IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-001062
[2024] NZHC 1242

UNDER	the Defamation Act 1992
BETWEEN	JOHN PATRICK MURPHY Plaintiff
AND	JINZHEN CAI also known as JASMINE CAI Defendant

Hearing: 7 and 8 October 2024

Appearances: Plaintiff in person (with M Spring as McKenzie friend)
P M Hunter for Defendant

Judgment: 17 December 2024

JUDGMENT OF ANDERSON J

This judgment was delivered by me on 17 December 2024 at 3:00 pm
pursuant to r 11.5 of the High Court Rules 2016.

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Registrar/Deputy Registrar

Solicitors:
Simpson Western North, Auckland

[1] The genesis of this defamation claim is the sale of a 2009 Toyota Yaris. The plaintiff, Mr Murphy, is a registered vehicle trader and the sole director and shareholder of Central Car Co Ltd (Central). Central trades as Cornwall Motor Co. Cornwall Motor Co advertises its vehicle stock for sale on Facebook.

[2] Ms Cai was the registered owner of the said Yaris. On 18 May 2023, Ms Cai's partner, Mr Zheng, sold the vehicle to Central. Mr Zheng and Mr Murphy (on behalf of Central) signed a sale and purchase agreement.[1]

[3] Central paid the purchase price, $2,700, into the bank account provided by Mr Zheng that same day. Mr Murphy then prepared the vehicle for sale and Cornwall Motor Co posted the vehicle for sale on its Facebook page.

[4] Later that day, Mr Zheng informed Ms Cai that he sold the vehicle. She said that she still needed it and instructed Mr Zheng to get it back. At 4.52 pm Mr Zheng texted Mr Murphy referring to having had a big argument with his partner who did not want the vehicle sold until now because their new car was not available for two to three weeks. He said she was the registered owner, and wanted the vehicle back.

[5] Mr Murphy responded that the vehicle had already been committed and he would not be taking a refund. There then followed a further series of text exchanges that evening in which Mr Murphy maintained his position. Among other things, Mr Zheng texted Mr Murphy and said "We will report this to the police" and "We will report it as stolen". Mr Zheng also recorded "I will expose your dirty practice to the media and your professional network". When Mr Murphy responded, "do what you must" Mr Zheng said he would give Mr Murphy one more chance before he contacted the Police and his lawyer and that "I will not let you go." Mr Murphy responded that he considered this extortion and repeated that Mr Zheng should do what he must.

[6] In the meantime, at 6.24 pm, Ms Cai texted Mr Murphy informing him that she was the registered owner of the vehicle, that she had just been told that Mr Murphy had possession of the car, and that she had not agreed to sell it. She asked for

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[1] Mr Murphy asserts that Mr Zheng called Ms Cai from the car yard. He is seen speaking on his phone, but I am unable to infer it is to Ms Cai.

Mr Murphy to arrange for the return of the vehicle. Then, at 6.36 pm, Ms Cai called the Police 105 number and reported the vehicle stolen. At 6.45 pm she made an online report as well. In answer to questions, Ms Cai stated that she did not know who stole the vehicle, that it had been stolen from being parked on a driveway.

[7] At 7.47 pm a comment was posted on the Facebook post advertising the vehicle from an account named "Jasmine Cai" stating:

> Anyone saw this advertisement please be aware this car is illegally in possession by John Murphy. I am registered owner of this vehicle and had never agreed to sell this car. I have reported this car as stolen with the police.

[8] Approximately one hour later, at 8.44 pm, a further comment by "Jasmine Cai" stated:

> This car has been reported as stolen by John Murphy and will be towed away immediately at your expense.

[9] The first comment was liked by a Facebook account under the name "Sam Zheng". Jasmine Cai is a name used by the defendant. Sam Zheng is a name used by her partner.

[10] The following day, on 19 May 2023, Mr Zheng and Ms Cai went to Cornwall Motor Co's premises. A tow truck arrived to take the vehicle back. Before that occurred, Mr Zheng loudly asked Mr Murphy in Ms Cai's presence whether he had "seen our media coverage". Police were called. Ms Cai and her partner left and the vehicle remained at Cornwall Motor Co.

[11] Mr Murphy filed and served the statement of claim in this proceeding on 26 May 2023. The comments posted on Facebook were removed later that day.

