IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2021-004-001568
[2025] NZDC 1476

BETWEEN	CHAOQUN HU Plaintiff
AND	CHEN QI First Defendant
AND	SKY MEDIA LIMITED Second Defendant

Hearing: 15 October and 15 November 2024

Appearances: No Appearance for the Plaintiff
A Romanos for the First Defendant and Counterclaim Plaintiff
S Judd and A Shinkarenko for the Second Defendant and Crossclaim Plaintiff

Judgment: 27 February 2025

RESERVED JUDGMENT OF JUDGE DAVID J CLARK

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A Claim in Defamation - Executive Summary

[1] Two posts appearing in a chat forum owned and administered by Sky Media Limited[1] gave rise to claims in defamation by Ms Hu and Ms Qi. To determine the outcome, the Court has been asked to deal with reasonably complex legal issues, some of which come before the Court for the first time.

[2] I acknowledge however the parties' focus is on the result rather than the legal issues and I therefore deal with them first. My reasons follow in the body of the judgment.

[3] Ms Hu's claim in defamation was struck out by me on 21 December 2023.[2] Accordingly, the primary issue is whether Ms Qi was defamed. If she was, what damages is she entitled to?

[4] The short answer is yes, Ms Qi was defamed. As a result, she is entitled to damages.

[5] The sum of $60,000 for general damages is awarded to Ms Qi against Ms Hu and Sky Kiwi on a joint and several basis. Punitive damages of $10,000 are also awarded against Ms Hu in favour of Ms Qi.

[6] I award Sky Media the sum of $30,000 against Ms Hu pursuant to s 17(1)(c) and (2) of the Law Reform Act 1936 as a fair and equitable contribution towards the damages award I have made against Sky Media.

[7] Interest on all sums is awarded.

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[1] Sky Media Limited trades as Skykiwi.com. The names were used interchangeably in the pleadings/evidence and submissions. I refer to the defendant company as 'Sky Media' in this judgment to avoid any confusion with the name of the website owned by Sky Media which is also called 'Skykiwi'. The chat forum is found on the social pages of the Skykiwi website.

[2] Minute dated 21 December 2023 at [3].

The issues

[8] In reaching the determination Ms Qi was defamed, the following issues have been considered:

- Who made defamatory posts?
- Where were they posted?
- Was Ms Qi identified in the posts?
- Are the posts defamatory?
- Was Sky Media a publisher of the posts?
- Does Sky Media have a defence based on the Harmful Digital Communications Act 2015 (HDCA)?
- Is Sky Media entitled to a defence based on Innocent Dissemination?
- Is Sky Media entitled to a defence based on the posts causing her insufficient harm?
- How have the damages been assessed?

[9] The structure of this judgment provides a background to the parties, the publication of the posts and the steps which were taken to remove them. It then considers the issues which are identified above and in doing so, determines those issues. Finally, an assessment of the damages is made.

Background

Ms Qi

[10] Ms Qi is a Chinese national who moved to New Zealand in 2017 with her partner, Mr Chen. Ms Qi obtained employment with Sitel which is a call centre based in Auckland. She worked for Sitel between June 2018 and May 2021. Her team was made up of mostly Chinese nationals.

[11] Ms Qi and Ms Hu met at Sitel. Ms Qi's evidence was she felt hostility from Ms Hu throughout the period she worked at Sitel. Initially the hostility appeared to be limited to name calling (*"fat as pigs"; "(the) green tea bitch*") but Ms Qi suspected the name calling went beyond the office to where comments about her were being posted online by Ms Hu.

[12] Ms Qi continued to work at Sitel until 21 May 2021. In January 2021, she moved to Hastings but continued working for Sitel remotely. In May 2021 she moved to Waipukurau and started work for the Hawke's Bay District Council as a Consents Support Officer.

[13] On 15 July 2021 Ms Qi received an email notification from LinkedIn. The email informed her 75 people had been viewing her account which she described as being unusual.

[14] Later that evening, Ms Qi was contacted by Ms Wu a former work colleague at Sitel. Ms Wu advised her a post had appeared in a social media chat forum. The chat forum was in the social pages of a website owned by Sky Media and called Skykiwi.com or Skykiwi. Following further discussions with another former work colleague, Ms Qi went onto the chat forum herself. She located the post on the front page of the chat forum. The forum is known as the FML[3] chat forum.

[15] Ms Qi's evidence was the post was "easily noticeable", given the title was highlighted and labelled as a "Heat Topic" and "Explosive revelation".[4] Ms Qi says she was "shaking and felt dizzy" after reading the post. The post was authored by a person listed as "Anonymous".[5] Following the post were numerous comments made by different users. Further comments were also made by the original author of the posts.

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[3] It is common ground "FML" stands for "Fuck My Life".
[4] Sky Media says the more accurate translation is "tipster/tip-off".
[5] It is common ground that although the author was listed as "Anonymous" the subscriber was a person with a username called "*Nnnnn"*.

[16] The English translation of the post and well as the authors subsequent comments are set out below:

> *Post*
>
> **Miss Q of Hastings, if you text my husband again** (labelled "Hot topic" with a stamp stating "Explosive Revelation")
>
> A colleague of my husband, who has left the job now. [She] went to Hastings with her boyfriend for the visa, but she is still texting my husband to seduce him. Women nowadays have no [moral] limits for permanent residency!
>
> If you text my husband again, do not blame me for publicising all the screenshots, along with your disgusting WeChat moments. I will post them all! [She] said [she] had no feeling for her boyfriend and being together was just for the visa. [She] keeps sending my husband photos showing cleavage. You are short and fat. Can't you see it yourself?
>
> Heard that you 1 were working for Hastings Council. That's fantastic. You are very easy to find. See if I can deal with you by this post. Try me! Everyone in Hastings who has a husband or boyfriend should be alert. This woman did it habitually. She seduced not only my husband but other male colleagues in the company. She does not mind if they have a wife or girlfriend. She is just trying to make a backup plan for her visa. One of those harassed by her saved screenshots too.
>
> *Comments*
>
> [She is] a newly hired contractor.
>
> A newly hired contractor. If you locate her, please let her know about this.
>
> If you want to fuck her, just go to Hastings Council and find a woman with last name Qi. A bus [i.e. a promiscuous woman] like her would love it.
>
> You never saw women. Her looks are average.
>
> It makes sense. You won't expect much for a free cum hole.
>
> Who are you to her, coming here whitewash? Dare you ask her to say for herself that I wronged her?
>
> You know why it is blocked? Because you dug up the right thing.
>
> Interesting, I am here to help her expand her business. Look, so many wolves like her. Each can fuck her and give her some money. She can also make some extra money. But you wolves should use protection; otherwise will get STD. Not worthy. Maybe someone can help her get residency. Then I have done something good. I am returning good for evil.
>
> I am wondering who said my husband has fucked that whore. Let me elaborate. My husband and his colleagues all know about her. They have tacit knowledge. Because this woman is messaging multiple men at the same time! My husband said a bus [i.e. a promiscuous woman] like her, everyone can

fuck. He was afraid she might have STD. To be honest, though he said this way, he must have fantasised. After all, with a woman flirting with him and asking for no money, he must feel proud of himself. I need to thank Miss Q, who helped my husband regain the confidence lost years ago. But I have never seen someone so shameless. Was turned down politely but still threw herself into my husband. At last, I will satisfy your curiosity and give you an answer. It [The picture posted earlier] is her! Those wolves hungering for sex, if you are interested, she might be delighted to oblige. After all, anyone can fuck her. Well, you might need to have residency.

Young people these days don't bother lifting a finger. Go to the earlier comments, and you'll find it. Have to feed everything into your mouth.

What else can I reveal? You men, of course, want more women like her. Look at the replies in this post. Talking to you guys can make you empathise with me? No.

Hehe, do you think I am not calm enough? I am not telling you I am taking a bath, drinking wine and feeling relaxed. Other wives don't know because their husbands dare not to tell. Even if nothing happened, speaking of it would lead to misunderstanding. But my husband is not like that because we are not afraid of misunderstandings. No help I need from you. Just jerk off gently, do not hurt yourself.

If you are helping me, can you tell me whether the post cannot be edited and can only be added with new content? Is that so? I am not very familiar with it.

So I am asking you how to edit the post. I wanted to expose the pictures, but I could not. Let it be.

It reminds me of another thing about Miss Q. My husband told me that he would keep the evidence safe. Because this woman successfully seduced a man before. Knew what kind of person she was. But chose to be with her. This man had been together with her for months until she may find out this guy could not sponsor her residency. It turned out that she accused the guy of harassing her! Geez. What is interesting. All the same time, Miss Q was living with her boyfriend. Therefore, my husband is afraid she may make a false countercharge. After all, she stops at nothing to get what she wants.

You stop at nothing to see the boobs photo. First, you tried to coax the boobs photo out of the post opener. Not working. Now prodding. Hahaha. The post opener said to post it if she flirted again. The truth is true, even without photos. Is it necessary for you to believe? The people involved all know. The fake is fake and will be revealed one day. Whoever cooked up the story in the post will apologise in public.

[17] Ms Qi registered with the Skykiwi website under the username "meichenchen" and made her own posts on the forum, refuting the allegations made in the post and subsequent comments. She also complained to the forum chat managers: "Clark1129" between 15 and 16 July; "Rabbit" also between 15 and 16 July and "Philip_J._Fry" (PJF) on 16 July.

[18] Ms Qi's messaging with PJF commenced at 11.30 am on 16 July. Whilst the interchanges discussed various issues about the post including the ability to save the post if legal action was commenced, by 12.30 pm Ms Qi says it was clear she wanted the post deleted. PJF had over the previous hour blocked any further comments on the post, removed any comments which identified Ms Qi and provided her with the contact number and email address of the Skykiwi administrators.

[19] At 12.44 pm PJF confirmed he could delete the post but was unsure whether this would affect Ms Qi's "evidence collection" and asked for her confirmation the post could be deleted. Ms Qi confirmed it could at 12.52 pm.

[20] At 12.55 pm PJF confirmed the post would be removed to the "recycle bin". This was done by a Skykiwi administrator (tianweiwang) at 12.55 pm as confirmed by PJF in his exchange with Ms Qi.[6]

[21] At the point of its removal of the post there had been 14,114 views of the post and 277 comments made.

[22] On 17 July 2021 a second post was published by "Anonymous". The English version is set out as follows:

> **Miss Q is back again. If you text my husband again, Miss Q** (labelled as "Hot topic" with a stamp 'Explosive Revelation')
>
> Damn, haven't logged in for over one day. The post got deleted, not because of false information but the exposure of location and job type??
>
> Then why it was highlighted in the first place??? Did you highlight it with your eyes closed?
>
> Republish this post is because of nothing but that I am telling the truth. Don't want you all to think that the post was gone because I wronged her.
>
> All of you can confirm with the forum manager. No one reported it for false information, and it is not that I cannot provide evidence. Below is my last post, without the content that might violate the forum rules and the word that excites all the horny males. Don't want to muddy the water. Also, I added some of my previous replies.

[6] There appears to be an inconsistency in the exact timing of when the post was deleted as it may have been deleted at 12.35 pm. I do not consider the difference in timing to be material.

A colleague of my husband, who has left the job now. [She] left Auckland with her boyfriend for the visa, but she is still texting my husband to seduce him. Women nowadays have no [moral] limits for permanent residency!

If you text my husband again, do not blame me for posting all the screenshots, along with your disgusting WeChat moments. I will post them all! [She] said [she] had no feeling for her boyfriend and being together was just for the visa. You are so short and fat. Can't you see it yourself?

Heard that you were working in a government agency. That's fantastic. You are very easy to find. See if I can deal with you by this post. Try me! Everyone who has a husband or boyfriend should be alert. This woman did it habitually. She seduced not only my husband but other male colleagues in the company. She does not mind if they have a wife or girlfriend. She is just trying to make a backup plan for her visa. One of those harassed by her saved screenshots too!

Given that most people here think Miss Q has fucked my husband,

I think I must explain it. This Miss Q is not fishing one man after another. She seduces multiple male colleagues at the same time!

My husband said that he was afraid she might have STD. Highly likely for an easy girl like her!

To be honest, though he said this way, he must have fantasised. After all, with a woman flirting with him and asking for no money, he must feel proud of himself. Who would decline a free whore.

Now I have recommended you the best person. If you like, go work on your relationship.

But if you don't have permanent residency, she will ignore you.

Also, save screenshots because this woman successfully seduced a man, who I think is an idiot with little life experience.

His colleagues all know about Miss Q. They have tacit knowledge. Everyone knows what kind of woman she is.

But this idiot, after seeing the screenshot of Miss Q seducing others, still chose to be with Miss Q.

Later Miss Q may find out this guy could not sponsor her residency. She then reported to the company that the guy was harassing her.

Now some may say that I made up all these. I wish I could have the talent of a scriptwriter. But life is often more incredible than drama.

I read some of the previous comments, only the early replies. Most of them either ask for a photo or talk nonsense.

One reply said willing to help. I asked how to edit a post. I planned to add the screenshot, but that person never answered and kept yelling for boob photos, truth and evidence. Hehe.

> If I posted it back then, the post would have completely different comments!
>
> Even if I post it now and blur the name and face, you could say that the screenshot could be anybody. Even if I do not blur it, you would say that I edited it myself.
>
> I know you only want the truth you like.
>
> All right. You should not only listen to my one-sided story. Likewise, you should not listen to Miss Q's pitifully never-done-it story!
>
> Mark this post. You already know who she is now. If she thinks I am wronging her, please ask her to report me. Then, I will provide the evidence to the administrator. Everything will be clear.
>
> Some said that the government doesn't hire people without PR. Ugh, isn't this [a case] (please don't understand society with your limited? Some said she was not fat and short. Ugh, do you see her lower body (please don't think with your lower body)?

[23] Although the post removed the reference to Miss Qi moving to Hastings and replaced the location with "working in a government agency" the first post was effectively repeated. The second post also added comments claiming Miss Q was habitually promiscuous with many male colleagues (including the authors husband), was doing so to obtain her (permanent residency) visa and was a "whore". It also confirmed to the readers: "You already know who she is now".

[24] Ms Qi says she again contacted Sky Media to complain about the post. This included messages with PJF, the relevant parts being:

> meichenchen 2021-7-17 19:02:26
>
> Hi, could I know if you are online?
>
> meichenchen 2021-7-17 19:38:59
>
> Hi, I've seen a new post, and it's been highlighted and labelled as "explosive revelation". The contents of these two posts are false information, except for my personal private information. The forum rules mention that (the account) will be banned without evidence provided, but not only has the account been banned, it's been highlighted, and is getting a lot of attention. It is weekend now, and it brings a very serious impact on my and my partner's life and mental well-being. Even a "deputy district head" (the forum manager bayilaoye) suggested my personal information be shared on other websites and forums for easier access by others. When you see my message, please delete the posts and ban comments. I am sure that I will take legal action next week. Waiting for your reply.
>
> Philip_J._Fry 2021-7-18 00:54:41

Hello. The message is received. We forum managers can only operate according to the forum rules. The previous post did violate rules. I didn't notice at first but saw the problem after you pointed it out. I took immediate action. But this new post does not breach rules. It only mentions “Miss Q”. I really can do nothing. I strongly support you in resolving this issue by seeking legal actions…

meichenchen 2021-7-19 10:28:54

Are you online? I only slept for a few hours last night again. I see that you are online, can you please reply to me?

Philip_J._Fry 2021-7-19 10:30:05

Good morning. I’ve just seen the messages. I completely understand and sympathise with the mental pressure this incident has brought to you. Please be sure to keep evidence of the mental pain this has caused, as it could be used for future compensation claims. As for the post, I really can do nothing. The previous post did mention a lot of specific information. I did not notice it at first, but after your reminder, I saw the problem. Immediately dealt with it in accordance with the forum rules. But this new post does not directly violate the rules. If a post does not violate the rules, we forum managers really have no room to act. Please check the 135th post for Skykiwi’s official reply to the new post.

meichenchen 2021-7-19 10:40:44

I have seen Skykiwi’s response distancing themselves from the situation and stating the responsibility exemption. I would like to ask, this post says, "Miss Q is back...", and mentions "Since you already know who she is..." Does it mean it has nothing to do with the previous post? You can remain silent to this question. Then please reply to my other questions: 1. Does this anonymous poster provide you with any evidence? 2. Skykiwi’s official telephone contact; 3. After the Skykiwi forum receives the lawyer’s letter and is unable to provide evidence, will a post of apology and clarification be pinned at the top of the forum?

Philip_J._Fry 2021-7-19 10:52:49

You should email Skykiwi’s office. That way, you will have a written record, which is better than a phone call. bbs@skykiwi.co.nz. The phone contact is here: https://em.skykiwi.com/contactus.html We forum managers are not employees of Skykiwi. Therefore, we have no idea how Skykiwi handles it. I remember that when registering an account on Skykiwi, there was a disclaimer. To what extent you can do depends on the relevant laws and regulations. You need to consult a lawyer about this. Only your lawyer can give you the most authoritative answer.

[25] Based on PJF’s message, Ms Qi emailed Sky Media. Sky Media’s (Ms Li) email response is set out as follows:

Admin Sent: Monday, 19 July 2021 11:54 am

To: Chen

Subject: Re: Request to Archive a Defamation/Cyber-bullying/Breach of Privacy Post

Hello, as per your email request, we have investigated the relevant posts, and our response at the current stage is as follows:

1. The post mentioned in your email, according to the FML forum regulations, currently does not reveal any clear and complete personal privacy information of any individual or organisation (including but not limited to names, addresses, photos, chat record screenshots with account information or mobile phone numbers); In addition, there is no partial concealment of information that could be used to contact specific individual or organisation, including any descriptive characteristics.

