followers.

[105] The hypocrite post was also republished by Minh Nguyen on his Facebook page. Minh Nguyen had more than 400 friends and followers.

[106] The Mai Pham post was published by Mai Pham on her Facebook page. It is unclear from the evidence as to the number of friends or followers that her Facebook page had at the time of this publication. However, I infer that it would have been similar to the number of friends her page had at the time of republishing the copyright attacks post around four months earlier (350 friends). There is also at least one comment on the Mai Pham post that was not written by Mai Pham.

[107] Although it is not possible to trace the spread of defamatory posts with precision, I accept Mr Price’s submission that the publications were made to significant online audiences (especially against a small New Zealand Vietnamese community of around 10,086 people), though to varying degrees. This will be relevant to my assessment as to quantum of damages for each publication.

[108] I also accept the submission that these publications were particularly damaging to Ms Nguyen’s reputation because they were spread in the community most significant to her. Ms Nguyen had mutual friends with many of the Facebook pages on which the publications were made. These are the people she relied on every day and was subsequently ostracised by. Although there is evidence that the publications

were spread beyond the New Zealand Vietnamese community, it is limited, and in any case the particular accusations — being a traitor to the very community she publicly claimed to champion — are the most relevant to people within the New Zealand Vietnamese community.

### **The conduct of the defendants**

[109] I will discuss the aggravating conduct and mitigating conduct of each defendant in deciding the appropriate award of compensatory damages.

#### *The first defendant – Dang Dinh*

[110] In her claim against Dang Dinh, Ms Nguyen claims general damages comprised of:

- (a) \$125,000 for publication of the copyright attacks post, and
- (b) \$240,000 for publication of the hypocrite post.

[111] Ms Nguyen also seeks \$80,000 in punitive damages for the publication of the hypocrite post. I will discuss whether an award of punitive damages is appropriate after first considering the appropriate award of general damages for all defendants.

[112] Mr Geiringer submits that there are many aspects of Dang Dinh’s conduct which aggravated the effects of the defamation on Ms Nguyen, including being responsible for the publication and pinning of the hypocrite post which I have already discussed above at [72]–[75].

[113] I do not propose to traverse all of Dang Dinh’s aggravating conduct in detail. Instead, I focus my discussion on the aggravation that was emphasised by counsel in oral submissions: it is submitted that the evidence enables the Court to draw the inference that Dang Dinh assisted with the fabrication of the TMD documents, or at least obtained the documents with the knowledge that they were fabricated. Mr Geiringer submits that this conduct is particularly egregious because it was motivated by a need to provide evidence in the Jenny Pham proceeding (meaning,

Dang Dinh was untruthful with the Court), and even after expert evidence proved the TMD documents were fabricated, Dang Dinh never accepted responsibility and continued to assert that he was defrauded by hackers in Vietnam.

[114] Dang Dinh's explanation of the events, as stated in his affidavit filed in the Jenny Pham proceeding, can be summarised as follows. In December 2021 and early January 2022, Facebook accounts controlled by him were subjected to copyright attacks. Around 4 January 2022, Dang Dinh received a message from a person living in Vietnam named Le Ba Tan. Le Ba Tan convinced Dang Dinh that NL was responsible for the attacks, which led to Dang Dinh making the copyright attacks post on 8 January 2022.

[115] Afterwards, Dang Dinh and Le Ba Tan continued to communicate through various messaging applications. When Dang Dinh asked Le Ba Tan whether he knew who had ordered Tran Minh Doan to attack his account, Le Ba Tan gave him the name "Ha" without Dang Dinh having ever mentioned Ms Nguyen's name. Dang Dinh says this "seemed like a miracle" as he was being threatened with legal action by Ms Nguyen over the copyright attacks post (which he claims he had not intended to be about her), but now he could prove it was in fact Ms Nguyen "who was responsible all along".

[116] Dang Dinh says over the next few months Le Ba Tan provided him with the TMD documents and other documents such as a screenshot of a conversation which showed Ms Nguyen's passport. Dang Dinh thought this was such significant proof of Ms Nguyen's involvement that he saved a copy of that screenshot. Dang Dinh says he no longer has access to some Facebook accounts where these conversations with Le Ba Tan took place, saying: "I didn't preserve these messages because I didn't think I needed to."

[117] Mr Geiringer submits that there are many reasons why Dang Dinh's evidence is unreliable and why his credibility should be seriously doubted. For example:

- (a) Dang Dinh says he did not preserve his Facebook accounts because he thought Ms Nguyen was no longer threatening him with legal action,

whereas the evidence suggests that Ms Nguyen had never withdrawn her threat of legal action.

- (b) Keith Ng's expert evidence suggests that at least some of the fabricated documents had been created in New Zealand, not Vietnam, and on a computer that seemed to belong to Dang Dinh. Dang Dinh refuted these claims in his affidavit with an explanation. Keith Ng filed an affidavit in response saying he had tested this explanation and was unable to replicate the result asserted by Dang Dinh. Dang Dinh filed a further affidavit exhibiting a video as proof of his explanation; however, that video does not show all the information required to verify his claims.
- (c) Dang Dinh could not have obtained the photo of Ms Nguyen's passport from Le Ba Tan as he claimed. This is because he had attached a fuller, less cropped version of the exact same photo in his complaint filed with the New Zealand Police (Police) on 21 April 2022.

[118] Mr Geiringer also submits that the TMD documents emerged at a suspiciously convenient time. Counsel for Ms Nguyen and Dang Dinh had been corresponding with offers and counteroffers in relation to settlement of the copyright attacks post since February 2022, with Ms Nguyen threatening legal action. In Dang Dinh's final counteroffer, dated 5 April 2022, he was prepared to pay costs of \$1,500 and publish an apology, but not an admission that he intended to refer to Ms Nguyen in the copyright attacks post. He then allegedly received the TMD documents around a week later. Ten days after that, Jenny Pham filed the TMD documents in the Jenny Pham proceeding, pleading the additional defence of truth to Ms Nguyen's counterclaims.

[119] Mr Geiringer notes that Dang Dinh has also never resiled from his explanation that the copyright attacks post was not about Ms Nguyen despite evidence to the contrary. On 20 April 2022, counsel for Dang Dinh wrote to Ms Nguyen. The letter stated that, despite the copyright attacks post not being about Ms Nguyen, Dang Dinh had been provided with information that clearly demonstrates that Ms Nguyen nevertheless did hire hackers to make false copyright claims against Facebook pages.