[12] On 2 June 2023, Ms Cai stated to Police that the vehicle was not stolen and said that she had sold it to the car yard.

The pleadings

[13] Mr Murphy sues Ms Cai in defamation. He alleges that he suffered serious damage to his reputation as a consequence of the statements which carry the meaning that he is a criminal who stole the vehicle.

[14] Mr Murphy seeks a declaration under s 24 of the Defamation Act 1992 (the Act) that Ms Cai is liable to him in defamation. He also seeks general damages of $200,000 and costs.

[15] In defence, Ms Cai pleads that she did not make, nor ask anyone else to make, the statements. Alternatively, she pleads that the statements do not bear the defamatory meaning alleged. She submits the statements merely indicate there:

> … was a dispute over the ownership of the vehicle because the registered owner had not agreed to sell it and this dispute had been brought to the attention of police.

[16] In any event, Ms Cai submits she is protected from Mr Murphy's claims by the defence of honest opinion. As a further affirmative defence, Ms Cai pleads that by leaving the comments on the post Mr Murphy consented to the publication and failed to mitigate his loss.

[17] As required by s 39 of the Act, Mr Murphy provided notice that he intended to allege that Ms Cai's opinion was not genuinely held and that the comments were unsupported statements of fact, not opinion.

The claim

[18] To succeed, Mr Murphy as plaintiff must establish that:

(a) a defamatory statement has been made;

(b) the statement was about him; and

(c) the statement was published by Ms Cai as defendant.

[19] I address each element in turn.

Defamatory statement?

[20] Two preconditions must be satisfied for a statement to bear a defamatory meaning alleged. First, the alleged meaning must be the meaning an ordinary, reasonable person would draw or infer from the words, taken in their context and in light of known facts.[2] Second, that meaning must be pleaded.[3]

[21] It is not open for a defendant to plead that a statement has a meaning different from the meaning alleged and to seek to establish the truth of that different meaning.[4]

[22] Mr Murphy pleads that the statements, read together, carry the meaning that he was a criminal who stole the vehicle. Before addressing whether this is defamatory, I must first address whether the statement bears the pleaded meaning.

What does the statement mean?

[23] The words complained of must be construed in their natural and ordinary meaning.[5] Their meaning must be determined "exclusively by an examination of the words themselves".[6]

[24] In *New Zealand Magazines Ltd v Hadlee (No 2)* the Court of Appeal set out principles relevant to the assessment of the natural and ordinary meaning of a statement alleged to be defamatory:[7]

> (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?

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2 *Craig v Slater* [2020] NZCA 305 at [15].
3 At [15].
4 *Broadcasting Corp of New Zealand v Crush* [1988] 2 NZLR 234 at 239–240, confirmed to apply to proceedings brought under the Defamation Act 1992 in *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [54]–[55].
5 Ursula Cheer "Defamation" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 955.
6 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 624.
7 At 625 (citation omitted).

> (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
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> (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
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> (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
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> (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
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> (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that [the fact finder] cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them …

[25] Each case depends on its facts and the impression that the statement(s) would make on a reasonable reader.[8] The intent of the publisher is irrelevant. The focus is on what the words portray, not what the publisher intended them to portray.[9]

[26] In this case, the context of the comments is the Facebook listing for the vehicle. It is common ground that because the two comments were posted within an hour of each other and could both be read together for the duration of their eight-day publication, they must be interpreted as a coherent whole.

[27] Mr Murphy submits that the natural and ordinary meaning of the two comments is that he stole the vehicle and that he is a criminal. He says that this is clearly conveyed by the statement that the "car has been reported as stolen by John Murphy". He says that the prior comment reinforces this meaning by asserting that "this car is illegally in possession by John Murphy". He says this is serious as theft is

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8 *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148.

9 *Hulton & Co v Jones* [1910] AC 20 (HL) at 23; and *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, [1968] 2 WLR 599 at 609. See also *British Chiropractic Assoc v Singh* [2010] EWCA Civ 350, [2011] 1 WLR 133; and *Banks v Cadwalladr* [2022] EWHC 1417, [2022] 1 WLR 5236.

a criminal offence. He says that allegations of theft are particularly damaging for a car dealer as people will not purchase from him if he is suspected of dealing with stolen vehicles.