Therefore, at this stage, the post does not have any content that obviously points to or could be associated with specific individuals or institutions. If you think this post contains any information that leaks or connects to your personal details, please specify the exact fields or paragraphs for us to further review.

2. For the post published on July 13 mentioned in your email, we communicated with the forum manager. The manager determined that the content disclosed "Hastings Council", and a screenshot of the relevant webpage was posted in a reply that involved a privacy leakage. The post was removed for record on July 16.

For the existing posts, we will have the forum management closely monitor them, and deal with any violations of laws and regulations in a timely manner; if you provide relevant proof, we will also respond and follow up in a timely manner after receiving it in the forum's email.

3. As for the two related posts already published, including the information of the poster, Skykiwi has already retained the record; if you take legal rights protection channels, Skykiwi Forum will also fully cooperate when receiving requests for evidence from legal authorities or police. Thank you for your email.

[26] Ms Qi says she was frustrated with Sky Media's response. She disputed the second post did not identify her. The request for further information and details had already been provided in her email and messaging to PJF.

[27] Later that day, Ms Qi went to the Community Law Centre in Hastings seeking help. She was advised to contact NetSafe. She attended the Police Station in Hastings where she was also advised to contact NetSafe. A complaint was lodged with Netsafe and a further formal complaint laid with the Police on 22 July 2021. Ms Qi says it was only after the Police became involved Sky Media started taking action to block comments on the second post and eventually remove it. She says even though the post was locked for further comments it was still visible and had amassed 9,666 views, and

193 comments. She also accepts by this date Sky Media had banned further comments in the thread and changed the heading of the post to 'under investigation'.

[28] On 26 July, Netsafe advised Ms Qi it had taken her complaint as far as it could and confirmed she could apply to the District Court under the Harmful Digital Communications Act 2015 (HDCA) for orders to have the post removed.

[29] On the same day, uncertain what to do, Ms Qi contacted Newshub for help. Newshub contacted Sky Media, which Ms Qi says seemed to prompt further action by Sky Media. A complaint was also laid with the Office of the Privacy Commissioner on 27 July 2021 who advised it was unable to help and referred her back to Netsafe.

[30] Ms Qi then engaged lawyers to assist her. Initially her lawyers wrote to Sky Media seeking information on who made the posts. On 12 August 2021, Sky Media advised the mobile number 0225831789 was linked to the account.

[31] On 6 September 2021 Ms Qi discovered a third post. Again, the author was "Anonymous" and sought to repeat what had been posted early. Ms Qi filed a further Police complaint and contacted Sky Media, advising it of the post. Sky Media confirmed the account owner "*Nnnnn"* had been banned.

Sky Media

[32] Ms Li is an employee of Sky Media and has the job title of Project Manager. She gave evidence on behalf of Sky Media. She confirmed she was the administrator for the Skykiwi FML chat forum and effectively controls the same. She is known as the "Mayor of the Forum" and has a username "tianweiwang" on the forum.

[33] The Skykiwi account has approximately 440,000[7] subscribers currently although Ms Li was unsure of the exact number in 2021. As a subscriber, members are able to post and comment on the FML site. The site is however available to be viewed by members of the public but unless they subscribe, they cannot post or comment on posts.

[7] https:/em.skykiwi.com/english.html.

[34] The site is intended to be a platform to vent, poke fun at persons and/or issues or, a place generally where subscribers can gossip. The site has its own regulations. These regulations prevent the identification of individuals. The web managers such as PJF, are volunteer moderators for the forum. However, any major editing of what appears on the site can only be done by administrators such as Ms Li.

[35] Ms Li also confirmed she is the primary person who responds to any email complaints under the name of "BBS@Skykiwi.com". As such, it was she who responded to Ms Qi's email.

[36] She confirmed her view that, the second post was different from the first in that it did not contain information which identified Ms Qi. If she was incorrect in her view, she invited Ms Qi to provide her with more information which Ms Qi failed to do. Despite that, Ms Li says steps were taken to amend the second post as set out in her evidence as follows:

> 4. On 21 July 2021 at 16:27 hours I took the following actions in relation to Post 2 and the comments made on it:
>
> > a. I blocked the content of the original post made on 17 July 2021 at 01:02:31. This means that no one except for staff within the Sky Kiwi office could see the original content of the post from that time on.
> >
> > b. I disabled the comment function so no more comments could be made.
> >
> > c. I edited the title of the post by removing the words "Miss Q".
> >
> > d. I removed the highlight of the post title.
> >
> > e. I moved Post 2 with existing comments that had been made into the admin section of the Sky Kiwi Forum. This meant that only Sky Kiwi subscribers could see those comments. f. I made an announcement on the post, which is recorded as comment #194, notifying of the investigation and advising people not to make any posts about the incident on the Sky Kiwi Forum.
>
> 5. This means that from 4:27 pm on 21 July 2021 onwards, the content of Post 2 could not be seen by anyone except Sky Kiwi staff and the title of the Post no longer referred to "Miss Q". The comments that had been made on the post could still be viewed by Sky Kiwi subscribers in the admin section of the forum, but the original content was no longer there. I attach to my brief marked "A" a screenshot showing what this would look like to a viewer.

[37] In cross examination Ms Li confirmed the moving of the post to the "Admin section" meant members of the public could no longer view the post but subscribers could, although subscribers could not comment on it.

[38] Ms Li also confirmed the "Admin section" contained the regulations which included the procedures where persons, concerned about any posts, were advised how they could complain. Ms Qi disputes she knew about the procedures and was only ever given advice from PJF how to complain. I return to this issue later in this judgment.

Who Made the Posts?

[39] On 11 July 2021, a Skykiwi account was set up under the username "*Nnnnn".*[8] The user, to activate the ability to make posts, needed to provide a mobile phone number. The number provided was 0225831789.

[40] On 13 July 2021, *Nnnnn* posted the first post. *Nnnnn* then posted the second post on 17 July 2021 with the third being discovered on 6 September.

[41] In various messages with Sky Media's representatives, Ms Qi commented she believed Ms Hu was the author of the posts. When Ms Qi complained to the Police on 23 July, she identified Ms Hu as a person responsible for the posts.

[42] After receiving the telephone information from Sky Media, Ms Qi and her partner researched the same. They discovered, through various means, it belonged to a Wayne Kim, the boyfriend of Ms Hu. Ms Qi suspected Ms Hu used the number to set up the account as Ms Hu already had a Skykiwi account under her own number with the username "*Chaohoo"*.

[43] Ms Qi's lawyers, through correspondence and eventually through a request to answer interrogatories, accused Ms Hu of being *Nnnnn.* Ms Hu denied all of the allegations, instead suggesting a range of other persons who could be the author.

---

[8] It is alleged the author also used the username *Chaohoo.* For the purposes of this judgment, I only refer to the author as *Nnnnn* but accept *Nnnnn* and *Chaohoo* are the same person.

Proceedings are Issued: Procedural Background

[44] After being accused of being the author of the posts, Ms Hu took offence and issued defamation proceedings against Ms Qi. Ms Qi denied she made the statements as alleged by Ms Hu but pleaded affirmative defences of, inter alia, qualified privilege and truth confirming she did name Ms Hu as a suspect who made the publications. On 23 March 2022, Ms Qi filed her own counterclaim in defamation against Ms Hu as well as a claim in defamation against Sky Media.

[45] Ms Qi's counterclaim pleading set out the posts[9] and then, as required by s 37 of the Defamation Act 1992 set out what she understood the posts to mean.

[46] In relation to the first post, Ms Qi says the natural and ordinary meaning is that she:

(a) sought to seduce the author's husband;

(b) sought to seduce a married man with the cynical objective of using or exploiting him to obtain permanent residency;

(c) has used or exploited her current boyfriend for cynical visa objectives;

(d) seduced several other men when working for her former company, not caring if they had girlfriends or wives;

(e) is motivated to seduce men for cynical visa objectives;

(f) has harassed another married man within the author's company in respect of which the author has preserved screenshots;

(g) is highly promiscuous; and

(h) prostitutes herself.

[9] The posts include the comments which followed the posts – all allegedly made by Ms Hu.

[47] In relation to the second post, Ms Qi says the natural and ordinary meaning is that she:

(a) sought to seduce the author's husband;

(b) sought to seduce a married man with the cynical objective of using or exploiting him to obtain permanent residency;

(c) has used or exploited her current boyfriend for cynical visa objectives;

(d) when working for her former company, seduced several other men not caring if they had girlfriends or wives;

(e) is motivated to seduce men for cynical visa objectives;

(f) has harassed another married man within the author's company in respect of which the author has preserved screenshots; and

(g) is highly promiscuous.

[48] On 29 August 2022, Ms Hu filed her amended statement of defence to the counterclaim.

[49] Sky Media filed its second amended statement of defence to the counterclaim and on 9 December 2022. It had previously filed a crossclaim on 28 October 2022 against Ms Hu seeking orders under ss 17(1)(c) and (2) of the Law Reform Act 1936. In doing so it sought orders for contribution from Ms Hu against Sky Media's liability (if any). The extent of the contribution is a complete indemnity or to such other extent as the court deems just. It relies on the grounds:

(a) Ms Hu was the author of the publications.

(b) Ms Hu posted the publications on the forum.

(c) Sky Media had no involvement in the content of the publications and did not approve or authorise them.

(d) The platform was used by Ms Hu to attack Ms Qi.

[50] For reasons which are unknown, Ms Hu failed to prosecute her claim and effectively disappeared. In doing so she breached several timetable orders made by this Court.

[51] As noted, on 21 December 2023, on the application of both Ms Qi and Sky Media, I made orders striking out Ms Hu's claim.[10]

[52] Notwithstanding Ms Hu did not participate in the hearing, I am satisfied on the weight of the evidence Ms Hu was the author of the posts. To this extent I unreservedly accept the evidence of Ms Qi in terms of the suspicions she raised. In doing so, I reject Ms Hu's attempted explanation(s) of her involvement with the posts and attempts to blame others. As the author of the posts, I must consider whether they are defamatory. Before I do so I set out the legal principles.

Legal Principles

[53] There are three basic elements which Ms Qi must prove in defamation. They are:

(a) Defamatory statement(s) were made;

(b) The statement(s) were about (in this case) Ms Qi (identification); and

(c) The statement(s) were published.

[54] In terms of what is a defamatory statement, I respectfully adopt the observations made by Becroft J in *Castello v Ybanez* where His Honour drew from the authors of *Todd on Torts* as to general definitions of what is a defamatory statement:[11]

[10] Above at [3] of this judgment.
[11] *Castello v Ybanez* [2023] NZHC 1723 at [34].

What is a defamatory statement?

[34] There is no statutory definition of what constitutes defamation. Instead, guidance can be sought from case law – where the courts have not adopted a single definition for what constitutes a defamatory statement. The authors of *Todd on Torts* helpfully set out four general definitions that tend to be commonly cited in cases.[12]

(1) A statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally;[13]

(2) A false statement about a person to his or her discredit;[14]

(3) A publication without justification which is calculated to injure the reputation of another by exposing him or her to hatred, contempt or ridicule;[15]

(4) A statement about a person which tends to make others shun and avoid him or her.[16]

While all these definitions have the same thrust, there are differences in emphasis between them. A reading of all four together gives a reasonable impression of the nature of the tort. A more accurate appreciation must depend on example.

[55] As noted, the requirements for a plaintiff to plead and give particulars of the alleged defamatory statements are set out in s 37 of the Defamation Act 1992. The Court must then determine if the words are defamatory. To reach this determination I again adopt Becroft J's observations regarding the approach required:[17]

> … before a Court can say whether words are defamatory, it must decide what the words mean. The test is stated by Lord Selborne in *Capital and Counties Bank Ltd v George Henty & Sons*:[18]
>
> > The test … is whether under the circumstances in which the writing was published, reasonable [people], to whom the publication was made, would be likely to understand it in a libellous sense.
>
> [38] The "reasonable person" is an ordinary person with ordinary general knowledge, not an unusually suspicious or unusually naïve person.[19] A reasonable person does not live in an ivory tower and is not inhibited by a knowledge of rules of construction. The reasonable person "can and does read

[12] Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [16.3.01].
[13] *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin.
[14] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 (CA) per Scutton LJ.
[15] *Parmiter v Coupland* (1840) 7 M & W 105; 151 All ER 340 at 109, 342 per Parke B.
[16] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 (CA) per Slesser LJ.
[17] *Castello v Ybanez*, above n 11, at [37].
[18] *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 (HL) at 745.
[19] *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL) at 259 per Lord Reid.

between the lines in the light of his general knowledge and experience of worldly affairs".[20]

[56] In terms of the reasonable person test, Becroft J explained.[21]

A statement may convey to the ordinary reader more than it expressly states: the words may have overtones and convey inferences which are apparent to the ordinary person without special knowledge. If these overtones and inferences are defamatory of a person, that person will have a cause of action.

In *Grubb v Bristol United Press Ltd* Holroyd Pearce LJ gave a clear example:[22]

> "If the defendant published of John Smith: 'His name is certainly not George Washington' then, however much the defendant may argue that the words were a harmless truism concerned with nomenclature, the natural and ordinary implication of the words is that John Smith is untruthful; and presumably the jury would find that to be the ordinary meaning of the words."

The New Zealand Court of Appeal has summarised the "reasonable person" test in the following propositions:[23]

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

(b) The reasonable person reading the publication is taken to be one of the ordinary intelligence, general knowledge and experience of worldly affairs.

(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.

(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.

(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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[20] Above at 258.

[21] *Castello v Ybanez*, above n 11, at [39]; citing Stephen Todd, above n 12, at [59.16.3.05]. See also *Hyams v Peterson* [1991] 3 NZLR 648 (CA) at 654 per Cooke P.

[22] *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 (CA) at 327.

[23] *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625. See also *Young v Television New Zealand Ltd* [2014] NZCA 50; *McGee v Independent Newspapers Ltd* [2006] NZAR 24 (HC).

(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.

[57] Publication of the alleged defamatory statement must have been made by the defendant to a person other than the plaintiff. No publication occurs if it is made only to the plaintiff.[24]

[58] Persons who make posts on social media platforms can be exposed to claims in defamation. As Becroft J noted:[25]

> [43] Publication on the internet is publication for defamation purposes. In *Stocker v Stocker*, an English case, where comments were published on the Facebook page of another person, the defendants lack of awareness that their friends could see it did not excuse the fact of publication. The United Kingdom Supreme Court considered the advent of the 21st century brought with it a new class of reader: the social media user. The judge, tasked with deciding how a social media post would be interpreted by a social media user, had to keep in mind the way in which such postings were made and read. The imperative was to ascertain how an ordinary reasonable reader would interpret the message. That search should reflect the circumstances that it was a casual medium; it was in the nature of conversation rather than carefully chosen expression; and it was pre-eminently one in which the reader read and passed on.[26]

[59] The posts which are the subject of this proceeding were made on Sky Media's social media chat forum known as FML. No issue arises over the fact the posts were made.

[60] The real controversy in this proceeding is whether Sky Media can be considered the publisher of the posts as the host of FML. Sky Media denies it is the publisher and has pleaded several affirmative defences. I consider each of the pleaded defences separately in terms of the legal principles.

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[24] *Powell v Gelston* [1916] 2 KB 615 at 619 per Bray J.
[25] *Castello v Ybanez*, above n 11, at [43].
[26] Affidavit of Mr Castillo at [57]; Affidavit of Nikko Buenaventura dated 7 June 2023, Annexure.

Murray v Wishart

[61] Sky Media says the law in New Zealand as to any liability as a publisher is determined in accordance with the Court of Appeal decision in *Murray v Wishart.*[27]

[62] Mr Murray took offence to the publication and content of a book authored by Mr Wishart called *Breaking Silence*. The content concerned the tragic non-accidental deaths of the Kahui twins. No one was convicted for their deaths. Following the inquest into their deaths, Mr Wishart wrote his book and, in doing so, obtained the co-operation of the twins' mother, Ms Macsyna King.

[63] Mr Murray established a Facebook page titled *"Boycott the Macsyna King Book"* and then proceeded to criticise[28] Mr Wishart and Ms King in a Facebook post, on Twitter (as it was then known) and in radio interviews.[29] In doing so he invited comments which supported his position to "boycott" Mr Wishart's book.

[64] The Facebook page received numerous posts, many of them from anonymous/third party authors who were happy to support Mr Murray. Many of these supporters did not hold back their own views about Mr Wishart.

[65] Mr Wishart sued Mr Murray in defamation on the basis he had published the third-party posts by hosting them on the Facebook page he had created. Furthermore, he had invited, facilitated and assisted the third parties to make the alleged defamatory comments.

[66] In the High Court whilst striking out many of the claimed meanings of the alleged defamatory posts, Courtney J refused to strike out all of the causes of action.[30] Courtney J reasoned that Mr Wishart, based on the pleaded meanings, had an arguable case for defamation. In making her determination Courtney J observed:[31]

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[27] *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 (CA).
[28] Through a post called "The Information Statement". Other (subsequent) posts were also made by Mr Murray which Mr Wishart claimed were defamatory.
[29] Whilst causes of action were brought against Mr Murray based on comments he made on Twitter and in the radio interviews, for present purposes the focus is only on the comments made on Facebook.
[30] *Wishart v Murray* [2013] NZHC 54; [2013] 3 NZLR 246.
[31] Above at [117].