The letter also demanded compensation from Ms Nguyen for loss of business and physical and emotional distress. When Ms Nguyen's counsel wrote back asking how the information had come into Dang Dinh's possession, no substantial response was provided.

[120] Commonly, when there is no cross-examination on affidavits, it is not possible to make an assessment of the credibility and reliability of a witness. However, in this case there are a number of aspects of Dang Dinh's evidence which in combination cast real doubt over his credibility and reliability when he says he was an innocent victim, convinced into believing the legitimacy of documents from criminal hackers.

[121] First, I have found he was untruthful when he said the copyright attacks post was about NL and not about Ms Nguyen. Given the copyright attacks post is not about NL then Dang Dinh has constructed an elaborate story about that person and provided that story under oath. That untruthfulness brings into question the whole of his account of his interaction with the hackers.

[122] Second, there is the expert evidence of Keith Ng. He has examined copies of five videos and two sets of screenshots (which together comprise the TMD documents) that were disclosed by Jenny Pham to Ms Nguyen in the Jenny Pham proceeding. Keith Ng's evidence, now accepted by the defendants, is that these documents were tampered with or fabricated to create the false impression that they contained conversations involving Ms Nguyen.

[123] Keith Ng further says that metadata shows that it is very likely that four of the videos were not made in Vietnam and were in fact made in New Zealand. He goes on to say that some of the videos and screenshots, which were claimed to have been authored by Tran Minh Doan, were in fact created by Dang Dinh and Le Ba Tan. He also says that according to his own advertising Le Ba Tan conducts attacks on Facebook pages and groups for money.

[124] Dang Dinh disputes that he was involved in the fabrication of the videos and provides an explanation as to why there is a New Zealand time stamp on a particular video.

[125] Keith Ng responds saying:

29. Recapping, Dang Son Dinh's account is that the video was created in Vietnam, transmitted to him via a Viber chat, and then downloaded and uploaded by him in New Zealand. Such a process would be expected to result in the video having a Vietnamese timestamp and not a New Zealand timestamp in the "com.apple.quicktime.creationdate" location in its metadata. From my experiments I have confirmed that the process described by Dang Son Dinh does not alter the "com.apple.quicktime.creationdate" value and would not have accounted for it having a New Zealand timestamp.

[126] Dang Dinh then filed a further affidavit in the Jenny Pham proceeding disputing that evidence from Keith Ng.

[127] It is not possible to make a finding on this evidence alone but there are many other strands of Dang Dinh's evidence that support a finding of lack of credibility and reliability. I now refer to those further strands.

[128] Dang Dinh included with his affidavit copies of online chat messages he says he conducted with the hackers. However, on his own account the message exchanges are incomplete. As regards the messages he did include, there is no ability to examine the original messages, as only copies were provided. Keith Ng's evidence is that copies of chat messages such as these are easy to fabricate.

[129] The reason Dang Dinh says the message exchanges are incomplete and why access to the original source is no longer possible was, in part, because he says he deleted the Facebook account which he had used to conduct many of the conversations. Dang Dinh claims he did that believing that Ms Nguyen was no longer pursuing threatened legal action against him. However, at the time Dang Dinh took that step, he had been told expressly that proceedings were to be brought against him as a settlement could not be reached, and later that information about the source of the documents was being demanded from him because of its relevance to the Jenny Pham proceeding that was already on foot. In any case, and here I accept Mr Geiringer's submission, the lack of a proceeding does not begin to explain why Dang Dinh decided to delete the account. Quite apart from anything else, the documents might have been needed if he (or Jenny Pham) were to seek legal remedies against the hackers.

[130] I consider that these circumstances entitle the Court to draw negative inferences about what the documents would have shown had they been preserved and discovered. When I take into account the evidence referred to above and further referred to below, I consider the Court can draw the inference that, on the balance of probabilities, the deleted documents would have shown that Dang Dinh was involved in commissioning the fabricated evidence and/or was involved in some of the fabrication himself.

[131] Next, Dang Dinh's decision to delete that Facebook page is inconsistent with other parts of his evidence. He talks about the importance of his Facebook accounts and the hardship it caused him when they were lost to him.

[132] Then there is the issue of the cropped photograph. As Ms Nguyen explains in her evidence, Dang Dinh's affidavit includes a screenshot of a conversation in which one of the hackers provides another hacker with a photograph of Ms Nguyen's passport. This was supposedly done to convince Dang Dinh that the hackers really had been working with Ms Nguyen.

[133] However, Dang Dinh provided a different version of the same photograph as part of his complaint to the Police against Ms Nguyen. The version that he gave to the Police was more complete than the cropped version that appeared in the screenshot.

[134] In other words, Dang Dinh already had a fuller version of the photograph that he claims that the hackers sent to him and from another source. I consider this undermines his explanation about how the hackers convinced him that Ms Nguyen was behind the Facebook attacks. It allows the inference on the balance of probabilities that Dang Dinh was the source of the material that was then provided back to him by the hackers as apparent proof of Ms Nguyen's wrongdoing.

[135] Next, the timing of the emergence of the TMD documents raises questions. On 25 March 2022 Ms Nguyen filed an amended pleading in the Jenny Pham proceeding. The amended pleading added a counterclaim based on Jenny Pham's repost of the copyright attacks post. On 20 April 2022 Jenny Pham filed an amended defence to that amended counterclaim in which she pleaded the defence of truth to the new

counterclaim. Meanwhile, from February through to April 2022, Dang Dinh was on notice that he could be sued for the copyright attacks post if he would not agree to a settlement.

[136] According to Dang Dinh it was at this time that the TMD documents appeared. Dang Dinh acknowledges he was “feeling really stressed by this time” in part because he was financially threatened by Ms Nguyen. Dang Dinh’s last counteroffer was on 5 April 2022 and Dang Dinh says he was given the TMD documents around 11 or 12 April 2022. Hackers in Vietnam would have had no knowledge of the status of the Jenny Pham proceeding, or of the status of Dang Dinh’s settlement negotiations. The opportune timing of the appearance of the fake documents again provides support for the inference that the documents appeared at that moment because that is when Dang Dinh commissioned them and/or was involved in some of the fabrication himself.