[28] Ms Cai denies the words bear the pleaded meaning. She submits that in their natural and ordinary meaning the comments merely mean that:

(a) the registered owner of the vehicle had not agreed to sell it to Mr Murphy, Mr Murphy was not entitled to possession, and the registered owner had reported it stolen; and

(b) the vehicle had been reported stolen and it would be repossessed.

[29] In addition, she says that the asserted meaning that Mr Murphy is "a criminal" conveys something more habitual or at least more than one-off offending.

[30] In my view, someone casually reading the Facebook posts would indeed take from the posts that Mr Murphy had stolen the car. That the posts refer to the vehicle only being *reported* as stolen is a nuance that would be lost on the reader. Read together, the second post updates the first. It conveys that it has been ascertained that not only is the vehicle in Mr Murphy's possession illegally, but that it is Mr Murphy who has stolen the vehicle. For an ordinary reasonable reader, that would also make Mr Murphy a criminal. I reject that anything habitual or more than one-off is required to convey this. Accordingly, I am satisfied that the statement had the meaning pleaded.

[31] Having determined the meaning of the statement, I must now consider whether that meaning is defamatory.

Is the statement defamatory?

[32] A defamatory statement is one that tends to lower the plaintiff in the estimation of reasonable people[10] or tends to make others shun and avoid the plaintiff.[11] A defamatory statement must affect a plaintiff's reputation adversely in a more than

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10 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240.
11 *Youssoupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 (CA) at 584.

minor way.[12] It is well-established that to incorrectly state that a person has committed a criminal offence such as theft is defamatory.[13] It can also be defamatory to say that someone is suspected of a crime.[14]

[33] The character of the statement (the sting being that Mr Murphy stole the car) is such that it affects Mr Murphy's reputation in more than a minor way. I accept that the statement is defamatory.

Rebuttal of presumption of more than minor damage

[34] The requirement for a more than minor effect on reputation for a statement to be defamatory reflects that damage to reputation is an essential element of the tort.[15] However, the requisite damage is presumed. As outlined above, the plaintiff need only establish that the statement has a tendency to cause more than minor harm.

[35] This presumption is rebuttable, with the onus resting on the defendant to establish that the statements in fact caused no more than minor harm.[16]

[36] Ms Cai contends that no more than minor damage is established because there is only evidence of Mr Spring seeing the posts; that he did not accept the statements; and that they were immediately rebutted by Mr Murphy when they talked. That ignores that the onus of proof is on Ms Cai to rebut the presumption. There is no positive evidence that only Mr Spring viewed the posts. My conclusion remains that the statement is defamatory of Mr Murphy.

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12 *Craig v Slater,* above n 2, at [44]–[45] adopting *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [62]–[69]. In *Television New Zealand Ltd v Talley's Group Ltd* [2024] NZCA 502 at [27] the Court of Appeal declined to reassess the threshold test of more than minor damage until the issue was further considered by the Supreme Court.

13 *Kim v Cho* [2016] NZHC 1771, [2016] NZAR 1134; *McGee v Independent Newspapers Ltd* [2006] NZAR 24 (HC); *Staples v Freeman* [2021] NZHC 1308; and *Truth (NZ) Ltd v Bowles* [1966] NZLR 303 (CA).

14 *Truth (New Zealand) Ltd v Holloway* [1961] NZLR 22 (PC) at 24; and *Vickery v McLean* [2006] NZAR 481 (CA).

15 *Craig v Slater*, above n 2, at [44].

16 At [45].

Identification of the plaintiff

[37] The statements name Mr Murphy. There is no dispute that he is identified. This element is met.

Publication by the defendant

[38] The last element is that the plaintiff must prove that the impugned statement was published by the defendant. Mr Murphy must therefore prove (a) the statement was published, and (b) it was published by Ms Cai.

Was the statement published?

[39] The statement was made as comments on a Facebook post. Publication on the internet is publication for defamation purposes.

[40] Publication must be to some person other than the plaintiff.[17] Mr Spring gave evidence that he saw and read the comments. The element of publication is established.

Did Ms Cai publish the statements?

[41] Mr Murphy must prove that Ms Cai published the statements or that she procured or participated in the publication by instructing, authorising or encouraging someone else to make them.[18]

[42] As set out above, the comments were posted using a Facebook account in the name of Jasmine Cai. Ms Cai denies that this is her account. She says she has not used social media in over 10 years and that she only became aware of the post after being served with these proceedings. She also denies instructing anyone else to make the comments on her behalf.