> [117] Those who host Facebook pages or similar are not passive instruments or mere conduits of content posted on their Facebook page. They will be regarded as publishers of postings made by anonymous users in two circumstances. The first 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. A request by the person affected is not necessary. The second is where they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory.

[67] In reaching her conclusion Courtney J relied (inter alia) on the England and Wales Court of Appeal decision of *Tamiz v Google Inc*.[32] In *Tamiz* the Court stated:[33]

> There is a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory: *Emmens v Pottle* (1885) 16 QBD 354, 357-358; *Vizetelli v Muddie's Select Library Ltd* [1990] 2 QB 170, 177-180; *Bottomley v S W Woolworth & Co Ltd* (1932) 48 TLR 521. There are differences in the reasoning in support of that conclusion but the conclusion itself is clear enough.

[68] As Alex Latu notes in his paper *Pages, posts and publication … on defamation and the Harmful Digital Communications Act 2015* the "long line of authority" of cases referred to in *Tamiz* has as its key focus the publication of the defamatory statements as the:[34]

> "… actionable wrong. Thus, no question as to the knowledge or intention of the publisher arises. All that is required is a voluntary act of participation in the communication of defamatory matter."

[69] Mr Murray appealed (inter alia) the conclusion reached by Courtney J on the issue of knowledge. In considering the issue the Court framed the two circumstances identified by Courtney J as the "actual knowledge" test and the "ought to know" test.

[70] The Court was concerned many of the cases relied on by Mr Wishart and applied by the High Court required a "strained analogy"[35] given most of the historical cases were not dealing with publications on the internet.

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[32] *Tamiz v Google Inc* [2013] EWCA Civ68, [2013] 1 WLR 2151.
[33] Above at [26].
[34] Alex Latu "Pages, posts and publication: Alex Latu, University of Otago, on defamation and the Harmful Digital Communications Act 2015" [2022] NZLJ 222 at 223.
[35] *Murray v Wishart*, above n 27, at [99].

[71] Five concerns were identified by the Court with the "ought to know test" when "applying [it] to a host of a Facebook page".[36] Those concerns (in summary) were:[37]

(a) Inconsistency between a host who has actual knowledge and one who does not. A host with actual knowledge if he/she acts reasonably to remove the post will not be liable as a publisher. A host who does not know (but ought to know) will be immediately liable as a publisher; the test imposes strict liability on the host and once posted there is nothing the host can do about it.

(b) Liability for "ought to know" was based on the host being negligent for failing to take steps to prevent the posts being made. Liability for defamation based on negligence was contrary to the well-understood notion defamation was an intentional tort.

(c) The balancing of the rights for freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 against the rights of the person who claims reputational harm. The ought to know tests gives the latter "undue preference".

(d) The uncertainty of the test's application and therefore unanticipated risk this may bring for users of Facebook.

(e) The defence of "innocent dissemination" under s 21 of the Defamation Act will be difficult to apply as the language in the section appears to focus on "old" media and does not necessarily cover internet publishers. The unavailability of the defence favours the limiting of the scope of who is a publisher in the context of the internet.

[72] As a result of these concerns the Court concluded:[38]

> [144] These concerns lead us to conclude that the actual knowledge test should be the only test to determine whether a Facebook page host is a

[36] At [136].
[37] At [137] - [143].
[38] At [144] (footnotes omitted).

> publisher. That is consistent with at least some of the authorities to which we have referred, (*Sadiq v Baycorp (NZ) Ltd, A v Google New Zealand Ltd* and *Davison v Habeeb*) and with the Law Commission's analysis. It conforms with the approach in *Byrne v Deane*, which is, we believe, the most appropriate analogy and with the decision in *Urbanchich v Drummoyne Municipal Council*. It makes the liability risk of a Facebook page host no greater than that of an organiser of a public meeting – another appropriate analogy, in our view. It is consistent with the right of freedom expression in the Bill of Rights, bearing in mind the unavailability of the innocent dissemination defence. And it provides a situation where liability for defamation is not imposed on the basis of negligence.

[73] Mr Judd submits *Murray* is binding on this Court. Only one test applies, namely the actual knowledge test. In these circumstances, to be a publisher, Sky Media needed to have knowledge of the post(s) and if (and when) it did, acted reasonably in relation to the post(s).

Oriental Press Group Ltd v Fevaworks Solutions Ltd* and *Fairfax Media Publications Pty Ltd v Voller

[74] The decision of *Murray* contrasts with the position decided in *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (*Fevaworks*)[39] and the current position in Australia. The relevant decision in Australia is *Fairfax Media Publications Pty Ltd v Voller (Voller).*[40]

[75] *Fevaworks* concerned statements which were posted on a website which hosted an internet discussion forum. The key issue in the proceeding was whether, as hosts of the platform, the internet service providers were able to rely on the common law[41] defence of innocent dissemination. In order to determine this issue, the Hong Kong Court of Final Appeal was required to determine whether the internet service providers were "publishers". This involved the analysis of the "actual knowledge" test and, "ought to know test". The Court found the ought to know test applied, holding, Fevaworks were "plainly participants in the publication of posting by the forum's users and, in that sense, they were publishers from the outset".[42]

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[39] *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKCFA 47 [*Fevaworks*].
[40] *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27, (2021) 392 ALR 540 [*Voller*].
[41] The defense of innocent dissemination was not available as of statutory right in Hong Kong, unlike in New Zealand, where it is available through s 21 of the Defamation Act.
[42] *Fevaworks*, above n 39, at [52].

[76] However, the Court also found, Fevaworks as an internet service provider, was entitled to rely on the defence of innocent dissemination if it was not the first or main publisher of the defamatory statements. It needed to a secondary or subordinate publisher. As the subordinate publisher, it needed to demonstrate it had no knowledge of the defamatory material in the published work and that the lack of knowledge was "not due to their own lack of care".[43]

[77] The Court found Fevaworks did not have any knowledge of the content of the posts until it was alerted to them and, given the high number of posts on the forum, it could not realistically have been expected to have monitored and controlled all posts. Furthermore, it had removed the posts soon after it became aware of them. In doing so, the Court held Fevaworks had acted with reasonable care and could therefore rely on the defence of innocent dissemination.

[78] In reaching this decision the Court distinguished the cases colloquially known as the "notice board" or "graffiti cases".[44] In these cases, the owners of the property had not participated in the publication of the defamatory statements but were considered to be publishers if, having been made aware of the statements, took no action to remove them. For internet service providers wanting to use innocent dissemination as a defence, assuming they are subordinate publishers, the innocent dissemination defence is available even though the internet service provider is a "publisher" before it has knowledge of the statement.

[79] Another distinction observed by the Court is persons who post on notice boards/graffiti are considered trespassers. In contrast the internet service provider, as a host of a site where posts are made, invite, facilitate, participate and actively encourage posts to be made, often for monetary gain.

[80] It was the latter distinction in *Voller* which the High Court of Australia observed as being a key reason why the "ought to know test" should apply and therefore a strict approach to exposure as a publisher should result in such circumstances. Considering the notice board cases to be "irrelevant" the Court was

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[43] At [29].
[44] Commencing with the well-known case of *Byrne v Deane* [1937] 1 KB 818.

firmly of the view internet service providers who exercise control over their platforms and "intentionally or negligently" participate in the communication of any defamatory statements will be publishers for the purposes of defamation.[45]

[81] The position set out in *Fevaworks* and *Voller* clearly contrast the position in *Murray.* Mr Romanos, appropriately conceding neither *Fevaworks* and *Voller* are binding on this Court, nonetheless argues the cases are persuasive.[46] Furthermore, he submits, unlike in *Murray* which dealt with the creation of pages on Facebook by Mr Murray, Sky Media owned and operated the FML chat forum which was subscriber based. He submits this is the same position as in *Fevaworks.* He submits this is an important distinction which means *Murray* can be distinguished and is therefore not binding on this Court.

[82] Finally, it can also be noted *Murray* was considered in *Voller.* The Court observed:[47]

> *Murray v Wishart* was a decision in which the New Zealand Court of Appeal held that an individual Internet user who was the administrator of a private Facebook page and who had no "actual knowledge" of the contents of third-party comments posted on the page was not liable in defamation. The Court of Appeal proceeded without reference to *Webb v Bloch*, and indeed without analysis of what constitutes publication at common law. Rather, the starting point for its analysis was that the issue of publication was to be determined by "strained analogy" with previously decided cases. It appeared to assume that either actual or constructive knowledge of the defamatory content was necessary for publication. Its ultimate conclusion that "the actual knowledge test should be the only test to determine whether a Facebook page host is a publisher" was reached having regard to the guarantee of freedom of expression in the New Zealand Bill of Rights Act 1990 (NZ). The reasoning does not reflect the common law of Australia.

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[45] *Voller*, above n 30, at [23]-[35] and [87]-[88]. The High Court emphasised the point: "This is because the defendant had active knowledge of the statements and failed within a reasonable time to remove them, or because of the circumstances, ought to have known and failed to remove them. Alex Latu noted (at 224): "As Gageler and Gordon JJ expressed it noted: the "long-standing rule of the common law" is that every intentional participant in a process directed to making matter available for comprehension by a third party is a "publisher" of the matter, upon it becoming available to be comprehended by a third party (at [62]). Through their operation of Facebook Pages, the defendants had facilitated, encouraged and assisted third parties to post comments, rendering them publishers of those comments — the notice board cases were thus irrelevant (at [50]–[55] per Kiefel CJ, Keane and Gleeson JJ; and [103]–[105] per Gageler and Gordon JJ)".

[46] Mr Romanos also points out *Fevaworks* has been endorsed by the learned authors of *Gatley on Libel and Slander* as *"a model analysis of how well-accepted principles of the common law of publication should apply to internet publications"*. Richard Parkes QC and Godwin Busutill (gen eds) *Gatley on Libel and Slander* (13th ed, Sweet & Maxwell, London, 2022) at [8-001].

[47] *Voller*, above n 40, at [94].

[83] Mr Latu picks up the High Court's apparent questioning of the *Murray* analysis and comments:

> In essence, the Court decided to raise the bar for a finding of publication, rather than preferring a lower bar based on participation/active facilitation, coupled with the downstream defence of innocent dissemination guarding against unduly extensive liability. Part of the reasoning for this was the Court's view, briefly expressed, that an innocent dissemination defence would be unlikely to assist Facebook Page operators and similar persons in New Zealand (at [143]–[144]). Outdated "old media"-centric language in the s 21 defence was seen as difficult to apply to Facebook Page hosts and apparently inapplicable to "internet publishers" generally. The common law defence appears to have been treated as simply unavailable. It is not entirely clear why this would be so. Although the common law defence appears to have fallen into disuse in New Zealand, s 21 does not clearly abrogate the common law and its purpose appears to have been to clarify the status of booksellers and printers. The overall effect of diminishing the relevance of negligence or unreasonable conduct (actual, not constructive, knowledge required for publication by Facebook page hosts; scepticism as to the availability of innocent dissemination), creates a fairly blunt approach. There is little ability to take into account, for instance, the relevance of an intermediary inciting comments of a particular nature; although greater certainty is provided to certain Facebook users.

[84] I return to these arguments and whether *Murray* is binding on this Court below.[48]

Where Were the Posts Made?

[85] No controversy arises on this issue. All posts appeared on the chat forum site called FML which is part of the Skykiwi chat forum. The forum is owned and controlled by Sky Media.

Was Ms Qi Identified in the Posts?

First Post

[86] Sky Media pleaded the first post did not identify Ms Qi,[49] and maintained that position in opening to the extent the only people who could know who she was were her work colleagues. Furthermore, any identification only occurred when Ms Qi self-identified herself. This occurred when she became a subscriber and started making

[48] Above at [104] of this judgment.
[49] Second Amended Statement of Defence dated 9 December 2022, at [9].

her own posts,[50] confirming she was "Miss Q". Identification then was because of her actions and not through the fault of, or anything done by Sky Media.

[87] Sky Media accepts identification occurred when Ms Qi complained to Ms Li but the focus in closing was on the conduct of Sky Media after the complaint was made. In that regard Mr Judd submits Sky Media acted quickly and removed the post. In accordance with the 'actual knowledge' test requirements under *Murray* it could not then be found to be a publisher.[51]

Second Post

Sky Media's Arguments

[88] Sky Media denies Ms Qi could be identified in the second post. As set out above, PJF replied to Ms Qi stating the post did not identify her on 18 July and repeated this position on 19 July. He also advised her to email Sky Media's administration and gave her the contact details.

[89] Ms Li's email response denied Ms Qi had been identified or could be linked to the first post. Further information was requested from Ms Qi which Mr Judd submits was necessary to comply with s 24 of the HDCA.[52]

[90] Notwithstanding the denial Ms Qi had been identified, Sky Media nonetheless blocked the post from public viewing and removed the "Miss Q" from the title. Only subscribers could then see the post. Mr Judd submits at that stage the only people who could link the two posts could be subscribers. In any event, any reputational harm was negligible (if any) as the only harm was caused by the first post because that post had identifying material. In any event because the second post was removed from public view on 21 July the HDCA immunity applied.

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[50] Ms Qi made her first post on 15 July at 22.14 pm confirming she was the person in the post. She made 27 in total.

[51] Sky Media also relies on s 24 of the HDCA although I will discuss this issue in more detail under the determination of whether it was a 'publisher' of the posts.

[52] Sky Media Closing Submissions, at [25].

Ms Qi's Arguments

[91] Mr Romanos says through a combination of the content of the second post and proximity of when the first post was removed to when the second post was published, (12 hours) it defies logic the two posts were not both talking about Ms Qi. As a matter of law, he says a plaintiff's identification in a subsequent publication may be inferred from its temporal linkage with an earlier publication.[53]

[92] Mr Romanos also points to specific comments made by readers after the second post was made. These readers were clearly linking the posts.[54] One post by a user (skysadness) posted a private message between herself and Ms Qi which displayed Ms Qi's image and username.[55] It was this post which confirmed the identity of who "Miss Q" was rather than anything Ms Qi herself did. Finally, the second post also declared to readers they knew who "Miss Q" is, deliberately linking that post to the first post.

Discussion

[93] In my view, it is quite clear the first post identified Ms Qi, irrespective of Ms Qi perhaps "self-identifying" herself.

[94] The information contained in the first post was sufficient to identify Ms Qi, whether it was the play on Ms Qi's name (Qi v Q), where she lived (Hastings) or who her employer was (Hasting Council). All of this however was reinforced when a user posted Ms Qi's LinkedIn profile on the morning of 14 July at 6.23 am.

[95] As I have already noted, the LinkedIn profile was blocked which occurred at sometime between 6.23 am and 9.47 am when a user complained he could no longer see the photo.[56] Even though it was blocked, sufficient time had lapsed for users to attempt to trace Ms Qi as evidenced by the comments made on the forum and the fact that Ms Qi's LinkedIn profile had an upsurge in viewers. The comments on the forum

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[53] *McGee v Independent Newspapers Ltd* [2006] NZAR 24 (HC) at [50]-[51].
[54] Publication 2: Comments #8, #9, #10,#14, #18, #38,#45, #61.
[55] Publication 2: #77.
[56] Comment #54 by qqq153 who posted at 09:47:27 "*I am late. Can't see the photo anymore".*

also establish, in some instances, users were successful in tracing Ms Qi despite the LinkedIn profile post being blocked.[57]

[96] I also am satisfied, based on the evidence, Sky Media knew the post was about Ms Qi before Ms Qi complained. Whilst Sky Media says the blocking of any posts which attempts to identify anyone is consistent with its "forum management regulations" the fact that posts are blocked (whether in accordance with its regulations or not) confirms Sky Media must be aware an individual had been identified and steps taken to block the identifying post. Confirmation of this was demonstrated when the forum manager "rabbit" replied to Ms Qi's post on 15 July.

[97] Finally, Ms Qi also contacted PJF on 16 July confirming the post was about her. Clearly this was before the complaint to Ms Li was made by Ms Qi. As a web manager for Sky Media, at the point PJF was contacted by Ms Qi with her concerns, identification of who the post was about occurred.

[98] For these reasons I find Ms Qi was identified in the first post, and as early as the morning of 14 July.

[99] In terms of the second post, I reject the suggestion the deletion of Ms Qi's workplace and where she lived did anything to anonymise her identity. I have little doubt, based on the timing and content of the posts, users linked the two posts. The comments by some users following the second post confirm this[58] as does Ms Hu's comment in the second post that readers know who the post is about.

[100] It follows then Ms Qi was identified as the subject person of the second post and PJF and Ms Li were wrong in concluding on 19 July the second post did not identify Ms Qi.

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[57] Comments #69, #71, #73; #77; #81; #91; #93 are some examples posted on 14 July.
[58] See the comments referred to above n 54.

Were the Posts Defamatory?

[101] Ms Qi has pleaded in paragraphs [10]and [19] of her counterclaim dated 23 February 2022 what she alleges the natural and ordinary meaning of the alleged words and statements in the two posts.[59]

[102] Sky Media's pleaded response was to express it had no knowledge of and therefore denied paragraph(s) [10] and [19].[60] During the hearing no serious argument was raised by Sky Media that the words and statements are not defamatory.