[137] Next, the Police have confirmed that Dang Dinh laid one of the three complaints Police have on file against Ms Nguyen. He did not tell the Police that he was in contact with the alleged Vietnamese hackers or that the hackers had been paid for the supposed evidence against Ms Nguyen.

[138] Looking at the issue in another way, even if Dang Dinh’s evidence was to be accepted at face value, there are many reasons why someone in his position would have known that they were not being given real documents. According to his affidavit evidence, he knew: that the fabricated materials were supplied by hackers and criminals; that Le Ba Tan, the person who brokered the acquisition of the fabricated materials was himself a hacker and a criminal; the hackers had demanded large payments for the fabricated materials and Dang Dinh paid or helped to pay for the fabricated materials himself. Further, Dang Dinh asked very specifically for incriminating videos that could be traced to Ms Nguyen. He was told the hackers themselves were deleting parts of the alleged conversations with Ms Nguyen and he also says that he and Jenny Pham suspected the hackers could not be trusted.

[139] Even on Dang Dinh’s account, he ignored so many red flags that the hackers were not to be trusted, that it seems much more likely that his version of events is

invented. That again supports the inference that Dang Dinh was involved in commissioning the fabricated evidence from the hackers and/or was involved in some of the fabrication himself.

[140] I next turn to the identity of Hoang Linh, the apparent author of the hypocrite post. Ms Nguyen believes that Hoang Linh is a pseudonym that was used by Dang Dinh. Mr Geiringer submits that this is likely. I am not certain that the Court can go that far. But I do accept on the evidence that it can be inferred on the balance of probabilities that Dang Dinh provided the TMD documents to Hoang Linh for publication in the hypocrite post. I say that first, because Dang Dinh admits he is the one who received from Le Ba Tan the TMD documents that Hoang Linh published. Whoever Hoang Linh was, they must have obtained the documents they published, directly or indirectly from Dang Dinh.

[141] The hypocrite post referred to legal correspondence between Ms Nguyen and Dang Dinh. It also referred to legal correspondence between Ms Nguyen and RN that led to a settlement which Dang Dinh admitted he knew about. The hypocrite post also referred to Police complaints. All of this information is likely to have come from Dang Dinh to Hoang Linh.

[142] The hypocrite post talks of an investigation over “several months” and says “many people in the investigation” were shocked at what they found. The post further says the identity of the culprit was “not unexpected”. The evidence is that it was Dang Dinh who talked about his investigation (in the copyright attacks post) several months earlier. Further, it was Dang Dinh, Jenny Pham and Mai Pham who were investigating Ms Nguyen’s alleged role, via the hackers.

[143] The hypocrite post mentions eight of the many Facebook groups and pages for the New Zealand Vietnamese community that came under attack. Four of those eight are Dang Dinh’s pages; one is his wife’s; two belong to his friends, Mai Pham and Julie Fam. The last is connected to RN.

[144] In summary, as regards Dang Dinh’s involvement, for the purpose of considering aggravating conduct, I am not able to make the finding that Dang Dinh

was Hoang Linh. But I do find on the balance of probabilities that he was involved in commissioning the fake documents and/or was involved in some of the fabrication himself, and providing them to Hoang Linh. In all the circumstances it must have been reasonably foreseeable that it would result in their publication. That is significant in terms of aggravation.

[145] I earlier found that Dang Dinh published the hypocrite post by virtue of pinning the post to the “Vietnamese Overseas Students and People in New Zealand” group (at [75] above). The further finding in this section of the judgment that Dang Dinh provided the fabricated TMD documents to Hoang Linh provides another basis for Dang Dinh’s liability for publishing the hypocrite post.

[146] In terms of mitigation, on 18 November 2022 Dang Dinh reposted an apology Jenny Pham had posted to her page on 30 October 2022 (Jenny Pham apology). In the original post, Jenny Pham referred to the proceeding between her and Ms Nguyen and explained how criminals in Vietnam “made me think that Ha Nguyen was the person behind all the destroyed Facebook pages and attacks”. She outlined the steps in the proceeding leading up to her realising that she was scammed, then wrote as follows:

I am sad for myself, but most of all, I feel terrible for accusing Ha Nguyen of doing these things. I want to everybody in our community to know that there is NO EVIDENCE that Ha Nguyen was involved in these Facebook attacks.

I am truly sorry Ha.

Please share this post so everybody can read it.

My court case with Ha Nguyen continues because there are lots of other Facebook posts and comments still being argued about. I will update you when I can but for now it is important that I do not post anything else about the case.

[147] In the reposting of the Jenny Pham apology, Dang Dinh added his own commentary as follows:

I would like to share this important post by Jenny Pham concerning her legal case against Nguyen Ha. I also want to use this opportunity to clarify to everyone that a post I made earlier in the year that some people thought was about Ms Ha (including Ms Ha) was not about her and nor was it ever intended by me to be about or aimed at Ms Ha. I apologise to Ms Ha for any embarrassment or distress in the event anyone thought my earlier post was referring to Ms Ha.

[148] I consider that this apology does not materially affect the calculation of damages for three reasons. First, the apology is not fulsome. It principally seeks to defend Dang Dinh's own reputation and explain his behaviour, more than it seeks to repair Ms Nguyen's reputation. I do not consider the more substantive apology contained in Jenny Pham's original apology post to form part of Dang Dinh's apology because it does not show that Dang Dinh has contributed to the mitigation of the harm to Ms Nguyen. Instead, he is simply following the instruction contained in Jenny Pham's apology: "Please share this post so everybody can read it."

[149] Second, the apology was not made in a timely manner: it was made more than six months after Ms Nguyen formally denied the hacking allegations and more than two months after Dang Dinh was provided with Keith Ng's expert evidence that the purported proof for the allegations was fabricated.

[150] Third, the apology was not made in a way such that it was seen by the recipients of the defamatory statements. Although Dang Dinh published the post on 18 November 2022, he only made the post visible to the public eight days later. By that time, the post containing the apology was positioned below other posts which had been published during that period so that potential recipients would have had to scroll a long way down to see it. The post was effectively hidden.