[43] Mr Murphy submits that I can be satisfied on the balance of probabilities it was Ms Cai who made the comments. He says it is implausible that there is another

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17 Cheer, above n 5, at [15.5.2(2)(e)].
18 *Sellman v Slater*, above n 12, at [114].

Jasmine Cai who made the comments on 18 May 2023, who happens to have the same name as the defendant, who has detailed knowledge of the private facts of the dispute that arose in relation to the exact same vehicle, and that someone with the same name as her husband liked the second comment.

[44] Mr Murphy asserts that the implausibility becomes greater when one considers the timing of the comments. He highlights that the second comment refers to the vehicle being stolen and says that the vehicle will be towed away and that the next morning a tow truck was called by the defendant and her husband. He also submits that Mr Zheng's reference to "media coverage" on 19 May can only refer to the two Facebook comments as there was no other "media coverage" about the vehicle. As well, the comments were deleted after the statement of claim was served on Ms Cai.

[45] Mr Murphy submits that all this evidence combined leads to the "incontrovertible conclusion" that it was in fact Ms Cai that made the two Facebook comments.

[46] Plainly, the person who made the comments on the post had detailed knowledge of the private facts and that the vehicle had been reported stolen to the Police. Equally, it is not inevitable that this person is Jasmine Cai because her partner, Mr Zheng, was also in possession of all these facts and in fact his text had made a threat to Mr Murphy of going to the media.

[47] Mr Zheng did not give evidence. He was not called by Ms Cai, although she repeated several times in answer to questions in cross-examination that Mr Murphy would need to ask Mr Zheng the relevant question, not her. Although Mr Murphy had served a form of subpoena on Mr Zheng, he did not come to Court, apparently because he considered the subpoena invalid. In any event, the Court was unable to issue a warrant because the requirements for his attendance had not been met. No application to adjourn the hearing was made. The upshot is that Mr Zheng was unable to be questioned about the circumstances of the posts.

[48] The possibilities are that Mr Zheng posted the comments in Ms Cai's absence (which would also involve him creating or using an account in her name on Facebook);

that Ms Cai set up the account and posted the comments; or that Mr Zheng did both with the knowledge and in the presence of Ms Cai.

[49] Mr Hunter submits that there is no direct evidence that Ms Cai made the posts or authorised the posts. She denies knowing about them until being served with proceedings. However, I do not accept her evidence. Although it is conceivable that she and Mr Zheng did not make the posts together, on the balance of probabilities I find that they did. That is for the following reasons:

(a) Ms Cai and Mr Zheng were both home together at the time the posts were made on 18 May and had plainly been talking to each other.

(b) As noted earlier, in Ms Cai's presence at the car yard on 19 May, Mr Zheng is seen and heard loudly taunting Mr Murphy as to whether he had seen "our" posts. This was captured on video. Ms Cai is within a few metres of Mr Zheng at the time.[19] I do not accept that Ms Cai was not aware of the post.

(c) That being so, I also do not accept her evidence that she only learned of the posts on the day proceedings were issued, undermining the credibility of her testimony on this aspect.

(d) Mr Zheng's text to Mr Murphy stated: "We will report this to the police". The juxtaposition of what is said in this text with Ms Cai then reporting the vehicle stolen suggests she and her husband were discussing what steps to take. The first post on Cornwall Motor Co's Facebook then refers to Ms Cai's report to the Police. The first Facebook post also uses words similar to those that Ms Cai had used in her earlier text exchange with Mr Murphy. Although it is possible that Mr Zheng separately made the first post, I consider it is far more likely that they made it together.

[19] Although Ms Cai appears to have AirPods in, Mr Zheng had to repeat himself louder because Mr Murphy could not hear.

(e) When pressed in cross-examination that it must have been her that made the posts, I found Ms Cai's responses uncompelling. Ms Cai maintained that she still does not know who made the posts. That is not credible.

[50] I consider Ms Cai was involved in making the posts whether or not she set up her Facebook account or physically posted them. I am satisfied that Ms Cai at the least authorised and/or encouraged the posts to be made whether or not she posted them herself. Accordingly, Ms Cai published the statements.