[103] On any objective view, the words and statements, without any evidentiary foundation, are defamatory. Their natural and ordinary meaning, as assessed by an "ordinary reasonable person"[61] lead to the only conclusion the words and statements mean what has been pleaded in paragraphs [10] and [19] of Ms Qi's counterclaim.[62] In short they say Ms Qi is promiscuous, seeks to have affairs for visa purposes, sought to have an affair with Ms Hu's husband and other work colleagues, and prostitutes herself.

[104] Ms Hu, whilst still an active participant in the proceeding, pleaded the defence of truth. Given her claim has been struck out, no direct evidence on these allegations was brought. Sky Media, based on Ms Hu's pleadings of truth also pleaded truth as an affirmative defence.[63] Mr Judd conceded in opening Sky Media could not produce any direct evidence to support the alleged statements. That did not however stop him cross-examining Ms Qi on a relationship she did have with a work colleague. Candidly, Ms Qi accepted she did have a relationship during a period when her relationship with her partner was struggling.

[105] The fact Ms Qi had a relationship with her work colleague falls significantly short of any evidentiary foundation needed to support the pleading of truth of the

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[59] [59] Above at [46]-[47] of this judgment; Ms Qi's Counterclaim dated 23 February 2022, at [10] and [19].
[60] Second Amended Statement of Defence dated 9 December 2022.
[61] Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2019) at [15.3.6(1)]; and *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA); and supporting authorities, above n 23.
[62] Ms Qi's Counterclaim dated 23 February 2022, at [10] and [19].
[63] Second Amended Statement of Defence dated 9 December 2022, at [51].

natural meaning of the words and statements in the posts. Accordingly, I find the two posts[64] are defamatory.

Was Sky Media a Publisher of the Posts?

[106] I return to one of the key issues in this proceeding. There are two legal elements to this issue. The first is whether *Murray* applies. The second is if *Murray* does apply, then did Sky Media act reasonably?

Does Murray v Wishart apply?

Ms Qi's Arguments

[107] As I have previously noted, the primary thesis of Mr Romanos submission is *Murray* is able to be distinguished on its facts. Indeed, he submits the Court of Appeal was concerned to emphasise its decision was based on the present circumstances of its case; Mr Murray creating pages on Facebook which had a limited moderating functionality and Mr Murray not having ultimate control over how content was published. In support of this position Mr Romanos cites the following passage from the judgment:[65]

> [125] … we see the authorities evaluated by Courtney J and cited to us as providing limited guidance because we think it is important to focus on the particular factual situation before the Court. Our analysis of the authorities shows how sensitive the outcome can be to the particular circumstances of the publication. The fact that many of the authorities relate to publication in one form or another on the internet does not provide any form of common theme, because of the different roles taken by the alleged publisher in each case.

[108] In contrast, Mr Romanos submits, just as in *Fevaworks,* Sky Media exercised control over a web forum it created, owned, and operated. This was compounded by it actively participating in the chat forum through its forum managers who promoted discussion and content. It had then, ultimate control (editorial, pre-approval of comments, the ability to block or delete) over published content. Mr Romanos submits it is for these reasons the Court made the observations cited above and why the "Court

[64] In respect of the first post this includes the subsequent comments made by Ms Hu as pleaded.
[65] *Murray v Wishart*, above n 27, at [100] (footnotes omitted).

did not purport that its decision would apply across the board to all internet intermediaries".

Sky Media's Arguments

[109] Mr Judd submits the focus on the issue of editorial control, vetting or the ability to pre-approve comments is misplaced. These submissions lead to the same position that the "ought to know" test continues to apply, a test which was expressly rejected by the Court in *Murray*. Furthermore, Mr Judd points out the Court expressly considered, and chose not to follow *Fevaworks,* a case which was focused on whether the (common law) defence of innocent dissemination could apply (confirming it could) but where the Court in *Murray* expressed significant concerns it did not. This was one of the five concerns as to why the Court concluded the "ought to know" test does not apply in New Zealand.

[110] Mr Judd also submits the underlying facts in the present case and *Murray* are not as disparate as suggested by Ms Qi. He suggests the fundamental starting point is a person who sets up a chat forum using Facebook as his/her platform, and then invites third parties to post on that forum based on the authors topic, is no different from Sky Media setting up webpages for a chat forum, and then encouraging third parties to chat, gossip, criticise or comment on any subject. Both types of forums have the potential to receive high volume posts, without any prior knowledge of, and limited control, over the content which is posted.

[111] Finally, Mr Judd submits the Court in *Murray* by using the analogy of an organiser of a public meeting[66] intended little distinction should be made between what is said at a "public meeting" and what is posted on a platform of an online host by a third party. In both instances the invitation to make a (defamatory) comment on the host's forum does not attract liability. Liability only arises when the host becomes aware of it and does nothing about it within a reasonable time.

[112] Mr Judd submits then if Mr Murray was held not liable for third party posts unless he had actual knowledge of the defamatory statements and failed to remove

[66] *Murray v Wishart,* above n 27, at [144].

within reasonable time, then Sky Media should also be held not liable for third party posts.

Discussion

[113] In my view the authority of *Murray* applies and is binding on this Court. I accept the distinctions based on the authorities cited by Mr Romanos are persuasive, but ultimately, are persuasive only.

[114] After an extensive analysis of all the relevant authorities, the Court of Appeal in *Murray* determined the only test which applies in New Zealand regarding the liability as a publisher is the "actual knowledge" test. In doing so the Court set out its five concerns which justified why the "actual knowledge" test should apply and why, the "ought to know" test does not apply.

[115] In undertaking the analysis it did, including referencing cases such as *Fevaworks,* the Court had the opportunity to leave the door open and allow the "ought to know" test to apply in certain circumstances. The Court chose not to. Instead, it unequivocally rejected the "ought to know test" and shut the door by expressly stating the only test to apply was the "actual knowledge" test.

[116] In reaching this finding, I accept Mr Judd's submission the focus of the Court in *Murray* was on knowledge of the post being made (considering the sheer volume of posts which can occur) and, post publication conduct, rather than the direct act of publication itself on a host's forum pages. A distinction between the type of host, or other factors such as editorial control by the hosts would appear to be irrelevant factors in New Zealand, notwithstanding the Court recognising Mr Murray had limited editorial control. As such these factors are incapable of being relied on as a means to distinguish this case from *Murray.*

[117] I accept then, as pointed out by Mr Romanos, the above position does put New Zealand at odds with some overseas jurisdictions (Australia in particular) and raises queries in some academic quarters. However, with respect, I make the following observations as to why, in my view, the Court was correct in deciding as it did.

[118] An inherent risk a Court faces, when attempting to regulate behaviour on the internet, is it will not keep pace with what is a fast developing and ever-changing environment. The significant analysis of the authorities undertaken in *Murray*, *Fevaworks* and *Voller* only serves to demonstrate that previously constituted principled decisions for traditional media platforms, have quickly become outdated and irrelevant. These cases, to varying degrees, all recognise this. What this means is decisions made may have unintended consequences for circumstances which are yet to develop or can be anticipated at this juncture in time.

[119] The Court in *Murray* has removed the risk and uncertainty the "ought to know" test imposes on an online host in the current internet environment.[67] *Fevaworks* and *Voller,* as Alex Latu describes, impose liability for publication on "a lower bar based on participation/active facilitation, coupled with the downstream defence of innocent dissemination guarding against unduly extensive liability".[68] However, by having a low bar, the "ought to know" test appears to place all risk on the online host for third party posts. On a proportionate basis it is questionable whether this risk fairly reflects the balance needed between what the public demands in terms of the internet as a provider of platforms to (freely) express themselves, and the right for innocent persons to be protected from online abuse.

[120] Ten years after *Murray* this Court is dealing with very real examples of why the "ought to know" test would only cement this imbalance and create significant hardship for online hosts. These examples are seen every day in this Court in the form of applications for take down orders under the HDCA.[69]

[121] Such examples include:

(a) A vendor of motor vehicles created advertisement pages on Facebook Marketplace attempting to sell a motor vehicle only to have persons wrongfully accusing the vendor and, other persons associated with the vendor, of having a history of selling faulty vehicles.

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[67] The fourth concern of the Court in *Murray v Wishart*, above n 27, at [142].
[68] Alex Latu "Pages, posts and publication", above n 34, at 225.
[69] Harmful Digital Communication Act 2016, s 19. I do not cite the cases as most cases determined under the HDCA are the subject of confidentiality orders.

(b) Instagram influencers with their own family vlog platform who promote sponsors products only to be accused of being "paedophiles" (with critical and defamatory comments being made about their sponsors) because the influencers' son appeared on their vlog platform.

(c) A group of flatmates (with one being singled out) being wrongfully accused on Facebook of lying, having no morals and being prejudiced towards persons with disabilities. The flatmates had significant (and justified) concerns over the authors mental health. In this case the author accuser created his own web pages and shared them with the flatmates employer and other companies which operated in the industry where the flatmate worked. In sharing the material with the flatmates employer's and other entities in the industry, he ridiculed them as to why they would be associated with the flatmate.[70]

[122] If the "ought to know test" applied, significant unfairness could result for the online hosts in each of these examples if the associated persons of the motor vehicle vendors/influencers /flatmates, took offence to what the third parties had posted about them and issued defamation proceedings.[71]

[123] In the first two examples, Meta Platforms (Facebook/Instagram) and TikTok would have immediate liability as primary publishers. The defence of innocent dissemination would not be available even though the hosts, in these examples, were acting legitimately when the web pages were created.

[124] In the third example the author and creator of the pages would be considered a primary publisher but so would Meta Platforms even though it could do little about a person who was clearly suffering from mental health issues.

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[70] I point out these are, but a handful of varied applications received by the District Court. The Court receives on average an application under the HDCA every 2-3 working days. This number has increased by 20 per cent every year since 2022.

[71] In the influencers example, the third-party author was highly critical of not only the hosts, but also the companies who were supporting/sponsoring the hosts calling for a boycott of the companies.

[125] But what happens to the persons who created the pages identified in the first two examples? A convoluted and complex process would be needed to determine whether they are "primary" or "subordinate" hosts. Arguably they could be primary publishers because they deliberately created the web pages (and had editorial control over them) for monetary gain, which clearly satisfies the "participation/active facilitation" premise.

[126] In both examples, the hosts had direct knowledge of the defamatory comments made against them and, their sponsors and associated persons. Even if they could establish they were subordinate hosts, they would nonetheless be burdened with the obligation to prove they are entitled to the defence of innocent dissemination. This is in an environment where the persons involved would have little knowledge of what the "ought to know" requirements were including having to act quickly to ensure a defence of innocent dissemination was available. Again, I emphasise, in these two examples the hosts were doing nothing more than legitimately attempting to sell or promote product. The risk and imbalance in my view is obvious.

[127] *Fevaworks* would suggest the answer lies with the analysis over whether the host is a subordinate host and the right to innocent dissemination exists. But as I have noted the process is convoluted and engages complex assessments of situations which are difficult to analyse. It also assumes a level of sophistication and ability to access legal advice is immediately available. The simpler solution, which covers all situations, is liability as a publisher only exists if the host (primary or subordinate) knows any post made on their website defames anybody. Only then should be deemed to have the responsibility of deleting the offending post before they incur liability as a publisher.[72]

Did Sky Media Act Reasonably?

[128] Having determined *Murray* applies, I now consider whether Sky Media acted reasonably.

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[72] I discuss below, in relation to the introduction Harmful Digital Communications Act 2016, Parliament's concern that online hosts should not be liable for posts where they knew nothing about them.

Ms Qi's Arguments

[129] To be fair to Mr Romanos, much of his submissions on this issue were through the lens that *Murray* does not apply. The issue then of a publisher acting reasonably is of lesser importance under the "ought to know" test unless Sky Media is a subordinate publisher (which he submitted it was not).

[130] However, he does submit the comments made by various Sky Media web administrators/managers made it clear Sky Media knew about the publications and failed to promptly to remove them. Examples include:

(a) The highlighting of the first publication in the thread list, and the posting of the headings "Hot Topic" and "Explosive Revelation" to the publication;

(b) Blocking Ms Qi's LinkedIn profile image in the first publication by 9:47 am on 14 July but allowing the post to remain online until 12:55 pm on 16 July 2021;

(c) Various comments made by Sky Media's web administrators ("*rabbit",* Deputy Mayor (of the forum) *"Bayilaoye"*[73]; PJF's refusal to remove the second publication even though he facilitated the removal of the first publication; Ms Li's refusal to remove the second publication after receiving the email complaint from by Ms Qi.

(d) The refusal to completely remove the second publication after contact from Netsafe, the Police and Newshub.

[131] In short Mr Romanos submits Sky Media knew about the posts at the very early stages of their publications and failed to act promptly and remove them. In terms of what constitutes a "reasonable time", given the context, he submits "48 hours is a lifetime on a forum such as FML". Relying on *Smith v King* where Gendall J agreed

[73] Mr Romanos is particularly critical of *Bayilaoye* given his comments were generally misogynistic about the physical appearance of Ms Qi.

48 hours was an unreasonable time to remove a Facebook post, 74 Sky Media was obligated to remove the posts far more promptly than what occurred.

Sky Media's Arguments

[132] Mr Judd submits Sky Media acted reasonably both in terms of timing and actions taken in respect of the two posts.

[133] The response by Sky Media to the first post was immediate. As soon as it received the complaint from Ms Qi, Sky Media was answering her concerns by replying to her messages and providing information. Because Sky Media could not identify Ms Qi until it was told (by her) she was the "Miss Q", liability as a publisher was not triggered. However once told, and Sky Media could identify her, the post was removed from public view within minutes.

[134] In respect of the second post Sky Media maintains the post did not contain any identifying information. It did however act reasonably because Ms Li promptly replied and requested more information to prove identification. Ms Qi did not provide this information. Despite this, Sky Media posted in the forum that the post was under investigation, changed the title to remove "Miss Q", and blocked any further comments while it was investigated. It also moved the post to the "Admin section" where it was visible to subscribers only.

[135] Mr Judd also rejects any criticism the comments made by the web administrators were intended to highlight and bring attention to the posts. Instead, he submits the comments emphasise the trivial nature of the FML chat forum which no one should take seriously.

Discussion

[136] I have already determined Ms Qi was identified as the subject person in the first post from the morning of 14 July. The issue is whether, Sky Media acted reasonably in removing this post on 16 July at 12.55 pm.

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[74] *Smith v King* [2021] NZHC 1252 at [43].

[137] Sky Media submits it acted reasonably because it "immediately" removed the post[75] when requested by Ms Qi on 16 July. If I had found identification occurred only when Ms Qi complained to Ms Li then I would agree, there would little issue Sky Media acted reasonably.

[138] However, because I have found Sky Media identified Ms Qi on 14 July when it blocked Ms Qi's LinkedIn profile, the timing in terms of acting reasonably, is 48 hours and not 30 minutes. The issue then is whether 48 hours is reasonable.

[139] Relying on *Smith v King,*[76] Mr Romanos submits it is not. The difficultly with this submission however is that 48 hour period is the period of time Parliament has determined under s 24 of the HDCA, an online host must remove a post which is objected to by a complainant and either the original author of the post cannot be located; consents to the removal; or does not file a valid counter-notice.[77] In my view, if Parliament has determined, after a lengthy Select Committee process, 48 hours is the appropriate timeframe when objectional material is to be removed, it would be inconsistent and wrong for this Court to attempt to determine its own timeframe.

[140] The post was removed just on 16 July, just over 48 hours after Sky Media blocked the LinkedIn post. In those circumstances I am satisfied Sky Media acted reasonably in relation to the first post.

[141] If there was only one post this judgment would effectively stop here as Sky Media would not be liable as a publisher under *Murray* principles.

[142] However, there were two posts which I have found were basically identical other than some minor amendments which did not anonymous Ms Qi. The effect of this is the second post contained the same damaging defamatory material as the first post. For Sky Media to be found not liable as a publisher under *Murray* principles, it needed to act reasonably to remove the second post once it had knowledge of the post.

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[75] The timing is about 30 minutes.
[76] *Smith v King*, above n 75, at [43].
[77] Harmful Digital Communications Act 2015, s 24(2).

[143] I find Sky Media did not act reasonably. I do so because, on the evidence, once Sky Media had actual knowledge of the second post it failed to effectively remove it.

[144] The second post was published at 1.02 am on 17 July. Ms Qi complained to PJF at 7.02 pm on 17 July and again 30 minutes later. PJF responded at 12.54 am on 18 July. He denied the post violated the forum rules. I find at the point PJF acknowledged Ms Qi's complaint at 12.54 am on 18 July, Sky Media had actual knowledge of the post and Ms Qi was identified as the person discussed in the post.

[145] I reject Sky Media's assertion the timing started when Ms Li was emailed on 19 July by Ms Qi. In doing so I also reject Sky Media was seeking further information from Ms Qi. I do not read Ms Li's email to say that. The second to last paragraph in Ms Li's email talked about Ms Qi providing additional proof of any violation of the forum's regulations but this was an unusual request given Ms Qi had made it clear what she was complaining about in terms of the virtually identical post which had been published. There was no further information she could provide.

[146] I also find it unusual that despite Sky Media asserting none of its regulations had been violated, it nonetheless went about amending the original post, blocking content, and then placing the post under investigation on 21 July.[78] What motivated Sky Media to take these steps is unknown and was not explained by Ms Li in her evidence. However, these actions contradict her assertion Ms Qi was not identified in the second post.