[151] I turn to assessing the quantum of damages. I consider there is evidence of serious aggravation on the part of Dang Dinh. Both of his publications were made in an attempt to distance himself, first by not naming Ms Nguyen in the copyright attacks post, then by pinning the hypocrite post in a way that ensured its visibility despite knowing of its defamatory content and that the basis for the accusations were falsified. He offered a comprehensive explanation of his conduct shifting the blame away from himself, an explanation which I have found to be evasive and lacking in credibility. He has never accepted responsibility for any of the defamatory conduct and yet has not defended himself in these proceedings.

[152] In my view, Dang Dinh's conduct is most comparable to *Lee v The New Korea Herald Ltd.*<sup>52</sup> In that case, seven defamatory publications were made in a Korean

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<sup>52</sup> *Lee v The New Korea Herald Ltd.*, above n 9.

community newspaper with a circulation of 3,000 people in the context of a community of 22,000 people of Korean origin living in the Auckland region (where the newspaper is primarily distributed). In *Lee*, the publications made “serious and ungrounded” allegations that the plaintiff was tried and convicted of criminal offences, involved in dishonest and fraudulent practices (including bribery of public officials) and had acted unethically or immorally (including with a woman who was not his wife).<sup>53</sup> No apologies were made and the publications were still available on the newspaper’s website at the time of the hearing. Justice Heath awarded general damages of \$250,000 (\$342,892 in today’s terms).

[153] I will award general damages of \$365,000 (\$125,000 in relation to the copyright attacks post and \$240,000 for the hypocrite post) as sought.

*The second defendant – Mai Pham*

[154] As regards the claims against Mai Pham, Ms Nguyen claims general damages comprised of:

- (a) \$25,000 for the publication of the shock post;
- (b) \$100,000 for the republication of the copyright attacks post; and
- (c) \$100,000 for the publication of the Mai Pham post.

[155] Mr Geiringer submits that Mai Pham knew the TMD documents were obtained from hackers as she had personally admitted to messaging Tran Minh Doan in an affidavit affirmed in the Jenny Pham proceeding. He also submits that Mai Pham’s conduct aggravates the harm caused to Ms Nguyen.

[156] In her republication of the copyright attacks post, Mai Pham wrote: “The story has not come to end. Let’s keep watching...”. In the comments section, another person wrote: “Let’s beat her to death”. Mai Pham did not delete or criticise the comment.

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<sup>53</sup> At [45] and [73].



[157] Mai Pham has made a number of other posts and comments about Ms Nguyen both on her own Facebook page and on other Facebook pages (though Ms Nguyen is not always directly named). It is not necessary to set these all out in detail. I include the following by way of example:

- (a) On 20 April 2022, Mai Pham commented under a post on Jenny Pham’s page that Ms Nguyen was a “poisonous dangerous snake” and “if this person is the number 2 asshole, no one is at number 1”.
- (b) On 27 May 2022, Mai Pham commented on her own page under a post separate to the Mai Pham post: “Even she is put in jail she does not open her eyes yet.”
- (c) In response to a letter from Ms Nguyen’s lawyer sent on 30 May 2022, on 1 June 2022 Mai Pham wrote the following post on her Facebook page:

Texting the vile, wretched, dirty, and filthy: do you think that asking your lawyer a threatening letter is scary to me? The asked me to delete the first 3 posts, I'll post the 4th post here, is that make you angry???

Quote from a leading lawyer: “When the Court order, then it needs to be answered, but the lawyer is nothing, do need to answer, you send me a letter, I put it under my ass”, have you heard the depraved woman?

[158] Mai Pham also messaged Ms Nguyen privately. On 5 May 2022, one day after the hypocrite post was first published, Mai Pham sent the following message to Ms Nguyen on Facebook Messenger:

Hi Miss Ha. Haven't talked with you for a while. I heard you're hiring hacker after hacker to attack FB? [smiling emoji]

I'm just curious, if I lose this FB, I'll open another FB, do you continue to spend money to hire hackers?

[159] On 3 October 2022, after Keith Ng’s expert evidence had been made available to the defendants, Ms Nguyen’s lawyer wrote to Mai Pham with a settlement offer. Mai Pham responded by email on 3 October 2022, stating: “I am willing to see Ha Nguyen in court”.

[160] In terms of mitigatory conduct, on 30 October 2022 Mai Pham reposted the Jenny Pham apology with her own commentary as follows:

I also believed the evidence to be true and criticized Ha Nguyen. It took me a while to accept the fact that Son [the first defendant] and Jenny were deceived. I feel very sorry and empathy for Son and Jenny very much.

I was very angry when my Facebook was attacked. Therefore, I apologize to Ha Nguyen if my criticism caused damage to Ha Nguyen.

[161] In my view, this apology was not timely or fulsome, and therefore does not materially mitigate the harm caused by Mai Pham's defamatory publications. It was made months after Mai Pham was told about Ms Nguyen's denial of the accusations and six weeks after she was provided with Keith Ng's expert evidence. The principal focus of the statement accompanying the repost was for expressing sympathy for Dang Dinh and Jenny Pham, as opposed to mitigating the damage to Ms Nguyen's reputation.

[162] I turn to the assessment of damages for Mai Pham's conduct. The shock post, which originates from her, was the first publication in time and makes imputations about Ms Nguyen which are not repeated by the other publications. However, this is counterbalanced by the Mai Pham post, which, while still serious in nature, does little more than reassert the existing imputations in the hypocrite post. Mai Pham's republication of the hypocrite post in and of itself is not particularly aggravating, however, it is concerning that she did not take action against another person's comment containing what is essentially a death threat against Ms Nguyen.

[163] I consider Mai Pham's conduct to be seriously aggravating. She blatantly disregarded Ms Nguyen's attempts to make contact through her lawyer, instead turning to the court of public opinion. I place particular weight on the fact that Mai Pham was the only defendant who privately messaged Ms Nguyen to make what Mr Geiringer submits, and I accept, are goading remarks. This shows that Mai Pham was willing to take the initiative to reach out directly to Ms Nguyen, but not with the intention of seeking to understand her side of the story before making the defamatory publications.