Conclusion

[51] The elements of defamation are established.

Honest opinion

[52] Section 9 of the Act provides that it is a defence to a claim for defamation that the publication was the statement maker's honest opinion. For a defence of honest opinion to succeed, the defendant must first show that the words complained of were an expression of an opinion, not an imputation of fact.

[53] If the words complained of are indeed an opinion, the defendant must next be able to prove the existence of facts upon which the opinion is based. These facts must be true or not materially different from the truth. It is not necessary that all of the facts relied upon are true. It is enough for the defendant to prove the existence of any facts sufficient to support the comment.[20]

[54] Third, the defendant must show that the opinion was genuinely held. Questions of reasonableness or soundness are irrelevant. "The test is the honesty of the opinion, not its reasonableness."[21]

[55] In my view this defence fails at the first hurdle. It must be clear to a reasonable person reading a statement that the passage complained of is merely the author

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[20] *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [22] quoting, *Kemsley v Foot* [1952] AC 345 at 358.
[21] At [24].

presenting his or her opinion on the facts in question. The ultimate question is "how the words would strike the ordinary, reasonable reader".[22]

[56] Whether a statement is one of fact or an expression of an opinion will depend on the context in which the statement is made. As said by the Court of Appeal in *Mitchell v Sprott,* "[p]resentation is crucial to whether a statement is or is not an expression of opinion"[23] and:[24]

> Sometimes words may in isolation appear to be stating a fact, but when read in context are properly understood to be drawing a conclusion from facts which have also been stated or indicated by the author or which would have been known to the person to whom the words were addressed.

[57] If it is not possible to distinguish fact from comment on fact, the words are not protected by honest opinion.[25] A statement that mixes fact with opinion runs the risk that it will appear to an ordinary, reasonable reader as a series of assertions of fact.[26] Bare and unsupported statements will normally be classified as a statement of fact rather than a comment on fact.[27]

[58] The sting of the publication here looking at the two posts together — that Mr Murphy "stole" the vehicle — does not present as a conclusion from the stated facts: for example, the assertion that Mr Murphy was "illegally in possession". Rather in my view the comments convey to the reader a series of propositions of fact and not opinion drawn from them.

[59] I need not consider the other elements of the defence, however I make the following findings on the evidence before me:

(a) In support of the defence, Ms Cai pleads the following facts as being true:

> (a) the defendant was both the legal and registered owner of the vehicle;

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22 At [19].
23 At [18].
24 At [17].
25 At [17].
26 Cheer, above n 5, at 1011.
27 At 1010.

(b) the defendant did not authorise her husband, Zheng Ping, to sell the vehicle to Central Car Company Limited;

(c) Mr Zheng purported to sell the vehicle to Central Car Company Limited on 18 May 2023 by signing an agreement for the sale and purchase of a vehicle with the plaintiff;

(d) Mr Zheng allowed the plaintiff to uplift the vehicle from the defendant's house without her knowledge or consent on 18 May 2023;

(e) when the defendant returned home from work on 18 May 2023 and discovered what had occurred, she asked the plaintiff to return the vehicle to her both by texting the plaintiff directly and asking her husband to text the plaintiff asking for the return of the vehicle which he did;

(f) the plaintiff responded by text on 18 May 2023 claiming that he could not return the vehicle as it had already been on-sold to another customer;

(g) the defendant believed that the plaintiff was committing theft by refusing to return the vehicle in circumstances where she had not agreed to sell it to him or his company and so she then reported the vehicle as stolen to the Police.

I am satisfied that the pleaded facts in (a)–(c) and (e) are true. The pleaded fact in (d) is not established in that Mr Zheng took the vehicle to the car yard and was dropped back by Mr Murphy. I accept Ms Cai was not aware and did not give consent to it being left at the car yard on 18 May 2023. The pleaded fact in (f) is not correct to the extent that precise words used in the text were not "on-sold to another customer" but "committed".

(b) If I am wrong that the texts are properly presented as opinion, I accept Ms Cai's evidence that as at 18 May she believed that what Mr Murphy had done amounted to stealing her car. I do not accept that she continued to hold that view because I consider that she became aware by 20 May 2023 that the Police regarded the issue as a civil dispute. This was noted on the Police file. I infer that she became aware of the Police view either directly or through Mr Zheng.