[147] Despite taking these steps I still find they were insufficient to meet the "acting reasonably" threshold. This is because the post remained viewable by subscribers and was only removed from public viewing three days after PJF acknowledged Ms Qi's complaints. This is clearly outside the 48 hour timeframe which I have determined is the reasonable period when a post must be removed. What should have happened, just

[78] "tianweiwang's" (Ms Li's) post on 21 July at 3:27pm which stated: "Public Notice: Since the Skykiwi customer service mailbox has received a report on this post and related incidents, we are in the evidence collection process. Therefore, to cooperate with the investigation, the post is closed for comments, and the post's first comment is blocked. Before the end of the investigation, please do not make any posts or raise any discussion related to this incident on the Skykiwi Forum. The violator will be warned. Those with severe violations will be banned. Relevant posts will be removed for evidence. Thank you for your cooperation!"

as it happened with the first post, is the post should have been completely removed by 20 July.

[148] I find then Sky Media did not act reasonably to remove the second post.

Innocent Dissemination?

[149] Sky Media says it acted reasonably in relation to the posts. It therefore does not need to rely on the defence of innocent dissemination. However, if it is wrong in its assessment, it pleads innocent dissemination as a statutory defence.

[150] Section 21 of the Defamation Act provides:

> **21 Innocent dissemination**
>
> In any proceedings for defamation against any person who has published the matter that is the subject of the proceedings solely in the capacity of, or as the employee or agent of, a processor or a distributor, it is a defence if that person alleges and proves—
>
> (a) that that person did not know that the matter contained the material that is alleged to be defamatory; and
>
> (b) that that person did not know that the matter was of a character likely to contain material of a defamatory nature; and
>
> (c) that that person's lack of knowledge was not due to any negligence on that person's part.

[151] Sky Media must discharge the burden by proving each of the elements in (a) to (c) above apply.

[152] I have already found Sky Media knew about the posts, knew they were defamatory, and did not act reasonably in relation to the second post, it is therefore unable to discharge (at least) the elements set out in s 21(a) and (b).

[153] Accordingly, it is unable to avail itself of this defence.

Harmful Digital Communications Act 2016 (HDCA)

[154] I now turn to whether Sky Media is entitled to rely on the statutory immunity ("safe harbour provisions") provided by the HDCA.

[155] I am informed by counsel no Court has yet considered the safe harbour provisions under the HDCA in relation to a defamation proceeding. I am grateful then to counsel for their thorough and helpful submissions which they have filed.

[156] I first start with some history and context.

[157] In 2010 the Law Commission undertook a review of the regulatory environment for the news media with respect to its adequacy in catering for new and emerging forms of news media. The three questions posed were first discussed in the Issues Paper (December 2011) being:[79]

(a) how to define "news media" for the purposes of the law;

(b) whether, and to what extent, the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover currently unregulated news media and, if so, what legislative changes would be required to achieve this end; and

(c) whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and, if not, whether alternative remedies may be available.

[158] Over the following two years the Law Commission continued to consider these issues, firstly producing a Ministerial briefing paper in August 2012 – *Harmful Digital Communications: The adequacy of the current sanctions and remedies,*[80] and then a report in March 2013 – *The News Media meets "New Media": Rights, Responsibilities and Regulation in the Digital Age*.[81]

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[79] Law Commission *The news media meets 'new media': rights, responsibilities and regulation in the digital age* (NZLC IP27, 2011) at 3.

[80] Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012).

[81] Law Commission *The news media meets 'new media': rights, responsibilities and regulation in the digital age* (NZLC R128, 2013).

[159] On 19 March 2013, the High Court's decision in *Wishart v Murray* was released.[82] As I have noted above, Courtney J held the "ought to know" test applied in New Zealand.

[160] Later in 2013, but following *Wishart v Murray*, the Harmful Digital Communications Bill was introduced. The Bill implemented the Government's decisions on addressing harmful digital communications, which were largely based on the Law Commission's 2012 Ministerial Briefing paper.

[161] The commentary which explained the purpose of the Harmful Digital Communications Bill was to mitigate the harm caused to individuals by digital communications and to provide victims of harmful digital communications with a quick and efficient means of redress. However, the Harmful Digital Communications Bill also sought to clarify the law relating to the liability of internet content hosts for content they host but which is posted by third parties. The intention was to ensure a content host could not be held liable for content they host that is posted by another person, but which the host does not know about.

[162] Clause 20 of the Bill as introduced (the bar-1 Bill) outlined the liability of online content hosts, stating:[83]

> **20 Liability of online content host for content posted by user**
>
> (1) This section applies to the liability of an online content host for the content of a digital communication posted by a person and hosted by the online content host.
>
> (2) No civil or criminal proceedings may be brought against the online content host in respect of the content complained of (the specific content) unless—
>
> (a) the person who provides the specific content does so on behalf, or at the direction, of the online content host; or
>
> (b) the online content host—
>
> (i) receives a notice of complaint about the specific content; and

[82] *Wishart v Murray*, above n 30.
[83] Harmful Digital Communications Bill 2013 (168-1), cl 20.

(ii) does not take reasonable steps as soon as is reasonably practicable to remove or disable access to the specific content.

(3) A notice of complaint must—

(a) specify the complainant's name; and

(b) set out the specific content, and explain why the complainant considers that—

(i) the specific content is unlawful; or

(ii) the specific content ought to be taken down or access to it disabled because it is harmful or otherwise objectionable; and

(c) sufficiently enable the specific content to be readily located; and

(d) contain any other information that the complainant considers relevant.

(4) The Approved Agency may lodge a notice of complaint on behalf of a complainant and provide advice and assistance to the complainant in relation to the complaint.

(5) The protection conferred on an online content host by subsection (2) does not apply if the host does not provide an easily accessible mechanism that enables a user to contact the host about specific content as provided in subsection (3).

(6) Nothing in subsection (2) affects—

(a) section 211 of the Criminal Procedure Act 2011; or

(b) section 19 of the Bail Act 2000; or

(c) copyright liability, or any proceedings, under the Copyright Act 1994; or

(d) any enactment that expressly overrides subsection (2).

[163] The explanatory note to the bar-1 Bill set out the General Policy Statement regarding the "Safe harbour provisions":[84]

Safe harbour provisions

This Bill contains a safe harbour provision stating that a content host is not liable for content they host, unless the content host has received a notice of complaint about the content, and fails to take reasonable steps to remove it.

[84] Harmful Digital Communications Bill 2013 (168-2) (explanatory note) at 5.

> The protection provided by the safe harbour does not apply if—
>
> > a content host does not provide an easily accessible mechanism for users to report such content to them:
> >
> > the provision is inconsistent with the express provisions of another enactment relating to the responsibilities of an online content host for content posted by others.

[164] On 14 November 2013 the first reading of the Harmful Digital Communications Bill took place. Hansard records that the Hon. Chester Burrows made the following comments on the safe harbour provisions:[85]

> The final part of the bill that I would like to discuss is the safe harbour provision. This provision clarifies the law relating to websites and other content hosts, and provides people with an easy, accessible, and direct way to remove harmful content. A content host could be any number of people – blog sites or organisations, including the likes of Facebook, Twitter, Vodafone, and TradeMe. Most of our legislation was written before the advent of the internet and is not always clear about when a content host is liable for the contents posted by its users. Some recent court decisions suggested that the content host could be liable for unlawful content that they do not even know about. Given the ease and speed of posting content online and the volumes of information involved, the majority of content hosts cannot actually read and vet all content before it is published.
>
> The safe harbour operates via a notice and take-down regime. Broadly speaking, an online content host will not be liable for unlawful content that another person has posted on the website unless they are notified that the content is unlawful and fail to take reasonable steps to remove the content. The basic principles behind this safe harbour are, as with the rest of the bill, personal responsibility and fairness. The author of a harmful or illegal communication should be responsible for it. *Content hosts should not be liable for things they have no knowledge of.*
>
> (Emphasis added)

[165] The Departmental Report for the Justice and Electoral Committee (the Departmental Report) was published in April 2014. The Departmental Report specifically discussed the application of defamation law to the bar-1 Bill while explaining the purpose of the safe harbour provisions established by cl 20:

> 281. With a small number of exceptions, the law is not sufficiently clear about when an online content host can be held liable for the content posted by others on their website. For example, a recent decision[86] in the context of defamation law indicates that a website host who has the ability to assume editorial control over a site may be liable for users' content even where they are not aware of

[85] (14 November 2013) 694 NZPD 14747.
[86] *Wishart v Murray* [2013] NZHC 540.

> that content, but "ought to have known" about content that is likely to be defamatory.
>
> 282. The safe harbour provision in clause 20 is intended to clarify that online content hosts only become liable upon receiving notice of illegal content. It operates via a **"notice-takedown"** procedure and specifies that an online content host is not liable for specific content it hosts unless it:
>
> > 282.1. receives a notice of complaint about specific content it hosts that was posted by another person; and
> >
> > 282.2. does not take reasonable steps as soon as is reasonably practicable to remove or disable access to the specific content.
>
> 283. This provision will apply broadly to all forms of liability except for the following enactments which already set out the liability of an online content host:
>
> > 283.1. copyright liability or proceedings under the Copyright Act 1994; and
> >
> > 283.2. liability for breaching name suppression under the Criminal Procedure Act 2011 and the Bail Act 2000.

[166] The Departmental Report clarified that cl 19 of the bar-1 Bill, which created a new offence of posting a digital communication with intent to cause harm, did not criminalise defamation. Clause 19 was instead concerned with the deliberate infliction of harm as opposed to harm to a person's reputation in defamation cases.

[167] Opponents of the safe harbour provisions submitted that it would unintentionally infringe on freedom of expression by incentivising content hosts to remove any reported content to obtain safe harbour protection. One opponent, Tech Liberty considered the safe harbour provisions should be removed and there should be a review of the Defamation Act 1992 to solve the problem of online content host liability. The Report noted that a review of the Defamation Act was beyond the scope of the Bill.

[168] Interestingly, Mr Wishart made Select Committee submissions, submitting the "ought to have known" test for liability was sufficient. The Report noted in response to Mr Wishart's submissions that:[87]

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[87] Ministry of Justice *Harmful Digital Communications Bill: Departmental Report for the Justice and Electoral Committee* (April 2014) at 55.

> … most online content hosts do not have the resources or capability to monitor all content, let alone identify which of that content is illegal. Most online content hosts therefore are reliant on reporting by users for such content. We therefore consider that the "ought to have known" test is not sufficiently clear in the online context.

[169] The Report acknowledged the safe harbour provisions required amendments, including to address an incentive on hosts to remove any content complained of.

[170] On 19 September 2014, the Court of Appeal's decision in *Murray* was released, overturning the decision of the High Court and confirming the "actual knowledge" test is the only test which should be applied in New Zealand, acknowledging the bar-1 Bill was consistent this approach.[88] Reference was made to the Bill in the judgment as follows:[89]

> If passed in its current form, the Bill would impose liability on an online content host for the context of a digital communication posted by another person, but only if the host has been notified and fails to remove or disable access to the communication within a reasonable time. He argued that the actual knowledge test would be consistent with this approach. We agree.

[171] On 24 March 2015 the second reading of the Harmful Digital Communications Bill took place. The Hon. Amy Adams acknowledged that "some issues have also been raised in relation to the operation of a "safe harbour" provision, and I have requested further advice on these concerns".[90] Additionally, the Hon. Clare Curran opined the "the workability of the "safe harbour" provision is significantly of concern".[91]

[172] select committee report on the amended Harmful Digital Communications Bill (the bar-2 Bill) set out that:[92]

> **Safe harbour**
>
> We have considered carefully the submissions on the safe harbour provisions of the bill, and recommend amending clause 20 to provide for a timely "notice-notice-takedown" approach (a regime of notices followed by enforced takedown) suitable for the wide range of online content hosts. In particular, we consider hours to be the best measure of time in an online environment.

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[88] *Murray v Wishart*, above n 27, at [144]-[145].
[89] *Murray v Wishart*, above n 27, at [145].
[90] (24 March 2015) 704 NZPD 2538.
[91] (24 March 2015) 704 NZPD 2540.
[92] Harmful Digital Communications Bill 2013 (168-2) (select committee report) at 5.

> We recommend inserting subclause 20(3) to require an online content host who had received a notice of complaint about specific content to notify the author of the content as soon as practicable but no later than 48 hours.
>
> New subclause 20(3)(a)(ii) would allow the author to respond to the online content host within 48 hours with a counter-notice. If the author agreed with the complaint or did not respond, the content would have to be removed or public access to it disabled. If the author responded within 48 hours and did not agree with the complaint, the online content host would have to leave the content in place. New subclause 20(3)(d)(i) would require an online content host to notify the complainant of the action that had been taken as soon as reasonably practicable and bring to their attention other remedies. New provisions would require the complainant and the author to indicate in their notices whether they consented to their identity details being passed to the other person.
>
> While we have struggled to find a perfect solution, we consider this proposal strikes a balance between ensuring the quick removal of harmful or illegal content; ensuring unpopular content which was nevertheless not illegal or harmful was not unilaterally removed; preventing frivolous, groundless or trivial complaints; clarifying the liability and obligations of online content hosts; and providing a practical and affordable procedure for everyone involved.

[173] The bar-2 Bill separated cl 20 into two separate clauses. Clause 20 outlined the liability of online content hosts and set out a notice and counter-notice takedown method, while cl 20A provided for "Further provisions relating to liability of online content host".

[174] On 23 June 2015 an amendment to the Bill was made by a Supplementary Order Paper (SOP). One of the major amendments in the SOP was to the safe harbour provisions. As Hon. Amy Adams explained:[93]

> The other change, again, is really a clarification, but I think a very useful one, around the safe harbour provisions. There was concern expressed from some quarters that in fact the safe harbour provision – which I want to acknowledge the select committee for because I know it worked very hard to make sure it had that balance right between giving the poster of the information enough time to say: "Well, actually, no, there's nothing wrong with that. I should be allowed to communicate in that way.", and, equally, not leaving it so long that revictimisation occurs. The select committee settled on 48 hours being the appropriate period of time, and I certainly did not want to interfere with that because I think it went through a very good, robust process. But we did want to make it absolutely explicit that there was nothing in that that in any way prevented any content host acting under their own terms and conditions, or their own views of what was appropriate for them as a content host, to either take the information down immediately—if that was what they would do today if someone complained—if they thought that was appropriate, or,

[93] (23 June 2015) 706 NZPD 4650-4651.

> equally, not to take it down at all. So if someone complains on the very trivial basis of saying: "Well, someone's put up a photo of me and I've got my eyes shut, and I don't like it." – who knows – and there is some triviality, it is absolutely open to the content host to say: "Well, look, I'm not taking any action on that. That's a nonsense", as they would now.
>
> So I think it is important that the bill is absolutely clear that they have the option to act immediately and remove the post, and that they have the option to take no action if that is appropriate. But if they want to follow the safe harbour provision in the bill, then that is very clearly set out, and, as I have said, I think that is a robust position in terms of where the select committee has got to.
>
> … I am certainly looking forward to this bill passing and becoming law so that we can say to New Zealanders that they do have an avenue available to them for real, effective remedy when they are unfairly attacked, demonised, and victimised on the internet in a way that causes serious harm. That is not currently the case. To suggest to a young person that they can go off and get an injunction or a defamation remedy is simply a nonsense. This is real, practical assistance, and I am looking forward to it passing.

[175] Following the SOP the safe harbour provisions were again separated into three separate sections, being clauses 20 (liability for online content hosts for content posted by user), 20A (process for obtaining protection against liability for specific content) and 20B (further provisions related to section 20A).

[176] On 24 June 2015 the third reading for the Harmful Digital Communications Bill began. The Hon Jacqui Dean made the following comments on the final version of the Bill:[94]

> I just want to finish by talking briefly about the safe harbour provision. So a content host could be anyone these days: anybody who has a blog, Facebook, Twitter, Vodafone. Most of our legislation was written before the internet was a consideration, so it is not always clear when a content host is liable for the content posted by its users. So we are proposing a safe harbour. *What that means is that a host will not be able to be taken to court for comments put on their website unless they have been notified by the complainant that the comments are in breach of the law and they then do not follow the process set out in the bill.* There have been many thoughtful contributions on this Harmful Digital Communications Bill. I do acknowledge that it is a legislative response that some view as impinging on freedom of speech and perhaps might be too heavy-handed. What I would say is that the protection of our young people in particular—their protection from cyber-bullying—is so very important that I think this bill is a very good step, and I commend it to the House.
>
> (emphasis added)

[94] (25 June 2015) 706 NZPD 4853.

[177] Also, during the third reading, the Hon. Chris Bishop (who sat on the Select Committee which had reviewed the Bill) discussed how the Harmful Digital Communications Bill provides an alternative redress as opposed to the existing remedies available through, for example, defamation:[95]

> Well, the Law Commission did a review, and it concluded that, basically, the existing remedies that we have in our law, like defamation, harassment, and vilification, do not effectively address the potential for harm from these new technologies. So we have a lacuna in the law. There is an argument, I think – and it has been advanced by some people – that we should just rely on defamation law and that we should just rely on the existing civil or tortious remedies in our law. I think, with respect – and I think Tracey Martin pointed this out, and others have as well – that it is a little far-fetched to expect that we could rely on a 13-year-old or even a 16-year-old to rely on defamation law to enforce their rights against those who seek to violate them. So I think that is a little bit far-fetched, and I think the Law Commission went through that and came to that conclusion as well.