[164] A case comparable to Mai Pham’s conduct is *Syed v Malik*.<sup>54</sup> In that case there were 20 publications on social media, the defamatory meanings of which Isac J considered “could not have been more serious”. One of the Facebook posts, for example, was shared 11 times and generated nine comments. The community was the plaintiff’s Muslim community in Australia. One of the aggravations in that case was the defendants’ assertion that the plaintiff had filed fabricated evidence with the court, which was unsubstantiated.<sup>55</sup> Damages of \$225,000 (\$232,494 in today’s terms) were awarded by Isac J.

[165] Taking each of the claims for damages individually, I would likely reduce the amount of damages for the Mai Pham post, as it is not as aggravating as the republication of the copyright attacks post. However, on a totality basis I consider the sum of \$225,000 as sought is appropriate. That is the award I will make.

*The third defendant – Julie Fam*

[166] As regards Julie Fam, Ms Nguyen claims general damages of \$100,000 for the republication of the hypocrite post on 4 May 2022.

[167] In the republication, Julie Fam wrote: “Is it possible that my fb was destroyed by the same mastermind?” Ms Nguyen says that readers would understand this to mean that Julie Fam’s Facebook page was one of those that Ms Nguyen was accused of targeting.

[168] Although Mr Geiringer does not contend that Julie Fam knew the TMD documents contained in the hypocrite post were fabricated from the outset, he submits that Julie Fam’s conduct subsequent to the republication aggravates the harm caused to Ms Nguyen.

[169] On 8 May 2022 Julie Fam made a complaint to the Police accusing Ms Nguyen of hiring hackers to make false reports against her account. On 30 May 2022 Julie Fam made a post on her Facebook page headed “PLEASE HELP!!!”, referencing her Police complaint and calling on the Police to protect her from “serious #cybercrime activity”.

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<sup>54</sup> *Syed v Malik*, above n 40, at [12].

<sup>55</sup> *Syed v Malik*, above n 40, at [27].

The post attaches screenshots which purportedly show Ms Nguyen, who is directly named, messaging with hackers. Julie Fam pinned the post and it attracted 55 reactions. Ms Nguyen says the post was only taken down on 14 October 2022 after Ms Nguyen called Jenny Pham asking why Julie Fam was still displaying the post.

[170] Julie Fam wrote a comment under the 30 May 2022 post which tagged a journalist working for the New Zealand Herald with the message “here is the police report and evidence.” Ms Nguyen says she was afraid the journalist would publish a story containing the false accusations and instructed her lawyer to approach the editor of the New Zealand Herald to provide an off-the-record briefing. No story eventuated.

[171] In addition to the above conduct, Julie Fam made a number of other posts and comments about Ms Nguyen on her Facebook page (though not always naming her directly). For instance:

- (a) On 18 May 2022, Julie Fam wrote in a comment under a post on her Facebook page:

See, what kind of teacher is there that plots cunning, chases and destroys, calls others fake when she herself is the pinnacle of lies, and then calls others worms and fucking.

- (b) On 26 May 2022, Julie Fam wrote a post on her Facebook page addressed to “the hot girl” (a reference to nicknames contained in the TMD documents) and in the comments of that post, wrote as follows:

... my facebook is almost disabled but I’ve got all evidence, no worries. This is just few years in prison.

- (c) On 11 August 2022, Julie Fam attached a photo of a dog to a comment addressed to Jenny Pham and asked: “Do you know who this is?”. She then described the dog as “dirty” and “stupid” and wrote: “Let’s see how you can teach this dog again, sis”.

[172] On 2 August 2022, Julie Fam responded to a request from Ms Nguyen’s lawyer sent on 1 June 2022 that she remove the false accusations. In the response, Julie Fam said that her publication was “true and correct” and she had “no intention to take down

the post,” instead counterclaiming \$30,000 in compensation for Ms Nguyen’s alleged criminal action of instructing hackers to deactivate her Facebook page.

[173] Ms Nguyen’s lawyers wrote to Julie Fam on 3 October 2022 with a final settlement offer by courier and email. The courier package containing the offer was returned and marked “don’t want it, refused”. However, on 7 October 2022 Julie Fam responded to the email attaching the letter and wrote that she was “very busy” but “could respond to every paragraph”, though she would first require an explanation of the damages sought.

[174] In terms of mitigatory conduct, on 31 October 2022 Julie Fam reposted the Jenny Pham apology with her own commentary as follows:

After all, Ms Jenny, Mai [the second defendant], Son [the first defendant] and everyone else involved are all victims of hacker fraud. And unfortunately, they also targeted Ms. Ha Nguyen. But instead of being weak or trying to justify like a victim, she (Jenny) stood up and apologized in a very clear and gentlemanly way. This makes me respect and trust her even more.

Also by the way, I would like to apologize to Ms. Ha Nguyen for trusting those deceivers and influencing her.

[175] Mr Geiringer submits that this apology was neither timely nor fulsome. I accept that submission. It was made months after Julie Fam was informed of Ms Nguyen’s denial of the accusations and six weeks after she was provided with Keith Ng’s expert evidence. The principal focus of the statement accompanying the repost was to express sympathy for Jenny Pham, Mai Pham and Dang Dinh. The expression of remorse, such as it is, to Ms Nguyen was only said as an afterthought as signalled by the phrase “Also by the way”.

[176] I accept that Julie Fam’s conduct aggravates the republication of the hypocrite post by repeating the imputations in those publications through posts and comments on Facebook. Julie Fam’s page has 2,400 friends, which is comparable to the circulation of a small community newspaper.<sup>56</sup> Even though it is not part of a cause of action in defamation, the post of 8 May 2022 — in which Julie Fam publicised her complaint with the Police and attempted to involve mainstream media by tagging a

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<sup>56</sup> *Lee v The New Korea Herald Ltd*, above n 9, at [2]; and *Kim v Cho*, above n 5, at [14].

journalist working for the New Zealand Herald — is particularly egregious because it encourages a “pile-on” such as that described in *Syed v Malik*.<sup>57</sup> This conduct persisted over a period of months, including after Julie Fam was informed that the accusations were disputed by Ms Nguyen. At no point did Julie Fam proactively contact Ms Nguyen to obtain her side of the story. Her apology, when it was eventually made, left much to be desired.

[177] Balancing all the above factors as best I can, I consider an award of \$100,000 as sought is appropriate.