Consent

[60] Section 22 of the Act provides that it is a defence to proceedings for defamation if the defendant alleges and proves that the plaintiff consented to the publication of the matter that is the subject of the proceedings.

[61] Ms Cai submits that by failing to delete the comments for eight days Mr Murphy consented to the comments through acquiescence. Clear and convincing acquiescence to publication of a defamatory statement can amount to consent and provide a defence to defamation.[28] However, "quiescence is not acquiescence".[29] Simple inaction does not amount to acquiescence unless there is any conduct upon which one can reasonably infer approval of the publication or an abandonment of a right to sue.[30]

[62] Ms Cai relies on *Carrie v Tolkien*.[31] Mr Carrie operated a blog relating to his self-published book. In his book, Mr Carrie alleged that he had suffered abuse at the hands of Catholic priest, John Tolkien (son of the author J.R.R. Tolkien), when he was a child. Royd Tolkien (the great-grandson of J.R.R. Tolkien) posted several defamatory comments on Mr Carrie's blog, alleging that he was a fraudster trying to extract money from the Catholic Church and the Tolkien family.

[63] Mr Carrie discovered the comments four hours later. It was not disputed that it was within his power to remove the comments, but he chose not to do so. Instead, he posted a response to the comments and subsequently commenced defamation proceedings. Mr Tolkien sought summary judgment against Mr Carrie on the grounds of consent to the publication from the time Mr Carrie learned of the post.

[64] The Court held that Mr Carrie could be taken to have consented from the point he became aware of the post. The Court held that Mr Carrie's justification of leaving the comments online so as to allow people to read his response "in context" did not undermine the defence of consent. The Court also found it difficult to reconcile

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28 *Mihaka v Wellington Publishing Co (1972) Ltd* [1975] 1 NZLR 10 (SC) at 17.
29 *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 (HC) at 500.
30 At 500.
31 *Carrie v Tolkien* [2009] EWHC 29.

Mr Carrie's conduct of leaving the comments undeleted for 22 months (the time between when the comments were first posted and when the hearing took place) and his suggestion that he had suffered "substantial upset and distress" or that he had "concerns about the welfare and safety of [his] family".

[65] The remaining allegations in the claim related to only the short window of four hours before Mr Carrie saw the post. The Judge struck out the remaining parts of the plaintiff's case as an abuse of process under the English common law principle in *Jameel (Yousef) v Dow Jones & Co Inc* which requires the Court to consider whether a "real and substantial tort" has been committed.[32]

[66] Here, Mr Murphy says that there is no evidence to support that he consented to publication of the posted comments prior to publication or subsequently. He says he did not know how to delete the comments and that Ms Cai has not shown that it is technically possible for him to have done so. He says his unequivocal position is that he did not consent to publication of the comments.

[67] Whether there is consent by acquiescence is an intensely factual enquiry. I do not consider the facts here sufficiently strong for the defence to be made out. I accept Mr Murphy's evidence that he did not know how to remove the comments. Mr Murphy had staff that managed the account. In principle it seems likely they could have simply removed and relisted the advertisement of the car, which would remove the comments. There is no evidence before the Court on the mechanism for this. In any event, the facts are less powerful than in *Carrie v Tolkien* where the merits of the plaintiff's case were undermined by the plaintiff engaging with the comments and leaving them there for nearly two years.[33]

[68] The evidence falls short of a defence of consent or acquiescence, or an abandonment of the right to sue.

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32 That principle now has limited application because there is now a statutory requirement to show "serious harm" under the Defamation Act 2013 (UK), s 1.

33 As well, I observe that Mr Spring's evidence was that he saw the posts on 18 May, the day they were posted, so on the current New Zealand law the tort was complete at that point (subject to rebuttal by the defendant of the "more than minor harm" presumption).

Failure to mitigate loss

[69] Ms Cai alleges that Mr Murphy failed to mitigate his loss by not contacting her sooner. Mr Murphy submits that he did mitigate his loss by promptly bringing the proceedings only eight days after the posts were made. Although he did not ask Ms Cai to remove the posts earlier, he says that Ms Cai has always denied making the posts and says she knew nothing about them being made. There had also been the altercation at the car yard.

[70] In these circumstances, I do not consider Mr Murphy failed to mitigate loss by moving straight to issuing proceedings eight days after the posts were made.