[178] Today the safe harbour provisions are found in ss 23, 24 and 25 of the HDCA. They are in full:

> **23 Liability of online content host for content posted by user**
>
> (1) Section provides protection for an online content host in respect of any specific content of a digital communication posted by a person and hosted by the online content host if the host follows the process in that section.
>
> (2) The fact that an online content host does not take advantage of section 24 does not of itself create any civil or criminal liability for hosting the specific content.
>
> (3) Section 24 does not affect any rights or defences otherwise available to the online content host in respect of the hosting of the specific content (for example, the removal of content or the creation, exercise, or taking advantage of any contractual indemnity or immunity or any other term of use).
>
> (4) This section is subject to section 25(5).
>
> **24 Process for obtaining protection against liability for specific content**
>
> (1) No civil or criminal proceedings may be brought against an online content host in respect of the content complained of (the *specific content*) if the online content host—

[95] (30 June 2015) 706 NZPD 4859.

(a) receives a notice of complaint about the specific content; and

(b) complies with subsection (2).

(2) The requirements of this subsection are that—

Host to notify author of complaint

(a) the online content host must, as soon as practicable but no later than 48 hours after receiving a notice of complaint,—

(i) provide the author of the specific content with a copy of the notice of complaint, altered to conceal personal information that identifies the complainant if the host has received confirmation that the complainant does not consent to the host providing that information to the author; and

(ii) notify the author that the author may submit a counter-notice to the host within 48 hours after receiving that notification:

(b) if the host is unable to contact the author (for example, because the identity of the author is unknown) after taking reasonable steps to do so, the host must take down or disable the specific content as soon as practicable after taking those steps but no later than 48 hours after receiving a notice of complaint:

Author's counter-notice consenting to removal of content

(c) if the author submits a valid counter-notice no later than 48 hours after receiving the host's notification under paragraph (a) in which the author consents to the removal of the specific content, the host must take down or disable the specific content as soon as practicable after receiving that counter-notice:

Author's counter-notice refusing consent to removal of content

(d) if the author submits a valid counter-notice no later than 48 hours after receiving the host's notification under paragraph (a) in which the author refuses to consent to the removal of the specific content, the host must leave the specific content in place and, as soon as practicable after receiving that counter-notice,—

(i) notify the complainant of the author's decision; and

(ii) if the author consents, provide the complainant with personal information that identifies the author:

Author failing to submit valid counter-notice

(e) if the author does not submit a valid counter-notice in accordance with this subsection (whether by failing to submit a counter-notice or by submitting an invalid counter-notice), the host must take down or disable the specific content as soon as practicable but no later than 48 hours after notifying the author under paragraph (a).

(3) A notice of complaint must—

(a) state the complainant's name and a telephone number, a physical address, and an email address for the complainant; and

(b) state the specific content, and explain why the complainant considers that the specific content—

(i) is unlawful; or

(ii) breaches 1 or more communication principles and has caused harm; and

(c) sufficiently enable the specific content to be readily located; and

(d) state whether the complainant consents to personal information that identifies the complainant being released to the author; and

(e) contain any other information that the complainant considers relevant.

(4) A counter-notice must state—

(a) the author's name and a telephone phone number, a physical address, and an email address for the author; and

(b) whether the author consents to personal information that identifies the author being released to the complainant; and

(c) whether the author consents to the removal of the specific content.

(5) An online content host must not disclose any personal information about the complainant or author under information privacy principle 11(1)(e)(iv) set out in section 22 of the Privacy Act 2020, except by order of a District Court Judge or a High Court Judge made on an application under this subsection.

(6) Nothing in subsection (5) affects the application of any other provision in the Privacy Act 2020.

(7) This section is subject to section 25(5).

> **25 Further provisions related to section 24**
>
> (1) The Approved Agency may lodge a notice of complaint under section 24 on behalf of a complainant and provide advice and assistance to the complainant in relation to the complaint.
>
> (2) The protection conferred on an online content host by section 24 does not apply if the host does not provide an easily accessible mechanism that enables a user to contact the host about specific content in the manner provided in that section.
>
> (3) The protection conferred on an online content host by section does not apply if the person who provides the specific content does so on behalf, or at the direction, of the online content host.
>
> (4) Nothing in section 23 or 24 or this section affects—
>
> …
>
> (d) any enactment that expressly overrides section 24.
>
> (5) Nothing in section 23 or 24 or this section limits the right of an individual to injunctive relief in relation to the content of a digital communication posted by another person and hosted by the online content host.

[179] Reviewing the history of the HDCA from its inception to its current form and based on the comments made by various Members of Parliament,[96] it is clear the purpose of the safe harbour provisions has remained the same throughout. Namely:

(a) firstly, to provide immunity for an online content host;

(b) secondly, reinforcing the requirement an online host should have "actual knowledge" and not "ought to know" knowledge;

(c) thirdly, to ensure liability would not be imposed if the online content host assessed the complaint did not need to be removed based on the criteria set out in the HDCA;[97]

(d) fourthly, an online content host was not compelled to engage in the process and by choosing not to, liability would not be assumed; and

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[96] Which I have deliberately set out in full to understand the intent of Parliament when these provisions were discussed.

[97] See the Communication Principles in s 6; or what was 'trivial' as referred to by Hon Amy Adams (25 June 2015) 706 NZPD 4853.

(e) finally, the right to "freedom of expression" was to be upheld.

[180] To this end, it is clear the HDCA provisions are consistent with the Court of Appeal's findings in *Murray*.[98]

[181] What is also clear is although there is overlap between the tort of defamation and remedies available under the HDCA, they are however distinct. The wording in s 23(2) and (3) makes this clear. An online content host may choose to invoke and rely on the complaints procedure to avoid liability, but liability will not be imposed if the process is not followed. It may instead rely on *Murray* in terms of having "actual knowledge" and acting reasonably, or it may rely on its own contractual immunities.

[182] However, if the online content host does choose the safe harbour provisions, it must however follow the provisions of s 24. This is made clear by s 23(1) of the HDCA. The issue then is whether Sky Media has followed the process and is entitled to protection.

Sky Media Arguments

[183] Sky Media submits it falls squarely within the definition of "Online Content Host" as set out in the "Interpretation" provisions of the HDCA.[99] No real difficulty is posed by this issue. I agree Sky Media is an "online content host" for the purposes of the Act.

[184] Mr Judd next submits the effect of s 24(2)(a) to (c) means 96 hours may pass if the process is strictly followed. What that means is the post may remain online for this period even though it might be defamatory, but the online host still gets immunity. Again, I see no difficulty with Mr Judd's interpretation of these sections.

[185] He further submits because the legislation does not prescribe forms for the notices under the s 24 procedure, a purposive approach to interpreting s 24 is warranted. "Substance" rather than the "form" should be applied. To this end he

[98] *Murray v Wishart*, above n 27.
[99] Harmful Digital Communications Act 2015, s 4.

points out regulation 19 of the Sky Media forum management regulations contains complaints procedure which he submits follow the HDCA process and which Sky Media followed. He also notes that Ms Li confirmed the forum is set up so every comment on a user's post is notified to the post's author. As such when the posts were removed or placed under investigation Ms Hu would have been notified as required by s 24(2).

[186] Finally, Mr Judd submits Ms Qi's failure to comply with Ms Li's request for more information did not assist Sky Media in terms of its investigation. More information was needed for Ms Qi to comply with s 24(3). However, even without this information the second post was blocked on 21 July at 16:27 and removed from public viewing.

Ms Qi's Arguments

[187] Mr Romanos starts with an analysis of s 25. Firstly, he submits Sky Media is not entitled to invoke s 24 as it does not have, an "easily accessible mechanism" which enables a user to contact the host about specific content as required by s 25(2). He says Sky Media's regulations are located in the "Admin section" of the forum accessible only to subscribers. A complainant will need to go through the registration process to become a subscriber in order to access this section. The regulations then were not located in a section which was obvious and accessible. He suggests a "report" button that links to a form which sets out the process under s 24(3) for a complaint to be laid is needed.[100]

[188] Mr Romanos then refers to the evidence of Ms Qi which outlined the steps she took to lay her complaints and the frustration she experienced both in terms of having to go through the web managers and then finally through to Ms Li. Mr Romanos says this evidence clearly establishes Sky Media's complaint process is not "easily accessible".

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[100] He gives as an example a link used by the Media Council to a complaints form: https://www.mediacouncil.org.nz/complaints.

[189] Secondly, Mr Romanos submits even if the Court accepts Sky Media complied with s 25(2), it did not follow the requirements of s 24 and by some margin. He says these requirements must be strictly followed if the online content host is to obtain the protection under s 24.[101] He says this is obvious given Sky Media only chose to call Ms Li,[102] suggesting it is unlikely anyone at Sky Media had even heard of the HDCA.

[190] His submission regarding Sky Media's non-compliance with s 24(2) is divided into two parts. The first relates to Ms Qi not filing a valid complaint to allow Sky Media to invoke the s 24(2) process. The second sets out that if a valid complaint was received, then the process under s 24(2) was not followed by Sky Media.

[191] Mr Romanos submits a valid complaint is one which sets out all of the details required under s 24(3). This detail must be received before the online host is required to proceed down the pathway prescribed by s 24(2). Ms Qi only dealt with PJF in respect of the first post. Ms Qi did not supply any of the details required by s 24(3) other than her name and that she wanted the post removed.

[192] For the second post, although Ms Qi messaged and emailed Sky Media, he says the detail prescribed under s 24 (3) was not provided.

[193] Mr Romanos submits if Sky Media wished to rely on the protection of s 24 it was incumbent on Sky Media to obtain the information. It failed to do this meaning the s 24(2) process was never triggered. He draws in support of this submission the observations of Alex Latu[103] over what happens if a valid complaint is not filed. Mr Latu suggests the failure to provide a valid complaint vitiates the process. It may be a "complainant" may deliberately not lodge a valid complaint to ensure the host does not get immunity. Mr Romanos submits the onus then is on Sky Media to direct Ms Qi to provide the requisite information, which it failed to do.

[194] The second part assumes a valid notice of complaint was submitted. Having received the messages and email from Ms Qi, Mr Romanos submits there is no

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[101] Harmful Digital Communications Act 2015, s 24(1).
[102] Only Ms Li was called as a witness notwithstanding other Sky Media officers had filed affidavit evidence.
[103] Alex Latu "Pages, posts and publication", above n 34, at 226–227.

evidence Sky Media provided a copy of the complaint to Ms Hu and, what her response was in terms of s 24(2)(c), (d) or (e). No evidence was produced of any communications between Sky Media and Ms Hu at all and there is no ability to confirm whether the 48 hour timeframe or 96 hour timeframe was ever complied with.

[195] Mr Romanos also rejects any suggestion the blocking of the second post by Sky Media on 19 July acted as notice to Ms Hu in compliance with s 24(2)(a). He says there is no evidence she received any messaging and even if she did, it did not comply with what needed to be advised to Ms Hu in terms of a counter-notice under s 24(2)(a)(ii).

Discussion

[196] The comments made by the various Members of Parliament make it clear the principal intention of the HDCA is to protect the victims of online abuse. Where victims need to remove online content, Parliament was concerned the HDCA should provide an easy and accessible method to make contact with a online content host and complain.

[197] Counsel submissions proceed on the basis an onus is on either the complainant or the online content host before the protection mechanisms are invoked. In other words, each party has submitted the onus is on the other to ensure sufficient information is provided before a complaint can properly proceed.

[198] In my view, if the primary intent of the provisions is to ensure victims of online (defamatory) abuse are able to complain through an easily accessible mechanism, then a sufficiently compliant complaint notice which fulfils the information needed under s 24(3) would be sufficient to invoke the process under s 24(2). At that point the online content host has an election to either proceed with the s 24(2) process or not. Arguably the onus then is on the person who most wants the HDCA to apply. I return to this issue shortly as I firstly deal with whether Sky Media had an easily accessible mechanism.

[199] In my view it did not. Such a mechanism should have been readily available on its forum pages, preferably being a link button on its front pages.

[200] The link would take a reader to the process describing how a complaint is to be made. The link and complaint process would need to available for all members of the public. If the complaint process intends to follow the HDCA provisions, then it needs to record what the HDCA process is and then follow it precisely. This is what is clearly expressed in s 23(1) when it provides that for an online content host to get the benefit of s 24, the host must follow "the process in that section".

[201] Sky Media's forum regulations were not easily accessible. As constructed and where they were located were difficult to access. Ms Qi's own perseverance and continued questioning of the web managers only got her to the point of how an email complaint could be sent. In the circumstances I find, notwithstanding Ms Qi did manage to send an email complaint on 19 July to Ms Li, an easily accessible mechanism was not available to invoke the protection under s 24 for Sky Media.

[202] In reaching this finding I emphasise Sky Media and, indeed any online content host, can have its own independent complaint process, accessed in any way by the public and/or subscribers, and still avoid liability if elects not to rely on s 24(2) or, once it has actual knowledge of a defamatory post, acts reasonably to remove it. However, in this instance Sky Media has not provided the mechanism needed to invoke the safe harbour provisions and therefore, it does not get the benefit of s 24(1).

[203] If I am wrong in my conclusions above and s 25(2) was satisfied, then I would still find compliance with s 24(2) did not occur. I start with Ms Qi's email to Ms Li:

> On Mon, 19 Jul 2021 at 11:05, Chen wrote:
>
> Hi Admin,
>
> I am writing to request to Archive a Defamation/Cyber-bullying/Breach of Privacy Post: http://bbs.skykiwi.com/forum.php?mod=viewthread&tid=4042023&extra=page%3D1and ban the anonymous poster or any potential posters to repost any relevant information.
>
> In the past three days, I chose the fastest way, contacted all the online forum managers of FML, contacted 093092288, no results, and finally I was led here. My family and I have suffered from serious emotional distress and serious negative impacts on our work and personal life from the post and yet it still has not been archived from public view.

> The first post was posted on the 13th July 2021, and I found out about the post on the 15th July. I contacted all five forum managers and one removed the post from the forum on the 16th July. The second post was posted at midnight 17th July, pointing to me and my family again. This time, the managers either refused to remove and archive the post from the forum, or simply ignored my messages. I was told that the reason the post cannot be removed this time is that the second post did not reveal any personal information, as if the second post were completely unrelated to the first one, though it mentioned Miss Q over and over again?
>
> I now request again to archive the post from the public and save the information within for evidence purposes. Please do let me know what more information that I need to provide to proceed with this request. Please also feel free to contact me, Chen: 0211033836 (please leave a voice message if I am in a meeting).
>
> Please reply to me as soon as possible.
>
> Regards, Chen Qi

[204] Sky Media says it wanted more information from Ms Qi, presumably to then proceed down the s 24 pathway. But if there was a genuine lack of information, this does not assist Sky Media. If Sky Media wanted to rely on s 24 then it needed to get the information it was allegedly lacking. As Alex Latu observed, a "complainant" may technically not wish to engage with the process (but still give notice of a complaint) just to ensure the online content host cannot receive immunity.

[205] It was of course open to Sky Media to make it clear to Ms Qi what information was lacking. It did not. It was also open to Sky Media to advise Ms Qi whilst it still needed further information, it would, in the meantime, treat the email as a complaint for the purposes of s 24(3) and would be proceeding with the steps under s 24(2). It did not do this either.[104]

[206] In my view Sky Media did not need any more information from Ms Qi for a process under s 24(2) to commence. Time commences once a complaint which complies with s 24(3) is received. I do not consider Ms Qi's messaging with PJF early on 18 July complies with s 24(3) and therefore time had not commenced.[105] However, her email of 19 July, in my view does comply.

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[104] At this point, if an online content host elects not to engage with the s 24(2) process, arguably it will still have "actual knowledge" of a potentially defamatory post. It will need to make its intentions clear and act quickly to avoid liability as a publisher.

[105] Although it was the time Sky Media had actual knowledge of the post and time has started to run for the purposes of *Murray v Wishart.*

[207] The only items missing from the s 24(3) requirements are a physical address and whether Ms Qi consented to the release of personal information to Ms Hu. I do not consider the absence of either is fatal to the compliance with s 24(3) as the information which was provided would have been sufficient for Sky Media to proceed with s 24(2)(a). Any personal information relating to Ms Qi can be concealed (although based on my findings Ms Hu knew exactly who she was talking about and where she was located).

[208] If the s 24(2) process had been commenced, then I accept Mr Romanos submission Sky Media needed to provide evidence it attempted to contact Ms Hu. It failed to provide this evidence which would suggest it did not attempt to contact Ms Hu. In making this finding I reject Sky Media's suggestion the blocking of the post would have been notified to Ms Hu and therefore, implicitly, compliance with s 24(2)(a)(i) and (ii) was met. Compliance can only occur where the process is followed which meant notification spelling out what is required to happen under s 24(2)(a)(i) and (ii) was needed. This process was not followed, and, in Mr Romanos words, by some margin.

[209] What all of this meant, and, assuming a counternotice was not received from Ms Hu, Sky Media needed to take down or disable the specific content no later than 48 hours after receiving a notice of complaint.[106] Within 48 hours Sky Media had blocked any further comments, made some amendments and notified users the post was under investigation. However, it did not take down or disable the post to the extent no person could see the amended post. Compliance then with s 24(2)(b) did not occur. Sky Media to remove the post completely, as I have set out in [145] above.

[210] In the circumstances, for the reasons given, Sky Media's defence based on the HDCA must fail.

[106] Harmful Digital Communications Act 2015, s 24(2)(b).