*The fourth defendant – Minh Nguyen*

[178] As regards Minh Nguyen, Ms Nguyen claims general damages of \$100,000 for the republication of the hypocrite post on 4 May 2022.

[179] In the republication, Minh Nguyen wrote: “Oh my gosh. Thank you for providing the information.” Mr Geiringer submits that this is evidence of Minh Nguyen’s endorsement of the hypocrite post. I accept that submission. In a comment under the original hypocrite post, Minh Nguyen called Ms Nguyen a “community hacker” and wrote: “if the teacher is such a person, what influence is she having on the students?”

[180] There is also evidence that Minh Nguyen made disparaging comments against Ms Nguyen elsewhere. Red River Nguyen, a member of the local Vietnamese Facebook group in Palmerston North, deposes that Minh Nguyen was “one of the most frequent commenters” on that group and “discredited” Ms Nguyen.

[181] Mr Geiringer does not contend that Minh Nguyen knew the TMD documents contained in the hypocrite post were fabricated from the outset. However, Mr Geiringer submits that Minh Nguyen, like the other defendants, did not contact Ms Nguyen before spreading the fabricated documents. He was at least reckless as to the truth of the documents before he posted them.

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<sup>57</sup> *Syed v Malik*, above n 40, at [12].

[182] In terms of mitigatory conduct, on 30 October 2022 Minh Nguyen reposted the Jenny Pham apology, simply adding:

Turns out it wasn't Ha Nguyen. This guy is a real trickster.

[183] Minh Nguyen was the only defendant who accepted service in these proceedings. On 14 October 2023, after being served, he had the following brief conversation with Ms Nguyen over text messages:

Minh Nguyen: Hi Ms Ha, I am Minh Nguyen, used to meet you in Palmerston North at Ms Ha's Motel. I am sorry for what happened. I'd like to call you directly to say apology and for further discussion. Thank you.

Ha Nguyen: please contact my lawyer for any further discussion.

Minh Nguyen: I understand. I just want to let you know I realized my mistake. I want to have an opportunity to talk to you directly.

[184] Ms Nguyen says after that conversation, Minh Nguyen has not made any further contact.

[185] I accept Mr Geiringer's submission that the post was not a proper apology from Minh Nguyen. I also place little weight on the apology through text because it was only made privately and has not been published to the public. Neither apology has a material effect of repairing Ms Nguyen's reputation in the public forum.

[186] I do not consider that Minh Nguyen's conduct justifies an award of \$100,000 in damages. He faces the same claim as Julie Fam of republishing the hypocrite post, but his Facebook page only has 400 friends whereas Julie Fam's page has 2,400 friends. There is no evidence that his republication of the hypocrite post generated any reactions, shares, or comments. The only evidence that Minh Nguyen wrote any other negative comments comes from the affidavit of Red River Nguyen (and the comments are not attached as exhibits). Minh Nguyen was the only defendant who accepted service of proceedings and he did genuinely apologise, albeit privately and after proceedings were served. I consider damages of \$60,000 are appropriate.

## Punitive damages

[187] Unlike general damages, punitive or exemplary damages are available against a defendant only where that defendant has acted “in flagrant disregard for the rights of the plaintiff”.<sup>58</sup> The plaintiff must give particulars specifying the facts or circumstances alleged to justify an award of punitive damages.<sup>59</sup> The Court of Appeal said of this test:<sup>60</sup>

... The question is simply “[did] the defendant act in flagrant disregard of the rights of the plaintiff?” Of course, if one acts in flagrant disregard the defendant will routinely have a mental intent or motive which would, in any event, satisfy the now New Zealand common law test.

[188] The leading decision on punitive damages for defamation claims is *Television New Zealand Ltd v Quinn*.<sup>61</sup> In that decision, Lord Cooke stated that the following principles should be made clear to a jury deciding whether to award punitive damages:

- (a) The jury must be satisfied that the publisher had no genuine belief in the truth of what they published. The publisher must have known the words to be untrue or been wilfully blind to the truth of them.<sup>62</sup>
- (b) Punitive damages for defamation are comparatively rare and should only be awarded if the jury are satisfied that compensatory (including aggravated) damages are not enough to punish the defendant.<sup>63</sup> The underlying public purpose of punitive damages is deterrence and to show that “tort does not pay”.<sup>64</sup>

[189] I consider Lord Cooke’s comments equally applicable to the determination of defamation damages in a Judge-alone trial.

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<sup>58</sup> Defamation Act, s 28.

<sup>59</sup> Defamation Act, s 44.

<sup>60</sup> *Siemer v Stiassny*, above n 34, at [65].

<sup>61</sup> *Television New Zealand Ltd v Quinn*, above n 40.

<sup>62</sup> At 33.

<sup>63</sup> At 37.

<sup>64</sup> At 33.



[190] The Court of Appeal further observed it is ultimately the totality of the award which is to be assessed.<sup>65</sup>

... if general damages are awarded which somehow shade into aggravated damages which in turn somehow shade into exemplary damages, there is a distinct possibility that there will be double or even triple compensation. The problem is not unlike the conceptual problems in the criminal law in sentencing: it is the totality of the award which matters at the end of the day, not how the individual component parts are made up.

*Are punitive damages appropriate?*

[191] Ms Nguyen seeks punitive damages of \$80,000 for Dang Dinh's publication of the hypocrite post. Punitive damages are not sought for any other publication.

[192] It is contended that Dang Dinh maliciously commissioned fabricated evidence (and I have made that finding) and then published that evidence in an attempt to smear the reputation of Ms Nguyen, was untruthful to the Court in the Jenny Pham proceeding, and has avoided taking responsibility for his actions.

[193] Mr Price, who advanced the submissions as to punitive damages, refers to the Court of Appeal judgment in *Siemer v Stiassny*.<sup>66</sup> Mr Siemer had published defamatory statements on multiple forms of media, including his own website and purchasing billboard advertisements. He failed to comply with interlocutory injunctions restraining him from making further defamatory publications, instead creating another website. He was found in contempt in court and was imprisoned for six weeks. During that period, he continued to make publications and republications of the offending material, and was re-committed to prison for six months. The plaintiff suffered legal and related business costs, estimated by the High Court judge to be over \$1.4 million. The Court of Appeal upheld the award of \$825,000 against Mr Siemer, including \$25,000 in punitive damages (\$1,076,662.40 and \$34,020 in today's terms, respectively).