Relief

[71] Mr Murphy seeks a declaration that that Ms Cai is liable to Mr Murphy in defamation. Given my conclusions above, Mr Murphy is entitled to that declaration.[34]

[72] Mr Murphy also seeks damages of $200,000. He submits that although the allegations in this case are less serious than in *Spring v Williams*, where Campbell J awarded damages of $170,000,[35] the allegations of theft are still of a very serious nature and the dissemination in this case was ten times wider on the basis of his Facebook page having 10,000 followers. Further, he says that as in *Spring* he has suffered emotional hurt, the publication was connected to the industry from which he makes his living, and the defendant has not apologised. Because of this, he submits that damages of $200,000 are justified.

[73] A favourable verdict on liability is the successful plaintiff's primary vindication as public recognition that a statement made by the defendant is false and defamatory.[36] Compensatory damages are also available to restore the plaintiff to the position they would have been in had the defamation not occurred.[37] Factors relevant to the quantum of damages include the nature of the defamatory statements, the extent of publication, injury to the plaintiff, damage to reputation and the conduct of the

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[34] Defamation Act, s 24

[35] *Spring v Williams* [2022] NZHC 2165.

[36] *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [32].

[37] At [31] citing, *John v MGN Ltd* [1997] QB 586 (CA) at 607–608.

defendant.[38] In regards to the latter, the defendant's conduct — including in conducting his or her defence — may be relevant.[39] Where harm is more than minor but less than serious, the appropriate remedy may be nominal damages combined with a declaration of defamation.[40]

[74] I consider this case justifies only a modest damages award. My reasons are:

(a) Ms Cai has made no apology that would mitigate the damages payable.[41] Ms Cai persisted in her denial of being involved in or knowing about the posts, which could potentially be regarded as conduct of the proceedings increasing their impact. I accept she initially considered that Mr Murphy's actions amounted to theft but this misapprehension did not continue.

(b) However, the extent of publication is relevant. The comments were posted on a post for a particular vehicle sale for only eight days. On the facts of this case, without positive evidence, I am not prepared to infer there was other than low or minimal engagement with the post for the purposes of awarding damages.[42] In the context of a vehicle sale post of this nature, I do not accept that I can presume engagement with the post simply from Mr Murphy's evidence of numbers of followers of the Facebook page.

(c) In cross-examination, Mr Murphy repeatedly ended many questions asked of him by saying how upset he is by the assertions that he stole a car, given the importance of his reputation in the car industry. I acknowledge that the nature of the allegation was serious and hence that the comments were published at all has had an effect on him. But

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38 *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [30] and [66].
39 At [73].
40 *Sellman v Slater*, above n 12, at [68].
41 Defamation Act, s 29(a).
42 In contrast with the issue of the plaintiff rebutting that there is more than minor damage at the liability stage, in my view the extent of publication/engagement with the post is for Mr Murphy to establish. In some on-line contexts, extensive engagement might be presumed as in *Wiremu v Ashby* [2019] NZHC 558, *Spring v Williams* above, no 34. In my view the facts of the present case do not support that here.

> I simply do not have sufficient evidence to form a view that the comments on the post were in fact viewed by anyone other than Mr Spring and hence have any wider impact. Mr Spring's assertions that others in the industry talked to him about the posts is inadmissible hearsay. Comments Mr Murphy made in his evidence about asserted consequences for his business were unsupported, are not the subject of any claim for special damages and would apply to the corporate entity in any event.

[75] In my view the damages sought are wholly excessive. A nominal award might have been appropriate. However, I make an award of damages of $20,000 in part due to the defendant's conduct and in part due to the nature of the allegation.

[76] Mr Murphy does not pursue claims for aggravated and punitive damages.

Result

[77] Defamation is established. No defence applies.

[78] I make an award of damages of $20,000.

[79] I make a declaration under s 24 of the Defamation Act 1992 that Ms Cai is liable to Mr Murphy in defamation.

[80] I direct the following exchange of submissions on costs: Mr Murphy is to file and serve a memorandum as to costs within 14 working days.[43] Ms Cai is to respond within another 14 working days. I will then address the issue of costs on the papers.

Anderson J

[43] Note a "working day" within the High Court Rules excludes the period commencing 25 December and ending 15 January.