No Damage to Reputation

[211] A theory strongly promoted by Sky Media throughout the hearing is that because Ms Qi, a recent immigrant to New Zealand who worked in a call centre which had 6-10 employees, had little public reputation which could be damaged. Accepting Ms Qi might have felt "harassed" by Ms Hu, the behaviour of Ms Hu was no more than malicious "low level" office gossip and "no real or substantial tort occurred" which would "justify the intervention of the Court". No evidence was given by Ms Qi as to how her reputation was harmed in any way. Whilst accepting she may have had "hurt feelings" defamation deals with reputational damage.

[212] Under this heading Sky Media repeats its assertion that despite not being able to rely on the defence of "truth" per se, there does appears to be some justification in Ms Hu's allegations Ms Qi was "flirting with and having affairs with men in the office" (for immigration benefits) because Ms Qi admitted she had an "affair" with her work colleague, Mr Kim. This was while she was in a relationship with her partner Mr Chan. Sky Media also points to an issue which arose in the office when Ms Qi laid a complaint over false promises of promotion with another male work colleague.

[213] Sky Media also suggests that Ms Qi's active engagement on the forum was not consistent with any alleged damage to her reputation and many of the posts supported her rather than ridiculed her.

[214] In the end, Sky Media says the posts were simply an extension of the "trivial gossip" which started in Sitel's offices and then ended up on a chat forum site intended for "trivia" which Ms Qi herself engaged in. To this end Sky Media relies on the passages of Tugendhat J in *Thornton v Telegraph Media Group Ltd* who observed:[107]

> whatever definition of "defamatory" is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims.

[215] Mr Judd also points out our Court of Appeal has made it clear more than minor harm to a claimant's reputation must be made out.[108] In further support of this

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[107] *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB); [2011] 1 WLR 1985 at [89].
[108] *Craig v Slater* [2020] NZCA 305 at [44]-[45].

principle he refers to *Opai v Culpan*[109] where Katz J cites from *Lachaux v Independent Print Ltd* the following:[110]

> … the common law had developed a twin-track approach to the elimination of trivial defamation claims: they might fail to meet the threshold of seriousness identified in *Thornton*, and be struck out on the grounds that the statement complained of was not defamatory; or they might be struck out as an abuse of process pursuant to *Jameel.* Inherent in the *Jameel* requirement of a real and substantial tort, but absent from the *Thornton* test, is an assessment of all the circumstances including, and in particular, the gravity *in fact* of the reputational harm that a publication has caused or is likely to cause.

[216] Finally, Mr Judd draws a comparison with the facts set out in *X v Attorney-General (No. 2).*[111] X had been the subject of serious sexual assaults whilst in the Royal New Zealand Navy. Despite this the Navy used photos of her in promotional material which X claimed was defamatory of her. Her claim was struck out in the High Court because the Court found only small number of people knew about the assaults and could link her to the material. Mr Judd submits only a small number of people (i.e. her former Sitel work colleagues) could link her to the posts and, they already knew the gossip.

Discussion

[217] Sky Media's submissions are based on the theory a serious harm threshold must be met before damages should be awarded. This may occur even though prima facie liability for defamation can be established. Support for this position was discussed in *CPA Australia Ltd v The New Zealand Institute of Chartered Accountants* where the High Court held the United Kingdom approach (*Thornton*) should apply in New Zealand.[112]

[218] The difficulty for Sky Media with this argument is *Thornton* does not represent the law in New Zealand. The law is set out in *Craig v Slater*[113] where the Court of

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[109] *Opai v Culpan (No. 2)* [2016] NZHC 3004 at [74] – [77]; and *Opai v Culpan* [2017] NZAR 1142 (HC). See also *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946 at [40] and [55].
[110] *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), [2016] QB 402 at [50].
[111] *X v Attorney-General (No. 2)* [2017] NZAR 1365 (HC).
[112] *CPA Australia Ltd v The New Zealand Institute of Chartered Accountants* [2015] NZHC 1854.
[113] *Craig v Slater*, above n 108, at [44] – [45] (footnotes omitted).

Appeal determined the threshold is "more than minor harm", and not a serious harm threshold. The Court stated:

> [44] For a meaning to be defamatory, it must tend to affect the claimant's reputation adversely. And it must do so in more than a minor way. That qualification was contended for by Mr Miles, for the appellant. Mr Akel queried it. It reflects the serious harm threshold developed in United Kingdom courts, and since legislated for there. The High Court in New Zealand has approved and adopted that qualification, but it has not yet been considered by this Court.
>
> [45] We approve adoption of the "more than minor" harm requirement in New Zealand common law, for three reasons. The first is that damage to reputation is an essential element of the cause of action of defamation, for the reasons Tugendhat J canvassed in *Thornton v Telegraph Media Group Ltd.* The fact that damage is rebuttably presumed (in most cases) does not alter the fact that damage to reputational credit remains an element of the tort. Principle and proof should not be confused. Secondly, a threshold of this kind is a necessary consequence of the right to freedom of expression protected by s 14 of the New Zealand Bill of Rights Act 1990. We agree with the reasoning of Palmer J in *Sellman v Slater* on that point. Thirdly, we consider the requisite threshold standard – "more than minor harm" – was correctly identified in the same decision and is to be preferred to a higher standard based on the word serious.

[219] The above position was recently reinforced by the Court of Appeal in *Television New Zealand Limited v Talley's Group Limited.*[114] TVNZ sought to reset the threshold test of serious harm to align with the United Kingdom authorities, and *Thornton* in particular. The argument for this is in order to balance the rights for freedom of expression (especially in relation to media) and harm caused to a plaintiff, the lowest threshold should be substantial harm. Anything less would mean trivial claims would go to trial resulting in a "chilling" effect on freedom of expression rights.[115]

[220] After citing the passage in *Craig v Slater* above, the Court held:[116]

> [26] We accept that the formulation of the test is important. We also accept that there was little analysis provided in *Craig v Slater* explaining why the "more than minor" harm threshold was preferable to the "substantial" harm threshold, or explaining any materiality of the different formulations in real terms. The various potential verbal formulations overlap and exist on a continuum, and they may become material. Neither was there an assessment

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[114] *Television New Zealand Ltd v Talley's Group Ltd* [2024] NZCA 502.
[115] Above at [14]. Most of these cases are strike out claims.
[116] At [26] - [27] (footnotes omitted).

> in *Craig v Slater* of the significance of the "more than minor" harm threshold being rebuttable.
>
> [27] But *Craig v Slater* is nevertheless a recent decision of this Court upholding the rebuttable "more than minor" harm threshold as an element of the tort. This Court is ordinarily bound by its earlier decisions and will only review earlier decisions in rare cases. That principle was restated by a full Court following the establishment of the Supreme Court in *R v Chilton*. Such an approach is necessary for certainty and stability in the law. None of the well-recognised reasons for departing from an earlier decision arise in the present case. For that reason, we do not think it is open to us to reassess what the test should be. *Craig v Slater* has established it unless the issues are further considered by the Supreme Court.

[221] So, the law as it stands in New Zealand is the harm must be "more than minor" to eliminate trivial cases. "Substantial harm" does not fall into the assessment of the type of harm.

[222] I turn then to considered whether the harm was "more than minor" and not trivial.

[223] Whilst the genesis of Ms Hu's posts and the content discussed may have started in a small office, it did not end there. If it had, I would accept, given the small number of people in the office, the harm would be unlikely to have exceeded the "more than minor" threshold.

[224] The two posts however were read almost over 24,000 times. The second post almost 10,000 times. 470 comments were made by users for both posts. 277 for the first post and 193 for the second.[117]

[225] I have found Ms Qi was identified in the posts. I have also found the words were defamatory. A short summary of what the words meant were Ms Qi was a promiscuous woman who was prepared to grant sexual favours to obtain a residential visa. None of this was true. It was an outright lie. The comments made by many users either accepted the lies as being true or, even if they did not, gave users the license to ridicule Ms Qi. Some examples are:

[117] Including Ms Qi's own comments.

Comments on first post

#6 Posted at 19:43:16 on 13/07/2021 (Mayfield)

Council rarely hires Work Visa people. This cleavage woman seems to have got something.

#9 Posted at 19:45:12 on 13/07/2021 (Esipan)

Where is the cleavage photo? Post it now. Let us judge!

#14 Posted at 19:53:28 on 13/07/2021 (bintoo) Replying to comment #10:

If someone has the cleavage to see, let me see.

#15 Posted at 19:55:19 on 13/07/2021 (Bayilaoye [Skykiwi Forum Administrator]) I want to see the screenshots! I want to see the screenshots! Post it. I will pin your post to the top and highlight it!

#17 Posted at 20:09:15 on 13/07/2021 (tudi @-@)

Half an hour passed. Why no cleavage photos yet?

#21 Posted at 20:27:07 on 13/07/2021 (stnz)

(Note: this comment is blocked by the forum manager or administrator, only visible to administrators.) Give me contact information, need fuck her. Waiting online. Please!.....

#30 Posted at 20:52:29 on 13/07/2021 (Anonymous)

Dare not post photos. What a coward. No wonder your husband was screwed by someone else.

#31 Posted at 20:56:16 on 13/07/2021 (lovemyhome)

I wonder how much cleavage she showed…?

#32 Posted at 20:58:08 on 13/07/2021 (nanbianqiudexiong)

Just tell your husband to sleep with her. Why not use her as a free prostitute!

#42 Posted at 00:18:17 on 14/07/2021 (Anonymous)

(Note: this comment is blocked by the forum manager or administrator, only visible to administrators.) Replying to comment #22:

If you want to fuck her, go to Hastings Council and find a woman with the last name Qi. A bus [i.e. a promiscuous woman] like her would love it.

#43 Posted at 06:23:17 on 14/07/2021 (xima laya dashan mao)

(Note: this comment is blocked by the forum manager or administrator, only visible to administrators.)

[Chen Qi's Linkedin profile with photo. This comment was blocked.]

This one?

#44 Posted at 07:09:49 on 14/07/2021 (nzrover) Replying to comment #43:

[You are] king of searching. Applause!

#45 Posted at 07:14:51 on 14/07/2021 (Anonymous) Replying to comment #43:

Wow, what a pretty young lady. Already attracted by the profile photo. Please post the cleavage photo.....

#53 Posted at 08:57:57 on 14/07/2021 (Anonymous)

(Note: this comment is blocked by the forum manager or administrator, only visible to administrators.)

I have decided to move to Hastings now. Could anyone refer me for a job in Hastings District Council?

#71 Posted at 11:45:29 on 14/07/2021 (Mayfield)

(Note: this comment is blocked by the forum manager or administrator, only visible to administrators.) Replying to

#70: Long hair. Earing. Round face. Login: Central Hawke's Bay District Council

#73 Posted at 11:59:38 on 14/07/2021 (ctai010)

(Note: this comment is blocked by the forum manager or administrator, only visible to administrators.) Replying to #71:

Found it. Thanks! Fellow gossipers, follow the lead. You can find it within 1 minute. From the photo, She looks pretty.

#115 Posted at 16:51:57 on 14/07/2021 (Anonymous) Replying to #111:

Interesting, I am here to help her expand her business. Look, so many wolves like her. Each can fuck her and give her some money. She can also make some extra money. But you wolves should use protection; otherwise will get STD. Not worthy. Maybe someone can help her get residency. Then I have done something good. I am returning good for evil

Comments after Second Post

#5 Posted at 2021-7-17 02:06:38 (masterq)

My husband said that he was afraid she might have STD. Highly likely for an easy girl like her! Yo, could your husband pass the STD to you? The risk is really high. Go test your blood!

#50 Posted at 2021-7-17 22:33:31 (not419) Replying to #34:

The beauty in the picture, can you find her, Sticker King? I offer 199 dollars for laojiu to have her for one night.

> #61 Posted at 2021-7-18 00:00:11 (Anonymous)
>
> Miss Q is back? Great! Where is the cleavage photo??? Where is the chat history?? No photo, no screenshot, no credibility at all, what the post opener said has. Just like the post opener said that her husband had no STD, the mere verbal statement cannot be taken as proof. Wait, did the post opener say her husband have no STD??? Seems not!!

[226] Ms Qi's evidence was the posts objectified her, leading to users attempting to track her down and, in her words, "fuck" her.[118]

[227] I agree the posts objectified Ms Qi. It is clear some users thought of Ms Qi in a disrespectful and demeaning way. Sky Media submitted no one was called to testify they saw Ms Qi in any lesser way. The reality is Sky Media's own platform clearly shows what many users thought of her.

[228] In these circumstances I find the posts were not trivial and caused her harm in a more than minor way. Because Ms Qi's reputation has been harmed, she is entitled to compensation. Before I consider the level of damages, I summarise my findings in terms of liability against Ms Hu and Sky Media.

Summary of Findings as to Liability for Defamation

Ms Hu

[229] The claim against Ms Hu has effectively proceeded by way of formal proof.[119]

[230] I am satisfied, based on the evidence I have heard, Ms Hu was the author of the posts and comments which were made. I am also satisfied the words and comments are defamatory. Accordingly, Ms Qi succeeds in her counterclaim against Ms Hu that Ms Hu has defamed her.

Sky Media

[231] I am satisfied, based on the evidence I have heard, Sky Media was a publisher of the defamatory statements. For the reasons I have set out, I dismiss the defences

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[118] She gave evidence at least one user attempted to contact her through her LinkedIn profile.
[119] District Court Rule 15.9.

pleaded by Sky Media. Accordingly, Ms Qi succeeds in her counterclaim against Sky Media.

Damages

[232] Ms Qi seeks the following remedies:

(a) a declaration of defamation under s 24 of the Defamation Act;

(b) general damages (including aggravated damages);

(c) punitive damages;

(d) interest pursuant to ss 9(1)(a)(ii) and 10 of the Interest on Money Claims Act 2016.

[233] Given my findings I make a formal declaration under s 24 of the Defamation Act 1992 that Ms Hu and Sky Media are liable to Ms Qi in defamation. The specific findings of defamation against Ms Hu and Sky Media are found in [227] and [228] above.

[234] Ms Qi is not entitled to solicitor/client costs as of right under s 24(2) of the Defamation Act because she is seeking the above declarations and damages. Instead, she seeks general damages (including for aggravation) of $275,000 against Ms Hu and Sky Media on a joint and several basis. She also seeks punitive damages of $10,000 against Ms Hu.

[235] Sky Media seeks an order that Ms Hu contributes to Sky Media's liability to the extent of a complete indemnity under s 17(1)(c) and (2) of the Law Reform Act 1936 for any damages awarded in favour of Ms Qi against Sky Media. This is on the basis Ms Hu as the author of the posts, assumed complete responsibility for any reputational damage caused to Ms Qi.

[236] There is no real disagreement between counsel as to the general principles regarding damages. Disagreement arises over whether damages should be awarded at

all and/or under what category damages should be awarded based on the conduct of defendant parties.

[237] I briefly state the applicable principles.

[238] General damages are awarded to compensate reputational harm. As the Court of Appeal in *Williams v Craig* noted:[120]

> The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; 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. The extent of publication is also very relevant: a libel published to millions has greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place.

[239] In *Williams v Craig* the Court of Appeal also held a "favourable verdict on liability" is the primary vindication. This is because the result restores a plaintiff's reputation and is a public recognition the statement or statements made were false and defamatory.[121]

[240] In *Broome v Cassell & Co Ltd*[122] Lord Hailsham LC confirmed damages operated firstly, as a vindication the plaintiff to the public and secondly, as consolation for a wrong done. His Lordship added compensation acted as a solatium rather than any attempt to compensate harm measured by way of a monetary sum. Compensation also acknowledges hurt to a plaintiff's feelings, for distress and humiliation in addition to harm to the plaintiff's reputation.[123]

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[120] *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [31]; which endorsed this passage in *John v MGN Limited* [1997] QB 586 (CA) at 607-608; discussed in *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) at 33–38 per Cooke P.

[121] *Williams v Craig*, above n 121, at [32]. See also *Nguyen v Dinh* [2024] NZHC 2358 at [81].

[122] *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) at 1070-1071; citing with approval Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150.

[123] *Fielding v Variety Inc* [1967] 2 QB 841(CA); and *Nguyen v Dinh*, above n 122.

[241] The assessment of quantum is not an easy one. Awards invariably differ. A helpful guide was recently set out by Isac J in *Syed v Malik:*[124]

> (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.
>
> (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.

[242] In terms of the extent and spread of the publication, I respectfully adopt the observations made by Gordon J in *Nguyen v Dinh*:[125]

> [86] … 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 or the plaintiff's professional community.
>
> [87] In assessing the spread of online publications, substantial publication is not presumed but Judges can draw inferences about how far material has spread. This can include inferences based on, for example, the number of followers of an Instagram account, the number of contacts on a WeChat friends list, or the average number of unique hits on an internet site. Overseas jurisdictions have also recognised a "grapevine effect" for online publications as the basis on which general damages may be recovered in defamation actions. The Court of Appeal of England and Wales in *Cairns v Modi* explained the grapevine effect as follows:
>
> > … 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

[124] *Syed v Malik* [2023] NZHC 1676 at [39].
[125] *Nguyen v Dinh*, above n 122, at [86]-[87] (footnotes omitted).

> agreement with the judge, this percolation phenomenon is a legitimate factor to be taken into account in the assessment of damages.

[243] The quantum of damages may be increased (aggravated) if the behaviour of the defendant is such to justify an increase. The learned authors in *Todd on Torts* explain:[126]

> If he or she has been high-handed, malicious or insulting, either in publishing the statement or in the conduct of the trial, this may well cause the plaintiff additional hurt. An unsuccessful plea of truth can sometimes have this effect … Aggravated damages, awarded as compensation for such hurt to feelings must be distinguished from exemplary or punitive damages which are not compensatory at all.