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<sup>65</sup> *Siemer v Stiassny*, above n 34, at [56] (footnote omitted).

<sup>66</sup> *Siemer v Stiassny*, above n 34.

[194] Mr Price contended that Dang Dinh's behaviour was in some ways worse than Mr Siemer's behaviour. I disagree. I consider Mr Siemer's behaviour and persistence in defamation to be at the extreme end of conduct which justifies punitive damages.

[195] On the other hand, this is not a case like *Kim v Cho* where the defendant's publications were, to a significant extent, simply going beyond what was reported in an existing investigation without any defamatory motive.<sup>67</sup> In this case Dang Dinh had a motive to produce evidence to assist his friend Jenny Pham's defence of truth in ongoing proceedings, and to defend himself from Ms Nguyen's threats of legal action against him in relation to the publications.

[196] I have taken into account Dang Dinh's conduct in calculating aggravation of the general damages. The question is whether the general damages awarded are sufficient to punish the defendant.

[197] I consider the threshold for punitive damages is met having regard to Dang Dinh's part in the fabrication of the TMD documents. Further, Dang Dinh's action in pinning the hypocrite post is analogous to *Karam v Parker* where Courtney J awarded \$10,000 in punitive damages (\$13,050 in today's terms) because the defendant "knew defamatory comments were being published on Facebook and encouraged it to continue".<sup>68</sup> That award was made in addition to \$340,500 of general damages (\$444,351 in today's terms) against that defendant. As to quantum, I consider \$80,000 is too high. Even the extreme conduct in *Siemer* only warranted \$25,000 of punitive damages, being \$34,020 in today's terms, (though the Court of Appeal commented that in the context of the award as a whole, this "demonstrated significant restraint").<sup>69</sup> I consider the appropriate amount is \$30,000.

### **Costs**

[198] Mr Geiringer seeks costs totalling \$78,719.00 on a category 3 basis, with some items at band B and some items at band C, plus disbursements of \$9,010.01. A copy

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<sup>67</sup> *Kim v Cho*, above n 5, at [51].

<sup>68</sup> *Karam v Parker* [2014] NZHC 737 at [245]–[246].

<sup>69</sup> *Siemer v Stiassny*, above n 34, at [75].

of Mr Geiringer’s schedule of costs is attached to this judgment as Appendix A. The costs claimed are in the highlighted part of the schedule.

*What is the appropriate categorisation of this proceeding?*

[199] Rule 14.3 of the High Court Rules 2016 describes the categorisation of proceedings as follows:

Category 1 proceedings	Proceedings of a straightforward nature able to be conducted by counsel considered junior in the High Court
Category 2 proceedings	Proceedings of average complexity requiring counsel of skill and experience considered average in the High Court
Category 3 proceedings	Proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court

[200] As summarised by Toogood J in *Craig v Slater*, factors relevant to fixing the categorisation of a proceeding include the following:<sup>70</sup>

- (a) whether the case is out of the ordinary run of High Court litigation, with the length of the hearing likely to reflect the complexity of the issues;
- (b) whether there are conceptually difficult issues of law and fact;
- (c) whether there is a considerable amount of money involved; and
- (d) whether the case has considerable public significance and the wider community has a significant interest in it.

[201] This Court has expressly recognised that “it is the nature of the proceeding rather than the identity of counsel which determines the appropriate categorisation of the proceedings”.<sup>71</sup>

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<sup>70</sup> *Craig v Slater* [2019] NZHC 1269 at [77]. This decision was set aside on appeal but not because of an error in categorisation: *Craig v Slater*, above n 11, at [123]–[130].

<sup>71</sup> *Peters v Bennett* [2020] NZHC 1734 at [30].

[202] Generally, a proceeding is classified as falling into one category. The re-categorisation of proceedings — while possible as all costs matters are at the discretion of the court<sup>72</sup> — is normally only appropriate if special reasons exist, such as a change in the nature of proceedings or the unexpected inclusion of particularly complex issues.<sup>73</sup> If certain steps are more complicated or require significantly more time, then this should be recognised by increasing the band for that step rather than changing the costs category.<sup>74</sup> This principle is stated by Justice Venning as follows:<sup>75</sup>

[33] Put another way, where more than a normal amount of time is considered reasonable then, rather than seeking to recategorise the nature of the proceedings to category 3, it is more appropriate and consistent with the intent of the rules to apply time band C rather than band B to those particular steps that warrant it.

[203] Mr Geiringer submits that this proceeding was one which required a high degree of knowledge and experience in a specialist legal field and therefore merits an award of costs at category 3. He says that defamation proceedings are frequently (though not always) set as category 3, depending on the complexity of the proceeding. He contends that this proceeding was complex because it involved: publications where the identity of the plaintiff and publisher were at issue; fabricated documents which raised difficult forensic issues turning on expert evidence; publications which were made in a mix of languages; and publications on social media, the nature of which require particularly difficult considerations.

[204] Mr Geiringer further submits that the appropriate categorisation of costs must not take into account the fact that the matter proceeded by way of formal proof. If it is to be taken into account, Mr Geiringer submits that, if anything, the proceeding was made more complex due to the lack of discovery and lack of agreed facts requiring every point in the statement of claim to be in issue.

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<sup>72</sup> High Court Rules, r 14.1.

<sup>73</sup> For example, see *Hojsgaard v Chief Executive of Land Information New Zealand* [2019] NZCA 84, [2019] 2 NZLR 864 at [127]. The Court of Appeal upheld the recategorisation by the trial judge as one claim (for judicial review) was relatively straightforward as compared to the claim for declaratory relief.

<sup>74</sup> *Peters v Bennett*, above n 71, at [32].

<sup>75</sup> *Peters v Bennett*, above n 71.