[244] Finally exemplary or punitive damages may also be awarded. They are however exceptional. Again, as the learned authors in *Todd on Torts* explain:[127]

> In exceptional cases exemplary or punitive damages may be awarded against the defendant. Such damages are not compensatory: their purpose is avowedly to punish and deter the defendant and may be awarded where the defendant has "acted in flagrant disregard of the rights of the plaintiff."

Assessment

[245] Mr Romanos suggests the approach to the assessment of damages should be as set out by Clark J in *Solomon v Prater.*[128] I respectfully agree with this approach which considers:

(a) the gravity of the defamation;

(b) the extent of publication;

(c) the harm suffered by the plaintiff; and

(d) whether there were aggravating features to the defendant's conduct to justify an award of aggravated damages.

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[126] Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2019) at [15.6.1(2)]; and see authorities cited therein.
[127] Above at [15.6.1(4)].; and see the authorities cited therein.
[128] *Solomon v Prater* [2021] NZHC 481 at [103].

Gravity

[246] Sky Media maintains its position the comments were little more than office gossip and of a trivial nature. As I have already determined, I do not accept this position.

[247] Mr Romanos submits the statements were "highly defamatory". There was only one conclusion which could be drawn from the words. Ms Qi was highly promiscuous and a homewrecker who effectively prostituted herself to do sexual favours for material (visa related) gain. This resulted in the user comments which were made, which exacerbated the harm caused by the original posts.

[248] In my view the comments are sufficiently serious to harm Ms Qi's reputation. Regrettably however, these types of comments are commonly seen on the internet, especially on social media. Whilst not wishing to diminish the effect of the words, this Court and the Superior Courts are needing to give posts such as these some context in the internet age. As Fitzgerald J recently observed in *Hooper v Gee*:[129]

> [147] I also accept that in today's social media environment, it is unsurprising that some "critique" or "debate" will be in what some might consider to be vulgar and offensive terms. That is evident from the majority of the posts that are the subject of this proceeding. But I also take into account that social media can be and often is an abusive and vicious form of communication. The courts have commented on the disturbing and damaging nature of social media in other contexts where it intersects with the law, such as in relation to the principle of open justice and the law of suppression. In *X v R*, for example, and while recognising the importance of open justice, the Court of Appeal observed that there can be no reasonable expectation that reportage on social media will be fair or accurate, no realistic way of controlling its content or spread, and that it is a communication forum in which persons (and young persons in particular) are vulnerable to trolling, doxing and internet vigilantism. The Court further noted that the statutory principles concerning suppression (drafted some years ago) did not give consideration to the "universality and toxicity of social media's current form", and the even more recent phenomenon of "cancel" or "call-out" culture, in which "social media is weaponised against those deemed to have transgressed the norms of any online group (or mob)". Jagose J made similar observations more recently in *R v AB*, taking judicial notice of "the present vindictive social media climate".
>
> [148] I mention these matters because the fact that certain posts might be just as vulgar or offensive as much of other social media posting does not itself provide an answer to, and indeed obscures, the real issue in this case. That is,

[129] *Hooper v Gee* [2022] NZHC 1854 at [147]-[148] (footnotes omitted).

> whether the manner in which Ms Hooper has gone about her online critique of Ms Gee has crossed the line from critique and debate in a modern social media environment to harmful digital communications.

[249] My conclusion then is the words are defamatory but in context, I would not consider them "highly defamatory" to place them at the level suggested by Mr Romanos.

Extent

[250] The posts were seen by over 20,000 users. Mr Romanos points out the current number of subscribers to the Skykiwi website is over 440,000.[130] The inference then is whilst the spread can be quantified to some extent, in the medium of the internet it is virtually impossible to know how far the posts were truly disseminated.[131]

[251] Support for this submission is found in the recent case of *Tucker v Pere*[132] where Anderson J, in the context of HDCA proceedings, considered the extent to which the spread of material occurred online. In this case Ms Pere was subjected to sustained online abuse after been falsely accused over cruelty to animals. Mr Tucker intended to use the internet (in this case Facebook) to hold Ms Pere accountable, "irrespective of the uncontrollable consequence of that dissemination and the effect of its content".[133]

[252] I accept the extent of the dissemination in this case was wide. However, again it must be seen in context. As Gordon J observed in *Nguyen v Dinh* "substantial publication is not presumed" but inferences can be drawn about how far the material has spread.[134] I take from this Ms Qi is entitled to assert the publication of the posts was wide and obviously viewed by more than just a handful of people.

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[130] https:/em.skykiwi.com/english.html.

[131] As a result of the 'grapevine' effect as explained in *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015 at [27].

[132] *Tucker v Pere* [2024] NZHC 3209. See also *Nguyen v Dinh*, above n 121, at [87] where Gordon J accepted 'Judges can draw inferences about how far material has spread' based on factors such as 'followers of an Instagram account, the number of contacts on a WeChat friends list, or the average number of unique hits on an internet site'.

[133] *Tucker v Pere*, above n 133, at [98].

[134] *Nguyen v Dinh*, above n 122, at [87].

Harm – General

[253] Harm can be seen in different ways. Harm which is quantifiable (loss of employment opportunities for example) through to personal hurt and humiliation, distress and anguish.

[254] Ms Qi and Mr Chen both gave evidence of the latter being suffered by Ms Qi because of the posts. Sky Media maintained the position there was no independent evidence of reputational harm and/or her own posts did not reflect she had personally suffered distress. Sky Media submits Ms Qi's claim she has suffered harm then is somewhat exaggerated.[135]

[255] I reject Sky Media's submissions. The user comments are evidence of what people thought of her, even if some were said in jest or mockery. On the personal harm she suffered, Ms Qi evidence was clear and unequivocal. I found her to be a credible witness and there is no reason to disbelieve she did not suffer considerable distress.

[256] The assessment however of general damages is more than an assessment of the personal impact upon the plaintiff. It is primarily about reputational harm. Mr Romanos has appropriately conceded Ms Qi is not a public figure and cannot point to a quantifiable loss. An assessment of the general damages must therefore proceed on this basis.

Harm – Aggravated

[257] As part of the general damages claim Ms Qi seeks an uplift or increase against both Ms Hu and Sky Media.

[258] Against Ms Hu, Ms Qi points to the conduct of the proceedings by Ms Hu over the content of the pleadings, the pleading of truth, correspondence between counsel suggesting Ms Qi had little chance of success, suggestions of conflicts with counsel

[135] Relying on *Wiremu v Ashby* [2019] NZHC 558 per Osborne J, where little evidence was given about reputational harm and/or personal stress which was suffered and therefore a minor award of $10,000 was made paid as a solatium.

and, her ultimate withdrawal from the proceedings. All these factors, Ms Qi says, made what was an already stressful experience, significantly worse.

[259] As against Sky Media, Ms Qi points to the promotion of the posts ("Heat Topic", "Explosive Revelations"); the comments made by various web managers such as *"Bayilaoye"* who not only promoted the posts[136] but sought to get around the blocking of the forum regulations and letting other users know how to do this;[137] the inconsistency over its conduct in removing the second post by denying any identification and only editing and removing it when external pressures were exerted such as from Newshub; the pleading of truth and even though it accepted at trial this pleading was only pleaded because of Ms Hu's assertions, nonetheless pursued in cross-examination details over the "affair" Ms Qi had even when there was no obvious reason why this issue was raised other than to cause further stress to Ms Qi.

[260] In closing Sky Media maintained the position it had to plead truth given Ms Hu's pleading and responsibly advised the Court the defence of truth, given Ms Hu's non-participation, would fall away. However, the cross examination over the "affair" was a relevant issue given Ms Qi had mentioned the relationship (and complaint about another worker) in answering interrogatories but failed to mention them in her brief of evidence. Mr Judd maintains then it was incumbent on Sky Media to examine on these issues.

[261] My assessment of the conduct of the parties in this litigation is mixture of the hard-fought nature of the proceedings where little is conceded across litigation journey. It would be wrong to interpret this conduct into a significant increase in damages based on aggravation factors. I do accept however, Ms Hu's overall conduct to be bizarre and unjustified. But this conduct is better reflected in an award of punitive damages rather than general damages uplifted because of aggravation.

[262] I did query the relevance for Sky Media to maintain a position of needing to cross examine Ms Qi over the "affair" especially when it was made clear the defence of truth was not being pursued. An element of "backdoor" (as described by

[136] Comment #14 for the first post and comments.
[137] Comments #17 and 18 on the second post.

Mr Romanos) strategy to lessen the reputation of Ms Qi perhaps was at play. I fail to see there was any real justification in pursing this issue.

[263] As far as the remaining conduct of Sky Media is concerned both in terms of the behaviour of its web managers and the delayed removal of the second post, I assess the conduct of *Bayilaoye* as childish and a reflection of Sky Media needing to invest more resource and time into the training of its web managers. I accept some increase is justified for this behaviour. The delay in removing the posts however is something which is covered more in the assessment of general, not aggravated damages.

[264] Standing back, I accept there is an element of aggravation based on the defendants' behaviour but not at the scale submitted by Mr Romanos. The damages then have been assessed primarily on the general damages' principles set out above, but with a small uplift of $5,000 for aggravation.

Quantum of General Damages

[265] Counsel have referred me to a range of cases suggesting, in accordance with the parties' different theories, what the appropriate quantum should be.[138] Added to the list of authorities cited by counsel are recent cases such as *Blomfield v Slater*[139] where $450,000 was awarded and *Murphy v Cai*[140] where Anderson J awarded $20,000. The range of awards made in the various cases cited clearly demonstrates, as noted by Osborne J in *Wiremu,* levels of damages are fact specific and difficult to compare.

[266] In my view the range of damages falls within *Murphy v Cai* at the low end and *Solomon v Prater* at the high end. It does not fall below *Murphy* at $20,000

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[138] Sky Media's closing submissions, at [95]-[102]; citing cases such as *Hunter v Ross* [2019] NZHC 2489 (at range of $24,000 to $40,000 for two plaintiffs and $10,000 each for exemplary damages); and *Wiremu v Ashby* [2019] NZHC 558 (an award of $10,000)
Mr Romanos submissions: paragraphs [193]-[194]; citing cases *Yu v Xia* [2022] NZHC 3243 ($30,000 general damages); *Chiv v Dai* [2023] NZHC 523 ($50,000 general damages); *Solomon v Prater* [2021] NZHC 481 ($100,000 general damages); *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010 ($250,000 ($342,892 in 2024)); *Nguyen v Dinh* [2024] NZHC 2358 ($750,000 general damages, and $30,000 punitive damages).
Mr Romanos submits the appropriate damages in this case fall between *Solomon v Prater* and *Lee v New Korea Herald.*

[139] *Blomfield v Slater* [2024] NZHC 228.

[140] *Murphy v Cai* [2024] NZHC 1242.

because in that case Anderson J, whilst accepting the material was clearly defamatory against Mr Murphy (he was falsely accused of stealing a motor vehicle) little evidence was produced about the extent of the dissemination and the degree to which Mr Murphy suffered any personal or reputational harm. Despite this, her Honour awarded $20,000. In these proceedings I am satisfied reasonably widespread dissemination has occurred and both personal and reputational harm has also occurred.

[267] At the high end, it does not exceed $100,000 as awarded in *Solomon v Prater*.[141] Although the dissemination of a defamatory anonymous letter was 'limited' perhaps to a community located on the Chatham Islands of approximately 3,000 people (so less than in this case), Mr Solomon was well-known in that community. He had worked hard since 2010 to gain the trust and respect of his fellow Islanders, even though the issues which he advocated for did not always make him popular.

[268] Assessing all of this, Clark J observed:[142]

> [125] It must also be noted that Mr Solomon won the election for which the anonymous letter had proposed Mr Prater's then wife, Debbie King, as the main contender. Ms King has since resigned. Mr Prater has left for Australia and there is no evidence the reputation of HMT has been affected. Hurt feelings are difficult to quantify yet they are central to defamation claims. The harm from the defamatory statements has been in the form of hurt and distress to Mr Solomon. Although the allegations in the letter are indisputably serious, it seems that Mr Solomon's excellent reputation withstood the potential adverse effects from the defamatory statements.
>
> [126] The damages to be awarded must compensate Mr Solomon for the damage to his reputation (which I have suggested appears to be negligible), vindicate his good name and take account of the distress, hurt and humiliation the defamatory publication caused. While recognising that the cases have their own distinct facts and that awards of damages recognise a range of features, I consider an award of general damages in the sum of $100,000 sits with awards made in comparable defamation cases.

[269] In my view, whilst it is indisputable Ms Qi has personally suffered harm, the fixing of quantum for her reputational harm is more difficult. Mr Solomon was awarded $100,000 to vindicate his "good name" (reputation) and to "take account the distress, hurt and humiliation the defamatory publication caused" even if the reputational harm was negligible. But the significant difference between Mr Solomon

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[141] *Solomon v Prater* [2021] NZHC 481.
[142] Above at [125] and [126] (footnotes omitted).

and Ms Qi is Mr Solomon enjoyed a position of public profile with some standing whereas Ms Qi did not.

[270] The fact that Ms Qi does not have a public profile does not mean she has a reputation which cannot be harmed. But there needs to be moderation and balance. It seems the higher awards are made where publicly profiled persons are unquestionably damaged by defamatory material. Absent this, and absent direct evidence of reputational harm (such as the loss of employment or public office opportunities), awards should be within a more in the modest range. For this reason, I assess an appropriate award to be just over half of the *Solomon* award being $55,000. I increase the award by $5,000 for the aggravation factors making a total of $60,000. This sum is to be paid on a joint and several basis by Ms Hu and Sky Media.

Punitive Damages

[271] As noted, punitive damages can only be awarded in exceptional circumstances. They are awarded where a party has acted in "flagrant disregard" to the plaintiff's rights.

[272] I have already described Ms Hu's conduct to be bizarre and unjustified. I do so based on my finding she was the perpetrator of the posts (the evidence is overwhelming); was persistent to the extreme (posting three times within a short period); blatantly lied; and when confronted with the allegations of being the author, issued her own defamation proceedings as plaintiff. She then, after being the cause of the mayhem, disappeared.

[273] In these circumstances, punitive damages are appropriate to punish this behaviour and to send a signal such behaviour will not be tolerated. Ms Qi seeks $10,000. I award it accordingly.

Sky Media's Crossclaim Against Ms Hu

[274] As Ms Hu was the instigator of all of this mayhem it is appropriate Sky Media is entitled to get contribution from Ms Hu for the award I have made against it in favour of Ms Qi. I decline however to award more than 50 per cent of the award as

Sky Media could have taken steps to mitigate the harm suffered by Ms Qi but failed to do this.

[275] Accordingly, Sky Media, as against Ms Hu, is awarded a contribution of 50 per cent of the award I have made in favour of Ms Qi. For the sake of clarification this sum is $30,000. Such award is made pursuant to s 17(1)(c) and (2) of the Law Reform Act 1936.

Interest

[276] Interest is awarded on all sums in accordance with the Interest on Money Claims Act 2016. For Ms Qi, this is from when she filed her counterclaim to when the payment of the judgment sums are made.

[277] For Sky Media, this is from when it filed its crossclaim to when it is paid.

Result

[278] Ms Qi has been defamed by both Ms Hu and Sky Media.

[279] A declaration as to liability for defamation is made against Ms Hu and Sky Media in favour of Ms Qi pursuant to s 24 of the Defamation Act against both is made.

[280] I make an award of general damages, including aggravated damages of $60,000 in favour of Ms Qi against Ms Hu and Sky Media on a joint and several basis.

[281] I make an award of punitive damages in favour of Ms Qi for the sum of $10,000 against Ms Hu alone.

[282] Sky Media is awarded, against Ms Hu, a contribution of 50 per cent of the award I have made against it in favour of Ms Qi. For the sake of clarification this sum is $30,000. Such award is made pursuant to s 17(1) and (2) of the Law Reform Act 1936.

[283] Interest is awarded on all sums payable to Ms Qi in accordance with the Interest on Money Claims Act 2016 from the date Ms Qi filed her counterclaim to when the

payment of the judgment sums are made. Interest is also awarded in favour of Sky Media on the contribution sum from the date it filed its cross claim against Ms Hu until payment is made.

Costs

[284] Ms Qi is entitled to costs against Ms Hu and Sky Media.

[285] I am conscious, given the dim view I have expressed about the conduct of Ms Hu, increased costs or indemnity costs may be sought. However, if costs are sought on this basis, they cannot be conflated with costs claimed against Sky Media. As against Sky Media I would have thought a range of costs between 2B and 2C are appropriate: filing of pleadings, preparation, and hearing time at 2C with the rest at 2B is a suggestion.

[286] If costs cannot be agreed, then Mr Romanos is to file submissions (no more than five pages) within 14 days of this judgment with Sky Media to respond (again no more than five pages) 14 days thereafter.

[287] Sky Media is also entitled to costs against Ms Hu. However, any costs awarded in favour of Ms Qi against Ms Hu will serve as a guide to any costs Sky Media may be entitled to recover (i.e. they will not exceed Ms Qi's costs). Sky Media will however be entitled to recover any costs awarded against it on a 50 per cent contribution basis against Ms Hu.

Signed at Auckland this 27th day of February 2025 at 3.30 pm

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Judge David J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 27/02/2025