[205] Mr Geiringer cites a number of authorities in support of his position. In *Jones v Lee*, Clifford J awarded costs on a 3B basis for the reason that the defamation proceedings raised “complex legal issues” and involved a civil jury trial, which raised issues “quite different from those in a normal criminal trial before a jury”.<sup>76</sup> In *Young v TVNZ*, which determined costs on a judgment striking out defamation claims on the basis that they were not capable of bearing the pleaded defamatory meaning, Gilbert J held as follows:<sup>77</sup>

I agree with Mr Young that not all defamation proceedings should be classified as Category 3. It will depend on the complexity of the proceedings and their significance. However, on balance, I am persuaded that Category 3 is appropriate for this proceeding which involves seven causes of action and raises matters of considerable significance, not only to the parties, but more generally. The claims, defences and replies to defences will all require detailed pleading and careful presentation at trial. I consider that the proceeding requires counsel with specialist skill and experience in the High Court. The parties appear to have made the same assessment as evidenced by their decision to retain leading defamation lawyers to represent them.

[206] I accept Mr Geiringer’s submission that there is no inherent difference, for the purpose of categorising costs, between a hearing that proceeds by way of formal proof and a hearing that proceeds in the usual way. As discussed above at [7]–[8], the plaintiff is still required to prepare evidence for and prove every claim on the balance of probabilities. To the extent that the proceeding was made simpler by the lack of trial processes such as cross-examination, this can be accounted for by adjusting the band of particular steps in the costs schedule as necessary.

[207] Although this proceeding also involved seven causes of action, I consider that *Young v TVNZ* can be distinguished on the basis that this proceeding: did not involve matters of public significance; no affirmative defences (or replies to defences) were formally raised; and the issues raised were of average complexity in the context of defamation proceedings.<sup>78</sup> Unlike *Jones v Lee*, this was not a case which involved the additional complications of a civil jury trial.<sup>79</sup>

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<sup>76</sup> *Jones v Lee* CIV-2007-485-001510, HC Wellington, 3 September 2010 at [21].

<sup>77</sup> *Young v Television New Zealand Ltd* [2012] NZHC 3460 at [10].

<sup>78</sup> *Young v Television New Zealand Ltd*, above n 77.

<sup>79</sup> *Jones v Lee*, above n 76.

[208] An analogy can be drawn with *Kim v Cho*, which was a formal proof hearing involving publication of nine defamatory statements (seven of which were actionable) in the Korean language.<sup>80</sup> No affirmative defences were considered. Justice Courtney awarded costs on a 2B basis.

[209] In the circumstances, and with regard to the available authorities, I consider that the proceeding warrants a classification of category 2.

*What is the appropriate band for each step of this proceeding?*

[210] A determination of what is a reasonable time for a step taken in a proceeding must be made by reference to band B “if a normal amount of time is considered reasonable” or band C “if a comparatively large amount of time for the particular step is considered reasonable”.<sup>81</sup>

[211] Mr Geiringer submits that the following steps should be at band C as they reasonably justified more time than normal: commencement of the proceeding (step 1), preparation and filing of affidavits (step 37), and preparation of written submissions (step 40).<sup>82</sup> Mr Geiringer submits steps 37, 40 and 41 are appropriately claimed by way of analogy to the process under an originating application. He submits that for all other steps, a band B allocation is sufficient.

[212] I agree with Mr Geiringer’s submission that steps 1, 37 and 40 reasonably required more than the normal amount of time and accordingly allocate those steps as band C. However, I consider the preparation of the bundle for the hearing would not have been particularly complicated and step 41 ought to be allocated as band B. Band B is appropriate for all other steps as sought.

[213] The assistance of second counsel was appropriate for this trial. Both counsel had an active role. I certify for second counsel.

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<sup>80</sup> *Kim v Cho*, above n 5.

<sup>81</sup> High Court Rules, r 14.5(2)(b)–(c).

<sup>82</sup> In his submissions Mr Geiringer also submitted that step 41 (preparation of the bundle) should be at band C. That is not reflected in the table which has step 41 at band B.

[214] I will make an award of costs in favour of Ms Nguyen on a category 2 basis with steps allocated to band B or C as set out in [212] plus disbursements against all defendants jointly and severally.

### **Results and orders**

[215] For the reasons given:

- (a) I make an award of damages against Dang Dinh in the amount of \$365,000 and punitive damages in the amount of \$30,000.
- (b) I make an award of damages against Mai Pham in the amount of \$225,000.
- (c) I make an award of damages against Julie Fam in the amount of \$100,000.
- (d) I make an award of damages against Minh Nguyen in the amount of \$60,000.
- (e) I make an award of costs in favour of Ms Nguyen against all defendants on a joint and several basis of \$62,307.01 (which comprises \$53,297 of scale costs and \$9,010.01 of disbursements).

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Gordon J

## Appendix A

### Schedule of costs and disbursements

Rate category 2            \$2,390  
Rate category 3            \$3,530

Description of step	Step	Date completed	Time Band B	Time Band C	Amount		Amount	
					2B	2C	3B	3C
Commencing the claim	1	27/09/2023	3	10	\$7,170	\$23,900	\$10,590	\$35,300
Application for substituted service including supporting affidavits	22	7/12/2023	0.6	2	\$1,434	\$4,780	\$2,118	\$7,060
Application for listing for formal proof including supporting affidavit	11	8/04/2024	0.4	1	\$956	\$2,390	\$1,412	\$3,530
Preparation and filing of evidence in support of the claim	37	8/07/2024	2	6	\$4,780	\$14,340	\$7,060	\$21,180
Preparation of written submissions	40	8/07/2024	1.5	3	\$3,585	\$7,170	\$5,295	\$10,590
Preparation of the casebook for hearing electronic and then physical	41	10/07/2024 & 15/07/2024	0.6	1	\$1,434	\$2,390	\$2,118	\$3,530
Appearance at the hearing	42	18/07/2024	1	1	\$2,390	\$2,390	\$3,530	\$3,530
Appearance of second counsel	43	18/07/2024	0.5	0.5	\$1,195	\$1,195	\$1,765	\$1,765
Sealing	29	TBD	0.2	0.2	\$478	\$478	\$706	\$706
<b>Total costs sought (as per the entries highlighted in yellow)</b>							<b>\$78,719</b>	

Disbursement type	Amount
Filing fee	\$1,350.00
Setting down fee	\$1,600.00
Hearing fee	\$1,600.00
Service agent fee	\$582.13
Expert fee - translator	\$765.38
Electronic bundle costs	\$135.70
Printing costs	\$1,962.50
Travel and accomodation	\$1,014.30
<b>Total disbursements</b>	<b>\$9,010.01</b>